Remedies against unlawful detention in Rwanda

Remedies tegen onwettige detentie in Rwanda

Niyibizi Tite

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Dedication

This work is dedicated to my entire family especially to my darling wife Franco, my lovely sons Jackson and David. This book is also dedicated to all victims of unlawful detention.

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List of abbreviations and acronyms

AfCHPR	African Court of Human and Peoples' Rights
AJR	Association of Rwandan Journalists
APCOF	African Policing Civilian Oversight Forum
ARDHO	*Association Rwandaise de Défense des Droits de l'Homme*
ARFEM	Association of Rwandan Female Journalists
AU	African Union
CCB III	Civil Code Book Three
CNRD	*Commission Nationale de Réparation de la Détention Provisoire*
CCP	Code of Criminal Procedure
CEDH	*Commission Européenne des Droits de l'Homme*
CPP	*Code de Procédure Pénale*
CSDP	*Commission de Suivi de la Détention Provisoire*
DOCD	Detaining Officer Complaints Directorate
EAC	East African Community
EACJ	East African Court of Justice
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
IECMS	Rwanda Integrated Electronic Case Management System
ILPD	Institute of Legal Practice and Development
IPCC	Independent Police Complaints Commission
JRLOS	Justice, Reconciliation, Law & Order Sector
LAF	Legal Aid Forum
MAJ	*Maisons d'Accès à la Justice*
MINIJUST	Ministry of Justice

MININTER	Ministry of Internal Security
NCHR	National Commission for Human Rights
NGOs	Non-Governmental Organizations
N°	Number
NPPA	National Public Prosecution Authority
NURC	National Unity and Reconciliation Commission
OAU	Organization of African Unity
OFJC	Organization, Functioning, and Jurisdiction of Courts
O.G.R.R	Official Gazette of the Republic of Rwanda
O.G	Official Gazette
PACE	Police and Criminal Evidence Act
PRI	Penal Reform International
RCS	Rwanda Correctional Service
REFO	Rwandan Editor's Forum
RIB	Rwanda Investigation Bureau
RNP	Rwanda National Police
UGHC	Uganda High Court
UHRC	Ugandan Human Rights Commission
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Right Committee
UNODC	United Nations Office on Drugs and Crime

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Chapter 1: General introduction

1.1. Why this study?

The right to liberty and security is a fundamental right inherent in the individual, enshrined in international and regional instruments for the protection of human rights. These instruments provide for the protection of the individual against arbitrary arrest and unlawful detention. The right to liberty is also recognized in Article 24 of the Constitution of the Republic of Rwanda of 2003, revised in 2015, which requires that any deprivation of liberty should be conducted under conditions specified by law. Articles 90-91 of the Rwandan Code of Criminal Procedure (CCP) define unlawful detention and set out the procedure for *habeas corpus*.[1]

Despite the existence of these provisions providing protection against arbitrary arrest and unlawful detention, the National Commission for Human Rights (NCHR) in Rwanda highlighted in its annual reports between 1999 through 2016 numerous cases of unlawful detention. For example, the 2009-2010 report noted cases of two people who were released, each after spending more than ten years in unlawful detention.[2] Moreover, in 2013, Rwanda's Legal Aid Forum (LAF)[3] reported that over seven hundred people were held in unlawful detention.[4] In the same year, the study on the End-to-End Process Mapping of the Criminal Justice System in Rwanda showed that communication issues between police, prosecution, courts, and prisons lead to unlawful detentions, unnecessary adjournment of cases, and delay in

1 Arts 90 and 91 of the CCP.

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

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

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

releasing inmates who have been acquitted by courts.[5]

Since 2003, there has been a debate regarding compensation for unlawful detention in Rwanda. For example, in 2003, the National Unity and Reconciliation Commission (NURC)[6] recommended the creation of a compensation fund for individuals who were wrongfully imprisoned in the immediate aftermath of the 1994 Genocide against the Tutsi in Rwanda and for heirs of innocent persons who died in prison.[7] In 2010, when the Rwandan Minister of Justice was asked about compensation for unlawful detention, he replied that "Regarding compensation of individuals detained and later exonerated has not yet been incorporated as a tenet of our justice system; nor will you find it to be a principle followed in our neighbouring countries."[8] In 2011, while presenting its report to Parliament, the NCHR recommended compensation for unlawful detention.[9] From 2003 until 2017, to the best of my knowledge, no steps have been taken to this end. There is neither a specific or general legal provision for compensation for unlawful detention nor a solution of the problem in Rwandan case law.

Hence, this study aims to (1) analyse the existing mechanisms at national, regional and international levels for the protection of unlawfully detained persons in Rwanda, (2) identify the legal and practical hindrances to the realisation of remedies for unlawful detention and (3) suggest mechanisms which might be introduced in Rwanda to compensate unlawfully detained persons. Additionally, this study intends to contribute to the current debate of legal scholars and legal practitioners on appropriate remedies for unlawful detention and the enforcement of international human rights instruments in national legal systems.

5 Institute of Legal Practice and Development (ILPD), *Study on the End to End Process Mapping of the Criminal Justice System in Rwanda*, May 2013. Dr. Muyoboke K. Aimé, Me Niyibizi Tite, and CIP Bisangwa Modeste conducted that study under the supervision of Prof Nick Huls., available at http://ilpd.ac.rw/fileadmin/user_upload/ILPD_Document/Publications/STUDY_ONEND_TO_END_MAPPING_TO_CRIMINAL_JUSTICE.pdf, [accessed 20/10/2017].

6 The National Unity and Reconciliation Commission was created in March 1999 by Law n°. 03/99 of 1999 to promote unity and reconciliation among Rwandans after the 1994 genocide against the Tutsi.

7 PRI, *Eight Years On...A Record of Gacaca Monitoring in Rwanda*, Penal Reform International, p. 46, (2010).

8 Response to Human Rights Watch from the Rwandan Minister of Justice, 5 May 2011. Former Minister of Justice Karugarama Tharcise, in Human Rights Watch, *Justice Compromised, the Legacy of Rwanda's Community-Based Gacaca Courts*, Human Rights Watch, (May 2011).

9 NCHR, *Annual Report January 2009-June 2010*, p.49-55, (October 2010).

1.2. Problem statement

In order to protect individuals against unlawful detention, the state has an obligation to regulate the detention of persons within its borders. The CCP sets out conditions which can lead to unlawful detention.[10] These conditions include (1) detaining a person in a place other than a relevant custody facility, (2) holding a person in detention for a period that exceeds the period specified in the arrest statement and provisional detention warrants, (3) retaining a person under custody while there is an order invalidating or rejecting extension of provisional detention or granting provisional release, (4) retaining a person in custody despite an acquittal granted by a court decision.[11] Article 91 of the CCP provides for writs of *habeas corpus*. The detained person is entitled to challenge the lawfulness of his or her detention before a court that is nearest to the place where the person was arrested.[12] Article 91(2) of the CCP provides that a judge, after hearing the evidence, may order the person's release or continuation of detention.

The continuation of detention despite its unlawfulness raises the question about the legal consequences. Unlawful detention may affect its victims emotionally, socially, physically and economically. Moreover, unlawful detention may also affect the detained person's family, especially when the detainee is the family breadwinner.[13] As there is no legislation providing for compensation for unlawful detention in Rwanda, it can be argued that unlawfully detained persons may seek compensation through tort law, administrative and criminal procedure law.[14]

Furthermore, Article 168 of the Rwandan Constitution states that international and regional instruments ratified by Rwanda have the force of law and supersede ordinary laws. Rwanda has ratified international and regional instruments that provide for the right to be released from, and compensation for, unlawful detention. These

10 Art.90 (2) of the CCP.

11 Art.90 (2) of the CCP.

12 Art.91 (1) of the CCP

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

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

instruments impose an obligation on the State to take specific legal and other measures to give effect to the right against unlawful detention and also require remedies to be provided in case of violation of rights.[15] For example, in 1975, Rwanda ratified the International Covenant on Civil and Political Rights (ICCPR).[16] Article 9(4) and (5) of that Covenant provides for victims of unlawful arrest or detention the right to challenge the lawfulness of detention, the right to be released from unlawful detention and the right to compensation. Where there is insufficient protection against human rights violations in a domestic legal system, victims of rights violations must look to international, regional or sub-regional instruments for protection and compensation. The ICCPR and other instruments are relevant sources of Rwandan law that may be invoked by victims of unlawful detention and applied by the courts in deciding cases brought by such victims.

Additionally, those instruments provide international, regional or sub-regional courts and institutions that may serve the needs of victims of human rights violations who failed to obtain remedies through national courts.[17] However, as of April of 2018, no unlawfully detained persons in Rwanda have obtained compensation based on those international and regional instruments from a Rwandan court,[18] a regional court,[19] and international institutions.[20]

1.3. Research questions

This study explores the necessary legal and institutional framework[21] to provide due process protections to victims of unlawful detention in Rwanda, as well as providing

15 Joseph, S., Schultz, J., & Castan, M., *The International Covenant on Civil and Political Rights, Cases, Material and Commentary*, p.viii, (2004).
16 Rwanda ratified the covenant on 16/04/1975, entry into force on 16/07/1975. It has been incorporated into domestic law pursuant to Decree-Law nº. 8/75 of 12 February 1975, *Official Gazette*, nº. 5, 1 March 1975.
17 REDRESS, *Reaching for Justice The Right to Reparation in the African Human Rights System*,p.3, (October 2013).
18 The US Department of State, *Country Reports on Human Rights Practices for 2016, Rwanda*, p.12.
19 Finalized cases before the African Court on Human and People's Rights, available at http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases, [accessed 27/03/2017].
20 The UN Human Rights Committee, Jurisprudence, available at http://juris.ohchr.org/search/results, [accessed 27/03/2017].
21 The legal framework comprises in this study, first, the formal rules, including the Constitution, international and regional conventions, legislation, and regulations. Second, it contains case laws, general comments, guidelines ,and literature.

compensation for those unlawfully detained. This leads to three research questions.

First, *what are the reasons in the existing Rwandan legal and institutional framework that prevent victims' release from, and compensation for, unlawful detention?* In answering this question, I have scrutinised the available procedures for unlawfully detained persons to seek release and compensation.

Second, *what are the obstacles to unlawfully detained persons in Rwanda obtaining release and compensation through the current courts and institutions of the East Africa Community, African Union, and United Nations?* The answer to this question assesses the practical and legal obstacles that unlawfully detained persons face when relying on regional and international courts and institutions. This study also suggests steps that the Rwandan government should take to provide compensation to victims of unlawful detention in accordance with the instruments of the East Africa Community, the African Union and the United Nations.

Third, *what can Rwanda learn from other countries' legal and institutional frameworks?* To ascertain alternative procedures that might be introduced in Rwanda, I have employed a comparative study to find best practices. The answer to this question explores whether there is a need to establish strict state liability and a special procedure for compensation for unlawful detentions.

1.4. Research methodology

1.4.1. Doctrinal method

A doctrinal approach is a method of analysing and interpreting the law, focusing on legal texts and court decisions.[22] Remedies for unlawful detention in Rwanda need to fit in the Rwandan legal system. In this study, doctrinal research is used to understand the existing domestic legal rules and ratified international instruments, in order to identify legal, institutional, and practical barriers to protect unlawfully

22 Van Hoeke, M., *Methodologies of Legal Research, Which Kind of Method for What Kind of Discipline?* 2011, p.2.

detained persons in Rwanda. The key instruments studied in this work include the ICCPR, the African Charter on Human and Peoples' Rights (African Charter),[23] the European Convention on Human Rights (ECHR)[24] and the Treaty for the Establishment of the East African Community.[25] Moreover, relevant case law and academic literature have been used to show how the remedies provided in the regional and international instruments have been interpreted and applied by regional courts and international institutions.

1.4.2. Comparative method

Article 9(4) and (5) of the ICCPR provides for release of unlawfully detained persons, as well as an enforceable right to compensation. The rights embodied in that Covenant are universal minimum standards which should have the same meaning for all member states.[26] At least 168 states, including Rwanda, are parties to the ICCPR.[27] However, in their domestic laws, the party states have adopted different approaches to the issues of release and compensation of unlawfully detained persons. In this study, I have compared the legal procedures of Rwanda, Uganda, France, England and Wales (all parties to the ICCPR[28]) with respect to the release and compensation for unlawfully detained persons to ascertain best practices for protecting victims of unlawful detention. Additionally, Rwanda and Uganda are parties to the African Charter[29] and the East African Community Treaty.[30] Both countries have similar

23 Ratified by the Republic of Rwanda on November 11, 1981, in Addis Ababa, as approved by Law n° 10/1983 of May 17, 1983.

24 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. This convention was selected because it has been ratified by the United Kingdom and France, which I compared with Rwanda.

25 The Republic of Rwanda acceded to the EAC Treaty on 18 June 2007, http://www.eac.int/about/EAC-history, [accessed 28 March 2017].

26 Joseph, S., Schultz, J., & Castan, M., p.viii. (2004).

27 *See* United Nations, International Covenant on Civil and Political Rights, ratification status, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, [accessed 20/01/2016].

28 Which provides in its Article 9(4) and (5) the right to be released from and compensation for unlawful detention

29 In their interpretation of Articles 5, 6, 7 and 26 of the African Charter, the African Commission on Human and Peoples' Rights indicates that "States shall ensure, including by the enactment of legal provisions and adoption of procedures that anyone who has been victim of unlawful arrest or detention is enabled to claim compensation." *See* African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("African Principles") 2003, DOC/OS (XXX) 247, Principle M (1) (h).

30 Article 6 of the African Charter provides that the member states are bound by principles of good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

social economic positions and have many prisoners. I have chosen France, England and Wales for this study because they have advanced legal systems.

1.4.3. Empirical method

To supplement my doctrinal research, I have conducted semi-structured interviews[31] with Rwandan legal practitioners and experts, specifically the Deputy Chief Justice, the former President of the NCHR and the Chairperson of the African Commission on Human and Peoples' Rights, the Deputy Chairperson of the NCHR, four senior judges, one inspector of courts, one prosecution inspector, two states attorneys in the Ministry of Justice, and two senior staff of non-government organisations.

Next, I conducted a survey of Rwandan defence lawyers to determine their experience seeking and obtaining remedies for unlawful detention in Rwanda. I distributed questionnaires[32] to one hundred and ten defence lawyers in the diploma in legal practice course at Rwanda's Institute of Legal Practice and Development (ILPD)[33] and received twenty seven responses. Additionally, to understand how the Rwandan courts have interpreted and applied the existing remedies for unlawful detention, I analysed twenty court decisions identified by lawyers whom I interviewed.

1.5. Conceptual framework

This study uses the following three key concepts: unlawful detention, remedies for unlawful detention and the victim of unlawful detention. Each is discussed separately below.

1.5.1. Unlawful detention

Unlawful detention is defined differently in international, regional and domestic

31 Semi-structured interviews use questions and a guide to conduct interviews to obtain the interviewee's perceptions and experience. *See* Laforest, J., *Guide to Organizing Semi-Structured Interviews with Key Informants*, p.1, (2009). *See also* Annex II.

32 See Annex I.

33 ILPD is a post-graduate legal institute with administrative and financial autonomy. See Art. 1 of Law n° 65/2013 of 27/08/2013 establishing the Institute of Legal Practice and Development (ILPD) and determining its mission, organization and functioning, *Official Gazette n° 41 of 14/10/2013*.

procedural legislation. There is no universal or common definition of "unlawful detention" in comparative law.[34] In this study, I have considered that a detention is unlawful if it contravenes any provisions of Rwandan or international law. This study is limited to detentions in contravention of the law at every stage of the criminal process, including arrest, pre-trial detention, detention during the trial and detention after the court decision.

Rwanda's legal system distinguishes between an administrative detention, detention because of mental illness, military detention, and detention for criminal charges. This study is limited to detention for criminal charges, including detention by the judicial police,[35] the military police, prosecutors, the military prosecutor and prison authorities. This study does not cover unlawful detention related to the 1994 Genocide against the Tutsi, because of its special character. Dealing with a huge number of genocide suspects brought a big challenge to Rwanda criminal justice system.[36] To deal with that catastrophic phenomenon, Rwanda established *Gacaca* courts through a constitutional amendment[37] and the enactment of new laws.[38] Without denying the right to compensation for unlawful detention for those suspects, this study is limited only to compensation for unlawful detention related to common offences before and after the 1994 genocide against the Tutsi.

1.5.2. Remedies against unlawful detention

Remedies are "the means by which a right is enforced or the violation of a right is prevented, redressed or compensated."[39] Remedies for unlawful detention may be

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

35 According to Article 19 of the CCP, the Judicial Police comprise the following: criminal investigation police officers; criminal investigation military officers and civil servants empowered by the law or the Minister in charge of justice.

36 Luyt, W., Genocide in Rwanda: Detention and Prison Involvement, in *Acta Criminologica 16(4)*, p.96, (2003).

37 Rwanda Constitutional Amendment of 18 January 1996.

38 Organic Law n° 08/96 of 30/8/1996 governing the prosecution of Genocide crimes and other crimes against humanity committed since the 1st October 1990, *O.G. n° 17, 1996*. Organic Law n° 40/2000 of 26 /01/2001, governing the creation of *Gacaca* Courts and organizing the prosecution of Genocide crimes and other crimes against humanity committed between the 1st October 1990 and the 31st December 1994, in *the Official Gazette of the Republic of Rwanda, 15th March 2001, p.* 66-98.

39 *Black's Law Dictionary*, 6th ed., p. 1294. (1990),

divided into two categories: procedural and substantive.[40] Procedural remedies are processes by which claims of unlawful detention are heard and decided by courts, administrative agencies or other competent bodies.[41] Substantive remedies refer to the outcomes of proceedings, i.e., the relief afforded to the successful claimant[42] in the form of release, compensation and other remedies such as prosecution and punishment of those responsible for the unlawful detention. With regard to the outcomes of proceedings, this study focuses on "release and compensation remedies" as provided in the ICCPR, and the ECHR.[43] The African Charter is silent on whether an unlawfully detained person should be released, but that the African Commission on Human Rights has opined that unlawfully detained persons should be released.[44] This study considers release either on a condition such as a bail or without condition as the first remedy.

The second remedy is the right to compensation for unlawful detention, which right has been provided for in various international and regional instruments. For example, the ICCPR and the ECHR provide for an enforceable right to compensation to anyone who has been a victim of unlawful arrest or detention.[45] The United Nations General Assembly has defined compensation as: "any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case... such as: (i) physical or mental harm; (ii) lost opportunities such as employment, education or social benefits; (iii) material damages including loss of earning potential; (iv) moral damage; and (v) any costs incurred for legal assistance, medical services, and psychological and social services."[46] This definition refers to both monetary and non-monetary damages. In this study, the term "compensation for unlawful detention " is used in the broad sense as a specific form of reparation seeking to provide monetary awards for certain losses resulting from

40 Shelton, D., *Remedies in International Human Rights Law*, p.7 (2005)

41 *Id.*, p.40.

42 *Black's Law Dictionary*, 6th ed., p.1294 (1990).

43 Art. 9(4) ICCPR and Art. 5(4) ECHR.

44 African Commission on Human and Peoples' Rights, (2003), para. m, 4, p.12.

45 Art.9 (5) ICCPR and Art.5 (5) ECHR.

46 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution adopted by the General Assembly*, 21 March 2006, A/RES/60/147, Section 20, Hereinafter referred to as "*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law.*"

unlawful detention, be it of a monetary or non-monetary nature.[47] I will examine non-monetary forms of compensation, including a public apology and sentence reduction.

1.5.3. The victim of unlawful detention

The use of the word "victim" for the unlawfully detained person can be confusing. It is important to differentiate the victim of an offence from the victim of an unlawful detention. Since an unlawfully detained person sometimes is considered a suspect by the detaining authority, another person might be the victim of the offence suspected of being committed. Both the ICCPR and the ECHR uses the term "victim" for a person illegally detained, without defining the term. However, any person can be considered a" victim of unlawful detention" if he or she is suffering, or has suffered, harm due to the unlawful detention. Thus, the term victim also includes the family of the detained person, as well as other persons who have suffered harm due to the unlawful detention of the principal victim. This study follows the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights, which provides that the victim of an unlawful detention is the unlawfully detained person and his/her immediate family or dependants who have suffered harm due to the unlawful detention of the principal victim.[48]

1.6. Structure of this research

This work is divided into five chapters. The first chapter consists of an explanation of the context of this research, the problem statement, and the research questions. It also introduces the research methods used and the key concepts.

Chapter 2 consists of three parts. The first part discusses the legal mechanisms for

47 REDRESS, *Reparation Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, p.15,(2003).

48 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, para. V. (8).

the protection of individuals against unlawful detention in Rwanda. The second part discusses unlawful detention in Rwanda. The third part discusses compensation for unlawful detention. Chapter 3 focuses on the role of regional and international courts and institutions for the protection of unlawfully detained persons in Rwanda and identifies the challenges such persons face in obtaining remedies. The first part of Chapter 3 examines the role of EAC institutions in the protection of unlawfully detained persons in Rwanda. Part two of Chapter 3 examines the role of African human rights institutions. The third part of Chapter 3 focuses on the role of UN institutions.

In Chapter 4, I compare the existing remedies in Rwanda for unlawful detention with those in Uganda, France, England and Wales, specifically focusing on procedural law and the institutional framework for remedies to discover best practices. Chapter 5 suggests specific ways in which Rwanda can improve its practices with respect to unlawful detentions. Part 1 of Chapter 5 considers how to increase access to justice for detained persons, educate the public on the rights of accused persons and make detaining officers more accountable. The second part of Chapter 5 examines how to improve the existing legal framework for both the *habeas corpus* procedure and compensation for unlawful detention. The third part of Chapter 5 discusses the need for Rwanda to enforce international and regional conventions protecting unlawfully detained persons. The fourth part of Chapter 5 makes recommendations for the future.

Chapter 2: Appraisal of the existing remedies against unlawful detention in Rwanda

When studying remedies for unlawful detention, it is crucial to examine the existing remedies for unlawful detention in Rwanda. First, it is important to understand the existing mechanisms that protect individuals against unlawful detention. Secondly, the situation of unlawful detention is studied. Thirdly, the compensation for unlawful detention in existing mechanisms is analysed. This chapter will illustrate the reasons in the existing Rwandan legal and institutional framework that prevent victims' release from, and compensation for, unlawful detention.

2.1. The protection of the individual against unlawful detention in Rwanda

2.1.1. Historical background

The pre-colonial period

During its pre-colonial period, Rwanda was governed by a king who ruled by customary law.[1] The justice system consisted of customary law whose main objective was to ensure social harmony and peace in the community and avoid retribution for individual wrongs.[2] During that period, there were no formal detention centres, judges, advocates, prosecutors, police or prison officers.[3] Any dispute was first resolved by the heads of families. If a party was not satisfied with that resolution, he or she could appeal the King's representative and finally to the king himself, who was the supreme judge.[4] However, some offences, like treason and rebellion, were directly judged by the King.[5]

1 Kagame, A., *Un abrégé de l'histoire du Rwanda de 1953 à 1972*, p.31 (1972).
2 Ntampaka, C., *Introduction aux Systèmes Juridiques Africains*, p.33, (2005).
3 *Ibid.*
4 Sandrat, G., *Cours de droit coutumier*, p. 63 & 74(1951).
5 X, *Rwaciriwe i Mutakara ubutabera bubereye u Rwanda twifuza*, p.7, (nzeri 2017).

The colonial period

Between 1896 and 1916, Rwanda was colonised by Germany,[6] which applied an 'indirect rule' system of administration.[7] In other words, Germany did not make changes to the existing legal, social and political institutions of Rwanda.[8] After Germany's defeat in World War I, in 1916, League of Nations gave Ruanda (now Rwanda) and Urundi (now Burundi) to Belgium to govern as Ruanda-Urundi.[9] During that period, Belgium introduced written law known as *Congo Belge law*[10] into Ruanda-Urundi. Belgium, which also ruled the Congo (now Democratic Republic of Congo), applied the Congolese Penal Code to Ruanda-Urundi. On January 30, 1940, Belgium introduced a new penal code for the territories of Ruanda-Urundi. By that time, Belgium had introduced the following formal criminal justice institutions: the police court, the first instance court and the court of appeal.[11] In 1930, Belgium built the Kigali prison and in 1935 the Ruhengeri prison and introduced the law regulating prisons.[12] There were no formal prosecution or judicial police institutions. The end of the colonial period was marked by ethnic conflicts between the Tutsi and Hutu tribes, followed by killings and mass arrests. In 1959, approximately 270 people were killed and over 1200 were arrested.[13]

From independence to 1994

After independence, Rwanda improved the laws and criminal justice system that it inherited from Belgium by incorporating some aspect from Civil law[14] and customary law.[15] During this period, the Supreme Court, the courts of appeal, the courts of

6 Bindseil, R., *Le Ruanda et l'Allemagne depuis le temps de Richard Kandt*, p.122,(1988).
7 Kagame, A., (*1972*), p. 174.
8 Reyntjens, F., *Pouvoir et droit au Rwanda – Droit Public et évolution politique, 1916-1973*, Musée Royal de l´Afrique Centrale – Tervuren, Belgique Annales – Série IN-8° - Sciences Humaines - n° 117, p.71, (1985).
9 Reyntjens, F., (1985), p. 41-47.
10 Belgium did not impose its civil code in its colonies; instead, Belgium adopted a colonial code for its colonies. See Ntampaka C., (2005), p.3.
11 Schabas, A.W. & Imbleau, M., *Introduction to Rwandan law*, Les Editions Yvon Blais INC., p.5, (1997).
12 Royal Decree n° 111/127 of 30/05/1961 on the administration of prisons in Rwanda.
13 UNESCO, *General History of Africa, Africa since 1935*, p. 212, (1993).
14 Tort law which is embodied in Articles 1240, 1241, and 1242 of the French Civil Code, which are identical with Articles 258, 259 and 260 of the Rwanda Civil Code Book Three.
15 Ntampaka, C., (2005), p.3.

the first instance, the Canton tribunal, formal prosecution[16] and police force[17] were established.[18]

In June 1973, a military *coup d'état* installed General Habyarimana as president. General Habyarimana stayed in power until his death on 6th April 1994. Between 1973 to 1990, Rwanda was characterised by peace and stability.[19] The presumption of innocence principle was introduced.[20] In 1977, unlawful detention was made an offence by Article 297 of the Rwandan penal code.[21] During this period, Rwanda ratified the ICCPR[22] and the African Charter, both of which contained provisions against unlawful detention.[23]

Between 1990 and 1994, Rwanda was engaged in a civil war ended with the 1994 genocide against the Tutsi.[24] That civil war was marked by abuses and violations of human rights, including killings and unlawful detentions.[25] Before 1994, no legal action was taken against those responsible for killing Tutsis and for unlawful detentions of Tutsis.[26] "One structural precondition that immunity from prosecution for those who had perpetrated violence against the Tutsi minority in the second half of

16 Law of 24 August 1962 related to organization and functioning of the court, establish the national public prosecution based in Kigali with the decentralized unit at the level of the first instance court.
17 Presidential order n° 105/04 of 22 June 1962 governed the status of national police officers. Law Decree of 25 January 1974 establishing the national gendarmerie. Presidential order n° 185/03 of 4 October 1977 on the organization of "*police communale*".
18 Law of 24 August 1962 related to organization and functioning of the court, *Official Gazette, 1962*.
19 UNESCO, (1993), p.462.
20 Art. 12 4 of the Rwandan Constitution of 20 December 1978, *J.O.*, 1988, n° 24 bis; Art. 12 4 of the Rwandan Constitution of 10 June 1991, *J.O.*, 1991; Art.19 of the Constitution of Rwanda; Art. 16 of the Criminal Procedure Code of 23 February 1963, *J.O.*, 1963, p. 98, as modified up to 1996.
21 The decree n° 21/77 of 18/08/1977 relating to penal code, in *Official Gazette, n° 13 of 01/07/1978*.
22 For example, on April 16, 1975, Rwanda ratified the International Covenant on Civil and Political Rights (ICCPR), which was entered into force on July 16, 1975, and was incorporated into domestic law pursuant to Decree-Law N°. 8/75 of 12 February 1975, *Official Gazette*, n°. 5, 1 March 1975.
23 Ratified by the Republic of Rwanda on November 11, 1981 in Addis Ababa, as approved by Law n° 10/1983 of May 17, 1983.
24 In a period of three months, the genocide in Rwanda resulted in between 800,000 to 1,000,000 deaths of Tutsis and moderate Hutus out of a population of 7,590,235 Rwandans. *See* Des Forges, A., *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, p.187, (1999).
25 Fédération Internationale des Droits de L'homme (FIDH), *Rapport de la Commission Internationale d'enquête (7-21 Janvier 1993)*, Violations Massives et Systématiques des Droits de l'Homme depuis le 1er Octobre 1990 au Rwanda, Paris (1993).
26 U.N. Commission on Human Rights, *Report on the situation of human rights in Rwanda* submitted by R Degni-Ségui Special Rapporteur of the Commission on Human Rights under paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994, Under Paragraph 20 of Commission Resolution E/CN.4/S---3/1 of 25 May 1994, §20, U.N. Doc. E/CN.4/1995/7 (June 28, 1994).

the 20th century appears to have paved the way towards the 1994 genocide against Tutsi".[27]

From 1994 to the 2004 judicial reform

In 1994, Rwanda fell into a dark hole due to the genocide against the Tutsi, which resulted in mass killings, property destruction and the flight of Rwandans from the country. Another effect of the genocide was the destruction of the justice system in Rwanda. Most judges, prosecutors, and advocates either fled the country or were killed. Courts, records, and equipment were damaged or destroyed.[28]

After the genocide, the new Rwandan government re-established the criminal justice institutions and appointed new judges and prosecutors. However, the new judges and prosecutors lacked experience and expertise. More than 120,000 people suspected of having participated in the genocide were detained and awaiting trials.[29] The caseload created by the large number of persons arrested for genocide crimes overwhelmed the courts, and the prisons overflowed. Between 1994 and 1998, thousands of prisoners died during pre-trial detention as a result of extreme overcrowding, deplorable prison conditions and injuries sustained from torture.[30] Since 1999, the conditions in prisons have improved steadily – most notably in 2003 when the government embarked on a programme of provisional release of several thousand prisoners.[31] The provisional release was for those detained without a case file, those whose case files lacked evidence, those who had confessed to their participation in the genocide, those accused of common crimes who had already spent more time in prison than the sentence provided for them under law and those who were under 18 years old at the time of their alleged crimes, as well as the elderly and sick. [32]

27 Jallow, H.B., *The Contribution of the United Nations International Criminal Tribunal for Rwanda to the Development of International Criminal Law*, in Phil Clark & Zachary D. Kaufman eds., *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond*, p. 265, (2009).
28 Nash, K., A Comparative Analysis of Justice in Post-Genocidal Rwanda: Fostering a Sense of Peace and Reconciliation, 1 *Africana, p.79 et seq.* (2007),
29 Bornkamm, P.C., *Rwanda's Gacaca Courts: Between Retribution and Reparation*, p. 1, (2012).
30 Tertsakian, C., *Le Château: The lives of prisoners in Rwanda*, p. 36, (2008).
31 *Id.*, p.49.
32 *Id.*, p. 427.

In 2004, the legislature improved the criminal justice institutions and criminal procedure code. The legislature established the primary court, intermediate Court, high court and Supreme Court. The high council of the judiciary appointed trained judges and court registrars. The Rwandan government appoints national prosecutors and prosecutors at intermediate courts and primary court levels. The legislature established also the judicial police.[33] In 1997, the Rwanda bar association was established with the goal of putting to gather all the members of the Bar Association and monitor welfare and ethics of Advocates.[34] With regard to the protection of individuals against unlawful detention, the CCP defined the particular conditions which lead to unlawful detention and introduces the *habeas corpus* procedure.[35] Moreover, the CCP defines the rights of suspects which will be developed in the following paragraph.

2.1.2. Rights of suspects

Article 24 of Rwanda's Constitution guarantees a "person's liberty and security." It explains that no one "shall be subjected to security measures except as provided for by law and for reasons of public order or State security." This subsection examines the rights of suspects under Rwandan law. The enforcement of these rights is discussed in section 2.2.

2.1.2.1. The right to be informed of the charges

The right to be informed of the charges against one is protected by Rwandan law and international instruments. In Rwanda, Article 29.1 of the Constitution states that all persons have the right to be informed of the nature and cause of the charges against them. The Rwandan CCP also guarantees that right. Article 38 of the CCP states:

33 Law n°46/2010 of 14/12/2010 determining the Powers, Responsibilities, Organization and Functioning of the Rwanda National Police, Law n°12/2017 of 07/04/2017 establishing the Rwanda Investigation Bureau and determining its mission, powers, organisation and functioning. *Official Gazette n° Special of 20/04/2017.*
34 Law n° 15/99 of 15/08/1999 modifying and complementing Law n° 03/97 creating the bar association in Rwanda in *Official Gazette* n° 18 of 15/09/1999.
35 Arts. 88 and 89 of the Law n° 13/2004 relating to the Code of Criminal Procedure, *O.G.R.R, Special n°. of 30/07/2004.*

> Any person held in custody by the Judicial Police shall be informed of the charges against him/her and his/her rights including the right to inform his/her legal counsel or any other person of his/her choice thereof. Such prerogative shall be indicated in the statement signed by both the Judicial Police Officer and the suspect.

International and regional human rights instruments ratified by Rwanda also recognize the right to be informed of the charges. Article 9 (2) of the ICCPR states that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."[36] In the same vein, the African Commission on Human and Peoples' Rights states, "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her."[37]

2.1.2.2. The right to be detained in a place recognized by law

Article 40 of the CCP states that "A person held in detention by the Judicial Police shall in no way be held in prison or in any place other than the relevant custody facility located within the jurisdiction of the Judicial Police Officer or the Military Police Officer for members of the military and their co-offenders and accomplices." Judicial Police custody facilities are located at police stations and police posts. The person under pre-trial detention, detention after starting of the hearing on merits, and detention after conviction[38] must be detained in prison. A prison is "a place established by a Presidential Order where persons are incarcerated following a court decision".[39] The pre-trial detention also resulted from the court's decision.[40] The African Commission on Human and Peoples' Rights also requires that any person deprived of liberty shall be held in an officially recognized place of detention.[41]

36 The Human Rights Committee points out that "one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded. See HRC, *General Comment n°. 35, ∫* 25.

37 African Commission on Human and Peoples' Rights,(2003), para M. 2(a).

38 Art. 229 of the CCP.

39 Art. 3(1°) of the Law n° 34/2010 of 12/11/2010 on the establishment, functioning and organization of Rwanda Correctional Services "RCS"), *Official Gazette n°04 of 24/01/2011.*

40 Art.102 of the CCP.

41 African Commission on Human and Peoples' Rights, (2003), para M.6 (a).

2.1.2.3. The right to inform family or friends

The right to inform family and friends of the charges is also secured by Rwandan law and a regional instrument. Article 38 of the CCP states that any person held in custody by the Judicial Police shall be informed the right to inform any person of his/her choice. The African Commission on Human and Peoples' Rights, interpreting the African Charter that "Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must include the fact of their arrest or detention where the place that the person is kept in custody."[42] Thus, detained persons have the right to inform, or have the authorities inform, their family or a friend.

2.1.2.4. The right to a legal counsel

The right to a legal counsel is secured by Rwandan law. Article 29 (1) of the Rwanda's Constitution states that everyone is entitled to the right to due process of law, which includes the right to defence and legal representation. Similarly, Article 39, paragraph 2 of the CCP provides:

> Any person held in custody by the Judicial Police shall have the right to legal counsel and to communicate with him/her. If a suspect is unable to find a legal counsel, the Judicial Police officer or the Prosecutor shall inform the Chairperson of the Bar Association so that he/she assigns a legal counsel for the suspect. The suspect shall have the right to accept or refuse to be represented by such a legal counsel.

2.1.2.5. The right to be presumed innocent

The presumption of innocence is a fundamental criminal law principle recognised under Rwandan and international law. According to Article 29, (2°) of Rwanda's Constitution "everyone has the right to due process of law, which includes the right... to be presumed innocent until proved guilty by a competent court." Article 85 of the CCP states that "an accused shall always be presumed innocent until proven guilty by a final court decision." Additionally, Article 165 of the CCP provides that

42 African Commission on Human and Peoples' Rights, (2003), para M.2 (c).

the accused is entitled to "the benefit of the doubt." That article of the CCP further provides that "If the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving beyond reasonable doubt that the accused committed the offence, judges shall order his/her acquittal." Those provisions embody the principle of *dubio pro reo,* meaning "when in doubt, for the accused." The presumption of innocence is also recognized in international law. Article 14(2) of the ICCPR states that: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." Article7 (1) of the African Charter requires that "Every individual shall have the right to have his cause heard. This comprises... the right to be presumed innocent until proved guilty by a competent court or tribunal."

The Human Rights Committee (HRC) indicates that the right of a person to be presumed innocent imposes upon judicial authorities and public officials "the duty to refrain from prejudging the outcome of a trial, e.g. by abstaining from making a public statement affirming guilt of accused."[43] Rwandan judicial authorities and public officials sometimes make public statements that prejudge the guilt of an accused person. For example, when Kizito *Mihigo*[44] was arrested, the Minister of Sports and Culture stated that the "Rwandan community should not continue to consider *Kizito Mihigo* as a star; he should be considered as other criminals."[45] That statement violated the presumption of innocence to which Mihigo was entitled.

The media must also respect the presumption of innocence when reporting news. Article 18 of the Code of Ethics Governing Journalists, other Media Professionals and the Media in Rwanda[46] provides that:

43 HRC, *General comments n° 32(n141) (30)*.

44 Famous singer and compositor in Rwanda.

45 See X, Kizito Mihigo ni umugizi wa nabi nk'abandi bose – Min.Mitali.,availible at http://www.kigalitoday.com/amakuru/amakuru-mu-rwanda/Minisitiri-Mitali-yagize-icyo-atangaza-ku-itabwa-muri-yombi-ry-umuhanzi-Kizito, accessed 12/12/2017.

46 Association of Rwandan Media Women(ARFEM), Rwandan Editors' Forum(REFO), Association of Rwandan Journalists(ARJ), *Code of Ethics Governing Journalists, Other Media Professionals and the Media in Rwanda*, June 2011.

> The journalist and any other media professional shall observe the innocence presumption principle for those suspected of punishable or criminal facts before the verdict from competent courts and tribunals is announced. While handling any legal information, they shall avoid establishing any individuals' relationship with the suspect, or referring to his or her ethnic group, tribe, religion, sex, family or friends, unless their mention serves public interest. If suspects' pictures or photos are broadcasted or published before their guilt is established, the journalist or media professional responsible for publishing those pictures has the obligation to follow up the lawsuit and broadcast or publish the verdict from competent courts and tribunals. However, if suspects are less than 18 years of age, journalists and other media professionals shall be careful not to broadcast or publish their pictures or photos before competent courts and tribunals establish their liability.

Despite that ethical code, in some cases journalists have distributed pictures of suspects during arrest and detention without reporting at the end what was the outcome of the trial. If the media report only the arrest of a suspect, the public continues to believe that the concerned person is guilty after he or she has been found not guilty by a court. This situation was reflected in the *Mujyanama Elisaphan* case.[47] *Mujyanama Elisaphan* was arrested by the Rwanda National Police and accused of corruption. Several publications and TV stations in Rwanda reported on his arrest by showing his photo and identifying him by name. He was subsequently acquitted. However, the media failed to report his acquittal. *Mujyanama Elisaphan* was denied by his employers and colleagues who have learned of his detention but who never heard on his acquittal. This affected his professional life. In this regard, *Mujyanama Elisaphan* submitted his complaint to the Rwanda Media Commission, pursuant to Article 18 of the Code of Ethics, requesting damages of twenty million Rwandan francs and an order directing the media to report his acquittal. As a result, the Rwanda Media Commission ordered the media to report the acquittal in their respective publications, but did

47 Decision by the Rwanda Media Commission on the case filed by *Mujyanama Elisaphan*, available at http://rmc.org.rw/decision-by-the-rwanda-media-commission-rmc-on-the-case-filed-by-mujyanama-elisaphan-philos-against-different-media-organs/, [accessed 11/12/2016].

not award damages[48] because it had no jurisdiction to award damages. However, it noted that Mujyanama could submit his claim for damages to the appropriate court.[49]

2.1.3. Phases of detention in the Rwandan legal framework

The CCP distinguishes four phases of detention. First, the detention by the judicial police and the prosecution, at which time the detainee is in police custody. Second, the pre-trial detention ordered by a court. Third, the detention while the court is trying the case. Fourth, the detention ordered by the judge as a sentence after conviction. I discuss each of these phases of detention below.

2.1.3.1. Detention while in police custody

The first phase of detention is detention following arrest when the detained person is held in police custody. According to Article 37 of the CCP, the Judicial Police has the authority to arrest and to detain a person. The same provision authorises the Judicial Police to arrest and detain a person who allegedly has committed an offence that is punishable by imprisonment of at least two years, if there are serious grounds for suspecting that the person has committed the offence or if there are serious grounds for believing that a suspect may escape or the person's identity is unknown or regarded as doubtful. The Judicial Police must also inform the arrested person of the charge and of the right to be assisted by defence counsel.[50]

Article 37 of the CCP requires the Judicial Police Officer to prepare a statement of arrest and detention and serve a copy on the detainee. That statement of arrest and detention is valid for only five days, which and may not be extended. Within that time period, Article 37 also requires that the police submit the case to the prosecutor, who must release the detainee if he or she finds "that there are no serious grounds for suspecting of having committed or attempted to commit an offence." The judicial police officer has a duty to obey the laws and the regulations governing the arrest

48 *Mujyanama Elisaphan case*, ∫2.
49 *Mujyanama Elisaphan case*, ∫5.
50 Art. 38 of the CCP.

and detention.[51] Failing to do so constitutes a fault punished by detention in a Police Disciplinary Centre not exceeding two months.[52]

Judicial Police officers work under the authority and supervision of the National Public Prosecution Authority (NPPA).[53] The NPPA leads the investigation carried out by the Judicial Police by giving instructions related to the conduct of the investigation,[54] ensuring that judicial police officers follow the law and procedures, advising them on the performance of their duties, authorizing legal acts such as search, arrest and ensuring that detention facilities are in compliance with the law.[55] The National Public Prosecution Authority is required to report to the judicial police officers' supervisors[56] every quarter and when necessary on the activities of Judicial Police Officers.[57] The National Public Prosecution Authority is required to inspect detention places at least once a week, so as to ensure that Judicial Police Officers are following the law with regard to detentions and to receive any complaints by detainees against the Judicial Police.[58] If a prosecutor finds that a person has been unlawfully detained by the Judicial Police, he or she has authority to release that person.[59]

After receiving the case from the Judicial Police, a prosecutor may also release or continue to detain the arrested person when the offence is punishable by an imprisonment of at least two years. If the prosecutor decides to continue the detention, he or she will issue an arrest warrant,[60] which is valid for a maximum of five days, and non-renewable.[61] In total, the arrested person by judicial police based on a

51 Art. 8(18) of the Ministerial instructions n°003/12 of 17/09/2012 establishing Police Code of Conduct.
52 Art. 29 of the Ministerial Instructions n°003/12 of 17/09/2012 establishing Police Code of Conduct.
53 Art. 18 of the CCP. Art. 38 of Organic Law n° 04/2011 of 03/10/2011 determining the organization, functioning and competence of the National Public Prosecution Authority and the Military Prosecution Department (NPPA Law), *Official Gazette* nº 46 of 14/11/2011.
54 Art. 38 of the NPPA Law.
55 Art. 40 of the NPPA Law.
56 Judicial Police Officers are part of the Rwanda Investigation Bureau and other institutions such as the Ministry of Defense. These institutions have their own hierarchy.
57 Art. 38 of the NPPA Law.
58 Art. 40 of the NPPA Law.
59 Art. 29, 3° of the NPPA Law.
60 Art. 49 of the CCP defines an arrest warrant as an order of detention signed by a Prosecutor in the course of case file preparation after the suspect is informed of the charges against him/her provided that the alleged offence is punishable with imprisonment of at least two (2) years.
61 Art. 49 of the CCP.

statement of arrest and detention and continued to be detained by the prosecutor based on an Arrest warrant issued by a Prosecutor, may be detained for a maximum period of ten days without the judge intervention.

This period of ten days of detention while in police custody without intervention of the judge is too long for two reasons. First, Article 9(3) of the ICCPR requires that an arrested or detained person be brought promptly before a judge. Interpreting that provision, the Human Rights Committee has stated that forty-eight hours is normally sufficient to bring a suspect before a judge to determine the legality of his or her detention.[62] A detained person should be tried within a reasonable time or be released.[63] The Human Rights Committee has pointed out that, when detaining officer's delay bringing a detainee before a judge for longer than 48 hours, there is an increased risk of ill treatment of the detainee.[64] The Committee also concludes that bringing a detained person to a hearing promptly after the arrest or detention provides an opportunity for inquiry on the treatment the detainee has received in custody and reduces the possibility of torture or other cruel, inhuman or degrading treatment. It also facilitates the transfer of the detained person to a prison if continued detention is ordered.[65]

Second, Rwanda law provides no remedy for the losses suffered by the detainee during that period.
In Rwanda, when these ten days period expire without bringing a suspect before a court, the suspect is unlawfully detained. Article 37(4) of the CCP provides that, if the public prosecution finds that there are no serious grounds against the suspect who is arrested, he or she shall be immediately released. In practice, where, at the end of the ten days period, the prosecutor releases the detained person before bringing him or her to the court, the released person does not have a cause of action for damages because the detention was in accordance with Rwandan law.

62 The Human Rights Committee, *General Comment n°. 35 Article 9 (Liberty and security of person), CCPR/C/GC/35,* (hereafter referred to as "General comments n° 35") 16 December 2014, para 33.
63 Joseph, S., Schultz, J., & Castan, M., (2004), p.326.
64 HRC, *General comments n° 35,* § 33.
65 HRC, *General comments n° 35,* § 34.

2.1.3.2. Pre-trial detention

The second phase of detention in Rwanda is court ordered detention while awaiting trial. If a suspect is not released within ten days of arrest, he or she must be brought before a judge.[66] The prosecutor must request pre-trial detention. After hearing from the Public Prosecutor and the suspect, the court has seventy-two hours to render a decision.[67] The judge may order provisional detention or release.[68] The CCP permits a judge to order pre-trial detention in only two circumstances. The first circumstance is where the detained persons is suspected of committing an offence carrying a minimum penalty of two years imprisonment.[69] The second, is where there are serious grounds for suspecting that the person has committed the offence.[70]

When the alleged offence is punishable by imprisonment of more than three months to not more than two years, a judge may order pre-trial detention only if: (1) there is reason to believe the suspect may evade justice; (2)°the suspect's identity is unknown or doubtful; (3) serious and exceptional circumstances require provisional detention in the interests of public safety; (4) provisional detention is the only way to prevent the suspect from disposing of evidence, exerting pressure on witnesses and victims or preventing collusion between the suspect and their accomplices; (5) detention is the only way to protect the accused, ensure that the accused appears before judicial organs whenever required or prevent the offence from continuing or recurring; or (6) given the serious nature of the offence, circumstances under which it was committed and the level of harm caused, the offence led to exceptional unrest and disruption of public order which can only be ended by provisional detention.[71]

A provisional detention order is valid for one month, but may be renewed by the judge for one month at a time.[72] However, this period of extension is limited in

66 Art. 49 of the CCP.
67 Art. 101 of the CCP.
68 Arts 91 and 101 of the CCP:
69 Art. 96 of the CCP.
70 Art. 96 of the CCP.
71 Art. 98 of the CCP.
72 Art. 104 of the CCP.

accordance with the nature of the committed crime.[73] For petty offences,[74] the order may not be extended beyond thirty days. For misdemeanours,[75] the detention order may not be extended after the accused has been detained for six months. For felonies,[76] time cannot be extended after one year of detention.[77] Once a court orders provisional detention, the detained person must be detained in a prison.[78]

The prison management may admit persons into prison only upon presentation of a committal order[79] bearing the date, number, signature and the names of the issuer, stamp of the Court that ordered the imprisonment, particulars of the incarcerated person and the date of his/her arrest.[80] The prison management shall remind the Court and the Public Prosecution in writing at least seven (7) days before the date when the provisional detention period expires.[81] If the provisional detention period elapsed without the Public Prosecution notifying the prison in writing that it filed an application for extension of the provisional detention with the court, the Prison shall release the detainee.[82]

2.1.3.3. Detention after the start of the trial on the merits

The third phase of detention occurs during the trial of the detainee on the merits of the charges against him or her. According to Article 121 of the CCP, if the accused is held in provisional detention or granted provisional release before the court hears the case on its merits; his/her status remains the same until judgement. However,

73 Art. 104 of the CCP.

74 According to Art. 24 of organic law n° 01/2012/ol of 02/05/2012 instituting the penal code penal code , "A petty offence is an offense punishable under the law by a main penalty of an imprisonment of less than six (6) months or punishable by a fine only. Offences against laws, orders, public service and security regulations in respect of which the law does not provide for specific sentences are also petty offences."

75 According to Art.23 of Rwandan penal code, " A misdemeanour is an offence punishable under the law by a main penalty of an imprisonment of six (6) months to five (5) years."

76 According to Art.22 of Rwandan penal code, "A felony is an offence punishable under the law by a main penalty of an imprisonment of more than five (5) years."

77 Art.104 of the CCP.

78 Art.3(1°) of RCS Law defines "prison" as a place established by a Presidential Order where persons are incarcerated following a court decision.

79 *Ordonnance d'incarcération*

80 Art. 19 of Law n°19 bis/2017 of 28/04/2017 modifying and complementing Law n°34/2010 of 12/11/2010 on the Establishment, Functioning and Organization of Rwanda Correctional Service (RCS), *Official Gazette, n°20 of 15/05/2017*.

81 Art.27 of the RCS law

82 Art.27 of the RCS law.

once the court begins to hear the case on its merits the period of provisional detention may not exceed the maximum period of imprisonment provided by law for the offence alleged against the accused. This provision limits the period of detention to the maximum period of imprisonment provided by law for the offence alleged against the accused. Although this provision on its face appears reasonable, in the case of an innocent person, imprisonment for the maximum term for a crime he or she did not commit is manifestly unjust. Another blatant injustice could occur for suspects of offenses punishable of penalty of life imprisonment likes person arrested for murder, who in accord with this provision could be legally detained for life without trial.

Article 121 of CCP undermines the right to be treated as innocent that is provided for in the Article 29(2) of Rwanda's Constitution and permits indefinite detention. The NCHR maintains that being detained for a long period before judgment may violate the right to a fair trial and the presumption of the innocence.[83] Limiting the provisional detention period to the maximum period of imprisonment for the alleged offence against the suspect is contrary to the presumption of innocence principle recognised under Rwandan law. Because such lengthy detentions are legal under Rwandan law, there is no means for a person detained during trial to seek damages for the period of detention. If, after trial, a detained person is sentenced to imprisonment, the detention period before conviction is deducted from the total prison time.[84]

Article 9(3) of the ICCPR provides that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Article 14 § 3 of the ICCPR states that in the determination ... of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time .... Moreover, Article 7(d) of the African Charter provides that "every individual has the right to be tried within a reasonable time by an impartial court or tribunal."

83 NCHR, *Annual report from January 2009-June 2010*, pp.49-54,(2010).

84 Art. 40(5) of the Rwandan penal code.

These provisions compel the Rwandan government to limit the maximum period that a person may be detained once trial begins to a reasonable time.[85]

2.1.3.4. Detention after conviction

The fourth and final phase of detention occurs following a defendant's conviction of a crime and being sentenced to imprisonment. Obviously, if the defendant is acquitted, he or she should be released. In fact, Article 228 of the CCP compels the prison director to immediately release the person upon presentation of a copy of the judgment of acquittal. However, convicted defendants are remanded to prison to serve their sentences. If a defendant appeals the conviction, he or she shall remain in detention notwithstanding the appeal.[86] The prosecutor is responsible for monitoring the execution of the judgement in the case of imprisonment.[87] Article 27(3) of the RCS Law specifies that the prison management must release a prisoner who has served his/her entire court-ordered prison sentence. A prison director who detains or continues to keep a person in prison unlawfully may be punished under the Penal Code.[88]

2.1.4. Obstacles in the enforcement of habeas corpus in Rwanda

Habeas corpus is a Latin term that literally means "you have the body. "[89] Its origin is in common law. It is a legal remedy through which a person deprived of her or his liberty may request a court to decide the lawfulness of the detention and order release if it finds that the detention is unlawful.[90] The *ratio legis* of *habeas corpus* is to protect people against arbitrary arrest and detention. *Habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing a person's disappearance or the keeping of the place of a detained person secret and in protecting against torture or other cruel, inhuman or degrading punishment or treatment.[91] This subsection examines the legal obstacles for unlawfully detained persons in Rwanda to obtaining release through the existing *habeas corpus* procedure.

85 The content of a reasonable time concept is discussed in the paragraph 4.4.2.,*infra*.
86 Art. 184 of the CCP.
87 Art. 227 of the CCP.
88 Art. 51 of the RCS Law. The enforcement of these provisions in practice will be discussed in the paragraph 2.2.2.2., *infra*.
89 Farrell, B., Habeas Corpus in Times of Emergency: A Historical and Comparative View, *International Law Review Online Companion*, Volume 1, Number 9 p.77, (Apr.2010).
90 Art. 9(4) of the ICCPR.

2.1.4.1. The competent court to hear the petition for habeas corpus

Article 91 of the CCP states that "when a person is unlawfully detained, any judge at the court competent to hear cases involving offences similar to those alleged against the person detained that is nearest to the place where the person is detained may issue a *writ* of *habeas corpus* ordering the person holding such a person in detention to appear personally with that person and justify the reasons and circumstances warranting such detention." This provision imposes two requirements on a petitioner applying for writ of *habeas corpus*. First, it requires a victim of unlawful detention in Rwanda to apply for a writ of *habeas corpus* in the court nearest the place of his or her detention that is competent to try the offence with which the victim is charged. Second, it requires that the petition be filed in court that hears cases involving offences similar to that with which the detainee is charged.

As stated above, Article 91 makes clear which court may issue a *writ of habeas corpus*. However, in the case of secret detention, [92]it is impossible for the detainee to know which court to petition. Despite the prohibition against secret detention under Rwandan law,[93] it occurs in practice,[94] and the opportunity to challenge the lawfulness of that detention in Rwanda is impossible when victims are held incommunicado and/or do not know where they are being held.

The issue of the unknown place of detention is an obstacle for the unlawfully detained person who wants to challenge the lawfulness of his detention. This issue

91 Farrell, B.R., *Habeas Corpus in International Law*, Ph.D. Thesis, National University of Ireland Galway, p. 134, (2013).
92 "Secret detention" means the individual is held in a place that is not an officially recognized place of detention, such as a private home or apartment, military camp, secret prison or a hidden section of a larger facility. *See* Amnesty International, *Combating Torture at*, 96 (2003), cited by Association for Prevention of Torture (APT), *Incommunicado, Unacknowledged, and Secret Detention under International Law,* 2 March 2006.
93 Art. 90 of the CCP.
94 US Department of State, *Country Report on Human Rights Practices 2014 – Rwanda*, p.9.

is illustrated by the case of *Laurent Nkunda*.[95] Since September of 2009, *Nkunda*'s wife petitioned three different courts for *habeas corpus* and each of those courts declined jurisdiction. *Laurent Nkunda's* relatives learned on the radio that he had been arrested in the city of *Rubavu*. His wife and lawyer first filed a *habeas corpus* application in the Intermediate Court of *Rubavu,* which rejected the claim, finding that it lacked jurisdiction because the petitioner did not identify the place where *Nkunda* was detained and the detaining officer. Next, Nkunda's wife and lawyer applied for a writ of *habeas corpus* in the Intermediate Court of *Nyarugenge* with the same result; the court rejected the petition because it lacked jurisdiction. *Nkunda's* wife and lawyer then requested the Supreme Court to determine the appropriate court to hear the *habeas corpus* petition. On March 26, 2010, the Supreme Court decided that the petition could be heard only by a military court, based on the fact that the Rwandan military had been responsible for Nkunda's arrest. After the Supreme Court decision, Nkunda's wife and lawyer did not continue the proceedings. Up to the time of this writing, it is unknown whether he remains in custody.

The second requirement of Article 91 of the CCP, is that the petition must be filed in a court with jurisdiction to try the offence with which the detained person is charged. When a person is being detained in official custody for a specific offence, this provision is clear. However, this condition becomes an obstacle when a detainee has not been informed of the charges. An example of such an obstacle follows. Article 28 of Rwanda's Constitution states that no one shall be imprisoned for inability to fulfil obligations arising from civil or commercial laws.[96] Thus, the detention of a person for failure to pay a debt is illegal. In such a case, where one is detained for a noncriminal offense, it is unclear where a person illegally detained for failure to pay a debt should file a petition for *habeas corpus.*

According to the Working Group on Arbitrary Detention, the right to challenge the lawfulness of detention is frequently denied where a detainee has not been formally charged or brought before a judge, has been held incommunicado or in solitary con-

95 Suprême Court, *Nkunda Mihigo Laurent c/ Général James KABAREBE*, Arrêt RP 0001/09/CS, 26 Mars 2010.
96 Art.28 (7) of Rwanda's Constitution.

finement or has been denied an effective procedure to challenge his or her detention.[97] Under Rwanda's *habeas corpus* procedure set out in Article 92 of the Criminal Code, it is unclear which is the appropriate court in which to file a petition for a writ of *habeas corpus* when a person is unlawfully detained in an unknown place and/or not informed of the charges.

2.1.4.2. The requirement to name the person carrying out the unlawful detention

Rwanda's requirement that petitions for *habeas corpus* must name the person carrying out the unlawful detention can pose an insurmountable obstacle for detained persons who do not know where or by whom they are being detained. Article 92 of the CCP permits the victim or by any other person "with knowledge of the injustice" to institute *habeas corpus* proceedings. That Article requires that the *habeas corpus action* "must be instituted against the person carrying out the unlawful detention and not against the organ for which he/she works." Therefore, the first step for filing a petition for a writ of *habeas corpus* is to identify the detaining officer or officers. If the petitioner is unable to identify the detaining officer(s), no court will receive the claim. The issue of identification was addressed by the court in the *Nkunda* case, where the wife of the detainee failed to identify the detaining officer. Similarly, a petition for *habeas corpus* was rejected by the Intermediate Court in *Nyarugenge* for failure to name the person responsible for the unlawful detention. While the decisions by the *Nkunda* and *Nyarugenge* courts comply with Rwandan law, they are contrary to the admonitions of the African Commission on Human and Peoples' Rights, which affirms that no circumstances whatever may justify denial of the right to *habeas corpus.*[98] Rwanda's requirement that the *habeas corpus* action name the person(s) responsible for the unlawful detention is an unjustified obstacle to those seeking to challenge unlawful detentions in Rwanda.

97 The Working Group on Arbitrary Detention Opinions 33/2012 and 38/2012. That was the case of Lt. Col. *Seveline Rugigana Ngabo* who has been held for a period of five (5) months *incommunicado* which was a violation of Art.49 of the CCP requires to bringing the suspect before the court within ten days.
98 African Commission on Human and Peoples' Rights, (2003) § M(5)(e).

2.1.4.3. The burden of proof

Proper allocation of the burden of proof in a *habeas corpus* case is critical for protecting the rights of detained persons. Because the CCP does not indicate who has the burden of proof in a *habeas corpus* proceeding, the Rwanda Civil Procedure Law applies. Pursuant to that law, every plaintiff must prove his or her claim. If the plaintiff fails to prove the claim, the defendant wins the case.[99] However, the detainee often does not have access to information to prove his or her innocence. Because Rwanda's Constitution guarantees individual liberty, fundamental fairness requires that the state should bear the burden of proving the lawfulness of any detention.

2.1.4.4. The Court decision

Article 92 of the CCP requires the court to hear the *habeas corpus* action within forty-eight hours after it is instituted. It further requires the court to render a decision within five days of the hearing. Article 91 of the CCP authorizes the judge to continue the detention or set the detainee free.

The detainee is entitled to also challenge the lawfulness of his detention during the provisional release hearing. Article 105, 5 CCP indicates that:

> When during the examination of an action against provisional detention of a person suspected of a felony the judge finds that the provisional detention is unlawful, he/she shall in spite of such illegality order continuation of the detention of the suspect if there are serious grounds for suspecting that the person has committed the offence and the person who illegally detains the suspect shall be personally prosecuted.

This provision states that despite previous unlawful detention situation, the judge has the power to order the continuation of detention. This continuation of detention happens once an unlawfully detained person is a suspect of a felony.[100] Rwandan

99 Art. 9 of Law n° 21/2012 of 14/06/2012, relating to Civil, Commercial, Labour and Administrative Procedure. (Civil Procedure Law).

100 For example, in the case of *Munyemanzi Yusuf*, the court ordered his detention despite finding that he had been unlawfully detained. Primary Court, Kacyiru, *Prosecution* v. *Munyemanzi Yusuf*, RP 0546/13/TB/ KCY, 11/06/2013.

law doesn't provide for the right to compensation for unlawful detention as a legal consequence of unlawful detention.

2.2. The situation of unlawful detention in Rwanda

The power to arrest and to detain a person against his or her will is among the most powerful instruments a state has against its citizens. The abuse of that power is the basis for human rights violations worldwide.[101] This section describes the situation of unlawful detention in Rwanda.

2.2.1. The National Human Rights Commission reports

A means to enforce human rights at the national level is through the establishment of human rights institutions.[102] In 1999, Rwanda's law established such a human rights institution - the National Commission of Human Rights (NCHR).[103] The creation of the NCHR was largely due to the fact that Rwandans themselves realised that their country's recent history was characterised by the failure to respect human rights and by impunity enjoyed by those in power, which culminated in the genocide.[104]

The overall mission of the Commission is to promote and protect human rights.[105] Although the Commission has various specific missions as regards to the protection of Human Rights, this study is limited to three that related to the protection of individuals against unlawful detention. The first mandate is mission to receive, examine and investigate complaints relating to human rights violations and to examine

101 The AfPCOF, *Snap-shot of the Use and Conditions of Pre-trial Detention in Police Cells in Africa* at 20 (2011).

102 Peter, C.M., 'Human Rights Commissions in Africa – Lessons and Challenges' in *Bosl, A and Diescho, J (eds.)* (2009) and *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, Windhoek: Macmillan Education Namibia, at 351 (2009).

103 The NCHR was established as an independent national institution by Law n° 04/99 of 12th March 1999. The Commission comprises seven commissioners. The term of office for the commissioners is four and may be renewed only once.

104 Gashirabake, J.M.V., Achievements of the National Commission for Human Rights of Rwanda, the Rwandan Bill of Rights and Prospects *vis-à-vis* the East African Community in Peter, C. M., *The Protectors, Human Rights Commissions and Accountability in East Africa*, Fountain Publishers, at 154.(2008).

105 Art.4 of Law n°19/2013 of 25/03/2013, Determining Missions, Organization and Functioning of the National Commission for Human Rights, *Official Gazette n°14bis of 08/04/2013.* (NCHR Law).

Human Rights violations in Rwanda committed by State organs, those who work in the public service abusing their powers, associations and individuals.[106] Its second mandate is to inspect detention centres to identify any violations of the rights of detainees and urge authorities to address identified cases of violations of rights of detainees.[107] Third, the NCHR has authority to assist victims of human rights violations in the court.[108] The following paragraph examines its role in the protection of rights of unlawfully detained persons in Rwanda.

2.2.1.1. Receive, examine and investigate complaints relating to unlawful detention

The NCHR is active in the fight against unlawful detention in Rwanda, especially in stimulating the release of victims of unlawful detention.[109] The NCHR receives and investigates complaints from detainees, generally via members of their families. It has the power to visit prisons to check for human rights violations.[110] This study reviewed NCHR annual reports of 2008, 2010, 2012, 2014 and 2016 to examine the types of cases received by the commission in those years.[111] Those figures are not complete because not all unlawfully detained persons file complaints with the NCHR.

Table 1. Unlawful detention cases received by the NCHR

Year	2008	2010	2012	2014	2016
Cases	240	170	12	22	18

The complaints received by the NCHR[112] can be grouped into four categories. The first category refers to those detained under police custody beyond the maximum period provided by the law. The second consists of those detained in prison without a valid detention order from the judge. The third category comprises those remaining in pre-trial detention beyond a reasonable period. The fourth category refers to those held in prison despite completion of their sentence or after having been acquitted by the court.

106 Art. 6(1,2) of the NCHR Law.
107 Art. 6(3) of the NCHR Law.
108 Art. 9 of the NCHR Law.
109 NCHR, *Annual reports from 1999 to 2015*.
110 Art. 6(3) of the NCHR Law.
111 These reports have been chosen as they present the followed cases by the NCHR in terms of percentage and they provide a representative sample.
112 The NCHR does not present all the followed cases in its reports instead it presents typical examples of complaints.

In 2008, the Commission followed up on 240 cases.[113] The complaints were from persons kept in custody without prior preparation of their case files and persons detained in prison beyond times permitted by law.[114] As an example, the 2008 report presents the case of *Sibomana Pascal*, who was accused of vagrancy and who spent fourteen years in detention, without a case file or imprisonment order. He was released without appearing before the court.[115] Also, that report shows claims of persons who were imprisoned but not tried within a reasonable time and those who were held in prison beyond the end of their sentence or despite a Judge's release order.[116] As an illustration, the report presents the case of *Nyiramahanga Ziripa* who was accused of poisoning another person and acquitted after spending ten years in pre-trial detention. The report also presents the case of *Niyonzima Jean* who stayed in prison for a year and a half after his sentence had ended because the court failed to send its verdict to the prison.[117]

In 2010, the Commission processed 170 complaints of unlawful detention.[118] The report included the following three egregious cases of unlawful detentions. The first is that of *Nyiraminan Venuses* and *Uwitonze Dative* who spent fourteen years in custody without being brought before the judge.[119] The second is the case of *Dr. Runyinya Barabwiriza*, who was accused of genocide and spent sixteen years in pre-trial detention.[120] He was acquitted after spending seventeen years in detention.[121] The third is the case of *Mushumba Elias* who spent fifteen years in pre-trial detention, when the detention order was valid for only one month.[122]

113 NCHR, *Annual Report for 2008*, at11, (March 2009),.
114 NCHR, (2009), p.51.
115 *Id.*, p.53.
116 *Id.*, p.51.
117 *Id.*, p.54.
118 NCHR, *Annual Report for January 2009-June 2010* at 10,(October 2010).
119 *Id.*, p.51.
120 *Id.*, p.55.
121 *TGI/HYE, Runyinya Barabwiriza* v. *The Prosecution* n°0084/11/TGI/HYE of 11/08/2011.
122 NCHR, (2010), at 51.

In 2012, the Commission processed 12 cases related to unlawful detention. Among those cases the three cases of *Rurangwa Louis, Ngarambe Léodomir and Manirarora Célestin*, all accused of genocide, who spent eighteen years in pre-trial detention.[123] The June 2014 to June 2015 report indicates that the Commission followed up 22 cases related to unlawful detention but did not provide any examples of those cases.[124] The decrease in complaints between 2010 and 2012 resulted from the combined efforts from the NCHR and the non-government organisations like Legal Aid Forum that investigate complaints of unlawful detention together with Ministry of Justice and criminal justice chain institutions.[125]

In 2016, the Commission followed up on 18 cases related to unlawful detention.[126] Additionally, the July 2015 - June 2016 report indicates that, while monitoring police stations and prisons, the Commission found that 22 persons were illegally detained at police stations[127] and 16 persons in prisons.[128] These who were unlawfully detained in police custody were detained beyond the maximum period of detention. Those unlawfully detained in prisons were not released after serving their sentences. The prisons excuse for not releasing those prisoners was because of the lack of copies of judgment from the Court of Last Instance in their files, incorrect identifications on their arrest warrants, unreadable dates of the judgment pronouncement, the failure of the court to submit a copy of the judgment showing the sentence, lack of dates of detention in police custody and unstamped documents by the prosecution.[129]

The NCHR made three recommendations. First, it recommended that all the unlawfully detained persons be released. If the detained person had not been brought before the court, the Commission recommended that the detainee be expeditiously brought before the court. Most of unlawfully detained persons followed by the

123 NCHR, *Annual Activity Report July 2012-June 2013* at 70 (September 2013).
124 NCHR, *Annual Report from June 2014 up to June 2015* at 16 (September 2015).
125 Interview with *KAREMERA Pierre,* Vice Chairperson of the NCHR, 30/01/2017.
126 NCHR, *Annual Activity Report July 2015-June 2016* at 15, September 2016.
127 *Id*., p.90.
128 *Id*., p. 89.
129 *Ibid.*

NCHR have been released.[130] Second, the NCHR recommended that the unlawfully detained persons be compensated for the damages they sustained due to their unlawful detentions. However, the unlawfully detained persons have not received any compensation as the NCHR recommendations do not indicate who should be liable and how much compensation should be awarded.[131] Third, the NCHR recommended punitive measures against the detaining officers.[132] It is noteworthy that the NCHR did not identify any detaining officers or their particular misconduct and did not recommend appropriate discipline or punishment. In practice, the NCHR does not follow up to see if its recommendations have been implemented.[133]

2.2.1.2. Assisting victims of unlawful detention

The NCHR has authority to file legal proceedings in civil, commercial, labour and administrative matters for violation of human rights protected by the Rwandan Constitution, international and regional treaties ratified by Rwanda and Rwandan laws.[134] Article 9 of the NCHR Law states that the Commission may be represented in courts by its employees authorized by the Chairperson of the NCHR or by counsel of its choice. In this regard, the NCHR is empowered to assist or represent the victims of human rights violations, including unlawfully detained persons, before the Rwandan courts. Nevertheless, the NCHR has never assisted victims of unlawful detention in court to claim release from or compensation for unlawful detention.[135] The lack of assistance to unlawfully detained persons may be due to the limited human resources of the NCHR.[136]

2.2.1.3. Reports on unlawful detention in Rwanda

The Commission submits to both chambers of Parliament[137] its activity report within three months of the end of the fiscal year, and sends a copy of its report to the

130 Interview with *KAREMERA Pierre,* Vice Chairperson of the NCHR, 30/01/2017.
131 *Ibid.*
132 NCHR, *National Commission for Human Rights Annual Report 2005*, at 176, May 2006.
133 Interview with *KAREMERA Pierre,* Vice Chairperson of the NCHR, 30/01/2017.
134 Art. 98 of the NCHR Law.
135 Interview with *Hilaire Mazimpaka Ngango,* NCHR Communications officer, 11 August 2014.
136 Interview with *KAREMERA Pierre,* 2017.
137 According to Art. 64 of the Rwandan Constitution, the Rwandan Parliament has two chambers: the Chamber of Deputies and the Senate.

president, cabinet and Supreme Court.[138] Over the last sixteen years,[139] every annual NCHR report has mentioned complaints of unlawful detention that it examined. The NCHR urged the government institutions to find a solution to the question of unlawful arrests and detentions and to sensitize the prosecution and police officers to respect the laws governing arrests and detentions.[140] The NCHR annually presents a report to parliament which is debated in the presence of the Minister of Justice,[141] who provides answers to the raised questions. Since the Rwandan law reform in 2004, with the intervention of the NCHR and collaboration with criminal justice institutions, cases of unlawful detention have fallen.[142] There has been a concomitant reduction in the number of complaints submitted to the Commission in recent years.[143]

2.2.2. The Legal Aid Forum (LAF) study

In 2013, the Legal Aid Forum (LAF) published a report entitled on "Improving the Performance of the Criminal Justice System through Improved Trial Justice: The Impact of Pre-trial Detention on Access to Justice in Rwanda (Report). The Report was based on interviews with detained persons, police officers and prosecutors. Below I discuss the findings and conclusions of that Report.

2.2.2.1. Violation of the maximum period of detention in police custody

The LAF Report indicates that there are cases where arrested persons have been detained by the police and prosecution beyond the maximum 10-day period allowed by the Criminal Procedure Code.[144] LAF indicates that of all those questioned in all but one prison, 55% were detained in excess of 10 days after arrest before being

138 Art.13 of the NCHR Law.
139 Between 1999 up to 2016.
140 NCHR, *Annual report for the year 2004*, p. 114, March 2005,.
141 The general mission of the Ministry of Justice /Office of the Attorney General is to organize and to oversee the promotion of the rule of law and justice for all. *See* Prime Minister's Order n°40/03 of 25/04/2014, determining the mission, functions, organizational structure and summary of job positions of the Ministry of Justice/Office of the Attorney General, published in *Official Gazette, n° 17 of 28/04/2014.*
142 Interview with *Karemera Pierre*, 2017.
143 The June 2014 up to June 2015 report indicates that the Commission received only 22 cases related to unlawful detention.
144 LAF, *Improving the Performance of the Criminal Justice System through Improved Pretrial Justice:* The *Impact of Pretrial Detention on Access to Justice in Rwanda Report* (2013), at 23.

taken before a court.[145] In most cases, the excess was only a few days. However, five people were held by the police or prosecution for over 40 days each before being taken before a Court.[146] The prosecution explained that such delays were due to lack of transport means.[147]

2.2.2.2. Violation of the maximum period of pre-trial detention

LAF found that in 2013, over seven hundred people were held more than one year in pre-trial detention.[148] LAF indicates that in some cases the second look at the pre-trial order does not take place and some detained persons have been held beyond the period prescribed by law or have already served a period in prison in excess of the maximum punishment for the crime with which they were charged.[149] LAF highlighted the case of a 35-year-old female held in detention in excess of 12 years. When LAF interviewed her, she stated that she did not know why she was being held and that she has never appeared before a court. LAF concluded that there is an absence of consistent judicial oversight of the period a person is held in the prison because, once a person is placed into prison; they are not brought back before the court until their trial.[150] LAF also found that, although Article 51 of the RCS Law empowers prison authorities to release persons due to lacking a valid detention order, not all suspects were released when their period of detention expired.[151] LAF found that, in 2012, almost 8,000 people were being held in Rwandan prisons without trial.[152]

2.2.2.3. Limited legal assistance for detained persons

Rwanda's National Legal Aid Policy identifies the organisations which provide legal aid to indigent people. LAF and three university clinics[153] often visit prison and

145 *Ibid.*
146 *Ibid.*
147 *Ibid.*
148 *Id.*, p.29.
149 *Id.*, p.27.
150 *Id.*, p.28.
151 *Id.*, p.46.
152 *Id.*, p.20. The Justice Minister *Tharcisse Karugarama* dismissed the allegations, saying the figure had been inflated and were made to mislead the public opinion on Rwandan criminal justice system. Nevertheless, the Justice Minister did not indicate the correct figures. See The New Times, Minister *Tharcisse Karugarama* says the figure in LAF report has been inflated, *www.newtimes.co.rw/section/Printer/2013-02-17/63003*,
153 Ministry of Justice, *National Legal Aid Policy*, at 16 (2014), available at http://www.minijust.gov.rw/fileadmin/Documents/MoJ_Document/Legal_Aid_Policy_-_IMCC_V2.pdf, [accessed 01/11/2017].

detention facilities to provide legal aid to detained persons. Three universities, [the University of Rwanda, the Kigali Independent University Gisenyi campus and the University of Lay Adventists of Kigali (UNILAK)], provide legal aid clinics.

However, LAF's Report shows that most detainees are not provided legal assistance.[154] This lack of representation makes it difficult for detainees to challenge their detention.[155] It means that many detainees are held beyond their maximum sentences. Furthermore, some detainees are unable to communicate with anybody about their case. The LAF Report observed that those detained by the police lack the opportunity to inform a friend or family member of their detention even if told that they have the right to do so.[156] The LAF Report found that detainees' inability to communicate with those outside of the prison inevitably exacerbates the problem of people becoming "lost" within the prison.[157] The LAF Report concludes that every detained person held in prison was at the mercy of the criminal justice system.[158] According to the Report, "a system which does not have adequate checks and safeguards within it to prevent a person being detained for periods well in excess of the one-year maximum, and which, more importantly, has such a backlog within it so as to be impotent to deal with those cases of excessive detention."[159]

Only a few people in detention apply for *habeas corpus*.[160] Most detainees held in Rwandan prisons and police stations are not aware of the existence of the *habeas corpus* procedure due to ignorance and the lack of effective legal aid services.[161] As detainees are not aware of the *habeas corpus* procedure, are detained beyond lawful maximum times.

154 LAF, (2013), p.14.
155 *Id.*, p.20.
156 *Id.*, p.16.
157 *Id.*, p.29.
158 *Ibid*
159 *Ibid.*
160 Interview with *Itamwa* inspector of the courts, Kigali, 13/01/2015.
161 *Ibid.*

2.2.2.4. LAF's recommendations

LAF recommended several changes to the legal framework governing pre-trial detention. First, it recommended adding to the CCP to a specific statement of a detainee's rights that the police must read to the detainee upon arrest. With respect to the wording of the statement, LAF recommended that it follow international standards. In particular, the statement should inform the detainee of the right to have a family member or friend informed of the arrest and of the right to remain silent unless they waive that right in writing.[162] Second, it recommended to amend the CCP to require release on bail unless specific identified grounds exist for not granting bail.[163]

Third, LAF recommended amending the CCP to provide the following procedural rights:

> "(i)On each and every occasion a person is taken before the Court, the Court must set a date for the next hearing and state that date in open court. If the person is to be held in prison until that next hearing the Court must draw an order stating that the individual is to be held in prison only until the stipulated date and that they must be produced before the Court on that date.," (...) and (iii)"No prison may admit a person without a valid order for their detention which contains the date upon which they must be produced before the court – it is in effect an order for their production before the court on the stipulated day".[164]

Fourth, LAF recommended amending the CCP to provide for sanctions against the RCS for unlawful detention. Fifth, it recommended amending the CCP to set "a level of compensation" payable to any person unlawfully detained.[165]

LAF also recommended suggested establishing a paralegal network to provide representatives to detainees. Having paralegals available to meet with detainees "will ensure that an independent person will monitor the rights of those detained."[166]

162 LAF Report, (2013), p.49.
163 *Ibid.*
164 *Id.*, p.50.
165 *Id.*, p.53.
166 *Id.*, p.48.

Finally, LAF recommended that each prison should contain a lawyer, who is able to take cases to court where it appears a suspect has been detained unlawfully, and it recommends that the Government should fund that lawyer.[167]

2.2.3. Institute of Legal Practice and Development (ILPD) study

In 2012, the Ministry of Justice commissioned the Institute of Legal Practice and Development (ILPD) to study the collaboration of Rwanda's criminal justice partner institutions.

2.2.3.1. Results of the study

The ILPD study showed that there are controversial issues on the communication between the police, prosecution, courts, and prisons, which lead to unlawful detentions, adjournments of cases and delay in releasing detainees who have been acquitted by courts.[168] That study found that some police officers and prosecutors recommend detention for even minor offenses at the investigation stage.[169] That study also found that courts do not inform correctional services of their decisions on time.[170] That study also revealed that the public does not understand the role of the Judicial Police and perceives pre-trial detention as a punishment.[171]

2.2.3.2. Explanation of the problem

ILPD found that the Judicial Police lacked skills and specialization due to the transfer of Judicial Police officers into the National Police and the hiring of new recruits.[172] In 2013, judicial Police used to be part of the National Police. Moreover, the Judicial Police were also under the command and financially dependent of the Rwandan National Police and under control and supervision of the prosecution. This lack of autonomy of the Judicial Police and the duplication of command was made them ineffective and inefficient.[173]

167 *Ibid.*
168 ILPD, Study on the End to End Process Mapping of The Criminal Justice System in Rwanda, (2013), p.7.
169 *Ibid.*
170 *Id.*, p.6.
171 *Id.*, p.5.
172 *Id.*, p.8.
173 *Ibid.*

The ILPD study found that three factors explain the overuse of pre-trial detention. Suspects released on bail flee the country, do not appear before the court or do not willingly abide by the court's decision imposing punishment.[174] The ILPD study also found that, because of adjournments and other causes, the backlog of cases waiting trail was still as high as it appeared in the report of the Judiciary of 2012.[175]

The ILPD study found that judgments are not always delivered to parties on the day of pronouncement. Judges justified that delay by explaining that they were still editing the judgments. Judges' delay was identified as the leading cause of failing to promptly release detainees or defendants after a court decision in their favour. That study found that delay, infringes the rights of detainees and sometimes puts prisons authorities under pressure of detainees who are claiming their release. Prison authorities said they cannot trust orders for release that the chief registrar[176]sent via emails. This poor communication was also mentioned by defence lawyers as being the leading cause of not releasing prisoners on time.[177] That study also identified the following additional reasons for delay in releasing detainees: The court decision is not clear; the case file was lost and administrative formalities.[178] Finally, that study found that despite an initiative that exists to create a multi-institutional database, there was no case management system accessible to all the participants in the criminal justice system. Rather, the various offices maintained paper files.[179]

2.2.3.3. ILPD's recommendations

ILPD made several recommendations to improve release time of detainees. First, it recommended setting up an independent institution separate from the National Police with investigation power. Second, to reduce the Supreme Court's caseload, ILPD suggested restructuring of the court structure, specifically recommending

174 *Id.*, p.5.
175 *Id.*, p.6.
176 Chief registrar is a Judicial staff. In each court, the Chief Registrar is responsible for the organisation, functioning and conduct of registrars of the Court. In that regard, he/she assigns duties to other registrars and supervises their activities in issuing copies of judgments and other court orders. See Article 42&43 of Organic Law N° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts, official gazette, *n° special 10 September 2008*.
177 ILPD, (2013), p.6.
178 *Ibid.*
179 *Id.*, p.7.

adding a second intermediate appellate court prior to the Supreme Court. Third, it recommending establishing an electronic case file management system that would permit secure electronic communication between the criminal justice partners.

2.2.3.4. Follow up by the Ministry of Justice

To resolve the issue of judicial police budget constraints, professionalism, and supervision, in 2017 the parliament creates Rwanda Investigation Bureau (RIB) as a specialized autonomous organ in charge of investigations.[180] The judicial police have been separated from the national police.[181] Although the law establishing the RIB was enacted in 2017, RIB starts working in April 2018[182] and was given the Judicial Police's staff and equipment in performing its mission, RIB acts under the supervision and instruction of the prosecution for criminal acts under its jurisdiction.[183] The Judiciary and Ministry of Justice agree with ILPD's recommendation to add a second intermediate appellate court between the High Court and Supreme Court. In 2018, the Court of Appeal has been established.[184]

To resolve the issue of case management and lack of communication between the criminal justice institutions, the Ministry of Justice, in 2016, established the Rwanda Integrated Electronic Case Management System (IECMS), which connects the institutions and people involved in the justice system (judicial police, prosecution, Rwanda Correctional Service, court and advocates). The Ministry of Justice believes that IECMS will enhance delivery of justice services to the public and improve administration and performance monitoring.[185] IECMS records contain all judicial case information from the time of arrest through sentence execution up to release

180 Law N° 12/2017 of 07/04/2017, establishing the Rwanda Investigation Bureau and determining its mission, powers, organisation and functioning (RIB Law), *Official Gazette n° Special of 20/04/2017*.

181 Art.5 of the RIB Law.

182 MINIJUST, Rwanda Investigation Bureau (RIB) was officially launched, http://www.minijust.gov.rw/media/news/news-details/?L=interface%2Fipsconnect%2Fipsconnect.php%2Bservices&tx_ttnews%5Btt_news%5D=744&cHash=c0ca20cec471cb44ab6b26b404b2dfa7, [accessed 25/05/2018].

183 Art. 6 of the RIB Law.

184 Organic law N°002/2018.OL of 04/04/2018 establishing the Court of Appeal, *Official Gazette n° Special of 30/05/2018*.

185 Rwanda IECMS (Integrated Electronic Case Management System) is an Electronic case management System Integrating 5 institutions of the justice sector in Rwanda (Judiciary, Ministry of Justice, National Public Prosecution Authority (NPPA), Criminal Investigation Department (Police) and the Rwanda Correctional Services (RCS)). See Integrated Electronic Case Management System (IECMS), available at http://www.judiciary.gov.rw/fileadmin/IECMS_Info/About_IECMS_-Final.pdf, [accessed 01/11/2016].

and efficiently share that information among all relevant sector institutions.[186] This system enables the prison officer to access the court file and to read the judgment. The court can easily communicate its verdict to the prison without delay. It is worth mentioning that it is too early to know whether the established mechanisms will solve all problems.

2.2.4. The U.S. Department of State reports

In preparing its reports, the U.S. Department of State relies on non-governmental organisations' reports, as well as its own intelligence. This study focuses on published reports of 2008, 2010, 2012, 2014, 2016, similar years as of the analysed reports of the NCHR. Both NCHR reports and the U.S. Department of State reports present the same categories of unlawful detentions. In addition to the identified categories of unlawful detention in the NCHR reports, the U.S. Department of State's reports include detentions in unofficial detention places and conclude that existing remedies for unlawful detention are ineffective. All analysed reports identified violations of maximum period of detention, secret detentions, the lack of release from detention and failure to provide for compensation for unlawful detention.

2.2.4.1. Violation of the maximum period of detention

With regard to the maximum period of the detention in police custody, 2008, 2012 and 2014 U.S. Department of State's reports showed that the judicial police and prosecutors did not respect the maximum period of detention in police custody. Moreover, the 2016 report indicates that the police and prosecutors disregarded maximum periods of detention in police custody, sometimes for months and often without charging the detainee, particularly in security-related cases.[187]

All U.S. Department of State's analysed reports indicate that there were serious problems of lengthy pre-trial detention, including the detention of persons whose

186 Watson, A.C., Rukundakuvaga, R. & Matevosyan, K., Integrated Justice: An Information Systems Approach to Justice Sector Case Management and Information Sharing, Case Study of the Integrated Electronic Case Management System for the Ministry of Justice in Rwanda, *International Journal for Court Administration, Special Issue, Vol. 8 n°. 3, July 2017*, p.3.

187 US Department of State, (2016), p.10.

unresolved cases dated from 1994, a consequence of a large number of persons suspected of committing genocide who continued to be held in prisons and detention centres.[188] The 2012 report specifies that 3,560 men, 343 women, and 49 juveniles (43 of them male) were in pre-trial detention beyond one year which is the maximum period for pre-trial detention.[189] The 2014 report refers to three cases of persons who spent eighteen years in pre-trial detention.[190] With regard to the maximum period of detention after starting of the hearing on merits, the 2016 State Department report indicates that after prosecutors formally file a charge, detention may be indefinite unless bail is granted.[191]

2.2.4.2. Detained persons in unofficial detention place

All analysed reports specify that although Rwanda's Constitution and law provide legal safeguards against unlawful detention, Rwandan security forces arrest and detain persons unlawfully and without due process.[192] The 2012 and 2014 U.S. Department of State's reports state that people were detained in unofficial detention places by the police and the military intelligence.[193] The 2016 report also indicates that state security forces held some suspects incommunicado or under house arrest.[194] The 2010 report describes the arrest of *Laurent Nkunda*, leader of a Congolese armed entity, while he was in Rwanda in January 2009.[195] *Nkunda*'s case was also described in the 2014 U.S. Department of State's report that states that *Laurent Nkunda* remained under house detention without charges and without being brought before the court.[196]

2.2.4.3. No effective remedies for unlawful detention

The 2014[197]and 2016 U.S. Department of State's reports state that, although detainees have the right to challenge their detention in court, few have done so and none were able to obtain prompt release or compensation for unlawful detention.[198] However, the cases analysed in the NCHR reports identified some unlawfully detained persons who have been released after challenging their unlawful detention either before a court or through the advocacy of the NCHR. The obstacles for those who failed to challenge the lawfulness of their detention and those who failed to obtain release from unlawful detention are the result of gaps in the Rwanda's current *habeas corpus* procedure, described in the subsection 2.1.4, *supra,* and the lack of legal assistance discussed in the paragraph 2.2.2.3, *supra*. With regard to compensation, the analysed cases in this research revealed that few unlawfully detained persons tried and none have obtained compensation.

188 *Ibid.*
189 US Department of State, *Country Report on Human Rights Practices 2012 - Rwanda*, p.12.
190 US Department of State, (2014), p.13. These cases were also mentioned in the 2012 NCHR annual report. see NCHR, *Annual Activity Report July 2012-June 2013*, September 2013, p.70.
191 US Department of State, (2016), p.10.
192 US Department of State, *Country Report on Human Rights Practices 2010 - Rwanda*, p.8.
193 US Department of State (2012), p.7 and US Department of State (2014), p.5.
194 US Department of State (2016), p.10.
195 US Department of State, *Country Report on Human Rights Practices 2010, - Rwanda*, p.9.
196 US Department of State, *Country Report on Human Rights Practices 2014, - Rwanda*, p.9.
197 US Department of State report, (2014), p.11.

2.3. Compensation for unlawful detention under Rwandan law

The reports and studies referenced above demonstrate that unlawful detention is occurring in Rwanda. This section examines the legal and practical obstacles faced by unlawfully detained persons in seeking compensation under tort law, criminal procedure law and administrative law.

2.3.1. Compensation for unlawful detention under tort law

Under Rwandan tort law, victims of unlawful detention are entitled to file a lawsuit in court seeking damages. Articles 258 and 259 of Rwanda's the Civil Code Book III[199]states that any act of a person "which causes damages to another, shall oblige the person by whose fault it occurred to repair it. One shall be liable not only by reason of one's acts but also by reason of one's imprudence or negligence." Thus, three elements are necessary to prove liability: fault, damages, and causation. The burden to prove each of those elements falls on the plaintiff.[200] Hence, in order to be compensated, an unlawfully detained person must prove the fault of the detain-

198 US Department of State report, (2016), p.12. Those reports do not identify the number who attempted to gain release and compensation but failed to do so.
199 The Decree of 30/07/1888 relating to contracts or conventional obligations, the Civil Code Book III.
200 Art. 12 of the Law relating to Civil Procedure states that " the claimant must prove a claim, failing which the respondent wins the case".

ing officer, the suffered damages and a causal link between the fault and damages. Before examining the three elements necessary for imposing tort liability, I first examine who may sue, who is a proper defendant and what is the competent court to adjudicate a claim for compensation for unlawful detention.

2.3.1.1. Procedural issues

Who may claim compensation for unlawful detention?

Article 2 of the Law relating to Civil, Commercial, Labour and Administrative Procedure states that a claim cannot be accepted by the court unless the plaintiff has the status, interest, and capacity to bring the suit. However, due to the lack of a specific legal provision for compensation for unlawful detention, it is uncertain under tort law whether all unlawfully detained persons are entitled to compensation regardless of the stage of the criminal process in which the detention occurred and the guilt of the detainee. Moreover, it is also uncertain whether the indirect victims of unlawful detention are entitled to claim compensation and whether, when the unlawfully detained person died during detention, the right to file suit is transferred to his or her representative.

If a court finds that a person was unlawfully detained before trial; that decision will not affect the outcome of criminal charges because the charges are is still pending. After trial, the court will adjudge the person guilty or not guilty of the charged offence. If a criminal case is ongoing, it is difficult for a detainee to sue the police or prosecutor because those persons have the power to recommend whether the detainee should continue to be detained or released on bail.

An unlawfully detained suspect may be sentenced to imprisonment after trial. For example, the case of *Lt. Col. Rugigana Ngabo*; on 21 January 2011, five months after his arrest, and over two months after the petition before the East African Court of Justice,[201] *Lt. Col. Rugigana Ngabo* was brought to court for the first time. At a

201 *Plaxeda Rugumba* v. *Secretary General of the EAC & Attorney General of Rwanda*, Ref, n° 8 of 2010, 1st December 2011, EACJ First Instance Division.

subsequent hearing in January 2011, he was charged with crimes against national security under Article 166 of Rwanda's Penal Code.[202] The Military High Court ruled on 28 January 2011 that he had been "irregularly detained" but continued his pre-trial detention due to the gravity of charges against him. Thereafter, the Military High Court found him guilty and sentenced him to nine years in prison and a fine of Rwf 100, 000.[203] It is uncertain under tort law whether he would be eligible for compensation for damages during his unlawful detention. This gap creates uncertainty on what will be the outcomes of the introduced compensation for unlawful detention claim. Thus, the lack of guidance for unlawfully detained persons may keep them from pursuing a lawsuit seeking compensation for their unlawful detention.

Who may be sued?

Article 21 of the Law relating to Civil Procedure requires that a claim must name the defendant. Article 92 of the CCP mandates that an action for unlawful detention must be brought against the person carrying out the detention and not against the organ for which he or she works. This provision regulates the procedure for instituting an action against unlawful detention.

Identifying the particular person(s) responsible for an unlawful detention can be a challenge for an unlawfully detained person in Rwanda,[204] when the detainee has been transferred to different facilities. Also, the particular detaining officials may change. A detainee may have spent more than one year in prison with several different prison directors because they were replaced. Alternatively, a detainee may have spent several years in different prisons with different directors and prison officials. Requiring the unlawfully detained person to identify the detaining officers responsible for his or her unlawful detention as a pre-condition to suing for compensation will make it almost impossible to seek compensation.

202 Organic Law n° 01/2012/OL of 02/05/2012 Instituting the Penal Code, *Official Gazette n° Special of 14 June 2012.*

203 Mbanda, J., Military Court Hands Nine Years to *Rugigana, The New Times of Rwanda (July 26, 2012)*. Rwf 100, 000. is almost equivalent to 98 Euro.

204 Interview with KABUYE, J., the Chairperson of the ARDHO (*Association Rwandaise de Défense des Droits de l'Homme*), on 20/01/2017.

This requirement of naming the detaining officer, victims of unlawful detention situation in Rwanda decide to remain silent and not report the suffered harm due to fear of the detaining officer who has abused his power of detention and who can retain them in the worst condition or in the same condition as previous one.[205] It has been found that although the court found that a person has been unlawfully detained, there was no further action against the detaining officer involved in his unlawful detention.[206] By the lacking of institutional mechanism, which protects victims of unlawful detention, victims cannot challenge the detaining officer so long as they fear being detained again or being detained for a longer period.[207] It is difficult for an unlawfully detained person to surrender the fear of being arrested or detained again and sue the detaining officer for compensation without a clear legal framework on that issue. Therefore, the requirement of identifying the detaining officer is an obstacle to unlawfully detained persons in Rwanda for obtaining compensation under tort law.

What is the competent court?

In addition to obtaining freedom, sometimes unlawfully detained persons also seek damages for the unlawful detention. In such a case, they must file their claim in the competent court. As explained in the previous section, a petition for a writ of *habeas corpus* must be filed in the court nearest to the place where the person is detained.[208] From Article 91 of CCP, it is unclear whether the nearest court to the unlawfully detained person would also have jurisdiction to hear the claim for damages. Therefore, it is important to examine what is the competent court that an unlawfully detained person may file suit for compensation.

In a 2014 case of first impression in Rwandan courts, *Murara Michel* v *Mwebase Fred*,[209] the High Court considered the issue of which was the proper court to hear a claim for compensation as a result of an unlawful detention. In that case, the plaintiff sought 1.500.000 Rwandan francs in damages because the defendant prison director detained him for three months after his acquittal by the High Court. The High Court found in favour of the plaintiff and awarded him 300.000 Rwandan francs.[210] The High Court based its ruling on Article 258 of the CCB III[211] that states that "any act of a person which causes damages to another, shall oblige the person by whose fault it occurred to repair it". At the best of my knowledge, this case was the first and only one in its kind awarding compensation for unlawful detention by application of the above provision.

The defendant appealed the Supreme Court,[212] which overturned the High Court's decision on the ground that the High Court lacked jurisdiction. Instead, the Supreme Court held that only the Primary Court had jurisdiction of claims for damages stemming from an unlawful detention that does not exceed three million (3, 000, 000) Rwandan Francs. The Supreme Court based its decision on Article 18 of the Law determining the Organisation, Functioning and Jurisdiction of Courts (OFJC Law), [213] which states, "In civil cases, the jurisdiction of courts shall be determined by the nature and value of the claim." According to Article 67 the OFJC Law, disputes between persons with a monetary value which does not exceed three million (3, 000, and 000) Rwandan Francs ...belong to the jurisdiction of the primary courts. In the *Mugara* case, the Rwandan Supreme court clarified the appropriate court in which to file claims for damages stemming from unlawful detentions. However, the above case showed that the lack of guidance on the competent court has been one of the obstacles for the plaintiff to obtain compensation for unlawful detention and the above decision has not been published.

205 A survey of respondents 4, 20, and 22.
206 A survey of the respondent 20.
207 A survey of respondents 4, 20, and 22.
208 Art. 91 Code of Criminal Procedure.
209 *Murara Michel* v *Mwebase Fred*, RP 0007/13/HC/KIG (High Court of Rwanda, 2014).
210 300.000 Rwandan francs is almost equivalent to 296 Euro.
211 CCBIII stands for Civil Code Book Three.
212 The Supreme Court, *Murara Michel* v *Mwebase Fred*, RPA 00039/14/CS, 21/11/2014.
213 Organic Law n° 02/2013/OL of 16/06/2013 modifying and complementing Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning, and jurisdiction of courts as modified and complemented to date, *O. G. n° Special Bis of 16/06/2013*.

2.3.1.2. Conditions for civil liability

Damages

Article 3 of the law relating to the civil procedure imposes the interest as one of the conditions for a claim to be accepted in the court.[214] In order to have the interest to introduce the compensation claim, the plaintiff should have suffered. *NGAGI* states that the existence of damage is an essential condition of civil liability in Rwanda.[215] This condition is also applied to the unlawfully detained person. In order to have the interest to introduce the compensation claim, the plaintiff must show that he/she suffered damages as a result of the unlawful detention.[216]

However, in order to be recoverable damage must actually exist and be certain, and it must be directly related to the plaintiff.[217] Contrary to some damages in Rwanda where the law has indicated compensable damages,[218] there is no specific provision on compensable damages for unlawful detention. The issue of what compensable damages are in case of unlawful detention has been decided in *Karangira Jean de Dieu* case law. In that case, the plaintiff claimed damages of five million Rwandan Francs[219] resulting from his unlawful detention. A Ministerial Order had granted his provisional release after completion of half his sentence.[220] Yet, the prison director refused to release him, believing that the order was in error. The court found that the plaintiff had been illegally detained for sixty-eight days[221] and ordered his release. Nevertheless, the court refused to award damages on the ground that the plaintiff failed to specify whether he was seeking monetary or non-monetary damages.[222] There is no guidance on compensable damages for unlawful detention either under tort law.

214 Article 3 of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, *Official Gazette n° Special of 29/04/2018*.
215 NGAGI, A.M., *Cours de droit civil des obligations, Manuel pour Etudiants*, 2004, p.149.
216 *Id.*, p.154.
217 *Id.*, p.154.
218 Law n° 52/2011 of 14/12/2011 establishing the Special Guarantee Fund for accidents and damages caused by automobiles and animals (SGF) and determining its mission, organization and functioning, *Official Gazette n° 03 of 16/01/2012*. For example. Presidential order n° 31/01 of 25/08/2003 on compensation for personal injury due to accidents caused by motor vehicles, *O.G* n18° of 2003/09/15.and Loi N° 41/2001 du 19/09/2001 *relative à l'indemnisation des victimes d'accidents corporels causes par des véhicules automoteurs*. *J.O.n°* spécial du 28/11/2001.
219 Equivalent to 5740 Euro.
220 Through Ministerial Order n° 169/08/11 of 23/11/2011, providing for his provisional release.
221 From 23/11/2011 to 31/01/2012.
222 HC/Nyanza, *Karangira Jean De Dieu* v *Gato Sano Alexis*, RP 0132/11/HC/NYA, 31/01/2012.

Fault

Because Rwanda has no specific law on liability for unlawful detentions, unlawfully detained persons are entitled to compensation only if the conditions for civil law liability are satisfied. According to Articles 258 and 259 of CCB III, in order to receive compensation, a victim has to suffer damage caused by another who acted with fault. Thus, simply unlawfully detaining the plaintiff is not enough; the plaintiff must establish the fault of the person unlawfully detaining him or her.[223] Rwandan law defines fault as having both an objective and subjective element. The objective element is satisfied when there was a violation of an imperative law. The subjective element is satisfied the plaintiff shows that the defendant was conscious of the consequences of his or her action.[224] In other words, the unlawfully detained person must prove (1) the unlawfulness of detention and (2) the detaining officer was conscious of (i.e. knew) the consequences of his action.

Moreover, the detaining officer whose behaviour contributed to the unlawful detention is protected by the Rwandan civil procedure with places the burden of proving all the elements on the plaintiff.[225] The requirement that victims to prove that the defendant knew that the defendant's detention was contrary to law create an obstacle to their obtaining compensation. I found no cases where a victim successfully proved that the detaining officer intentionally unlawfully detained him or her.

Causality between the suffered damages and fault

Under Rwandan tort law, a defendant is liable only if his or her act or omission caused the claimed damage.[226] The burden of proof is, on the plaintiff.[227] An unlawfully detained person must prove to judge that the damages suffered are linked to a fault performed by the perpetrator of unlawful detention. As we have discussed above, it is not easy for victims of unlawful detention situation to prove the fault in

223 Art. 258 & 259 CCB III.
224 NGAGI, A. M., (2004), p.164.
225 Art. 12 of the Law Relating to the Civil, Commercial, Labour and Administrative Procedure.
226 NGAGI A. M., (2004), p.169.
227 Art. 12 of the law relating to the Law Relating to the Civil, Commercial, Labour and Administrative Procedure states that the claimant must prove a claim, failing which the respondent wins the case.

chief of the detaining officer. If the unlawfully detained person cannot prove the fault in chief of the detaining officer, linking that fault to the damage is not possible.

2.3.2. Compensation for unlawful detention through criminal procedure law

The Rwandan Penal Code makes unlawful detention a criminal offense and subjects the person responsible for the unlawful detention to a term of imprisonment equivalent to the term incurred by the illegally detained person and a fine. Article 668 of the Rwandan Penal Code states:

> Any civil servant who puts or retains a person in detention or in prison, without an order or a judgment passed in conformity with the law, shall be liable to a term of imprisonment equivalent to the term incurred by the illegally detained person and a fine of one hundred thousand (100,000)[228] to one million (1,000,000)[229] Rwandan francs.

This provision defines elements of that offense. Article 9 of the Code of Criminal Procedure permits victims to file a civil action in criminal court to seek compensation for damages caused by the offence. Thus, unlawfully detained persons are entitled to file a civil action to seek compensation for damages that resulted from their unlawful detention. However, NCHR and U.S. Department of State reports reveal that unlawfully detained persons in Rwanda do not obtain compensation.[230] This subsection examines legal and practical obstacles that unlawfully detained persons in Rwanda face in obtaining compensation through the criminal procedure law.

2.3.2.1. Prosecution of unlawful detention offences

Article 3 of Rwanda's Code of Criminal Procedure requires that "A criminal action shall be instituted by the Public Prosecution." Under this provision, the investigation of a claim of unlawful detention is conducted by the judicial police under the supervision of the prosecution.[231] This provision does not take into account that the police and/or prosecution might have been responsible for the unlawful detention in the first place. There is no special unit in charge of investigating complaints against the police in case of unlawful detention. If an unlawfully detained person wishes to file a criminal complaint against his or her unlawful detention, he or she is obliged to submit the complaint to the same police station which possibly was responsible for the unlawful detention.

It is difficult for the judicial police officer to investigate a fellow police officer. In addition, the judicial police carry out their functions under authority and supervision of the prosecutor with respect to offences being investigated.[232] As a supervising authority, the public prosecutor may instruct the police to initiate investigations,[233] may order police to perform additional investigation, may delegate to police its activities of conducting a search,[234] or conduct an investigation on commission.[235] The public prosecution should also be immediately served with a copy of the statement of an arrest made by judicial police.[236] It could be argued that in case the prosecutor has been involved in unlawful detention offence; it is difficult for the judicial police to start an investigation into the behaviour of a prosecutor who is the supervisor. Also, the judicial police do not have the power to institute a criminal action.[237] Article 3 of the Code of Criminal Procedure permits only prosecutors to initiate a criminal action.

Rwanda's *habeas corpus* procedure contains a very unusual provision that has never been used. Article 91 of the Code of Criminal Procedure allows a judge who finds a detention unlawful to immediately try the person responsible for the unlawful detention and sentence that person if found guilty. However, no judge has ever used that provision. And, there have been no prosecutions against a person responsible for unlawful detention under Article 668 of the Penal Code.[238]

228 100.000 Rwandan francs is almost equivalent to 114 Euro
229 1,000,000 Rwandan francs is almost equivalent to 1148 Euro.
230 NCHR, (2016), p.15. See also U.S. Department of State, (2016), p.10.
231 Art.26 National Public Prosecution Authority Law.
232 Art.18 of the CCP.
233 Art.22 of the CCP.
234 Art.67 of the CCP.
235 Art.77 of the CCP.
236 Art.37 of the CCP.
237 Art.3 of the CCP.
238 Interview with *Mugisha* and *Mukashema*, 2017.

It may be argued that detaining officers involved in unlawful detention offences are not prosecuted due to the lack of specialized unit to investigate and prosecute unlawful detention offences. The fact that no one has been prosecuted for having unlawfully detained a person affects the civil action because the civil action under Article 9 of the Code of Criminal Procedure is an action filed to seek compensation for damages caused by the offence. If the prosecution fails to file criminal charges against the person responsible for the unlawful detention, it is difficult for detained persons to file a civil action based on the unlawful detention offence that has not been confirmed by the prosecution either by the court.

2.3.2.2. Filing a civil action by way of private prosecution

In cases where the prosecutor does not bring criminal charges against the person responsible for the unlawful detention, victims of unlawful detention may file a civil action by way of private prosecution. Article 3 of Rwanda's Code of Criminal Procedure states that "a criminal action may be instituted by the aggrieved person by filing a case in a criminal court by way of private prosecution. Article 142 of the Code of Criminal Procedure states:

> A civil action by way of private prosecution is a claim a person aggrieved by an offence files in a criminal court demanding that the offender, his/her co-offender or accomplice be punished and ordered to pay for damages caused.

Moreover, Article 143 of the Code of Criminal Procedure states that a "person who files an action by way of private prosecution must clearly indicate allegations against the accused to enable him/her to prepare his/her case expeditiously." Where the victim of an offence files a civil action under the Code of Criminal Procedure, the burden of proof is on the victim, i.e., the plaintiff.[239] The detaining officer whose behaviour contributed to the unlawful detention situation is protected under the presumption of innocence principle. As discussed in section 2.1.2.5, *supra,* an accused shall always be presumed innocent until proven guilty by a final court decision. Article 85 (2) CCP states that an accused shall not be obliged to prove his/her

239 Article 85 of the CCP.

innocence unless his/her guilt has been established. An unlawfully detained person is obliged to prove that detention was unlawful or malicious.

However, in unlawful detention cases, it is worth mentioning that the plaintiff is the detained person, who is not in a position to gather and maintain evidence of his/her unlawful detention. The lack of specific procedure for prosecuting the detaining officers involved in unlawful detention cases inhibits plaintiffs from seeking damages for their unlawful detention.

2.3.3. Compensation under administrative law

In practice, victims of unlawful acts by public services in Rwanda obtained compensation from the state.[240] The Ministry of Justice's annual report 2013-2014 indicates that the Government of Rwanda has been sued by individuals and was represented in 667 civil litigations among them 22.3%, the individual won against the state. This report specifies that unfair dismissal of employees in public institution was one of the major causes of the litigations leading the Government to be sued in courts.[241] The 2014-2015 Ministry of Justice Report shows that the Government was summoned in 516 cases among of 364 litigations were decided on by the courts and 116 cases (31.87%) individual won against the government.[242] During that period, cases related to unidentified auto vehicles and land title issues were dominating.[243] During that year, Rwandan courts have ordered the government to pay out Rwf 164 million[244] to individuals and firms, it lost cases. That year, it was reported that the government paid all lawsuits that its institutions lost previously.[245] That compensation has been possible partly due to various specific legal frameworks related to compensation for damages resulted from these particular public services established under Rwandan law.

240 For example in Kayijuka case, a plaintiff won case and obtained compensation from the State. see Supreme Court, *Kabayijuka v. Government of Rwanda* (Minisanté), R.Ada 0054/12/CS, December 19, 2014] in *Rwanda Law Reports, V.4-2015,* p.31-43.

241 The Ministry of Justice, *Annual Report 2013-2014,* August 2014, p. 6.

242 The Ministry of Justice, *Annual Report of activities 2014-2015,* December 2015, p.4.

243 The Ministry of Justice, (2015), p.4.

244 Equivalent to 179,527 Euro.

245 Rwandan courts order government to pay Rwf164m for lost suits, *The East African*, available at http://www.theeastafrican.co.ke/Rwanda/News/Rwandan-courts-order-govt-to-pay-Rwf164m-for-lost-suits/1433218-3103648-item-0-14t2ctf/index.html, [accessed 25/04/2017].

However, although Article 260 CCB III provides for possibilities for victims of unlawful acts from civil servants to sue the state that possibility has been excluded for victims of unlawful detention. Article 92(3) of the Code of Criminal Procedure indicates that an action against unlawful detention should institute against a person carrying out unlawful detention and not against organ for which he/she works.[246]

2.3.3.1. Compensation for loss resulting from an administrative decision

Compensation for those harmed by administrative decisions in Rwanda is regulated under the organisation, functioning, and jurisdiction of courts Law and the Law relating to Civil Procedure. According to Article 342 of the Law relating to Civil Procedure, a party may file an administrative claim for compensation of loss incurred while challenging an administrative decision that was taken against him/her. Article 12 of the OFJC authorizes specialized chambers of intermediate court to hear actions for damage arising from extra-contractual liability of government agents and public institutions, as well as other actions for damage resulting from an act or omission of the administration or due to public interest activities. When decisions or omissions of government employees cause damage to individuals, the individuals affected are entitled to claim compensation from the administration, not the individual. The same law indicates the proper person to be sued while suing the government or other administrative entities.[247]

According to Article 180 of the Law relating to Civil Procedure, a party may file an administrative lawsuit for compensation of the loss incurred while challenging an administrative decision taken against him/her. This article gives two options to the plaintiff. First, the plaintiff may file a claim for damages jointly with a petition for annulment of the illegal administrative decision. Second, the plaintiff may seek damages before an administrative court without also seeking annulment of the illegal administrative decision. However, under the second option, the plaintiff must still prove the illegality of the decision.[248]

246 Art. 92(3) of the CCP.

247 Art. 36 of the Law relating to Civil Procedure reads: "The following persons are summoned through the following procedure: 1° in a case where the Government is the respondent, the Attorney General is summoned on behalf of the Government; 2° in a case where the City of Kigali is the respondent, the Mayor is summoned on behalf of the City of Kigali; 3° in a case where the District is the respondent, the Mayor is summoned on behalf of the District; 4° in a case where public entities with legal personality are respondents, their representatives are summoned on their behalf; "

2.3.3.2. Compensation for Wrongful conviction

Similar to the right to compensation for unlawful detention which is provided for in Article 9(5) of the ICCPR, the right to compensation in the case of wrongful conviction has been provided for in Article 14(6) of the ICCPR.[249] Similarly, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, endorsed by the African Commission on Human and Peoples' Rights, require equally that victims of wrongful convictions[250] and victims of unlawful detention be compensated.[251] These provisions establish an obligation of state parties to enact domestic legislation providing a procedure for victims of wrongful convictions and unlawful detentions to obtain compensation.[252]

Rwandan law explicitly provides for the right to compensation for wrongful conviction. Article 197 of the Code of Criminal Procedure, states:

> Upon request by the party applying for review, when the case subject to review shows that a person was convicted despite his/her innocence, the court may award him/her damages for the moral prejudice suffered as a result of the penalty imposed on him/her.

However, the law does not indicate which court has jurisdiction to try claims requesting damages for wrongful conviction. Article 197 does not include compensation when a conviction is vacated on appeal, its focus only on convictions quashed on

248 Art. 180 of the Law relating to Civil Procedure.

249 Article 14(6) of ICCPR reads: "When a person has by a final decision 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 conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

250 African Commission on Human and Peoples' Rights, (2003), § N.10 (C) states: "When a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law."

251 African Commission on Human and Peoples' Rights, (2003), § M (1) (h)).

252 Human Rights Committee, *General Comment n°. 35*, ∫ 50.

review.[253] This study did not find the compensation awarded based on that provision. That provision does not also indicate who should be sued for damages. The lack of specific provisions in the law providing compensation for wrongful conviction and identifying the proper party to sue may explain why in practice there has been no compensation for persons who have been wrongfully convicted.

2.3.3.3. Expropriation

Article 34 of Rwanda's Constitution recognizes the individual's right to own private property. Paragraph 3 of that article provides an exception to inviolability of property liberty when public interest is required subject to fair and prior compensation. The Constitution entitles the owner of the expropriated property to compensation. Article 2 of the Law Relating to Expropriation in Public Interest defines expropriation as an "act of Government, local entities with legal personality or public institutions, aiming at the interest or well-being of the general public."[254] Moreover, Article 2 of the Law Governing Land in Rwanda gives a more specific definition of expropriation as "an act of taking away individuals' land by the State due to the public interest in circumstances and procedures provided by law and subject to fair and prior compensation."[255]

Articles 2 and 7 of the expropriation law determine who is eligible for compensation in case of expropriation, competent authorities to carry out expropriation in public interest, criteria for determining fair compensation, and payment of fair compensation. Articles 18 and 34(4) of the same law indicate that any person affected by the decision on expropriation in public interest shall have the right to request for review of the decision before organ directly higher than the one having taken the decision within thirty days (30) days after the decision is taken. If the appeal is not successful, the case may be referred to a competent court.

2.3.3.4. Damages caused by animals from the national park

253 According to Art.192 of the Code of Criminal Procedure "Review means a procedure that aims to annul a judgment that has become final and re-try the case due to either of the grounds provided under Article 194 of this Law".

254 Art. 2, 4° of Law n° 32/2015 of 11/06/2015 relating to expropriation in the public interest, *O. G. n° 35 of 31/08/2015.*

255 Art. 2, 14 of Law n°43/2013 of 16/06/2013 43/2013 governing land in Rwanda, *O. G. n° Special of 16/06/2013.*

Compensation for injuries caused by animals encountered inside or outside the national park or other protected area is currently regulated by the law on compensation for damages caused by animals.[256] In order to guide victims of damages caused by animals, the article 9 of that law indicates who is entitled to compensation, compensable damages[257] and competent organ to receive and compensate the victim's complaint. When it is established that someone has a responsibility for the occurrence of damage caused by an animal, organ in charge of compensation shall compensate the victim and then cause a responsible person to be answerable.[258] The special guarantee fund for automobile and damages caused by animals has been created for that effect.[259] Persons whose property or life was damaged by animals are protected under that law and the victims are entitled to compensation on real cost valuation.[260] Moreover, the prime minister order determines the rates, calculating method and criteria for determining the compensation to victims of damage caused by an animal.[261]

2.3.3.5. Lessons learned

The Rwandan government is aware that a victim of its acts must be compensated. In this regard, the Rwandan government has enacted different laws which regulate compensation for damages resulted from government public services. These are provisions which regulate the compensation of loss incurred while challenging an administrative decision, compensation in case of wrongful conviction, provisions regulating compensation in case of expropriation and compensation for damages caused by animals from the national park.

256 Law n°26/2011 of 27/07/2011 on compensation for damages caused by animals, *O. G. n° 34 of 22/08/2011.*

257 *Any person injured by an animal shall be entitled to 1° compensation for corporal injury in accordance with the level of disability ascertained by an authorized medical doctor and the loss incurred; 2° compensation for pecuniary loss; 3° all medical expenses after providing supporting documents; 4° prothesis and orthesis upon recommendation by an authorized medical doctor; 5° transport fees.* Law N° 52/2011 of 14/12/2011 establishing the Special Guarantee Fund for accidents and damages caused by automobiles and animals (SGF) and determining its mission, organization and functioning, *O.G., n° 03 of 16/01/2012.*

258 Art. 11 of compensation for damages caused by animal's law.

259 Law n° 52/2011 of 14/12/2011 establishing the Special Guarantee Fund for accidents and damages caused by automobiles and animals (SGF) and determining its mission, organization and functioning, *O. G, n° 03 of 16/01/2012.*

260 Loi n° 04/2002 de la 19/01/2002 portante création du fonds de garantie pour les véhicules automoteurs, *O.G. n° 6 of 15/03/2002.*

261 Prime Minister's Order n° 26/03 of 23/05/2012 determining the rates, calculating method and criteria for determining the compensation to the victim of damage caused by an animal, *O.G. n°25 of 18/06/2012.*

In order to enable the enforcement of these rights, procedural provisions have been established. These procedural provisions specify who is entitled to compensation, the competent court, who to be sued and compensable damages. The preceding analysis shows that the victims of these public's acts and services claim and obtain compensation in practice.

Article 15 of Rwanda's Constitution states, "All persons are equal before the law. They are entitled to equal protection of the law." The lack of the right to compensation for victims of unlawful detention leads to the denial of equal protection for the victims of unlawful detention. In other words, they are treated differently compared to those harmed by administrative agencies.

2.4. Conclusion

The 1994 genocide destroyed the justice system in Rwanda. After the genocide ended in July of 1994, in addition to those held for committing common offences, there were more than 120,000 genocide suspects detained awaiting trials.[262] The caseload created by the arrested genocide suspects overwhelmed the courts, and the prisons began overflowing. Rwanda's attempts to deal with the mass arrests and detentions with its limited resources led to many unlawful detentions. Since 1994, Rwanda has taken steps to reduce the risk of arbitrary or unlawful detention on a large scale by regulating the conditions of detention, introducing *habeas corpus* and creating institutions like the National Commission for Human Rights, to assist unlawfully detained persons. As the NCHR reports indicate, complaints related to unlawful detention have been dramatically reduced.

However, despite Rwanda's regulation of maximum period of detention, this study found that there are discrepancies between what the law prescribes and what happens in practice. Although the maximum period of detention in police custody and pre-trial detention is limited by statute, in some cases that period is not respected by

262 Bornkamm, P.C., (2012), p.1.

detaining officers. *Habeas corpus* is a new concept under Rwandan law. In practice, it has not effectively protected people against unlawful detention. Although detainees have the right to challenge their detention in court, few take advantage of that right. Some were not able to obtain prompt release[263] due to the lack of effective legal assistance and the lack of external control mechanism of detaining officers. In cases where courts found that a person had been unlawfully detained, the court took no action against the detaining officer and awarded no compensation to the victim.

Reports by humanitarian agencies on unlawful detention in Rwanda and case law demonstrate that only a few victims of unlawful detention tried to obtain compensation for their unlawful detention, and none were successful. Rwanda's tort law, criminal procedure law, and administrative law do not to provide sufficient means for victims of unlawful detention to obtain compensation. The lack of specific provisions providing for compensation for unlawful detention, identifying who may claim compensation, as well as the current exclusion of state liability for unlawful detention and the lack of a law clearly identifying the competent court and how to calculate compensable damages are obstacles to victim's compensation for unlawful detention in Rwanda.

According to Article 168 of the Rwandan Constitution, international and regional instruments ratified by Rwanda have the force of the law and are more binding than ordinary laws. Therefore, the following chapter examines the role of sub regional, regional, and international mechanisms in the protection of unlawfully detained persons in Rwanda.

263 US Department of State, (2016), p.12.

Chapter 3: Protection of unlawfully detained persons in Rwanda through sub regional, regional, and international mechanisms

Rwanda is a member of the East African Community,[1] the African Union[2]and the United Nations.[3] These organisations have adopted instruments that provide for the protection of individuals against unlawful detention. Promotion and protection of human rights are some of the fundamental principles of the East African Community's (EAC) Partner States.[4] The African Charter on Human and Peoples Rights prohibits unlawful and arbitrarily arrest or detention.[5] The International Covenant on Civil and Political Rights provides in Article 9.4 and 9.5 the right to be released from unlawful detention and compensation for anyone who has been the victim of unlawful detention. The national legal system should play a role in the enforcement of those international and regional human rights instruments. But when a State fails to protect victims of human rights violations, regional and international human rights complaint mechanisms might be of help.[6]

This chapter explores the stand of international and regional instruments on the right to be released and compensation for unlawful detention and its possible enforcement in Rwanda. It examines also the role of established mechanisms at sub regional, regional and international levels in protecting unlawfully detained persons in Rwanda. This chapter also assesses established Rwandan legal mechanisms for the effective implementation of the right to be released and compensation, in case of unlawful detention situation, from the point of view of international and regional conventions. Section one discusses the role of the EAC mechanism in the protection

1 The East African Community (EAC) is a regional intergovernmental organisation of six Partner States: the Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda, with its headquarters in Arusha, Tanzania.
2 Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000.
3 United Nations, *Charter of the United Nations*, 24 October 1945, 1 Unts XVI. Rwanda is a member of the United Nations since 18-09-1962.
4 Art. 6(d) of the EAC Treaty.
5 Art. 6 of the African Charter.
6 REDRESS, (2013), p.1.

of unlawfully detained persons in Rwanda. The role of the African human rights mechanisms is discussed in the second section and the role of the United Nations human rights mechanisms in the third section.

3.1. The role of the East African Community mechanisms

The East African Community (EAC) is headquartered in Arusha, Tanzania and is comprised of six partner states. It began on 30 November 1999,[7] when three countries, Kenya, Tanzania, and Uganda created it[8] as a regional body to promote the economic integration of its member States. Rwanda and Burundi joined the EAC in 2007, and South Sudan joined in 2016.[9]

The main objective of the East African Community is "to develop policies and programmes aimed at widening and deepening co-operation among Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit."[10] The promotion and protection of human rights are fundamental principles that govern the achievement of the objectives of the East African Community (EAC) of its Partner States.[11]

The first subsection below considers the rights to be released and receive compensation for unlawful detention under the EAC Treaty. The second subsection examines whether unlawfully detained persons in Rwanda are entitled to seek and obtain release or compensation via EAC established mechanisms.

3.1.1. The EAC Treaty's remedies for unlawful detention

The EAC Partner States committed themselves to promote and protect human and

7 The East African Community was initially formed in 1967 by Kenya, Uganda, and Tanzania; however, it collapsed after ten years in 1977.

8 By the Treaty for the Establishment of the East African Community (EAC Treaty), signed on 30th November 1999, entered into force on 7th July 2000, as modified to date.

9 https://www.uneca.org/oria/pages/eac-%e2%80%93-east-african-community, [accessed 21/11/2017]. Art.5 (1) of the EAC Treaty.

10 Art.5 (1) of the EAC Treaty.

11 Art.6 (d) of the EAC Treaty.

people's rights in accordance with the provisions of the African Charter.[12] As a result, the EAC Partner States are bound by the provisions on human rights enshrined in the African Charter. The African Charter in Article 6 prohibits unlawful detention. Moreover, Article 7.2 of the EAC Treaty indicates that "Partner States undertake to abide by principles of good governance, including adherence to the principles of democracy, rule of law, social justice and maintenance of universally accepted standards of human rights."

3.1.1.1. Release from unlawful detention

Although the right to be released from unlawful detention is not explicitly mentioned in the EAC Treaty, the EAC Partner States have committed themselves to promote and protect human and people's rights in accordance with the provisions of the African Charter.[13] Interpreting the African Charter, the African Commission on Human and Peoples' Rights[14] explained that: "Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful."[15]

3.1.1.2. Compensation

Article 6(d) of the EAC Treaty makes the provisions of the African Charter binding on the EAC Partner States.[16] The African Charter has established the right to compensation for unlawful detention. Interpreting the African Charter, the African Commission on Human and Peoples' Rights stated that "States shall ensure, including by the enactment of legal provisions and adoption of procedures that anyone who has been a victim of unlawful arrest or detention is enabled to claim compensation."[17]

12 Art.6 (d) of the EAC Treaty.

13 *Id.*

14 According to Article 45 of the African Charter, "the African Commission has the mandate to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation."

15 African Commission on Human and Peoples' Rights, (2003), Principle M (1) (h) (1) (b) 6) (1).

16 Article 6(d) of the EAC Treaty states 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, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."

17 African Commission on Human and Peoples' Rights, (2003), Principle M(1)(h)).

3.1.2. The role of the East African Court of Justice

The main task of the East African Court of Justice (EACJ)[18] is to ensure adherence to the law in its interpretation and application of and compliance with the EAC Treaty.[19] Pursuant to Article 30(1) of that Treaty,

> any person who is resident in Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

With regard to EACJ jurisdiction on human rights issues, Article 27(2) of the Treaty provides that: "the Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, Partner States shall conclude a protocol to operationalize the extended jurisdiction." Because the partner states have not concluded that protocol, the EACJ does not have jurisdiction over human rights issues"[20] at this time.

However, the EACJ has held on several occasions that, based on Article 21(1) of the EAC Treaty, it has jurisdiction over all matters related to the EAC Treaty, including human rights violations.[21] In the *Katabazi* v *Secretary General of the EAC*, the EACJ explained that "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes an allegation of human rights violation."[22]

3.1.2.1. The EACJ has jurisdiction over unlawful detentions that occur in Rwanda

The EACJ clarified its jurisdiction over unlawful detention cases in *Plaxeda Rugumba* v *Attorney General of the Republic of Rwanda*. In 2010, the plaintiff sought a declaration against the Rwanda Attorney General that her brother was being unlawfully detained.[23] The applicant claimed that her brother had been held incommunicado for five months by the Rwandan Government and that relatives had not been informed as to where her brother was detained. She further claimed that he had not formally charged in any court or notified of his alleged offence. Thus, the applicant claimed that the detention of her brother was a breach of the fundamental principles of Articles 6(d) and 7(2) of the EAC Treaty, which require Partner States to uphold the principles of good governance and universally accepted standards of human rights.
In its defence, Rwanda argued that the EACJ did not have jurisdiction over human rights claims. Rwanda also argued that, because the applicant did not exhaust her local remedies, the EACJ did not have jurisdiction to adjudicate her claims.
In its decision, the EACJ (First Instance Division) concluded that it had jurisdiction and that exhaustion of a local remedy was not required[24] because Article 30 of the EAC Treaty allows citizens of East Africa direct access to the court.[25] The Court went on to decide that the detention of plaintiff's brother by agents of the Rwandan Government for over five months "was a breach of fundamental and operational principles of the East African Community as enunciated in Articles 6(d) and 7(2) of the Treaty."[26]
As a result of the EACJ's decision, plaintiff's brother was brought before the Military High Court in Rwanda five months after his arrest and charged with crimes against national security under Article 166 of Rwanda's Penal Code. Even though the Military High Court ruled that he had been "irregularly detained," it continued his detention and remanded him to pre-trial detention "due to the gravity of charges against him"[27] based on Article 91 of the Code of Criminal Procedure.

18 The EACJ is an organ of the EAC. The Court is a judicial body which ensures "the adherence to law in the interpretation and application of and compliance with this Treaty." Art. 23 of the EAC Treaty.
19 Art.23 of the EAC Treaty.
20 Peter, C.M., *The Protectors: Human Rights Commissions and Accountability in East Africa*, 2008, p. 210.
21 See *Katabazi* v *Secretary General of the East African Community* [2007] EACJ 3 (2007).
22 *Katabazi* v *Secretary General of the EAC*, reference nº. 1 of 2007, p.16. {Hereafter referred to as "*Katabazi* Case"}, available at http://www.saflii.org/ea/cases/EACJ/2007/3.html, [accessed 09/01/2018].
23 *Plaxeda Rugumba* v *Secretary General of the EAC &Attorney General of Rwanda*, 2010, EACJ first Instance Division, p.1. {Hereafter referred to as "*Rugumba case*"}, available at http://www.worldcourts.com/eacj/eng/decisions/2011.12.01_Rugumba_v_Secretary_General.pdf, [accessed 02/11/2017], p.1.
24 *Rugumba case*, p. 22.
25 *Peter Anyang' Nyong'o* v *Attorney general of Kenya*, No 1. of 2006 & APPEAL NO. 1 OF 2009 Available at http://eacj.org/wp- content/uploads/2006/11/EACJ_ruling_on_injunction_ref_No1_2006.pdf, [accessed 02/11/2017].
26 *Rugumba case*, §44(a).
27 ODP 0006/011/HCM, Military High Court ruling on pre-trial detention matters, 28 January 2011.

Dissatisfied with the decision of the EACJ's First Instance Division, Rwanda appealed to the EACJ's Appellate Division, arguing that the "irregular" detention was cured by the decision of the Rwandan Military High Court to continue the pre-trial detention.[28] The Appellate Division[29] rejected Rwanda's arguments and affirmed the First Instance Division's decision, relying on Article 6(d) of the EAC Treaty and Article 6 of the African Charter.[30] The court considered that the action taken against the subject by the Appellant in holding him incommunicado for a period of five months and in ignorance of the charges was, in all respects, not transparent; and offends the Principles of Articles 6 (d) and 7 (2) of the EAC Treaty. First, the Appellate Division confirmed its jurisdiction over the unlawful detention.[31] The Court stated that" breach of the treaty by a Partner State under Article 27(1) creates a cause of action".[32]

After the EACJ's Appellate Division's decision in *Rugumba*, there is no question that the EACJ has jurisdiction over unlawful detention cases. However, the question of an effective remedy, specifically release and compensation, remains. Although the EACJ decision compelled the Government of Rwanda to produce the plaintiff's brother before a competent court five months after his arrest, its decision did not affect his release or award compensation.

3.1.2.2. The EACJ has no jurisdiction to require release or compensation for unlawful detention

Nothing in the EAC Treaty provides the EACJ jurisdiction to require release of an unlawfully detained person or to award compensation for unlawful detention. Although the EACJ has jurisdiction over the interpretation and application of the EAC Treaty, it does not have jurisdiction over human rights issues. According to Article 27(2) of the EAC Treaty, the human rights jurisdiction of the EACJ will be operationalised by a protocol to the EAC Treaty. Compensation for unlawful detention falls under human rights over which the EACJ has no jurisdiction.

When the EACJ finds that a Partner State has acted in contravention of the EAC Treaty, the EACJ simply declares the act or omission to be contrary to the Treaty and leaves it to the State to act.[33] In *Rugumba,* the EACJ found the detention in violation of the Treaty, and Rwanda reacted by taking the detained person before a court and presenting him with charges. The current legal framework of the EACJ does not empower it to order remedies, such as release and compensation for EAC Treaty violations. In *Rugumba,* the EACJ admitted that it "obviously" had no jurisdiction to order release of a prisoner from illegal detention.[34] The lack of explicit human rights jurisdiction compelled the applicant in *Rugumba* to seek only a declaration that Rwanda's detention of her brother without bringing him before a court was in breach of fundamental and operational principles of the East African Community.

From the *Rugumba* case, it is clear that the EACJ is powerless to provide unlawfully detained persons in Rwanda release from unlawful detention or compensation. The lack of explicit jurisdiction over human rights violations jurisdiction and the lack of Partner States to adopt the protocol to provide the EACJ with jurisdiction over human rights violations substantially weakens its ability to protect unlawfully detained persons in Rwanda.

3.2. The role of the African Union in the protection of unlawfully detained persons in Rwanda

The Organization of African Unity (OAU) was legally born on 13 September 1963 when its constituting text, the Charter, entered into force after being ratified by two-thirds of the signatory States.[35] The main objectives for establishing the OAU were

28 East African Court of Justice, Affidavit by T. Karugarama, the Attorney General of the Republic of Rwanda, 16 June 2011.

29 *Attorney General of Rwanda* v *Plaxeda Rugumba*, June 2012, EACJ Appellate Division, Appeal N°. 1 of 2012. (*Rugumba* case).

30 That Article states that "every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

31 Open Society Justice Initiative, *Human Rights Case Digests East African Court of Justice* at 9 (June 2013).

32 *Attorney General of Rwanda* case, p.27.

33 Possi, A., *The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community,* Ph.D. thesis, Centre for Human Rights, University of Pretoria, 2014, p.132.

34 *Rugumba case,* 24.

35 The article xxv of the OAU Charter provided that it "shall enter into force immediately upon receipt by the Government of Ethiopia of the instruments of ratification from two-thirds of the signatory States."

to rid the continent of the remaining vestiges of colonization, racism and apartheid, to promote unity and solidarity among African States and to defend the sovereignty and territorial integrity of African States.[36] Nevertheless, as time passed, the Partner States found that some of the objectives of the OAU were outdated and that the OAU was not responding effectively to new challenges. Thus, the idea of either reinvigorating the OAU or replacing it with a new organization was considered. In 2000, it was decided to replace the OAU with the African Union.[37] One of the objectives of the African Union is the promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights.[38]

Protection of human rights in Africa has its roots in the African Charter, adopted in 1981 and entered into force in 1986. The African Charter created the African Commission on Human and Peoples' Rights to promote and protect human rights.[39] Rwanda ratified the African Charter in 1983.[40] In 1998, the African Court on Human and Peoples' Rights was established to complement the African Commission on Human and Peoples' Rights in the protection of human rights in Africa.[41] The African Charter entitles victims of humans rights violations to seek remedies before their national organs as well as before the African Court. Accordingly, in Rwanda, victims of unlawful detention have the additional avenue of the African Court for relief.

This next section analyses the remedies for unlawful detention provided by the African Charter. It also addresses the possibility of unlawfully detained persons in Rwanda to seek and obtain release and compensation through the African Union.

36 Art. II, 1 of the Charter of the Organizations of African Unity, adopted 25 May 1963, ILM (1964) 1116.
37 Constitutive Act of the African Union of July 2000., available at https://au.int/sites/default/files/pages/32020-file-constitutiveact_en.pdf, [accessed 27/10/2017].
38 Art. 3(h) of Constitutive Act of the African Union.
39 Art.30 of the African Charter.
40 On November 11, 1981, in Addis Ababa, as approved by Law n° 10/1983 of May 17, 1983.
41 Protocol to the African Charter on Human and Peoples` Rights on the establishment of an African Court on Human and Peoples` Rights, (ACHPR Protocol) was adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004.

3.2.1. Remedies

The African Charter provides for the protection of the individual against unlawful detention. Article 6 of the Charter states, "every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." However, the right to be released from, and compensation for, unlawful detention is not directly expressed in the African Charter. The lack of explicit provisions does mean that remedies for human rights violation are not recognised.[42] Indeed, Article 1 of the African Charter obliges state parties to "recognise the rights, duties, and freedoms enshrined in the Charter and ... to adopt legislative or other measures to give effect to them."

Article 45 of the African Charter mandates the African Commission on Human and Peoples' Rights to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation." Hence, the African Commission on Human and Peoples' Rights in its interpretation of the African Charter has explained that the right to be released and the right to compensation for unlawful detention are part of the African Charter.[43] In this regard, the African Commission on Human and Peoples' Rights published the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. By proclaiming these principles, the African Commission on Human and Peoples' Rights hoped to strengthen and supplement the African Charter's provisions relating to a fair trial to reflect international standards. Those Principles and Guidelines explicitly recognise the right to *habeas corpus* and compensation for unlawful detention. Principle M (1) (h) (1) (b) 6) (1) states "Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful."[44] Principle M (1) (h)) provides that "states

42 REDRESS, (2013), p.14.
43 African Commission on Human and Peoples' Rights, (2003), Principle M (1) (h) (1) (b) 6) (1) and Principle M (1) (h)).
44 African Commission on Human and Peoples' Rights, (2003), Principle M (1) (h) (1) (b) 6) (1).

shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been a victim of unlawful arrest or detention is enabled to claim compensation."[45] However, it is important to note that the Principles and Guidelines are only principles and guidelines, and not binding on state parties. In issuing the Principles and Guidelines, the African Commission on Human and Peoples' Rights stated that it urged state parties to incorporate them into their domestic legislation and respect them.[46]

Despite the African Commission's Principles and Guidelines calling for compensation and urging state parties to incorporate the Principles and Guidelines into their domestic legislation, Rwanda has failed to do so. Thus, the African Commission's Principles and Guidelines are unhelpful to unlawfully detained persons in Rwanda.

3.2.2. The role of the African Commission on Human and Peoples' Rights

Article 30 of the African Charter established the African Commission on Human and Peoples' Rights (African Commission) with a mandate of promoting human rights and ensuring their protection in Africa. The African Commission also has power to interpret the Charter provisions upon request by a state party, an organ of the African Union or an individual.[47] The African Commission reviews complaints lodged by states, individuals or non-governmental organizations (NGOs) alleging violations of the African Charter. Article 62 of African Charter gives the African Commission power to check whether countries are meeting their legal obligations to protect human rights, as set out in the Charter. On the basis of this mandate, the African Commission has rendered several decisions on alleged violations of human rights.[48]

3.2.2.1. The jurisdiction of the African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (African Commission)

45 African Commission on Human and Peoples' Rights, (2003), Principle M (1) (h)).
46 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Preamble.
47 Art. 45 of the African Charter.
48 Hansungule, M., African Court and the African Commission on Human and Peoples' Rights, in Bösl, A. and Diescho, J., *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, Macmillan Education Namibia, 2009, p.233.

receives complaints of human rights violation and decides those cases.[49] Although the African Commission has rendered decisions related to release from, and compensation for, unlawful detention in various party states. However, due to the lack of binding force of decisions by the African Commission, its recommendations have been ignored.[50] That is the reason why some scholars have concluded that "the African Commission on Human and Peoples' Rights can bark but it cannot bite".[51]

The African Commission receives complaints and makes recommendations to the concerned state. Article 52 of the African Charter requires the African Commission to use all appropriate means to reach an amicable solution before preparing a report of the facts and its findings to be sent to the concerned State, as well as to the Assembly of Heads of State and Government. Because the African Charter does not give the African Commission power to make binding decisions, its reports and decisions have no legally binding character. Instead, its powers are recommendatory.[52] Notably, the African Commission is not a court and cannot make enforceable binding decisions.[53]

Additionally, although the African Commission has power to receive and decide individuals' complaints, its decisions and recommendations are seldom implemented. States' compliance with the African Commission's decisions and recommendations is poor. There has been full state compliance in 14%, partial compliance in 20% and non-compliance in 66% of the cases.[54] Therefore, even where the Commission found that a state violated a fundamental human right, the state's refusal to implement the Commission's decision has caused frustration for victims.[55] The

49 Louw, L., *An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights*, Ph.D. Thesis, University of Pretoria, (2005), p.iv.
50 Nyanduga, B.T.," Conference paper: Perspectives on the African Commission on Human and Peoples' Rights on the Occasion of the 20th Anniversary of the Entry into force of the African Charter on Human and Peoples' Rights," *African Human Rights Law Journal*, (2006) 2, 255-267, p.263.
51 Udambona, Ns. J., "Toward the African Court on Human and Peoples' Rights: Better Late than Never" 3 *Yale Human Rights and Development Journal*.at 64 (2000). Olukayode, O. B., Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis, *Journal of Law, Policy and Globalization*, Vol.40, 2015, p. 52.
52 Symonides, J., *Human Rights International Protection, Monitoring, Enforcement* at 228 (2003).
53 Nyanduga, B.T., (2006), p.261.
54 Louw, L., (2005), p.314.
55 Hansungule, M., (2009), p.234.

African Commission's inability to enforce its decisions likely discourages unlawfully detained persons from filing complaints with the Commission.

3.2.2.2. The access of unlawfully detained persons in Rwanda to the African Commission on Human and Peoples' Rights

The report on communications from the African Commission on Human and Peoples' Rights shows that no unlawfully detained person in Rwanda has obtained release from, or compensation for, unlawful detention through the African Commission on Human and Peoples' Rights.[56] However, in 1996, the African Commission decided the case of Organisation *Mondale contre la Torture* v *Rwanda*.[57] In that case, three non-government organizations submitted complaints to the African Commission, alleging human rights violations in Rwanda from 1989 to 1992.[58] The complaints alleged ethnic massacres, extra-judicial killings and unlawful detentions by the government. Although the complaints were filed beginning in 1991, the Commission did not decide the case until 1996.[59] In its decision, the African Commission found that the alleged human rights violations occurred and constituted violations of the African Charter. The Commission urged Rwanda to adopt measures in conformity with that decision. Noteworthy, the Commission's decision, did not award compensation to the victims, some of whom had been held in detention for over four years.[60] In 2015, the African Commission's Chairperson told the United Nations that the African Commission's work is largely unknown.[61] Most people who suffer from human rights abuses sometimes do not know that their rights have been violated,

56 African Commission on Human and Peoples' Rights, Decisions on Communications, available at http://www.achpr.org/communications/,[accessed 12/01/2016].

57 Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes (C.I.J) and Union Interafricaine des Droits de l'Homme v Rwanda, African Commission, Communications Nos. 27/89, 46/91, 49/91 and 99/93 (1996) {hereinafter referred to as «*Organization Mondale contre la Torture case*»}, available at http://www.equalrightstrust.org/ertdocumentbank/OMT%20v.pdf, [accessed 02/11/2017].

58 *Organisation Mondiale Contre la Torture case*.

59 From 1993 to 1995, the African Commission sent various letters and notifications to Rwanda, to which Rwanda failed to respond. Also, the Commission attempted unsuccessfully to send a mission to Rwanda to investigate the case. See the *Organisation Mondiale Contre la Torture* case point 5-14.

60 Most of political detainees have been released by APR (*Armée Patriotique Rwandaise*) in 1994 after winning the Rwandan civil war 1990-1994.

61 Hon. Kayitesi Zainabo Sylvie, Statement by the Chairperson of the African Commission on Human and Peoples' Rights on the Human Rights Situation in Africa (28th Session of the United Nations Human Rights Council), available at http://www.achpr.org/news/2015/04/d171, [accessed 30 December 2015].

and even if they knew, they do not know where or who to turn to for help even within their own country.[62] In addition, there are a lack of lawyers and civil legal aid society organizations to represent those victims and submit complaints on their behalf to the African Commission.[63] Moreover, the African Commission does not provide any legal aid to those who cannot afford it. Ordinary Rwandan victims of unlawful detention are too poor to afford fees for legal representation.[64] Additionally, "illiteracy and ignorance of their rights and duties on part of overwhelming majority of the African people, together with a lack of reliable transportation systems and underdeveloped infrastructures as well as long distances from the nearest law services, deny the African people prompt and adequate access to good and effective administration of justice."[65] As a result, despite the large scale of human rights violations across the continent, few persons complain to the African Commission[66] compared to the other regional institutions. As of May 2017, there were two hundred and twenty-two complaints currently pending before the Commission.[67]

To complement the African Commission, the African Union created the African Court on Human and Peoples' Rights (African Court) with a mandate to award remedies for human rights violations of the African Charter. The African Commission's rules of procedure permit the African Commission to refer cases to the African Court where it considers it necessary to do so. Examples are a case involving serious human rights violations or a case where a state failed to comply with the Commission's decision.[68]

62 The African Commission on Human and Peoples' Rights, Information Sheet nº.2, Guidelines for the Submission of Communications, p.2.

63 Egyptian Initiative for Personal Rights, Filing a Communication before the African Commission on Human and Peoples' Rights, A Complainant's Manual, 2013, p.2.

64 Symonides, J., (2003), p.228.

65 *Id*., p.229.

66 As at December 2014, there were 89 Communications before the African Commission. During its last session held in February 2015, the African Commission considered one inter-State Communication and 52 individual Communications on seizure, admissibility, and merits.

67 African Commission on Human & Peoples' Rights, 42nd Activity Report of the African Commission on Human and Peoples' Rights, 2017, p.9 available at http://www.achpr.org/files/activity-reports/42/42nd_activity_report_eng.pdf, [accessed 02/11/2017].

68 *See* Rules 84 (2) and 118(1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights approved by the African Commission during its 47th ordinary session held in Banjul, The Gambia from May 12 to 26, 2010.

3.2.3. The role of the African Court on Human and Peoples' Rights (AfCHPR)

In 2004, a Protocol to the African Charter established the African Court on Human and Peoples' Rights. It was an important step to ensure access to court for Africans denied human rights by their states, as well as to enforce decisions of the African Commission.[69] It issued its first decision on 05 December 2009.[70]

3.2.3.1. Remedies for unlawful detention

Human rights can only mean anything if they are being enforced.[71] The African Court is empowered to order remedies to victims of human rights violations of the African Charter and to seek enforcement of its judgments against state parties. "If the Court finds that there has been a violation of human or peoples' rights, it shall make appropriate orders to remedy the violation, including payment of fair compensation or reparation."[72] That power should be interpreted together with Article 6 of the African Charter, which states that no person may be arbitrarily arrested or detained. Where state parties have unlawfully detained a person, the African Court can order release and compensation, based on Article 27 of Protocol.

According to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the AfCHPR the Court's jurisdiction is grouped into two main categories. One category is related to a subject matter and the second category is related to who may file a suit before Court. With regard to subject matter jurisdiction, Article 3 of the Protocol states that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning interpretation and application of the African Charter, this Protocol and any other relevant Human Rights instrument ratified by the states concerned."[73] Article 4 of the Protocol gives the Court jurisdiction to issue advisory opinions on "any legal matter relating to the Charter or other relevant human rights instruments, provided that the subject matter of the opinion

69 REDRESS, (2013), p.3.
70 Executive Council, *Activity Report of the African Court for the Year 2013, Ex.Cl/825(Xxiv), Twenty- Fourth Ordinary Session 21 – 28 January 2014*, Addis Ababa, Ethiopia, p.4.
71 Peter, C. M., "The Human Rights System: An Overview," in MCHOME, Sifuni E. (ed), *Taking Stock of Human Rights in Africa*, University of Dar es Salaam, Faculty of Law, 2002, p.20.
72 Art.27 of ACHPR Protocol.
73 Art.3 of ACHPR Protocol.

is not related to a matter being examined by the Commission."

With regard to who may file suit, the Protocol provides for both a compulsory and an optional personal jurisdiction.[74] In the Court's exercise of its compulsory jurisdiction, those entitled to seek relief from the Court are: the African Commission, a State party which has lodged a complaint with the Commission, a State party against which a complaint has been lodged at the Commission, a state party whose citizen is a victim of a human rights violation and the African intergovernmental organizations.[75] Additionally, when a state party has an interest in a case, it may request the Court to be permitted to join the case.[76] In addition to compulsory jurisdiction, the court has optional jurisdiction over cases submitted by individuals and non-governmental organizations with observer status before the Commission.[77]

Although the Protocol establishing the African Court was adopted in 1998 and came into force in 2004,[78] the Court did not issue its first decision until 2009. As of March 2017, the Court had received 124 applications and finalized 32 cases,[79] none of which provided a remedy for unlawful detention.

3.2.3.2. The access of unlawfully detained persons in Rwanda to the AfCHPR

Article 34(6) of the Protocol states that "at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the court to receive cases under Article 5(3) of this Protocol." That declaration of the State party is a condition to receive any petition from individual victims of human rights against that State party.[80] In 2013, as required for under Article 5(3) and Article 34 (6) of the Protocol,[81] the Republic of Rwanda deposited a declara-

74 Art.5 (3) of ACHPR Protocol.
75 Art.5 (1) of ACHPR Protocol.
76 Art.5 (2) of ACHPR Protocol.
77 Art.5 (3) of ACHPR Protocol.
78 After it was ratified by more than 15 countries.
79 http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court, [accessed 12/04/2017].
80 At the end of 2013, seven such declarations had been made, by Burkina Faso, Côté d'Ivoire, Ghana, Malawi, Mali, Rwanda, and Tanzania. See Executive Council, (2014), p.3.
81 Art. 5(3) of ACHPR Protocol indicates that the Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34 (6) of this Protocol. Art. 34(6) states that at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5 (3) of this Protocol. The Court shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration.

tion accepting the jurisdiction of Court to receive applications from individuals and Non-Governmental Organizations (NGOs) with observer status before the African Commission on Human and Peoples' Rights.[82] As the Rwandan Minister of Justice stated, "deposition of its declaration indicates recognition of the role of the African Court protection human rights in Africa".[83] That declaration authorised individuals and NGOs to directly take their petitions involving Rwanda before the African Court on Human and People's Rights in *Arusha,* subject to the reservation that all local remedies would have been exhausted before competent organs and jurisdictions of the Republic of Rwanda.[84] Since 2013, unlawfully detained persons in Rwanda were allowed to seek and obtain compensation before the African Court of Human and People's Rights.

Nevertheless, the Rwandan government withdrew for review its declaration in 2016. The government argued that the court has given a platform for a genocide convict and while making its declaration the State never envisaged that kind of person would seek and be granted a platform on the basis of the said declaration.[85] The African Court while examining the validity of Rwanda withdrawal for review, rules that Rwandan's withdrawal of its declaration pursuant to Article 34(6) of the Protocol, was valid and will take effect one year after the deposit of the notice, that is on 1 March 2017. The court ruled that Rwanda withdrawal of its declaration has no effect on the received case.[86] The withdrawal limits direct access of individuals and NGOs from Rwanda to the court.[87]

82 On 22nd January 2013, the Republic of Rwanda unilaterally made that declaration.

83 Busingye, J., Opening remarks by the Honourable Minister of Justice/Attorney General, Third Annual Joint Meeting of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights 18th -19th /07/2014, p.3.

84 Busingye J., (2014), p.3.

85 Mushikiwabo, L., Withdraw for review by the Republic of Rwanda from the declaration made under 34(6) of the Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and Peoples' Rights of 24 February 2016(letter).

86 *Ingabire Victoire Umuhoza v Republic of Rwanda, ACHPR, Application nº 003/2014, 3rd, June 2016.*

87 International Justice Resource Center, Rwanda withdraws access to African court for individuals and NGOs, available at http://www.ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/, [accessed 03/01/2018].

3.3. The role of the UN mechanisms

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly. Rwanda is a signatory to the ICCPR, having ratified it in 1975.[88] The state parties that signed the ICCPR agreed to respect the civil and political rights of individuals. Article 9 of the ICCPR sets out the right of individuals with respect to detention and compensation for unlawful detention. It states:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

88 Rwanda ratified the Covenant on 16/04/1975. It was entered into force on 16/07/1975, and has been incorporated into domestic law pursuant to Decree Law nº. 8/75 of 12 February 1975, *Official Gazette, nº. 5, 1 March 1975.*

In addition to setting forth individual's rights, the ICCPR established the Human Rights Committee to interpret the ICCPR. The Human Rights Committee has published its interpretations as "general comments." Although the Human Rights Committee's general comments have no binding force, they are persuasive authority, interpreting the states parties' obligations in the Covenant and clarifying states parties' compliance with the Covenant. The Committee's "general comments" provide consensus on the meaning and scope of particular human rights.[89] I discuss the ICCPR's provisions on unlawful detention and compensation, as well as the Human Rights Committee's general comments on those provisions in the following section.

3.3.1. The ICCPR's remedies for unlawful detentions

The ICCPR provides specific remedies for unlawful detention. First, Article 9(4) states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." The Human Rights Committee has explained in its general comments that the purpose of that right is the release of the person, either unconditionally or conditionally, from ongoing unlawful detention.[90] According to the Human Rights Committee, Article 9(4) entitles the individual to take proceedings before "a court" with the power to order release if it determines the detention is unlawful.[91]

The second provision of the ICCPR concerning remedies for unlawful detention is Article 9(5), which states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." In interpreting that provision, the Human Rights Committee has noted that:

> Paragraph 5 obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time. Paragraph 5 does not specify the precise form of procedure, which may include remedies against the State itself or against individual State officials responsible for the violation, so long as they are effective.[92] Paragraph 5 does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. Paragraph 5 does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement of proceedings for compensation to the initiative of the victim.[93]

Article 9(5) does not provide any details on how the right to compensation should be enforced. It leaves implementation to the state party.[94]

3.3.2. Enforcement of these remedies in Rwanda

When Rwanda ratified the ICCPR, it incorporated the ICCPR into its domestic law. Therefore, the ICCPR has the force of law and supersedes the ordinary law in Rwanda.[95] As a result, Rwanda has an obligation flowing from the ICCPR to compensate victims of unlawful detention. The Human Rights Committee has explained that, in addition to ratification and domestication, the state's parties to the ICCPR have an obligation to introduce domestic legislation to provide compensation for unlawful detention.[96] Specifically, Article 2(2) of the ICCPR states, "where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or

89 Lepard, B.D., *Customary International Law, A New Theory with Applications*, 2010, p.183. put in proper form. See Blake, C., *Normative Instruments in International Human Rights Law. Locating the General Comment, Center for Human Rights and Global Justice Working Paper* Number 17, 2008, p.38.

90 Human Rights Committee, General Comment N°. 35 Article 9 (Liberty and security of person), CCPR/, 16 December 2014, para.41.{Hereinafter referred to as "*General Comments n°.35*"}.

91 HRC, *General Comments n°. 35*, §41.

92 See concluding observations: Cameroon (CCPR/C/CMR/CO/4, 2010), para. 19; Guyana (CCPR/C/79/Add.121, 2000), para. 15; United States of America (A/50/40, 1995), para. 299; Argentina (A/50/40, 1995), para. 153; 1885/2009, *Horvath* v. *Australia*, para. 8.7 (discussing effectiveness of remedy); 1432/2005, *Gunaratna* v. *Sri Lanka*, para. 7.4; general comment No. 32, para. 52 (requirement of compensation for wrongful convictions).

93 HRC, *General Comments n°. 35*, §50.

94 Lepard, B. D., (2010), p.183. See Blake, C., (2008), p.38.

95 According to Article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, the hierarchy of laws is: 1° Constitution; 2° organic law; 3° international treaties and agreements ratified by Rwanda; 4° ordinary law; 5° orders.

96 Human Rights Committee, *General comments n°. 35*, §50.

other measures as may be necessary to give effect to the rights recognized in the present Covenant."[97] Thus, Rwanda has an obligation to adopt specific provisions in its domestic legislation to facilitate enforcement of the right to compensation for unlawful detention. Nevertheless, the Rwandan legislature has not enacted any domestic legislation to comply with Article 2(2) of the ICCPR. In sum, despite agreeing to the ICCPR's provision that victims of unlawful detention "shall have an enforceable right to compensation," Rwanda has failed to provide victims of unlawful detention with such a right.

3.3.3. Role of the Human Rights Committee in enforcement of these remedies in Rwanda

The Human Rights Committee uses three procedures to implement the rights articulated in the ICCPR. Those procedures are: (1) mandatory periodic reports by states, (2) an optional interstate procedure where one state may file a complaint against another and (3) an optional procedure where individuals may file complaints. The following sections describe each of those procedures and how they relate to Rwanda.

3.3.3.1. States' Reports to the Human Rights Committee

The state parties to the ICCPR are obliged to submit periodic reports[98] to the Committee explaining how they have implemented the human rights provisions of the ICCPR. After reviewing the reports, the Committee gives its concluding observations on submitted reports. Since its ratification of the Covenant to 2015, Rwanda has submitted four reports to the Human Rights Committee.

Rwanda submitted its initial report in 1982. In its concluding observations, the Committee began by stating that it appreciated that Rwanda not only ratified the ICCPR but was among the first thirty-five countries to ratify it. The Committee then observed that Rwanda's report was too brief to provide specific information under each article of the Covenant. Specifically, Rwanda's report did not discuss the right to compensation.[99]

97 Art.2.2 of the ICCPR.
98 Art.40 of the ICCPR.
99 The initial report of Rwanda (CCPR/C/1/Add.54) in CCPR A/37/40 (1982).

In 1987, Rwanda submitted its second report to the Committee.[100] With respect to implementation of Article 9 of the ICCPR, the Committee recommended that Rwanda improve the general conditions of detention.

In 2007, Rwanda submitted its third report to the Committee after 20 years. That report stated the steps Rwanda had taken to implement the ICCPR. With regard to Article 9 of the Covenant, Rwanda's report highlighted its recognition of the general principle of liberty in the Constitution of the Republic of Rwanda and its introduction of strict conditions of detention in Rwanda law reform of 2004. The report also included measures that the Rwandan government had taken to avoid unlawful detentions. For example, from 2003 to 2006, the Rwandan government released 59,919 genocide suspects who were under pre-trial detention.[101] In its concluding observations to the report, the Committee found that the ICCPR was not made sufficiently well known for it to be regularly invoked before courts and authorities in Rwanda.[102]

Rwanda submitted its fourth report about the status of the Covenant's implementation in Rwanda to the Committee in 2014.[103] That report stated that Rwanda had introduced strict conditions of detention, prohibited unlawful detention and introduced *habeas corpus* into Rwandan law. With regard to compensation for unlawful detention in Rwanda, the report explained that an unlawfully detained person enjoys the right to lodge an appeal before a court to obtain compensation through the *habeas corpus* procedure.[104]

With regards to the protection of individuals against unlawful detention, the Human Rights Committee recommended that the Rwandan government:

100 The Second Periodic Report of Rwanda (CCPR/C/46/Add.l) in United Nations, *Report of the Human Rights Committee of 1988*, New York, p.46.
101 Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the covenant, third periodic report Rwanda, CCPR/C/RWA/3*, 12 September 2007, p.42.
102 Human Rights Committee, (2007), p.42.
103 Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant Fourth periodic reports of States parties due in 2013 Rwanda*, 30 October 2014.
104 Human Rights Committee, (2014), p.47.

(a) Make the legislative amendments necessary to ensure that the normal maximum period of detention before a suspect is brought before a judge is 48 hours; (b) Ensure that all persons deprived of their liberty are only detained in official places of detention and are provided in practice with all legal safeguards; (c) Ensure that allegations of unlawful detention, torture and ill-treatment are promptly investigated and that the perpetrators are brought to justice; (d) Guarantee that persons who have been victims of unlawful detention, torture and ill-treatment have an effective right to remedy and redress.[105]

The Human Rights Committee highlighted the need for Rwanda to enact procedural provisions on compensation for unlawful detention in its domestic legislation.[106] Nevertheless, Rwanda failed to take the recommended action.

3.3.3.2. Interstates complaint procedure

Articles 41 and 42 of the ICCPR provide for an interstate complaint procedure for violations of rights embodied in the ICCPR. Any state may submit a communication to the Committee when it believes that another state party is not fulfilling its obligations under the ICCPR. This optional procedure is available only to states parties.[107] Due to political and economic ties between the states parties, it is not expected that one state will accuse another of such human rights abuses. So far, no state has used this procedure with regard to compensation for unlawful detention.[108]

3.3.3.3. Procedure for complaints by individuals to the Human Rights Committee

A complaint to the Committee is called a "communication" or a "petition."[109] The Optional Protocol to the ICCPR regulates individual communications to the Human

105 Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Rwanda, CCPR/C/RWA/CO/4, of 2 May 2016*, adopted by the Committee at its 116th session (7-31 March 2016).
106 McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights,* Clarendon Press- Oxford 1991, p.68.
107 *Id*., p.153.
108 *Id*., p.123.
109 X, Procedure for Complaints by Individuals under the Human Rights Treaties, available at http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx, [accessed 02/11/2017].

Rights Committee.[110] Article 1 of Optional Protocol states that "no communication shall be received by the Committee if it concerns a State party to the Covenant which is not part of the present Protocol."[111] This provision indicates that the Human Rights Committee will only receive and consider the communications from individuals who come from the State party to the Optional Protocol.[112] The most effective way of protecting individuals' rights in the ICCPR is to allow victims to complain directly to the Committee.[113] Because Rwanda is not a party to the first Optional Protocol to the Covenant,[114] the Human Rights Committee will not accept complaints from individuals alleging violations of their ICCPR rights in Rwanda. Therefore, this procedure is unavailable to victims of unlawful detention in Rwanda.

3.3.4. Role of the United Nations Working Group on Arbitrary Detention

In 1946, the United Nations Economic and Social Council established the UN Commission on Human Rights as its subsidiary body.[115] It was the UN's principal international forum concerned with promotion and protection of human rights. The United Nations Commission on Human Rights was replaced by the United Nations Human Rights Council in 2006.[116] The core mandate of the United Nations Human Rights Council is to promote universal respect for human rights and to make recommendations on cases of human rights violations occurring among the states members of the United Nations.[117] In 1991, the United Nations Commission on Human Rights created the Working Group on Arbitrary Detention to investigate arbitrary detention claims.[118] The following sections discuss the jurisdiction and

110 UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, *Treaty Series, vol. 999,* p.171.
111 This optional protocol has not been ratified by Rwanda. Status of ratifications of the Optional Protocol to the International Covenant on Civil and Political Rights, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en, [accessed 14/10/2016].
112 Ghandhi, P.R., *The Human Rights Committee and the Right of Individual Communication, Law and Practice*, 1998, p.48.
113 Haxhiraj, A.," The Covenant on Civil and Political Rights," 3 *Juridical Tribune,* at 313 (December 2013).
114 Optional Protocol to the International Covenant on Civil and Political Rights Ratification Status as at 20-02-2017 05:00:50 EDT, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en, [accessed 20/02/2017].
115 Donnelly, J., *International Human Rights: A Regime Analysis. International Organization*, 1986, 40, p. 611.
116 *Human Rights Council,* General Assembly Resolution 60/251, UN GAOR, 60'h sess, 72nd plen mtg,.
117 Upton, H., "The Human Rights Council: First Impressions and Future Challenges," *Human Rights Law Review* (2007), pp.29–39.
118 Commission on Human Rights Resolution 1991/42 of March 1991 (United Nations, Official Records of the Economic and Social Council, 1991, supplement nº 2(E/1991/22) CHAP.ii, SECT.a.

the mission of the Working Group on Arbitrary Detention and its possible role in releasing and compensating unlawfully detained persons in Rwanda.

3.3.4.1. Jurisdiction of the Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention investigates petitions by individuals anywhere in the world.[119] The Working Group investigates cases of arbitrary detention.[120] In addition to arbitrary detentions, the Working Group investigates detentions resulting from the exercise of rights or freedoms. While carrying out its mission, the Working Group seeks and receives information from governments and intergovernmental and non-governmental organizations. Moreover, the Working Group receives information from the detained individuals, their families or representatives.[121] In addition to its mission, the Working Group has been asked by the Human Right Council in Resolution 20/16 to draft and submit the basic principles and guidelines on remedies and procedures on the right of anyone deprived of his liberty by arrest or detention, which embodied also enforceable right to compensation for unlawful detention.[122] The United Nations Working Group on Arbitrary Detention adopted the final version of the United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court in its 72nd session which was concluded on 29 April 2015 in Geneva.[123]

3.3.4.2. Role of the Working Group in releasing and compensating unlawfully detained persons in Rwanda

The Working Group on Arbitrary Detention's mandate expressly provides for investigation of individual complaints.[124] Thus, it is accessible to all individuals without

119 Fact Sheet 26, the Working Group on Arbitrary Detention, available at http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf, [accessed 01/08/2017].

120 Weissbrodt, D. S., & Mitchell, B., The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence, Human Rights Quarterly, Volume 38, Number 3, August 2016, p. 668.

121 Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, E/CN.4/1992/20, 21 January 1992, p.3.

122 General Assembly, *Report of the Working Group on Arbitrary Detention United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, A/HRC/30/37.

123 Available at http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx, accessed on 04 June 2018.

124 Office of Higher Commissioner, Working Group on Arbitrary Detention, available at http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx, [accessed 16/02/2017].

condition. Since its creation in 1991, the Working Group has received hundreds of complaints alleging arbitrary detention.[125] In some of the decided cases, it has recommended in its views the release and compensation. This section examines the role of the Working Group on Arbitrary Detention in compensating unlawfully detained persons in Rwanda.

The position of the Working Group on Arbitrary Detention has considered two cases on unlawful detentions in Rwanda. In the first case, Augustin Misago, a Roman Catholic bishop, was arrested and charged with participating in the 1994 genocide. He filed a petition with the Working Group, claiming he was unlawfully detained for two months since 14 April 1999. The facts are as follows. Following his arrest, a court issued a pre-trial detention order, which was valid for only two months. Yet, he was not brought before a court again until four months later. Therefore, he claimed that he had been unlawfully detained for the last two months. After its investigation, the Working Group stated that the Rwandan court acknowledged the unlawful detention since his detention order was valid only for two months, but the court continued to detain him due to the gravity of the charged offences,[126] i.e., participating in the murder of 150,000 Tutsis during the Rwandan genocide and, in particular, of the murder of 30 female students who had asked him for protection. In its decision of 17 May 2000, the Working Group was of the opinion that his detention beyond the first two months was illegal and a violation of his right to a fair trial, as guaranteed by various international human rights instruments.[127] Therefore, the Working Group requested Rwanda to remedy the unlawful detention and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the ICCPR rights. On 15 June 2000, Misago was acquitted of the charges against by a Rwandan Court of law.[128]

125 Available at http://www.unwgaddatabase.org/un/, [accessed 11 January 2016].

126 See *Monseigneur Augustin Misago* v *Rwanda*, opinion n° 03/2000, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2001/14/Add.1 at 58 (2000), §11, adopted on 17 May 2000, 12.

127 Particular, by Article 10 of the Universal Declaration of Human Rights, Article 9, paragraph 4, of the ICCPR and Principles 11, paragraphs 1 and 3, and 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted on 9 December 1988. See *Mgr. Augustin Misago* v *Rwanda*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2001/14/Add.1 at 58 (2000), adopted on 17 May 2000, 12.

128 BBC, Rwandan Bishop cleared of Genocide (online), available at http://news.bbc.co.uk of 15 June 2000, [accessed 12 April 2017].

In the second case investigated by the Working Group, two Rwandan journalists, Agnès Uwimana Nkusi and Saïdati Mukakibibi, petitioned the Working Group to investigate their detentions. They claimed that their arrests and pre-trial detentions between July 2010 and February 2011 were arbitrary.[129] They stated that, during the first week after their arrests, their family members were not aware of their whereabouts not allowed to visit them. They further claimed that they were not informed of the charges against them until after one week of their arrest. They had been arrested due to newspaper articles that had appeared in a Rwandan newspaper. They claimed that, during their pre-trial detention, they twice requested to be released on bail, but that the court denied bail because of the seriousness of the charges against them.[130] On 4 February 2011, the court convicted and sentenced Uwimana to 17 years imprisonment and a fine of 250,000[131] Rwanda francs for four offences.[132] The journalists filed a petition with the Working Group, which sent the petition to the Rwandan government on 1 March 2012, giving it 60 days to reply. However, the government failed to reply within the deadline.[133]

In April 2012, the Rwandan Supreme Court cleared Uwimana on the charges of genocide denial and divisionism. However, it upheld her convictions for defamation and endangering national security. The Court reduced her sentence to four years in prison. It also upheld Mukakibibi's conviction for endangering national security, but reduced her sentence from seven years to three years in prison.[134]

In August 2012, the Working Group issued its opinion, concluding that the detentions of Uwimana and Mukakibibi were arbitrary and conducted in violation of

129 Human Rights Council, Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27–31 August 2012, A/HRC/WGAD/2012/25, Communication addressed to the Government on 13 March 2012, 4. {Hereinafter referred to as "*Uwimana Nkusi case*"}.

130 *Uwimana Nkusi case*,§8.

131 Approximately US $420.

132 (a) endangering national security under Article 166 of the Penal Code (five years' imprisonment); (b) denying the genocide under Article 4 of the Genocide law (10 years' imprisonment); (c) defaming the President under Article 391 of the Penal Code (one year's imprisonment), and (d) creating divisions under Article 1 of the Divisionism Law (one year imprisonment).

133 *Uwimana Nkusi case*, §1.

134 *Uwimana Nkusi case*,§ 49&50.

international human rights instruments ratified by Rwanda.[135] In its opinion, the Working Group specifically requested the Government of Rwanda to immediately release Uwimana and Mukakibibi, to ensure that they were in good health and to provide them with adequate compensation in accordance with Article 9, paragraph five, of the ICCPR.[136] However, Rwanda ignored the Working Group's opinion and continued to detain the two journalists and did not award them any compensation, as recommended by the Working Group. They were not released until completion of their sentences.

While Rwanda is a party to or signatory of ICCPR, it has not ratified the optional protocols of ICCPR that would enable the Human Rights Committee to review individual or collective complaints against the Rwandan government. Therefore, the procedures of the Working Group provide one of only a few potential outlets for individuals whose rights have been violated by the Rwandan government to bring complaints. Although among the decided cases related to arbitrary detention in Rwanda, the Working Group has recommended the release and compensation of those who were unlawfully detained. After the Working Group decision, those cases have been reviewed before Rwandan court and one person has been released after being acquitted and other have been released after the completion of their sentences that has been also reduced, such releases are not typically carried out directly following the Working Group's decision or with any reference to the Working Group's concerns. There is no compensation awarded as recommended by the Working Group decision.

Though in the above cases, the petitioners were not immediately released and received no compensation for their unlawful detentions, those cases show that the Working Group is an effective forum for challenging the lawfulness of a detention. After receiving petition, the Working Group sends it to the government of the state where the petitioner is being detained and requests the government to reply within

135 The provisions contained in Articles 9, 10, 11, paragraphs 1 and 19 of the Universal Declaration of Human Rights and Article 9, paragraphs 1 and 2; Article 14, paragraphs 2 and 3 (a); and Article 19, paragraph 2 of the ICCPR.

136 *Uwimana Nkusi case*,§ 66.

60 days. If the government does not reply within the time limit, the Working Group may render an opinion on the basis of the information submitted by the petitioner.[137] Even the exchange of information between the Working Group and the government in question can influence the situation of unlawfully detained persons. NGOs and other organizations can use the Working Group's decision to put pressure on governments and to draw public attention to the plight of individuals they seek to free from detention.[138] However, the Working Group on Arbitrary Detention as the Human Rights Committee is not well known by persons who are being detained.[139]

3.4. Conclusion

This chapter's objective was to examine the roles of the East African Community, the African Union, and the United Nations in the protection of unlawfully detained persons in Rwanda. It considered each organisation's human rights instruments that have been ratified by Rwanda. It noted that, despite protections afforded by regional and international instruments, most unlawfully detained persons in Rwanda are not aware of their existence or that they can approach those organisations for help.

This study revealed that victims of unlawful detention in Rwanda may challenge their detentions before the EACJ based on Articles 6(d) and 7(2) of the EAC Treaty. The lack of a human rights jurisdiction within the EACJ limits its role in awarding remedies for unlawfully detained persons in Rwanda. Although the African Commission on Human and Peoples' Rights has the mandate to receive and decide individual's complaints, unlawfully detained persons in Rwanda did not seek compensation through the Commission due to their lack of awareness of the African Commission on Human and Peoples' Rights jurisdiction and lack of lawyers and legal aid organizations to assist them.

137 Methods of Work of the Working Group on Arbitrary Detention, A/HRC/33/66, 12 July 2016, §15.
138 Weissbrodt, D. S., & Mitchell, B., (2016), p. 699.
139 Nowak, M., "The Need for a World Court of Human Rights," 7 *Human Rights Law Review* (2007), p.253.

Moreover, this chapter established that victims of unlawful detention in Rwanda do not have access to established enforcement mechanisms at regional and international levels. The inability of unlawfully detained persons in Rwanda to access the AfCHPR impedes the court's ability to protect those persons' rights. Although Article 9(5) of the ICCPR provides the right to compensation for unlawful detention, due to ignorance and lack of procedures on exercising that right, unlawfully detained persons in Rwanda do not use that provision to claim and obtain compensation for unlawful detention. Furthermore, the failure of Rwanda to ratify the First Optional Protocol of the ICCPR prevents unlawfully detained persons in Rwanda from seeking and obtaining remedies through the Human Rights Committee.

In summary, although Rwanda has ratified treaties with grandiloquent language providing for the right to be released from, and compensation for, unlawful detention, Rwanda has failed to enact specific procedural provisions in its domestic legislation to provide for compensation to unlawfully detained persons. And it has not ratified the Optional Protocol to the ICCPR required before the Human Rights Committee may accept complaints from individuals who claim to be unlawfully detained.

Chapter 4: A comparison of the Rwandan remedies against unlawful detention with those of Uganda, France, England and Wales

This chapter compares Rwandan legal remedies for unlawful detention with those of three countries: Uganda, France, the England and Wales. Those countries, like Rwanda, are parties to the International Covenant on Civil and Political Rights (ICCPR), in which they recognized the right of individuals to *habeas corpus* and to an enforceable right to compensation in cases of unlawful detention.[1] Those countries have developed instruments to rectify unlawful detentions.

Each of those countries is historically or geographically connected to Rwanda and, thus, a fitting choice for comparison. Because of France's long historical connection with, and hegemony over, Rwanda, France's legal system had an immense influence on, that of Rwanda. Rwanda's civil law system was inherited from Belgium that also has been influenced by the French.[2] However, following the 1994 genocide, which Rwanda blamed partly on the French, Rwanda moved away from the French and closer to the British. For example, Rwanda joined the Commonwealth of Nations (comprised of Great Britain and many of its former colonies), introduced English as one of its national languages and introduced basic tenets of Common Law, which has its roots in Britain.[3] Since 1994, Rwanda has been inching towards adoption of Common Law. Uganda is an appropriate comparison because of its proximity to Rwanda, Uganda has a long historic connection to Great Britain, is a member of the Commonwealth of Nations and its legal system is based on the Common Law. Also, both Rwanda and Uganda are parties to the same international instruments,[4]

1 Articles 9.4 & 5 of the ICCPR.

2 France and Rwanda belong to the civil law system and share main principles related to tort law. Articles 1240, 1241, and 1242 of the French Civil Code are identical with Articles 258, 259 and 260 of Rwanda Civil Code Book III.

3 For example, Article 47 of Organic Law related organization, functioning and jurisdiction of the Supreme Court introduces the use of precedent. article 91 of CCP introduce the *habeas corpus* procedure under Rwandan law. *See* Kosar, W. E., Rwanda's Transition from Civil to Common Law, *The Globetrotter, International Law Section*, Volume 16, n°. 3 July 2013, p.1.

4 The ICCPR, African Charter, and EAC Treaty.

discussed above. Both young developing countries with similar social economic problems and are post- conflict countries with many prisoners resulting from those conflicts.

Comparing each of those country's remedies for unlawful detention will help to identify best practices for remedying cases of unlawful detention and, hopefully, provide a basis for improvement of the Rwandan legal system. All legal systems embrace that country's customs, practices, attitudes and culture.[5] While the differences in customs, practices, attitudes and culture among the chosen countries do not undermine the value of comparison,[6] it is important to understand the each country's aims for adopting the legal remedies for unlawful detention in their country. The below sections attempt to do so.

4.1. Remedies against unlawful detention in Uganda

From 1894 to 1962, Uganda was a protectorate of the British,[7] which imposed Common Law across the land.[8] Although *habeas corpus* was part of the Common Law, in their colonies and protectorates, the British acknowledged *habeas corpus* only on paper and not in practice.[9] Following independence in 1962, Uganda had a troubled history for many decades during which it failed to recognize *habeas corpus*. It suffered extensive turbulence, as well as brutality and authoritarian rule by its leaders[10] and experienced a coup by Milton Obote in 1966 and another by Idi Amin in 1971, both accompanied by numerous violations of human rights. It also endured civil wars. From 1971 to 1979, it endured a reign of terror under President Idi Amin, which destroyed all semblance of legal order. During that period of Idi Amin's reign,

5 Fairgrieve, D., *State Liability in Tort: A Comparative Law Study*, Oxford University Press, 2003, p. 2.
6 Peters, A. & Schwenke, H., "comparative law beyond post modernism", *International and Comparative Law' Quarterly* [Vol. 49, October 2000] 800, p.831.
7 Mahoro, B., *General information the Ugandan Legal System Sample Cases History of Uganda*, New York, March 2013, p.1.
8 Clark, D. & McCoy, G., *The Most Fundamental Right, Habeas Corpus in the Commonwealth*, Oxford University Press, 2005, p.13.
9 *Idem*, p.46.
10 Carson, J., A Legacy in Danger, in the Africa Program, Challenges and Change in Uganda *Presentations Made at a Conference held on June 2, 2005*, "Uganda: An African 'Success' Past its Prime?", p.3.

the Ugandan judicial system could not protect personal liberty[11] and numerous persons were imprisoned with impunity during that period and into the early 1990s.[12]

In 1995, after having suffered many years of military and other forms of dictatorships, the people of Uganda wanted a new chapter in their lives.[13] The Ugandan Constitution of 1995 regulates the conditions of detention in Article 23(4) (b),[14] which provides that a person arrested or detained shall be kept in a place authorized by law and that an arrestee must be brought to court within 48 hours. The Constitution established the Uganda Human Rights Commission (UHRC) as a permanent body to monitor human rights in Uganda, in recognition of Uganda's violent and turbulent history characterized by arbitrary arrest, detention without trial, torture, and brutal repression with impunity on the part of security organs.[15]

This section presents an overview of the current Ugandan legal framework regarding remedies for unlawful detention. The first subsection focuses on the protection of the individual against unlawful detention in Uganda. The second discusses the application of *habeas corpus*. The third considers enforcement of the right to compensation for unlawful detention. The fourth subsection discusses the role of the Ugandan Human Rights Commission in the enforcement of remedies for unlawful detention.

4.1.1. Protection of the individual against unlawful detention in Uganda

4.1.1.1. Police detention

Article 23(4) of the Ugandan Constitution states that "A person arrested or detained ...shall, if not earlier released, be brought to court as soon as possible, but in any case not later than forty-eight hours from the time of his or her arrest."[16] That pro-

11 Smith, G.I., *Ghost of Kampala*, London, June 1985, p.141. Cited in Clark, D. & McCoy, G. (2005), p.13.
12 Clark, D. & McCoy, G., (2005), p.13.
13 Peter, C.M., *Human Rights Commissions in Africa – Lessons and Challenges*, in Bösl, A. & Diescho, J., *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, Macmillan Education Namibia, 2009,p.358.
14 The *Constitution of the Republic of Uganda*, 22 September 1995, available at http://www.refworld.org/docid/3ae6b5ba0.html, [accessed 3 March 2017].
15 Peter, C.M., (2009), p.358.
16 Constitution of Uganda, Chapter 4 § 23(4)(b).

vision agrees with the guidance of the ICCPR[17] and African Charter.[18] However, in practice

> A majority of suspects, even suspects of petty crimes, are detained in the police stations for longer than forty-eight hours as a result of a variety of factors, including (1) lack of control over the suspect, (2) lack of ample transportation, (3) backlog at the Directorate of Public Prosecution's office, and (4) corruption.[19]

In its nineteenth annual report, the UHRC recommended that the Uganda Police Force should adhere to the law and equip its officers with the necessary facilities to enable them to efficiently perform their duties and fulfil the constitutional obligation to bring suspects to the court within 48 hours.[20]

4.1.1.2. The maximum period for pre-trial detention

Article 23(6) of Ugandan Constitution provides that a detained person should be released from all charges if not brought to court within one hundred and twenty days. That same Article limits the period of pre-trial detention to 120 days[21]or 360 days,[22] depending on whether the case is tried by a subordinate court or the High Court. Nevertheless, the requirement that detainees be released from all charges if not timely brought to court is often violated.[23] In Uganda, "a detained person would be lucky to be detained for only 360 days prior to trial".[24]

4.1.1.3. Right to a trial without undue delay

The right to a trial within a reasonable time is guaranteed by Article 28(1) of the Ugandan Constitution. That Article also provides a right to a speedy trial,[25]and Article 126(2)(b) states that justice should not be delayed. Uganda's Constitution

17 Human Rights Committee, *General comments n°35*, para.33.
18 African Commission on Human and Peoples' Rights, G*uideline on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa* (2014).
19 Oppenheimer, B. J., From Arrest to Release: The Inside Story of Uganda's Penal System, 16 *Indiana International & Comparative Law Review* at 129 (2005). Karugonjo-Segawa, R., (2012), p.6.
20 UHRC, *The 19th Annual Report to the Parliament of the Republic of Uganda*, 2016, p.XXXII.
21 Chapter 4, § 23(6)(c) of the Ugandan Constitution.
22 Chapter 4, § 23(6)(c) of the Ugandan Constitution.
23 Oppenheimer, B. J.,(2005), p.136.
24 *Id.*, p.135.
25 Chapter § 28(1) of the Ugandan Constitution.

does not provide any guidance as to what constitutes a speedy trial and only notes it as a right without more.[26] In the case of *Shabahuria Matia* v *Uganda*,[27] the High Court of Uganda identified the factors for determining unreasonable delay, as well as determining when such delay would amount to being so oppressive and unjust as to be an abuse of court processes. The factors that the Court identified are: (1) length of the delay; (2) reasons for the delay [including (a) inherent time requirements of the case, (b) actions of the accused, (c) actions of the State, (d) limits on institutional resources or systematic delays, and (e) other reasons for the delay]; and (3) prejudice to the accused.

In case where a trial is delayed, the detained person applied for bail as a remedy. For example in the case of *Ssemanda Alex Burton* v *Uganda*, the applicant urged that his right to a speedy trial had been infringed because he has been detained for twenty-one months. After finding that the right to a speedy trial was seriously violated, the court ordered the release of the accused on bail.[28]

4.1.2. Habeas corpus in Uganda

In cases where the detaining officer violates the conditions of detention required by the Ugandan Constitution, the Constitution entitles the detained person to challenge the lawfulness of the detention before Ugandan courts[29] by means of a writ of *habeas corpus*.[30] Article 23(9) of the Constitution states that the right to *habeas corpus* is inviolable and that *habeas corpus* shall not be suspended. Additionally, Article 44 (d) of the Constitution provides that there shall be no derogation of that right. The following sections describe the procedural aspect of *habeas corpus* in Uganda.

26 Isaac Bakayana, *From Protection to Violation? Analyzing the Right to a Speedy Trial at the Uganda Human Rights Commission*, HURIPEC Working Paper n° .2., November, 2006, p. 33, available at http://www.huripec.mak.ac.ug/pdfs/Working_paper_2.pdf, [accessed 9/2/2018].
27 *Shabahuria Matia* v *Uganda* - Criminal Revisional Cause n°. MSK 00 CR 0005 of 1999 (Criminal Revisional cause n°. MSK 00 CR 0005 UGHC 1 (1999).
28 *Ssemanda Alex Burton* v *Uganda*, High Court Miscellaneous Criminal Application n°. 157 of 1999 (arising from High Court Criminal case n°. CR 944 (1998).
29 Art.23(7) of the Ugandan Constitution.
30 Karugonjo-Segawa, R., *Pre-trial Detention in Uganda*, APCOF Policy Brief n°. 4, 2012, p.7.

4.1.2.1. The competent court to adjudicate habeas corpus applications

According to section 34 of Uganda's Judicature Act, the High Court is the competent court to adjudicate a *habeas corpus* application. Any person aggrieved by an order of the High Court on *habeas corpus* is entitled to appeal to the Court of Appeal.[31]

4.1.2.2. Who may petition for habeas corpus and who must be served?

Ugandan law allows any person or organization on behalf of a detained person to challenge the lawfulness of detention. Section 34 of the Ugandan Judicature Act requires that the petition for a writ of *habeas corpus* be directed to the person in whose custody the detained person is. Therefore, if a person is in prison, the petition for a writ of *habeas corpus* should be served on the head of the prison.[32]

4.1.2.3. Who bears the burden of proof in habeas corpus proceedings?

In *habeas corpus* proceedings in Uganda, the detaining officer bears the burden of proving that the detention is lawful. Also, when a court finds that a detention is unlawful, it should order the release of the detained person. Those procedures were followed in the case of *Kishaija Steven* v *Attorney General*.[33] In that case, the High Court issued a writ of *habeas corpus ad subjiciendum* to the officer in charge of *Kigo* Prison to produce *Kishaija Steven,* who was said to be detained in that prison, and found that the detention was unlawful. In that case, although the applicant as not in the military, a military court (General Court Martial) charged and ordered him held in custody. The High Court found that the military court was not competent (in other words, had no jurisdiction) to try the petitioner who was not subject to military law and, therefore, found that his detention was unlawful.[34] The court, in those circumstances, has no option but to order, as it did, that the applicant be released at once from the illegal detention.[35] In the application of *habeas corpus,* the court has to order release if the detention is not lawful.[36]

31 Section 35 of the Ugandan Judicature Act states, "Any person aggrieved by an order made under section 34 may appeal from the decision to the Court of Appeal within thirty days after the making of the order appealed from whether the order has been made in the exercise of the civil or criminal jurisdiction of the High Court.."

32 UGHC, *Kishaija Steven v Attorney General,* 21 February 2010, Misc.Cause nº.15 of 2010. {Hereinafter referred to as "*Kishaija Steven case*"}.

33 *Kishaija Steven case.*

34 *Kishaija Steven case.*

35 *Kishaija Steven case.*

36 UGHC, *Joseph Tumushabe* v *Attorney General,* 11 June 2003, *Misc. Appl. nº. 63 of 2003.* In that case, the detainees were entitled to release on bail.

4.1.2.4. The enforcement of the right to habeas corpus

The 2016 US Department of State country report on human rights practices in Uganda observed that, despite the Constitution's prohibition of unlawful detention, Ugandan security forces often arbitrarily arrested and detained persons, including opposition leaders, politicians, activists, demonstrators and journalists.[37] The report also noted that, although persons arrested in Uganda have the right to legally challenge their detentions and obtain prompt release if a judge determines the detention to be unlawful, few persons challenge their detentions and, when they do, are rarely successful.[38] Due to ignorance about the right to *habeas corpus,* few people in detention apply for it.[39] The reason for this ignorance is the lack of a comprehensive and integrated system for the provision of legal aid, which would increase detained persons' accessibility to lawyers and courts.[40]

4.1.3. Compensation for unlawful detention in Uganda

The adoption of the 1995 Ugandan Constitution came shortly after the accession to the ICCPR by the Republic of Uganda in the same year.[41] As required by Article 9(5) of the ICCPR, Uganda included in its Constitution the right to compensation for unlawful detention. Article 23(7) of the Constitution reads: "A person unlawfully arrested, restricted or detained by any other person or authority, shall be entitled to compensation from that other person or authority whether it is the state or an agency of the state or other person or authority." That provision guarantees a right to compensation for unlawful detention as a constitutional right. Under Article 23(7) of the Constitution, only the unlawfully detained person has a right to compensation; indirect victims of the unlawful detention have no right to compensation. However, a person unlawfully detained in Uganda, may bring a civil suit alleging a constitutional tort, i.e. a violation of the constitution that gives rise to a cause of action for damages.

37 U.S. Department of State, *Country Reports on Human Rights Practices for 2016-Uganda,p.* 5.

38 *Idem,* p.9.

39 Karugonjo-Segawa, R., (2012), p.7.

40 *Ibid.*

41 Uganda acceded to the ICCPR on 21 June 1995. Uganda adopted its 1995 Constitution on 8 October 1995.

Apart from the provision in the 1995 Uganda Constitution described above that gives rise to a cause of action for constitutional tort, the right to compensation for unlawful detention also has been recognized in the Common Law[42] in false imprisonment tort cases by Ugandan courts.[43] The following section discusses the enforcement of the right to compensation for unlawful detention.

4.1.3.1. Who is entitled to a claim and how can the fault be defined?

As it reads from Article 23 (7) of the Constitution, the right to compensation for unlawful detention is provided only for the unlawfully detained person. The right to compensation for unlawful detention is not open to indirect victims of the unlawful detention. With regard to fault as a precondition for compensation for unlawful detention, it is worth mentioning that Uganda is a common law country.[44] This is the basis as to why general common law principles established in the tort law on false imprisonment are also applied in Uganda. False imprisonment in the common law has been established as a tort of strict liability.[45] Hence, it has been established in the Ugandan practice for example, that the plaintiff is entitled to damages for unlawful detention when the period of 48 hours under detention expires without being taken to court.[46] It is noteworthy from a number of cases that Ugandan courts have ordered compensations for unlawful detention against the Attorney General due to the violation of the right to liberty where suspects have stayed longer than 48 hours in custody. For example, in the case of *Kidega Alfonsio* v *Attorney General*, the court found that *Mr. Kidega's* detention for nine days before appearing in court on a murder charge was unlawful and considering all the circumstances of this case, the court awarded damages general damages of UGX 2,000,000[47] to the plaintiff as a compensation for his unlawful detention.[48] Detaining a person in violation of the existing law in Uganda is considered as a fault without the need to

42 As stated above, Uganda is a common law country.
43 *See, eg.*, UGHC, *Fred Hereri* v *The Attorney General, 22 February 2001*, Civil Suit n°.42 of 1995.
44 Busingye Kabumba, *The application of international law in the Ugandan judicial system: a critical inquiry, in Magnus Killander, International law and domestic human rights law*, Pretoria University Law Press, 2010.p.83.
45 Owen, R., *Essential Tort Law (English)*, Third Edition, Cavendish Publishing Limited, 2000, p.87.
46 Detention made in violation of what is provided for in Article 23(4) of the 1995 Ugandan Constitution.
47 UGX 2,000,000=460EUR.
48 UGHC, *Kidega Alfonse* v *Attorney General*, 27 June 2008, Civil Suit n°.4 of 2000. {Hereinafter referred to as "*Kidega Alfonse case*"}.

check whether the detaining officer was acting in bad or good faith while conducting unlawful detention.[49]

4.1.3.2. Who can be sued and which organs are competent to decide about compensation for unlawful detention claims ?

Article 23(7) of the 1995 Ugandan Constitution states that "a person unlawfully detained by any other person or authority, shall be entitled to compensation from that other person or authority whether it is the State or an agency of the State[50] or other person or authority." That provision distinguishes between categories of persons liable in cases of unlawful detention: (1) persons with authority to detain or an agency of the state and (2) persons without legal authority. If the unlawful detention was caused by a person with authority, an agency of the State or the State,[51] the state will be liable. In that case, plaintiffs direct their claim for compensation claim to the Attorney General, who represents the State. According to Article 250(2) of the Ugandan Constitution, (...), civil proceedings against the government shall be instituted against the Attorney General.

Because the High Court is the only competent court to adjudicate claims for compensation for unlawful detention claim against the State,[52] plaintiffs must file their cases in the High Court. So, many cases been filed in the High Court against the Attorney General.[53]

49 The consulted literature did not indicated why the Ugandan legislators made that choice.
50 For example, the Uganda Revenue Authority is a Government Agency. If its staff cause an unlawful detention, the government will be liable.
51 The state may only act through natural persons or institutions with natural persons. The State is defined differently compare to an agency of the State. Uganda is one sovereign state with a legal personality. It has institutions that have no legal personality; for example, ministries do not have their own legal personality. In case a civil servant who belongs to that institution acts contrary to the law, the victims can sue the State. The agency of the state refers to the agency created by the Ugandan State with its own legal personality that is distinct to the legal personality of the State in general, For example, Uganda Revenue Authority has its own legal personality. In case a civil servant who belongs to that institution acts contrary to the law, the victim can sue the agency of the state. For example, Uganda Revenue Authority.
52 Section 12 of the Government Proceedings Act 1959, available at http://www.ulii.org/ug/legislation/consolidated-act/77, [accessed 30/04/2017].
53 Uganda Legal information Institute displays almost 100 cases related to compensation against the attorney general. See https://www.ulii.org/search/ulii/compensation%20and%20unlawful%20detention%20%20, accessed 11/06/2018.

As private persons, i.e., non-civil servants may be responsible for unlawful detentions, Article 2(7) also states permits suits against those persons.[54] To obtain compensation against such persons, the unlawfully detained person may file a common law tort action for false imprisonment.

According to section 15 of the Ugandan Criminal Procedure Code,[55] any private person may arrest any person who in his or her view commits a cognizable offence, or whom he or she reasonably suspects of having committed a felony. Moreover, section 16 of the above code states that "any private person who arrests any person without a warrant shall without unnecessary delay make over the person so arrested to a police officer, or in the absence of a police officer shall take the person to the nearest police station". If, under the Criminal Procedure Code, a private person makes an arrest that turns out to be unlawful, the private person may be sued for false arrest.[56] The magistrate courts are the only competent courts to adjudicate claims for compensation for unlawful detention against a private person.[57] Either party dissatisfied with the magistrate's decision has the right to appeal to the High Court.[58]

4.1.3.3. Compensable damages

In addition to the constitutional rule governing the right to compensation for unlawful detention, the courts have developed detailed procedural rules by applying tort law on false imprisonment to claims against public bodies and public officials. For example, Ugandan courts, through case law, have determined the appropriate amount of damages in cases of unlawful detention. Ugandan courts recognise three

54 For example, shopkeepers who detain suspected shoplifters in their shops could face a civil suit if the suspected shoplifter claims the detention was unlawful.

55 Criminal Procedure Code Act 1950, available at http://www.ulii.org/ug/legislation/consolidated-act/116, [accessed 28/04/2017].

56 For example, some cases have been initiated against private security officers who have arrested or detained persons. See, e.g. *Winyi Kaboyo* v *KPI Security Services Ltd*, Civil Appeal nº. 008 of 2012 (UGHCCD 2014). In that case, the Magistrate found that the plaintiff had been falsely imprisoned by a private security officer. Accordingly, the magistrate awarded plaintiff 5,000,000 Ugandan shillings as general damages; 3,000,000 Ugandan shillings as punitive damages; interest at the rate of 18% on both awards from the date of judgment till payment in full, and costs of the suit.

57 Section 208 of Ugandan Magistrates Courts Act, available at http://www.ulii.org/ug/legislation/consolidated-act/16, [accessed 28/04/2017].

58 Section 220 of Ugandan Magistrates Courts Act.

categories of damages: special, general, and exemplary, for compensating victims of unlawful detention.[59]

The first category, special damages, refers to the quantifiable monetary losses suffered by the plaintiff. Special damages include transport expenses, damaged property and lost earnings.[60] Special damages are not presumed to flow from the wrong and are awarded only after strict proof. [61] For example, in the case of *Kamuntu* v *Sendagire* & Anor,[62] the plaintiff alleged he was unlawfully arrested by the Ugandan police, which confiscated his property, including cattle, a motorcycle and money. He also claimed that the police illegally detained him for several weeks at five different police stations, where he was beaten and tortured, but was never charged in court.[63] He also stated that the false and malicious allegations against him were levied without any truth, and/or evidence and that the file was closed on the orders of the Deputy Director of Public Prosecutors. The court awarded him special damages in the amount of UGX 90,000,000 (€19663) for his confiscated cows and UGX 680,000 (148) for his medical treatment for injuries sustained in jail.

The second category is general damages. General damages are presumed or implied by the law to naturally flow from the unlawful detention and include bodily pain and suffering.[64] Courts have discretion to award general damages without proof of a specific amount.[65] In awarding general damages, courts consider the individual circumstances of the particular unlawful detention. Courts decide each case based on its peculiar facts.[66] For example, in *Kidega Alfonsio,* after considering the individual circumstances of the plaintiff and the condition of his unlawful detention

59 Khiddu-Makibuya, E., Uganda, in Theo Van Boven, *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Maastricht 11 - 15 March 1992, Utrecht: Netherlands Institute of Human Rights, 1992, p.90.

60 *Mugwanya* v. *Attorney General,* Civil Suit nº.154 of 2009 (UGHC 2012). [Hereinafter referred to as "*Mugwanya* case"].

61 *Akankwasa* v. *Attorney General,* HCT-00-CV-CS-0202-2013 (UGHC 2016).

62 UGHCCD, *Kamuntu* v. *Sendagire,* Civil Suit nº. 188 of 2009 (UGHC 2016). [Hereinafter referred to as "*Kamuntu* case"].

63 *Id*.

64 *Mugwanya* case.

65 *Kamuntu* case.

66 *Kainamura* v. *Attorney General* , 1 Civil Suit nº. 961/89 (UGHC 1994).

and mistreatment for nine days, the court awarded the plaintiff general damages of UGX 2,000,000 (€ 437) relying on previously decided cases.[67] In doing so, the court relied on the cases of *Newman* v. *Attorney General*,[68] where a court awarded the plaintiff general damages of UGX 3,000,000 (€655) for twelve days of unlawful detention and *Apire Michael* v. *Attorney General*,[69] where a court awarded the plaintiff general damages of UGX 8,000,000 (€1747) for unlawful arrest and detention of four months and one day.

The third category is exemplary or punitive damages, which United Kingdom courts award where the defendant, normally a government agent, acts oppressively, arbitrarily or unconstitutionally and in utter disregard of the plaintiff's rights.[70] Ugandan courts apply a similar definition, explaining that exemplary damages are appropriate when government officials act in a flagrant, oppressive, arbitrary and unconstitutional manner.[71] Exemplary or punitive damages are meant to deter the wrongdoer from repeating the act.[72] In *Kamuntu* v *Sendagire*,[73] the court found that the police had illegally detained and tortured the plaintiff for several weeks. The court, therefore, awarded the plaintiff UGX 100,000,000 (€26,038) as punitive damages, explaining that it hoped that the award would deter violations of people's rights by the police, who should be safeguarding such rights, not violating them.[74]

4.1.4. The role of the Ugandan Human Rights Commission in the enforcement of remedies for unlawful detention

Article 51 of the Constitution of Uganda of 1995 established the Ugandan Human

67 *Kidega Alfonse case*.
68 *Newman* v. *Attorney General*, HCB2009. [Hereinafter referred to as "*Newman case*"].
69 HC.C.S., *Apire Michael* v *Attorney General*, nº. 92 of 2004.
70 Exemplary damages are limited to three circumstances: (1) for oppressive, arbitrary or unconstitutional actions by the servants of government, (2) where the defendant's conduct was 'calculated' to make a profit for him or herself and (3) where a statute expressly authorizes them. *Rookes* v *Barnard*, (nº 1) UKHL 1 (1964).
71 *Mugabi* v *Attorney General*, Civil Suit nº. 133 of 2002, (UGHCCD 29 2013);
72 *Mugwanya, supra, p.*147 n. 67.
73 *Kamuntu* v *Sendagire & Anor*, 30 August 2016, *Civil Suit nº. 188 of 2009*.
74 *Kamuntu, supra*. In that case, the plaintiff sued the police officer responsible for his unlawful detention in addition to the Attorney General. Article 23(7) of the 1995 Ugandan Constitution, which provides: "A person unlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority whether it is the State or an agency of the State or other person or authority. required the State to pay for the police officer's violation of rights."

Rights Commission (UHRC). At the end of 2015, its staff of the UHRC totalled 223, including five commissioners and the chairperson.[75] And, in addition to its headquarters office it had ten regional offices.[76] Article 54 of the Ugandan Constitution states that UHRC shall be independent and shall not be subject to the direction or control of any person or authority. The UHRC receives financial support from the government and development partners.

4.1.4.1. The UHRC mandate

According to Article 52(1) of the Ugandan Constitution, the UHRC's mandate is to:

> investigate, at its own initiative or on a complaint made by any person or group of persons, the violation of any human right; visit jails, prisons, and places of detention or related facilities with a view to assessing and inspecting the inmates' conditions and make appropriate recommendations; establish a continuing programme of research, education and information to enhance the respect of human rights; recommend to Parliament effective measures to promote human rights, including the provision of compensation to victims of violations of human rights, or their families; create and sustain within society an awareness of the provisions of the Constitution as the fundamental law of the people of Uganda; educate and encourage the public to defend this Constitution at all times against all forms of abuse and violation; formulate, implement, and oversee programmes intended to inculcate in the citizens of Uganda an awareness of their civic responsibilities and an appreciation of their rights and obligations as free people; and monitor the government's compliance with its obligations under international treaties and conventions on human rights.

Moreover, Article 52(2) of the Ugandan Constitution requires the Commission to publish periodic reports and submit annual reports to Parliament on the state of human rights and freedoms in the country. The UHRC has adhered to its mandate without fail over the years.[77]

75 UHRC, *The 18th Annual Report of the Uganda Human Rights Commission 2015*, p. 82 (2016).
76 *Id.*, p.ii.
77 Peter, C. M., (2009), p.361.

Article 53(3) of the Constitution provides that any person dissatisfied with an order made by the Commission has the right to appeal to the High Court. Article 53(4) of the Constitution that "the Commission shall not investigate any matter which is pending before a court or judicial tribunal; a matter involving the relations or dealings between the Government and the Government of any foreign State or international organization; or a matter relating to the exercise of the prerogative of mercy." Although victims of human rights violations are entitled to submit their complaints to the High Court or to UHRC, once submitted to the court, that claim will and cannot be received and investigated by UHRC.

4.1.4.2. The enforcement of remedies for unlawful detention by the UHRC

Article 53(1) of the Ugandan Constitution empowers the UHRC to act as a court of law and receive complaints, issue summonses, question any person, require any person to disclose any information within his/her knowledge relevant to any investigation by the Commission; and commit persons for contempt of its orders.[78] Article 52(a) provides that the UHRC may investigate the violation of any human right, on its own initiative or on a complaint made by any person or group of persons. In addition, the Commission, if satisfied that there has been a violation of human rights or freedoms, is empowered to order the release of a detained or restricted person,[79] payment of compensation or any other legal remedy or redress. The UHRC's quasi-judicial powers have been instrumental in making the UHRC the strong institution that it is.[80]

In 2012 alone, the UHRC received 2,725 complaints. Sixteen percent of the complaints related to personal liberty/detention beyond forty-eight hours. In that year, the UHRC tribunal heard and concluded ninety-six complaints: twenty-five were decided in favour of the plaintiff and ten were resolved amicably.[81] The Commission awarded victims a total of UGX 329,888,000 (€72073). The 2012 UHRC Report

78 Art. 53(1) of the Constitution of Uganda.
79 *Kishaija Steven* v. *Attorney General*, Misc.Cause n°.15 of 2010 (UGHC 2010).
80 Peter, C. M., *The Protectors: Human Rights Commissions and Accountability in East Africa*, p. 257 (Fountain Publishers Kampala, 2008).
81 UHRC, *15th Annual Report*, *p.*16 (2012).

states that the government has paid up to UGX 1,093,899,461 (€238995) of all tribunal awards decided by the UHRC since 2003, with an outstanding balance of UGX 2,815,035,515 (€615029). Although that report does not indicate how much has been paid specifically for unlawful detentions, it does state that the awards were mainly for violations of the right to be free from torture and cruel, inhuman and degrading treatment and the right to liberty.[82]

In 2015, the UHRC received 4,227 complaints, 27 of which related to unlawful detention.[83] During that year, the UHRC awarded UGX 579,300,000 (€126565) to victims of human rights violations. Over ninety-three percent of the UHRC's awards were against the Attorney General.[84] The awards were mainly for violations of the right to be free from torture and cruel, inhuman and degrading treatment and the right to liberty.

In 2016, the UHRC received 4,220 complaints.[85] In that year, the highest numbers of complaints (438) were for unlawful detentions beyond 48 hours.[86] The total compensation that the UHRC awarded to victims was UGX 1,044,524,500 (€228207).[87]

The 2015 UHRC Report indicates that the UHRC faces a number of challenges. One challenge is that some state agency and state institution respondents do not fully cooperate with UHRC to enable it to investigate complaints. Other challenges are delayed payment of its awards[88] and limited resources.[89] Moreover, due to the lack of a witness protection law and lack of a national legal aid scheme, many victims of human rights violations in Uganda do not file complaints.[90] Despite those challenges, in 2013, the UHRC won an award from the African Commission on Human and Peoples' Rights for being the best National Human Rights Institution

82 UHRC, (2012), p.16.
83 UHRC, *18th Annual Report 2015*, p.xxi.
84 *Id.*, p.31.
85 UHRC, *19th Annual Report 2016*, p.206.
86 UHRC, (2016), p.207.
87 *Id.*, p.179.
88 *Id.*, p.32.
89 *Id.*, p.91.
90 *Id.*, p.32.

(NHRI) for contributing the most to the human rights work in Africa.[91] The UHRC has carved for itself a specific niche for its bravery in promotion and protection of human rights in Uganda. Without fear, it has confronted government departments against which complaints have been made and demanded explanations and commitments for reform.[92]

4.1.5. Conclusions about Uganda

The rights to *habeas corpus* and compensation for unlawful detention are established in the Uganda Constitution. In Uganda, *Habeas corpus* petitions are filed in the High Court against the head of the prison holding the prisoner. Once a *habeas corpus* petition is filed, the head of the prison has the burden to prove the lawfulness of the detention. If a court finds the detention unlawful, it orders the head of the prison to release the prisoner. However, despite the clear legal framework on *habeas corpus,* because of the lack *pro bono* and legal aid attorneys, unlawfully detained prisoners in Uganda rarely file *habeas corpus* petitions.

The Uganda Constitution also establishes the right to compensation for unlawful detentions. False imprisonment is a tort of strict liability. The High Court adjudicates claims of unlawful detention by civil servants and the Attorney General is the defendant. Victims of unlawful detention may also file claims in the UHRC. The UHRC has played a great role in providing remedies for unlawful detention in Uganda. The computation of damages for unlawful detention has been developed through case law where courts award three categories of damages (special, general, and exemplary) to compensate unlawfully detained persons.

91 UHRC wins an award as the best national human rights institution in Africa, available at http://uhrc.ug/uhrc-wins-award, [accessed 28/08/2017].

92 Peter, C.M., (2009), p.362.

4.2. Remedies against unlawful detention in France

France is a party to both the ICCPR[93] and to the European Convention on Human Rights (ECHR).[94] Both instruments provide for the right to be released from and compensation for unlawful detention.[95] Both conventions require the State parties to enact domestic legislation to enable the realisation of these rights in their countries.[96]

This section examines the established mechanisms in France to enable the enforcement of those rights. The first subsection focuses on guarantees against unlawful detention in France, while the second focuses on compensation for unlawful detention. The third subsection discusses the compensation for unjustified detention in France.

4.2.1. Protection of the individual against unlawful detention in France

Although France does not have a so-called *writ of habeas corpus*,[97] it recognises the right to individuals' liberty and security.[98] According to Article 7 of the French Declaration of the Rights of Man and of the Citizen,[99] "No individual may be accused, arrested, or detained except where the law so prescribes, and in accordance with the procedure it has laid down." The right to liberty is also recognized in Article 66 of the French Constitution, which commands: "No one may be arbitrarily detained. The French domestic legislation, especially the Code of Criminal Procedure, guarantees the right to be free from unlawful detention. Provisions of the Code of

93 Rwanda acceded to the ICCPR on 16 Apr 1975 and by France on 4 Nov 1980.

94 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at http://www.refworld.org/docid/3ae6b3b04.html, [accessed 10 March 2017]. France ratified the European Convention in 1974. See Decree 74-360 publishing the ECHR adopted on 3 May 1974, *J.O*, 4 May 1974, p. 4750.

95 Art. 9(4) and (5) of the ICCPR and Art. 5(4) and (5) of the ECHR.

96 Human Rights Committee, (2014), § 50.

97 Atwill, N., "France: *Habeas Corpus* Rights – March 2009," in *Habeas Corpus Rights: Canada, Egypt, France, Germany, Iraq, Italy, Japan, Pakistan, Russia, Saudi Arabia, Syria, United Kingdom, and Yemen* at 7-8 (The Law Library of Congress 2009).

98 The Declaration of Human and Civil Rights of 26 August 1789, available at https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789, [accessed 07 March 2017].

99 That Declaration is part of *bloc de constitutionnalité* in France. This *bloc* includes articles of *Constitution de 1958, la Déclaration des droits de l'Homme et du citoyen de 1789*.

Criminal Procedure relating to police detention, provisional detention, and pre-trial detention, as well as making and unlawful detention an offence, support the right to be free from unlawful detention. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute."[100]

4.2.1.1. Police detention

The French Code of Criminal Procedure (*Code de Procédure Pénale* or CPP) at Article 63-1 allows the Judicial Police to arrest a suspect in only a limited number of circumstances.[101] Article 62-2 of the CPP allows the judicial police to arrest and detain a person for the purpose of inquiry. The police may arrest and detain a person for inquiry only if they have plausible reasons to suspect that the person has committed or attempted to commit an offence. Article 63 II of the CPP states that the police may not detain a suspect more than twenty–four hours without authorization of the Prosecutor, and then, only for an additional twenty-four hours and only when the alleged offence is punishable by imprisonment of at least one year.[102] For cases of suspected organised crime, Articles 706-73 and 706-72 of the CPP permit extension of police detention from forty-eight hours to another forty-eight hours maximum. However, Article 706-88 of the CPP permits that extension only if granted by either the liberty and custody judge[103] or the investigating judge.[104] The investigating judge has the power to order release of detained persons. Moreover, Article 125 of the CPP provides that, if a detained person is not presented before a judge within twenty-four hours or authorized period of extension, that person should be released immediately.

100 Art. 66 of the Constitution of 4 October 1958, consolidated version of 07 February 2017, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194, [accessed 07/03/2017].
101 Code of Criminal Procedure in France,(CPP) consolidated version of 02 March 2017, available at https://www.legifrance.gouv.fr/affichCode.do;jsessionid=F3F5129D9BE0F924A71B233F2CE25E41.tpdila12v_3?idSectionTA=LEGISCTA000006151876&cidTexte=LEGITEXT000006071154&dateTexte=20170307, [accessed 07 March 2017].
102 Art. 63, II of the CPP.
103 Art. 137-1 of the CPP states that the liberty and custody judge decides pre-trial detention matters, including detention and extension orders and release applications.
104 Art. 49 of the CPP places the investigating judge in charge of judicial investigations. The investigating judge may not take part in the trial of the criminal cases that he or she dealt with in his capacity as investigating judge, under penalty of nullity. Art. 50 states that the investigating judge is selected from the judges of the court and is appointed following the formal rules for the appointment of judges.

4.2.1.2. Pre-trial detention

Contrary to police detention which takes place in police prison, pre-trial detention takes place in official prisons, especially in arrest houses.[105] Article 137-1 of the CPP states that pre-trial detention is ordered and extended by the liberty and custody judge (*le juge des libertés et de la détention*).[106] The provisional detention decision must be taken and motived by the competent authority. The specialized judge of liberty and custody is the competent authority to authorize provisional detention in France.[107] Article 137 of the CPP states that provisional detention is an exception to the consecrated principle of liberty and presumption of innocence in the French CPP. According to Article 144 CPP extension or refusal of the provisional detention decision should always be motivated. The provisional detention extension must be based on the need to investigation or security reasons.
Also, a person under provisional detention is entitled to challenge the lawfulness of his detention and may file a petition for release at any time during the investigation.[108] Moreover, the judge must order the immediate release of a pre-trial detainee as soon as conditions for his or her detention no longer exist.[109]

Additionally, courts may order release of a person who is detained beyond a reasonable time. Pursuant to Article 144-1 of the CPP, "[p]re-trial detention may not exceed a reasonable length of time in respect of the seriousness of charges brought against a person under judicial examination and of the complexity of investigations necessary for the discovery of truth." Thus, if a reasonable time for the investigation has been exceeded, the detained person should be released.

Articles 145 to 148 of the CPP limit the maximum period a person may be provisionally detained, depending on the offence gravity, the category of the offence and the criminal record of the suspect. Article 145-1 of the CPP states:

105 Pradel, J., «la détention avant jugement en droit français», Van Kempen, P.H.P.H.M.C., (2012), p.383.
106 Art. 137-1 CPP states that the liberty and custody judge is a judge with the rank of president, of senior deputy president, or of deputy president. He is appointed by the president of the district first instance court."
107 Art.145 CPP.
108 Art.148 of the CPP.
109 Art. 144 of the CPP.

> Detention may not be in excess of four months in misdemeanour matters if the person under judicial examination has not previously been sentenced, in respect of a felony or an ordinary misdemeanour, to an unsuspended prison sentence of at least a year, and when he is at risk of a sentence of five years or less. In other circumstances, the liberty and custody judge may exceptionally decide to extend the pre-trial detention for a period not in excess of four months, in a reasoned decision in accordance with the provisions of article 137-3 .... This decision may be renewed following the same procedure, subject to the provisions of article 145-3. The total duration of the detention may not exceed a year.[110]

According to Article 145-3 CPP in case the provisional detention is extended more than one year for a felony and eight months for a misdemeanour, the provisional detention order should justify the ground for that extension and probable time to finish that procedure. The pre-trial detention can be extended to two, three or four years depending on the complexities of cases but that extension should be granted by the courts after the hearing in presence of prosecution and defence of an accused person.[111]

The 2015 Council of Europe's Committee for the Prevention of Torture (CPT) report on France notes that the French legal system prohibits mistreatment of detained persons. The rights of detainees include the right to inform a relative of the detention, the right to a lawyer, the right to medical treatment and the right to be informed of his or her rights.[112] The 2016 U.S. Department of State country report on human rights practices in France states that in general, the French government observed that conditions of detention complied with the law, but that the length of pre-trial detention was a problem.[113]

110 Article 145-1 of the CPP provides: "this time limit is extended to two years where one of the component parts of the offence was committed outside the national territory, or where the person is being prosecuted for drug trafficking, terrorism, criminal conspiracy, living off immoral earnings, extortion of money or for a felony committed by an organised gang and which carries a sentence of ten years' imprisonment."

111 Pradel, J., (2012), p.386.

112 The Council of Europe's Committee for the Prevention of Torture (CPT), *Rapport au Gouvernement de la République française relatif à la visite effectuée en France par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 15 au 27 novembre 2015*, Strasbourg, le 7 avril 2017, p.17. Available at on https://rm.coe.int/1680707074, [accessed 13/11/2017].

113 U.S. Department of State, *Country Report on Human Rights Practices 2016-France*, pp.5 &7.

4.2.1.3. Punishment for the offence of unlawful detention

French law provides for severe punishment for judges and civil servants who have arbitrarily ordered or carried out an unlawful detention. According to Article 432-4 of French Penal Code (*Code Pénale* or CP), "a person holding public authority or discharging a public service mission, acting in the exercise or on the occasion of his (or her) office of missions" is subject to seven years imprisonment and a fine of €100,000. When the unlawful detention is for more than seven days, the penalty is increased to thirty years imprisonment and a fine of € 450,000.[114]

French law not only provides for severe punishment of those who have been directly involved in unlawful detention but also of those aware of the unlawful detention but did not stop it. Those persons are subject to three years imprisonment and a fine of € 450,000.[115] Moreover, receiving and keeping a detained person without a valid detention order or unlawfully extending the duration of detention is punishable by two years of imprisonment and a fine of € 30.000.[116] Such laws show the importance of the right to liberty in France. However, this study did not find any cases where judges or other civil servants were convicted of unlawful detention offences.

One reason for the lack of cases may be that French law requires intent.[117] In order to punish those responsible for unlawful detention, a prosecutor must prove intent of the government official.

4.2.2. Compensation for unlawful detention

In addition to French tort law principles embodied in Articles 1240–1244 of its Civil Code,[118] French law contains specific provisions on compensation for detention. Victims of unlawful detention in France are entitled to compensation based on: (1) Article 141-1 of the *Code de l'Organisation Judiciaire* (COJ), which makes the state

114 Art.432-4 of the French Penal Code (CP), the consolidated version at 1st February 2016, available at https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20160301, [accessed 1/03/2016].

115 Art.432-5 of the CP.

116 Art.432-6 of the CP.

117 *Il n'y a point de crime ou de délit sans intention de le commettre.*

118 For example, Article 1240 states that "[a]ny act of man, which causes damages to another, obliges the one by whose fault it occurred to compensate it.

liable for damages from the defective functioning of justice system services[119] and (2) Articles 149-150 of the CPP, which requires the state to pay compensation for any "material or moral harm" caused by a detention where a decision was made to drop a case, or there is an acquittal or discharge. The right to compensation under Articles 149-150 of the Code of Criminal Procedure for detentions that do not result in convictions is independent of the ability to seek compensation for unlawful detention through Article 141-1 of the COJ for damages resulting from the defective functioning of justice system services.[120] Depending on the facts of their cases, victims of unlawful detention have a choice to pursue recovery either under Articles 149-150 of the CPP or Article 141-1 of the COJ. For example, where a person who has been held in pre-trial detention is later acquitted he or she may seek compensation under Articles 149-150 of the CPP. In contrast, an unlawfully detained person who was subsequently convicted may seek compensation only under Article 141-1 of the COJ.

The following sections consider both methods of seeking compensation. Sections 4.2.2.1 to 4.2.2.5, below discuss how to obtain compensation for unlawful detention based on Article 141-1 of the COJ. Section 4.2.3, below, discusses how to obtain compensation based on Articles 149-150 CPP.

4.2.2.1. The legal framework

In France, administrative courts have created autonomous rules of governmental liability.[121] Similarly, French administrative courts and the European Court of Human Rights have influenced the rules governing compensation for detention in France. In the eighteenth century, the French governing principle was *"irresponsabilité de l'Etat,"*[122] which was reflected in the maxim *"le Roi ne peut mal faire."*[123] Since 1873,

119 Article 141-1 of the COJ indicates that « *L'Etat est tenu de réparer le dommage causé par le fonctionnement défectueux du service de la justice*».

120 Commission de Suivi de la Détention Provisoire (CSDP), *Rapport Annuel* 2013, 2014, p. 73. The CDSP was established by Article 72 of Law n° 2000-216 of 15 June 2000, with a mandate to collect statistical data related to pre-trial detention in France. It is part of the Ministry of Justice.

121 Fairgrieve, D., (2003), p.1.

122 *"Irresponsibilité de l'Etat"* literally means "Immunity of the State." Dupuis, G., Guedon, M-J., & Chretien P., *Droit administrative*, 6th ed, Paris, 1999, p.514.

123 *"Le Roi ne peut mal faire"* literally means "The King can do no wrong." Soulier, G., *Réflexions sur l'évolution et l'avenir du droit de la responsabilité de la puissance publique*, RDF, 1969, p. 1039, 1043.

there has been a development towards state liability in France.[124] That shift is marked by the 1873 case of *Blanco*.[125] In *Blanco,* the plaintiff, who was injured by a wagon owned by a government agency brought an action before a court. Relying on the principle of separation of powers, the court held that the administrative courts had jurisdiction to hear actions brought against the State for damage caused by persons employed in public service.[126] It explicitly rejected applications of rules stated in the code civil relating to tort law. The rules of administrative liability were considered by the courts to be of a special character. The need to balance the exercise of private rights with general public interest required certain limits to be placed upon state liability.[127]

However, despite the development of state liability in France, the dogma of *irresponsibilité de l'Etat* in the case of malfunction of justice was dominating in the nineteenth century though justice was considered as one public service in France.[128] This situation has reformed in 1972 due to the influence of legal scholars[129] and some parliament members. Therefore, the law[130] which regulates the state liability in case of malfunctioning of justice service, resulting from the project initiated by two lawyer's parliament member *MM. Foyer* and *Mazeaud* has been initiated.[131] By initiating that project, they argued that it was a right time to apply the common principle of state liability of public service to the justice service as well.[132] From their proposal, the general principle of state liability in case of malfunctioning of justice service has been recognised by the article L.781-1 COJ which indicates that the State

124 Fairgrieve, D., (2003), p.1.

125 *Blanco* v *French State*, TC, 8 February 1873, in *1st supplt - Rec. Lebon*, p. 61. Quoted by Fairgrieve, D. (2003), p.1.

126 Fairgrieve, D., (2003), p.13.

127 *Ibid.*

128 Besson, J.-P., Le dysfonctionnement du service public de la justice, *Le Courrier Juridique des Finances et de l'Industrie n° 61 - Troisième Trimestre 2010*, p.15.

129 Philippe, X., Chapter 5 Les dommages-intérêts pour violation des droits de l'homme en France, in Ewa_Baginska, *Damages for Violations of Human Rights A Comparative Study of Domestic Legal Systems*, volume 9, Springer, 2016, p.76.

130 Law n° 72-626 of 5 July 1972, *Official Journal of 9 July 1972*, 718-1, Art 11: 'The State is liable for injury caused by the defective functioning of the justice system. This liability is only incurred in cases of gross fault *(faute lourde)* or of denial of justice.

131 Errera, R., *Sur l'indépendance et la responsabilité des Magistrats*, in Gaboriau, S., & Pauliat, H., La responsabilité des magistrats, Actes du colloque organisé à Limoges le 18 novembre 2005, Presses Universitaires de Limoges – Pulim, p.86.

132 *Id.*, p.10.

has to compensate damages resulted from the defective functioning of its justice system services.[133] Nevertheless, the state liability was limited only to gross fault or denial of justice.[134] It is worth indicating that with the introduced reform in 2006[135] on COJ, the content of Article L781-1 COJ has become the article L141-1 of the revised COJ.[136] So now, the unlawfully detained person can base his compensation claim on Article L141-1 of the revised COJ.

4.2.2.2. Who may be sued and what is the competent jurisdiction?

Article L141-1 COJ indicates that the State has to compensate damages resulted from the defective functioning of its justice system services. Therefore, victims of unlawful detention as other victims of malfunctioning of justice services, in general, are entitled to claim compensation for damages directly from the State. What is notable is that, according to this provision, the state is liable not only for wrongs committed by judges themselves but also for wrongs committed by other staff involved in justice services include the judicial police and court clerk.[137] By defining the criminal justice system, they refer to all activities performed by all civil servants who work in the justice system. For example, activities performed by judges, court registrars, court assistants and the judicial police while they called to perform juridical acts.[138] In France, the State is liable regardless the types of the fault of judicial authorities.[139] Although it is indicated in French law that the judges can be personally liable for their wrongdoing in the sense that the State, after having compensated a victim, has a right of recourse against them,[140] *Canivet* indicates that the State does not use this right in practice.[141]

133 *L'Etat est tenu de réparer le dommage causé par le fonctionnement défectueux du service public de la justice.*
134 *Sauf dispositions particulières, cette responsabilité n'est engagée que par une faute lourde ou par un déni de justice.*
135 Ordonnance n° 2006-673 du 8 juin 2006.
136 Besson, J-P., (2010), p.157.
137 Iegrashn, O., *State Liability for Judicial Wrongs: comparative analysis of the UK, France and Ukraine*, Central European University Collection, 2008, p.23.
138 Besson, J.-P., (2010), p.158.
139 Fairgrieve, D., (2003), p.1.
140 Art. L141-3 COJ.
141 Canivet, G. & Joly –Hurard, J., « La responsabilité des juges, ici et ailleurs », *Revue Internationale du Droit Comparé*, 4-2016, p.1074.

With regards to jurisdiction, in France, justice is administered through two separate systems: administrative and judicial.[142] Claims related to State liability resulting from the defective functioning of the justice system are within the jurisdiction of administrative courts.[143]

4.2.2.3. Who is entitled to claim compensation?

The State is liable for defective functioning of the justice system when the plaintiff has suffered injury from the gross fault *(faute lourde)* or a denial of justice.[144] Thus, victims of defective functioning of the justice system such as victims of unlawful detentions are entitled to compensation. *Besson* wrote that in the earlier period, only parties to a proceeding were entitled to claim compensation.[145] Later victims of dysfunction of justice have been extended to all users of public service of justice (*usagers du service public de la justice*).[146] By interpreting the concept of the user of justice service, the French court decision included all directly concerned persons with the litigant's procedure. For example, the company director of the company that is subject to the collective procedure belongs to the category of users of justice services when he is concerned with the procedure from which he suffered damages due to that collective procedure.[147]

Furthermore, the *Cour de cassation* ruled that *damage par ricochet* resulting from the malfunctioning of justice should be compensated.[148] Victims *par ricochet* are persons directly related to victims, suffered damages resulting from principal damages from the direct victim. Victims *par ricochet* (a rebound victim)[149] include all persons (such as relatives and persons who intervened to help the unlawfully detained person) who suffered damages in addition to the victim's damages. For example, in one case

142 Kock, *The Machinery of Law Administration in France*, 108. U. PA. L. Rev. 366, 368, (1960).
143 Administrative courts in France are *Conseil d'Etat, Cours administratives d'appel, tribunaux administratifs, and cour nationale du droit d'asile*, available at http://www.conseil-etat.fr/Tribunaux-Cours/La-juridiction-administrative, [accessed 07/02/2018].
144 Art. 141-1 COJ.
145 Besson, J.-P., Le dysfonctionnement du service public de la justice, *Le Courrier Juridique des Finances et de l'Industrie n° 61 - Troisième Trimestre 2010*, p.158.
146 For the court decision interpretation. See TGI Évry, 16 février 2004, et CA Paris, 29 mars 2004.
147 Cass. Civ. 1ère, 25 janvier 2005, *Bull.* n° 41, Quoted by Besson, J.-P.,(2010), p.158.
148 Com., 12 juillet 2004, Bull. n° 154 ; TGI Paris, 28 juin 2006, Quoted by Besson, J.-P., (2010), p.158.
149 Van Dam, C., *European Tort Law,* (2d ed. Oxford University Press 2013), p.353.

where a person who was under pre-trial detention died in prison due to the gross fault of the *juge d'instruction* who was in charge of that case.[150] The *Cour cassation* indicates that the widow, daughter, and parents in law of the detained person were entitled to claim compensation not only as the right holder (*ayants droits*) of that person but also as the victims *par ricochet* for their personal damages.[151]
Additionally, successors (*ayants droits*) are entitled to claim compensation when the victim has been died before instigating his compensation for unlawful detention claim. In case the victim of the malfunctioning of justice services died after he initiated a compensation claim, that compensation will be paid to rights holder (*ayants droits*).[152]

4.2.2.4. Fault

In order to be compensated the unlawfully detained person is also required to prove fault. Article 141-1COJ indicates that suffered injury resulted from the gross fault *(faute lourde)* or of denial of justice should be a precondition to engaging the state liability due to defective functioning of the justice system in France. The notion of fault accommodates both an objective criterion of unlawfulness and a subjective criterion, which can be called "*imputabilité or culpabilité*".[153] *Scherr* argues this strict interpretation has affected the majority of asserted claims for liabilities in front of ordinary courts. They tend to fail or are simply dismissed.[154]

However, *Phi* claimed that since 1994, the fault in the defective functioning of the justice system has been interpreted as any deficiency characterized by the fact or

150 Cass. 1re civ. 16 avril 2008, n° 07-16.286.
151 Cass. 1re civ. 16 avril 2008, n° 07-16.504.
152 *« Le droit à réparation du dommage moral subi par une personne défunte, entré dans son patrimoine, se transmet à ses héritiers »* (TGI Paris, 26 avril 2006).
153 *« La faute lourde est celle commise sous l'influence d'une erreur tellement grossière, qu'un magistrat normalement soucieux de ses devoirs n'y eut pas été entraîné »* (Civ. 1ère, 13 octobre 1953), quoted by Besson J-P., *(2010)*, p.160.
154 Scherr, K. M., *the Principle of State Liability for Judicial Breaches The case Gerhard Köbler* v *Austria under European Community law and from a comparative national law perspective*, Ph.D, Thesis, the European University Institute, 2008, p.262.

series of facts showing that the public service of justice has not fulfilled its mission.[155] *Besson* highlighted that the errors committed during the investigation or the delay in delivering the judgment to concerned person have been considered as a *gross fault* which served as a basis on compensation for the defective functioning of justice.[156] In this regard, *Scherr* claimed that the fault now mostly means its objective component. This means that if the action is unlawful the state is at fault. The culpability, as a rule, is not a condition anymore in state liability due to defective functioning of the justice system in France.[157] In practice, the fault is incurred whenever a violation of a mandatory rule occurs and no valid justification is suggested, and burden disproves fault is on the part of the wrongdoer.[158] *Quézel-Ambrunaz* indicates that this interpretation resulted from the overall objective of tort law in France perspective, which indicates that tort law is more a means to award compensation to a victim, than a means to determine the culpability of individual conducts.[159] The fact that a public authority has acted in violation of the law is sufficient to constitute fault without checking his intention or his care while taking that illegal act.[160] Therefore, the intention of the judge or other court staffs is no longer a criterion to define the fault instead unlawful or illegality of acts is per se sufficient condition of state liability.[161]

Moreover, French courts liberally construe the meaning of "denial of justice" under the law as any failure by the state to fulfil its duty of judicial protection of the individual, which includes the right to have a case decided within a reasonable time.[162] That interpretation was influenced by the European Convention on Human Rights

155 « Toute déficience caractérisée par un fait ou une série de faits traduisant l'inaptitude du service public au regard de la justice de la mission dont il est investi ». See Cass. Ass.Plein 23 fév 2001 Bull. n° 5. .p. n° 5, Quoted by Besson, J-P., (2010), p.164. And in Phi, T.T L., *La detention provisoire, étude de droit comparé droit français et droit vietnamien*, Thèse de doctorat, Ecole Doctorale de Droit (e.d.41), Université Montesquieu – Bordeaux IV, 2012, p.311.
156 *TGI Nîmes, 26 mars 2001 and CA Paris, 28 juin* 2004, Quoted by Besson, J-P., (2010), p.164.
157 Scherr, K.M., (2008), p.264.
158 Van Gerven, W., Lever, J. & Larouche, P., *Tort Law*, Oxford: Hart 2000, p. 305.
159 *Quézel-Ambrunaz, C.,* "compensation and human rights (from a French perspective)", *NUJS LAW REVIEW 4. 189 (2011)*, April - June 2011, p.190.
160 Fairgrieve, D., (2003), p.57.
161 *Idem*, p.1. Besson, J-P., (2010), p.158.
162 « Tout manquement de l'Etat à son devoir de protection juridictionnelle de l'individu, qui comprend le droit pour tout justiciable de voir statuer sur ses prétentions dans un délai raisonnable ». See *C et A de Jaeger c. Agent judiciaire du Trésor public, Gazette du Palais*, 1994. II.589, quoted by Errera, R., (2008), p.87.

(ECHR).[163] Article 6 of the ECHR provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This interpretation has been confirmed by the ECtHR.[164] Moreover, the *Cour de cassation* confirmed that to try a person beyond the reasonable time required by Article 6 of the ECHR in itself is a denial of justice under Article L-141-1 of the COJ.[165] In determining what is a reasonable time, French courts follow the criteria set out by the ECtHR in interpreting Article 6(1) of the ECHR.[166] Those criteria are discussed in section 4.4.2.1, below.

4.2.2.5. Damages

In awarding damages flowing from a defective function of justice in France, administrative courts have reflected the civil law approach which requires that the claimant must prove that his or her damages are *certain* and *direct*[167] and must be related to the plaintiff.[168] The victim shall be placed in the same position that he would have been in had the unlawful act not occurred. This principle is known as the "*Principe de réparation intégrale*".[169] Moreover, in order to be compensated, suffered damages should not have been compensated through other actions. For example, if a victim of unlawful detention has been compensated as a victim of unlawful detention offence, the same damages cannot be compensated again based on Article L141-1 COJ. In France, victims of the defective functioning of justice are entitled to obtain compensation for both moral and material damages. In compensating the material damages, *Besson* indicates that courts take into the consideration of lost earnings. Expenses paid by claimant victims of defective of the functioning of justice are also

163 Bonnemaison, J.-L., *La responsabilité juridictionnelle*, Thèse de doctorat, Université Paul Verlaine – Metz, 2011, p.159.
164 CEDH, 6 octobre 1988 *Funke c/ France*, req. n° 10828/84 ; 9 mai 1989, *Barany c/ France* req. n° 11926/86 ; 8 juin 1990, *Mouton c/ France*, req. n° 13118/87 ; 6 mars 1991, *Cunin c/ France* req. n° 14238/88.
165 Cass. civ. 1ere 25 mars 2009, Bull. n° 65, quoted by Bonnemaison, J.-L., (2011), p. 160.
166 Dalloz, **La sanction du non-respect du délai raisonnable n'est pas l'annulation mais la réparation !**, **available at** https://actu.dalloz-etudiant.fr/a-la-une/article/la-sanction-du-non-respect-du-delai-raisonnable-nest-pas-lannulation-mais-la-reparation/h/101415e92a5871869a2d7b3529bb12e7.html, [**accessed 12/02/2018**].
167 CE 25 Jan 1978, Pavita, d. 1979 Jurisprudence 143. and ce 21 feb.200, vogel, req. 195207 cited by Fairgrieve, D., (2003), p.191.
168 Philippe, X., (2016), p.88.
169 *Id.*, p.90.

compensated.[170] While compensating moral damages, the mental suffering related to delay of the case, disgrace and humiliation suffered because of unlawful detention situation are considered.[171]

The burden of proof is always on the claimant to prove that he or she actually sustained damages, as well as causality between the suffered damages and the unlawful act.[172] The claimant is required to prove and calculate all damages before he submits his claim. The French judge has discretionary power in awarding damages requested by the claimant.[173] The 2016 US Department of State country human rights report on France indicates that in general, detained persons in France obtained compensation if found to have been unlawfully detained.[174]

4.2.3. Compensation based on unjustified detention

Before the establishment of Articles 149-150 CPP that related to compensation for unjustified detention, the state could not be held accountable for unjustified detentions and there could be "no liability without fault."[175] Moreover, *Mackinnon* wrote that exposure to the risk of prosecution is one of the inevitable hazards of living in society.[176] Thus, according to him, there is no reason to shield the citizen from the financial consequences of such prosecution, so long as no malice, incompetence or serious neglect can be attributed to the prosecutor.[177]

In 1970,[178] France began providing compensation for detentions not followed by a conviction. Providing compensation for detention not followed by a conviction and was based on the principles of *égalité devant les charges publiques* and risk. The principle of *égalité devant la charges publiques* means that the compensation should

170 *CA Nîmes, 19 décembre 2002,* Quoted Besson, J-P., (2010), p.164.
171 *TGI Paris, 2 mai 2002*, Quoted Besson, J-P., (2010), p.164.
172 Besson, J-P., (2010), p.164.
173 Philippe, X., (2016), p.88.
174 US Department of State, *Country Report on Human Rights Practices 2016,* France, p.7.
175 Borchard, E.M., European Systems of State Indemnity for Errors of Criminal Justice, 3 *J. Am. Inst. Crim. L.* & *Criminology* (May 1912 to March 1913), p. 684.
176 MacKinnon, P., 'Costs and Compensation for the Innocent Accused', 67 *Canadian Bar Review*, 1988, p.90.
177 *Id.*, p.490.
178 Canivet, G., *The Responsibility of Judges in France,* Cambridge Yearbook of European Legal Studies, Volume 5, January 2003, pp. 15-33, p.19.

be provided for those who have assumed a disproportionately large burden or loss caused by activities performed in pursuing the common goals. Hence, a public policy decision was made that the taxpayer, who benefit from the judicial system, should pay to compensate those few citizens who were harmed by the system.[179]

The *Commission de Suivi de la Détention Provisoire* (CSDP) indicates that "even in absence of wrongdoing imputable to its officials, in certain cases the community must put up with the prejudicial consequences of the risk created by the operation of its services, in particular, the justice system in order to avoid a breach of equality between citizens in the face of public burdens imposed by the State."[180] In the same logic, when the state deprives a persons of their liberty for the public interest, the state should compensate them if deprivation is found to be unjustified. It is unfair that a few individuals should be forced to bear the burden of errors of the criminal justice system when society at large reaps the benefits of that system.[181] For that reason, Articles 149 and150 of the CPP established the State's no-fault liability in cases of pre-trial detention followed by acquittal.[182] Acquitted persons who do not want to go through all the required conditions in Article L141-1 of the COJ, may avail themselves of the remedy of Articles 149 and 150 of the CPP to obtain compensation.

4.2.3.1. The legal framework for unjustified detention

The Act of 17 July 1970 introduced a special procedure for compensating persons who were held in pre-trial detention but not prosecuted or were acquitted, when the pre-trial detention caused them damage that is manifestly abnormal and of particular gravity.[183] The Act limited this no fault liability to damages, which include special and extraordinary damages.[184] The extraordinary character of damages was

179 Fairgrieve, D., (2003), p.137.
180 Commission de Suivi de la Détention Provisoire, *Rapport au Garde des Sceaux, la détention provisoire*, Edition 2002/2003, p.75.
181 Dessalles, L., *Quelques Réflexions sur la Détention Préventive: la mise au secret et la réparation des Erreurs Judiciaires* - Primary Source Edition (French Edition), Cotillon, 1863, p.77.
182 Philippe, X., (2016), p.87.
183 Art. 1 of Act n°. 70-643 of 17 July 1970 *Official Journal* of 19 July 1970 in force 1 January 1971.
Canivet, G. & Joy-Hurard, J., « La responsabilité des juges, ici et ailleurs », *Revue Internationale de Droit Comparé, 4-2006, 1065*, p.17.
184 *Loi n° 70-643 du 17 Juillet 1970.*

measured in terms of scope and degree. It was argued at that time that the members of the community must endure the ordinary inconveniences of life as part of society without seeking compensation.[185] It was not easy to define objective criteria for "manifestly abnormal and particular serious injury." Hence, the application of that provision was complicated because the detained person was asked to first prove the special character and extraordinary nature of his or her suffering.

After finding that the requirement that injury should be 'extraordinary or particularly serious' was an obstacle to obtain compensation due to an unjustified detention;[186] the legislature, by the Law of 30 December 1996, removed that requirement.[187] The new law simply states that a court may award compensation to a person who has been detained during criminal proceedings that end either by a decision to drop the case or a final discharge or acquittal decision, when the detention caused damages.[188] Nevertheless, the modification was not clear about the types of damages that could be awarded. The determination of the type of damages that could be awarded for such detentions was left to the *Commission Nationale de Réparation des Detentions* (CNRD).[189]

Because the 1996 reform did not specify the types of damage that could be awarded, in 2000, the legislature enacted another reform through the Law of 15 June 2000.[190]That law established a right to full and obligatory compensation for any person detained during proceedings ended by a decision to drop the case or a discharge or acquittal decision that has become final. According to Article 149 of the CPP, a person who has been imprisoned during proceedings ended by a decision to

185 Iegrashn, O., (2008), p.24.
186 Canivet, G., (2006), p.20.
187 Loi n° 96-1235 du 30 décembre 1996 relative à la détention provisoire et aux perquisitions de nuit en matière de terrorisme, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000562805, [accessed 04 January 2018].
188 Art.9 reads : « Une *indemnité peut être accordée à la personne ayant fait l'objet d'une détention provisoire au cours d'une procédure terminée à son égard par une décision de non-lieu, de relaxe ou d'acquittement devenue définitive, lorsque cette détention lui a causé un préjudice.* »
189 The National Commission for Compensation of Detention has been established by the article 72 of *Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*. The National Commission for Compensation of Detention is one of commissions attached to the *cour de cassation* that intervenes as a jurisdiction of appeal of the decision taken by *les premiers presidents de cour d'appel* with regard to compensation for unjustified detention claim.
190 *Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes.* Commission de Suivi de la Détention Provisoire, (2014), p.77.

drop the case or a discharge or acquittal decision that has become final has, at his or her request, the right to full compensation for any material or moral harm that the detention cause.[191] That provision clarifies that both moral and material harm resulting from detention should be compensated. As a result, compensation for detention in France is no longer a matter of a judge's discretion but a right.[192]

4.2.3.2. Who is entitled to compensation for detention?

Article 149 of the CPP provides for the right to compensation for any material or moral harm resulting from detention for a person who has been detained during proceedings ended by a decision to drop the case or a discharge or acquittal decision that has become final. However, not every discharged or acquitted person in pre-trial detention in France is entitled to compensation. According to Article 149 of the CPP, no compensation is due where the decision to drop a case or a discharge or acquittal decision is based solely on the recognition that the detained person was not responsible for his or her actions under Article 122-1 of the CP,[193] an amnesty was passed after a person was in custody, or the limitation period for prosecution expired after the person was released, when the person was also being held on other charges, or where a person was detained after freely and voluntarily accusing himself or letting himself be wrongly accused in order to let the perpetrator of the offence escape prosecution.[194]

The *Commission Nationale de Réparation de la Détention provisoire* (CNRD) states that the right to compensation for detention followed by acquittal is reserved only for the detained person, not for his relatives or any indirect victims.[195] Therefore, only damages suffered by the detained person are compensable. Spouse and children are not entitled to compensation due to the detention of a spouse or parent.

191 Art. 149 of the CPP reads :« ...la personne qui a fait l'objet d'une détention provisoire au cours d'une procédure terminée à son égard par une décision de non-lieu, de relaxe ou d'acquittement devenue définitive a droit, à sa demande, à réparation intégrale du préjudice moral et matériel que lui a causé cette détention.»
192 Commission de Suivi de la Détention Provisoire, (2014), p.83.
193 Art. 122-1 of the CP states that a person is not criminally liable if, when the act was committed, the person was suffering from a psychological or neuropsychological disorder which destroyed his discernment or his ability to control his actions.
194 Art. 149 of the CPP.
195 Commission de Suivi de la Détention Provisoire, (2014), p.78.

4.2.3.3. Who may be sued and what is the competent court?

According to Article 150 of the CPP, an action for compensation for detention in France must be against the State.[196] State liability is based upon two distinct principles: risk and égalite devant les charges publiques.[197] According to the principle of risk, certain activities of the state, including pre-trial detention, are undertaken in the public interest and may cause harm. If the state engages in such activities, the State is obliged to provide reparation to persons who are harmed by those activities.[198] The principle of *égalite devant les charges publique* is based on the idea that compensation should be provided for those who have shouldered a disproportionately large burden or loss caused by activities pursued for the common good.[199] Under this principle, the State pays compensation for detention when there is a decision not to prosecute or an acquittal. The compensation is paid as criminal justice costs.[200]

After the State compensates the victim, the State has a right to seek indemnity from any malicious denunciator or witness whose fault caused the detention or its extension.[201] However, the State has never done so.[202]

Article 149-1 of the CPP imbues the premier president of the Court of Appeal in the jurisdiction where the decision to drop the case, or the decisions of discharge or acquittal were made to rule on an application for damages if made within six months of the decision to drop the case, or when the discharge or acquittal became final. Debates take place in open court unless opposed by the applicant. The applicant may be heard in person or through counsel.[203]

196 Art. 150 of the CPP states that « *La réparation allouée en application de la présente sous-section est à la charge de l'Etat, sauf le recours de celui-ci contre le dénonciateur de mauvaise foi ou le faux témoin dont la faute aurait provoqué la détention ou sa prolongation. Elle est payée comme frais de justice criminelle.*"
197 In Englsih : "equality before public purse ."
198 Fairgrieve, D., (2003), p.138.
199 *Id.*, at 137.
200 Art.150 of the CPP.
201 Art.150 CPP.
202 Joly-Hurard, J., «La responsabilité civile, pénale et disciplinaire des magistrats » , in: *Revue de droit comparé, vol 58, n° 2, 2006*, p.454.
203 Art. 149-2 CPP.

If the parties are not satisfied with the decision of the Court of Appeal, they have a right to appeal to the *Commission Nationale de Réparation de la Détention provisoire* (CNRD)[204] within ten days of the Court of Appeal's decision being communicated. Article 149-3 of the CPP states that this Commission situated in the *Cour de cassation* has power to decide the case, and its decisions are not subject to appeal. The Commission is composed of the president of the *Cour de cassation* or other judge appointed by him, who is the chair, and two additional judges.

4.2.3.4. Compensable damages

Article 149 of the CPP provides for full compensation (*réparation integrale*) for detentions followed by a decision to drop the case or a discharge or acquittal decision that has become final. That article requires full compensation for both moral and material damages resulting from the detention upon the request of the released person. That person must prove the damage he or she claims to have suffered and must also prove a direct and certain link between the detention and claimed damage. [205]

Material assessable damage such as lost earnings,[206] transport expenses by a spouse visiting the detained person,[207] costs of legal assistance,[208] medical services, and psychological and social service. Lost earnings are based on salaries or wages that the victim would have received.[209] For example, in the decided case of *Mr. X*,[210] the Commission awarded him the amount of 6,618.60 Euros for his lost earnings.

Moral damages compensate for, pain, and suffering, including mental anguish, humiliation and a sense of injustice resulting from the deprivation of liberty.[211] Moral damages may be aggravated by the conditions of detention, e.g., psychological shock

204 The legislative text does not explain why France has chosen to set up a commission within the *cour de cassation* to deal with reparation for unjustified detention issues. The 2012 CNRD annual report indicates that The commission registered 46 appeals in 2012. 29 of these appeals that is 63 % of the total, were changed by the commission. See CNRD, *Rapport d'activités 2012*, p.1.
205 Commission de Suivi de la Détention Provisoire, (2014), p.77.
206 CNRD, 15 juillet 2004, n°2C-RD.078.
207 CNRD, 14 décembre 2005, n° 5C-RD.036.
208 CNRD, 21 janvier 2008, n° 7C-RD.048 et n°7C-RD.049.
209 CNRD, 21 October 2005, n° 5C-RD.001, Bull. n° 10.
210 CNRD, Décision du 20 Janvier 2014, n°13-CRD-021.
211 Commission de Suivi de la Détention Provisoire, (2014), p.74.

by the detained person. Moral damages can also be aggravated by the separation of the detained person from his or her family. An example is the above case of *Mr. X*, who was acquitted of murdering his wife after spending three years, eight months and sixteen days in pre-trial detention. In that case, the court considered that the detention broke his connection to his family, as his relatives were not in France and were not able to visit him during his detention. The court also considered that the detention caused his separation from his 12-year old daughter, who was placed in foster homes. Finally, the court considered that he had attempted suicide and spent sixty days on a hunger strike while asking for the burial of his wife remains.[212] The Commission awarded him moral damages of €100, 000. The 2015/2016 CSDP report indicated that the average award of moral damages was €73 per day. That amount varied between €180 per day for detentions of less than a month and 50 per day for detentions of one year and more.[213] That report also revealed that in 2016, the *cour d'appel* awarded a total of €9.2 million for pre-trial detentions. The minimum award was €200 and the maximum was €781, 902.[214]

Article 149-1 of the CPP requires applications for compensation to be filed within six months of the prosecution's dropping of the case or the discharge or acquittal. The CNRD opined that the six months limitations period was too short for persons who had been in detention to exercise their rights. Hence, the CNRD recommended that released persons be informed of their right to compensation and that court staff guide them on the procedure time limit for claiming compensation.[215]

4.2.4. Conclusions about France

In conclusion, French law allows persons released from detention without a conviction to seek compensation for their detention and provides a specific procedure for doing so. Although the French law includes persons lawfully detained but not convicted, persons who have been unlawfully detained can also avail themselves of the procedures under that law. Detained persons in France have the following rights:

212 CNRD, Décision du 20 Janvier 2014, n°13-CRD-021.
213 Commission de suivi de la Détention Provisoire, *Rapport annuel, 2015-2016*, décembre 2016, p.73.
214 Commission de Suivi de la Détention Provisoire, (2016), p.72.
215 Commission de Suivi de la Détention Provisoire, (2014), p.79.

to inform a relative of the detention; access to a lawyer and a medical doctor; and to be informed of their rights.

Article 141-1 of the COJ establishes State liability for damages resulting from the defective functioning of justice system services. Victims of unlawful detention may sue the State under that article. Under French law, persons affected by the detention (victims *per ricochet*), as well as the unlawfully detained person may claim compensation. French law makes clear that the intent of the judge or judicial police in detaining someone is not relevant because it is only necessary to show the illegality of the act of the judge or judicial police to establish state liability.

To reinforce the presumption of innocence, French law established the right to full and obligatory compensation for unjustified detentions. Victims of unjustified or unlawful detentions in France have sought and obtained compensation.

4.3. Remedies against unlawful detention in England and Wales

Unlawfully detained persons in England and Wales[216] are entitled to challenge the lawfulness of their detention through *habeas corpus*.[217] However, *habeas corpus* is not a vehicle to obtain compensation or damages.[218] To obtain compensation, the plaintiff must file a tort action for false imprisonment.[219] This section analyses the current legal framework for the protection of individuals against unlawful detention. The first subsection describes how individuals are protected against unlawful detention. The second subsection focuses on the means to challenge unlawful detentions. The third subsection discusses compensation for unlawful detention.

216 The United Kingdom comprises England, Wales, Scotland, and Northern Ireland. It contains three different legal systems of which English law is one. This section considers English law, which includes the law of England and Wales.
217 Farbe, Y.J., Sharpe, R. J. & Atrill, S., *The Law of Habeas Corpus*, Oxford University Press (3rd ed. 2011), p.152.
218 Clark, D. & McCoy, G., (2005), p.32.
219 *Ibid.*

4.3.1. Protection of individuals against unlawful detention in English law

4.3.1.1. Police detention

The responsibility for investigating crimes and arresting offenders rests with the police and other law enforcement authorities.[220] Section 30 (1a and 1b) of the Police and Criminal Evidence Act 1984 (PACE) requires that, once an individual has been arrested by a police officer on suspicion of having committed a criminal offence at any place other than a police station, that individual must be taken to a police station as soon as practicable after the arrest. Section 28(3) of the PACE requires police to inform the arrested person that he or she is under arrest, as well as the ground for the arrest. Upon arrival at the police station, an arrested person must be presented to a "custody officer."[221] Section 37(2) of the PACE provides that, if the custody officer determines that there is not sufficient evidence to charge the person, the person must be released, either with or without bail. However, when the custody officer has reasonable grounds for believing that detention without being charged is necessary to secure or to preserve evidence or to obtain evidence, the custody officer may authorise the arrested person to be kept in police custody.[222] In such case, the custody officer must, as soon as practicable, make a written record of the grounds for the detention and informs the detained person of those grounds.[223] Section 40(1) of the PACE mandates that the detention without charge must be reviewed periodically by a review officer.[224] At the police station, the person arrested has the right to see a solicitor who will be provided free of charge.[225]

220 Van Kalmthout, A.M., Knapen, M.M., & Morgenstern, C. (eds.), *Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, 2009, p.944.
221 Section 37(2) of the PACE. The role of a custody officer is to ensure that the defendant is properly treated according to the rules laid down in the PACE and the Codes of Practice. According to section 36(3), the custody officer shall be a police officer of at least the rank of sergeant.
222 Section 37(3) of the PACE.
223 Sections 37(4) and (5) of the PACE.
224 The review officer must be a police officer of at least the rank of inspector and not directly involved in the investigation of the case. Section 40(3)(A) of the PACE requires the first review to take place not later than six hours after the detention without charge was first authorized by the custody officer. Sections 40(3)(b) and (c) of the PACE require that the second review shall be no later than nine hours after the first review and subsequent reviews shall be at regular intervals of no more than nine hours.
225 Shute, S.C. & Mora, P.D.,(2012), p.335.

Section 41(1) of the PACE states that a person shall not be kept in police detention for more than 24 hours without being charged, section 41(7) requires that, if the detained person is not charged after 24 hours, he or she shall be released either with or without bail. Section 42(1) of the PACE specifies that if a police officer of the rank of superintendent or above who is responsible for the police station at which a person is detained has reasonable grounds for believing that continued detention is necessary in order to secure or preserve evidence or obtain evidence through questioning, that officer may authorise an additional twelve hours of detention, for a total of thirty-six hours.[226] Section 43(1) of the PACE directs that any further detention of a suspect in police custody without charge beyond 36 hours must be authorised by a magistrate's court.[227] If a magistrate is unavailable at that time, the law allows the police an additional six hours to obtain the magistrate's authorisation.[228] Hence, a person may be detained at the police station for a maximum of 42 hours before being brought before a judge.[229] The magistrate's court may extend the detention for an additional 36 hours but may not extend the detention for longer than 96 hours from the time the person was first brought to the police station following arrest.[230] England and Wales has created the Independent Police Complaints Commission (IPCC) to oversee the police complaints system and set standards for the police to handle complaints.[231] IPCC is not part of the police; rather makes its decisions entirely independently of the police and government.[232] IPCC receives and investigates complaints from victims of police misconduct. Examples of such complaints are where a person was kept in custody longer than necessary, or where a person was arrested when he or she should not have been.[233] Complaints are made against individual police officers, and, if successful, could result in discipline or criminal proceedings against the officer.

226 However, detentions of terrorist suspects are regulated by the Terrorism Act 2006, which allows detention in police custody without charge for a maximum period of 28 days. *See* Shute, S.C. & Mora, P.D., (2012), p.330.
227 According to the section 45 of the PACE, a magistrate's court is a court of two or more justices of the peace sitting otherwise than in open court.
228 Shute, S. C. & Mora, P. D., (2012), p.332.
229 *Id.*, p.330.
230 *Id.*, p.333.
231 Independent Police Complaints Commission, about IPCC, available at https://www.ipcc.gov.uk/, [accessed 08/12/2017].
232 Part 2(9&10) of Police Reform Act 2002, available at http://www.legislation.gov.uk/ukpga/2002/30/pdfs/ukpga_20020030_en.pdf, [accessed 08/12/2017].
233 Ben Hoare Bell LLP, Police misconduct, available at http://www.benhoarebell.co.uk/service/police-misconduct/, [accessed 08/12/2017].

4.3.1.2. Pre-trial detention

According to the section 4 of Bail Act, 1976, a person who is accused of an offence who has been brought before a magistrate's court or a crown court in connection with a criminal offence shall be granted a bail only if one of the exceptions contained in schedule 1 of the Act applies. Section 4 of the Act creates a refutable presumption that bail will be granted.[234] In England, the default position is that bail must be granted,[235] but if one or more of the statutory exceptions to bail exist, the court may deny bail. When bail is denied, the detained person is kept in pre-trial detention.[236]

To protect the person held in pre-trial detention, a maximum period of pre-trial detention has to be set.[237] The maximum time-limit for pre-trial detention in England depends upon the type of case and the stage of proceedings.[238] For summary offences,[239] the maximum period of custody between the first court appearance and the start of a trial is 56 days.[240] For either-way offences when the court commits the accused to the Crown Court for trial, [241] the maximum period is limited to 70 days [242] of custody between the accused's first court appearance and the start of a summary trial, or the time when the court decides to send the accused to the Crown Court for trial.

However, where a case is sent for trial to the Crown Court, the maximum period of custody between the time when the accused is sent for trial and the start of the trial is 182 days.[243] The maximum period of custody between the accused's first court appearance and the start of a trial in the Crown Court is 252 days (i.e., 70 +

234 *Id.*, p.362.
235 *Ibid.*
236 Cape, Ed. & Smith, T., *The Practice of Pre-trial Detention in England and Wales: Research Report,* Project Report, the University of the West of England, Bristol, 2016, p. 26.
237 *Id.*, p.29.
238 *Ibid.*
239 Summary offences, such as common assault and disorderly conduct) are normally handled by the magistrate's court, where they are governed by Part 37 of the Criminal Procedure Rules 2010.
240 The Secretary of the State, a form of the prosecution of offences (custody time limits) regulations 1984, SI 1987/299. Regulation 4(4A).
241 This category of offence can be tried summarily in the magistrates' court or on indictment in the Crown Court. Some offences that fall into this category include theft, dangerous driving, burglary and obtaining property/services by deception.
242 Cape, Ed. & Smith, T.,(2016), p.29.
243 *Ibid.*

182), equivalent to 36 weeks.[244] At the expiry of that time limit, the detained person has a right to bail[245] subject to conditions, e.g., to have a residence address and reporting conditions.[246] However, at any time before the expiration of the 36 weeks, at the request of the prosecution, the court may extend the detention if it finds that the prosecution acted with due diligence and expedition and that there is good and sufficient cause for doing so.[247]

4.3.1.3. Right to a trial without undue delay

Article 6 of the European Charter on Human Rights (ECHR) provides for the right to trial without unreasonable delay. Victims of violations of that right are entitled to compensation before the national courts or before the ECtHR. The role of ECtHR in the protection of the violation of that right in state's parties to ECHR will be analysed in the paragraph 4.4.2. There are no reported cases of UK courts awarding damages for breach of Article 6 of the ECHR.[248]

4.3.2. Habeas corpus

Over time, *habeas corpus* became associated with the form most commonly used to inquire into detention, known as *habeas corpus ad subjiciendum*.[249] *Habeas corpus ad subjiciendum* is an ancient and fundamental principle of English constitutional law,[250] which grants a right to a judicial determination of the legality of detention.[251] *Habeas corpus* in England has been regulated by a number of statutes that date back to the Magna Carta of 1215.[252] Although the practice of *habeas corpus* has changed through

244 *Ibid.*
245 van Kalmthout, A.M., Knapen, M.M., & Morgenstern, C. (eds.), (2009), p.950.
246 Cape, Ed. & Smith, T., (2016), p.29.
247 *Ibid.*
248 Amos, M., Chapter 17 Damages for Violations of Human Rights Law in the United Kingdom, in Ewa_Baginska, *Damages for Violations of Human Rights: a Comparative Study of Domestic Legal Systems*, Springer, 2016, p.388.
249 Halliday, P., *Habeas Corpus: From England to Empire*, 2010, p.41.
250 Feikert, C., United Kingdom: *Habeas Corpus Rights – March 2009*, in *Global Legal Research Center, The* Law Library of Congress, *Habeas Corpus Rights: Canada, Egypt, France, Germany, Iraq, Italy, Japan, Pakistan, Russia, Saudi Arabia, Syria, and United Kingdom, and Yemen*, March 2009, p.17.
251 Farrell, B., Habeas Corpus in Times of Emergency: A Historical and Comparative View, *International Law Review Online Companion*, Volume 1, Number 9, Apr.2010, p.74.
252 Art. 3 of the Magna Carta *1215 reads: "no freedom shall be taken, or imprisoned... but by lawful judgment of his peers, or by law of the land"*, available at http://www.constitution.org/eng/magnacar.pdf, [accessed 28/11/2016].

years,[253] the substance of its guarantee remains the same.[254] *Habeas corpus* describes a court order (*a writ)* that commands an individual or a government official who has restrained another person to produce that person before the court at a designated time and place so that the court can determine the legality of that detention.[255] In England, *habeas corpus* is a prerogative *writ* used to challenge the detention of a person.[256] It can be used to challenge the detention in official custody or in private hands.[257] Examples of where a person detained by the police might apply for a writ of *habeas corpus* are where a person was unlawfully arrested, held for an excessive or unreasonable length of time without being charged, or not timely brought before a magistrate.[258]

Part 87 of the Civil Procedure Rules provides that a writ of *habeas corpus ad subjiciendum* is a discretionary writ issued by the High Court in England and Wales, requiring the custodian to produce the detainee in court and demonstrate the authority for the detention.[259] A petition for issuance of the writ may be filed by the detained person or by other individuals acting on his or her behalf.[260] The writ is directed to the person holding the detained person.[261] When the person is being detained in prison or a police station, the writ is directed to the head of the prison or police station.[262] The writ of *habeas corpus* is a command to bring up the body of the prisoner with the cause of his detention for scrutiny by the court.[263]

On the hearing of a *habeas corpus* application, the court will only determine whether the person is lawfully imprisoned.[264] It will not determine guilt or innocence of a de-

253 For example, *Habeas Corpus* Act 1640, *Habeas Corpus* Act 1679, *Habeas Corpus* Acts of 1816.
254 Farbe, Y.J., Sharpe, R. J. & Atrill S., *The Law of Habeas Corpus*, Third Edition, Oxford University Press, 2011, p.17.
255 Duker, W.,(1980), p.13.
256 *Idem*, p.4.
257 Le Quesne, N., "*Habeas corpus* in Jersey", *Jersey & Guernsey Law Review*, June 2013, p.1.
258 Farbe, Y.J., Sharpe R. J. & Atrill S., (2011), p.152.
259 Part 87 - Applications for *writ* of *habeas corpus* of civil procedures rules, CPR - Rules and Directions, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-87-applications-for-writ-of-habeas-corpus.[accessed 10/05/2017].
260 Barnett, H., *Constitutional and Administrative Law*, 4th ed. 2002, p.741.
261 Wilkes, Jr. D. E., "*Writ* of *habeas corpus"* in Kritzer, H. M., *Legal Systems of the World: A Political, Social and Cultural Encyclopedia*, ABC-CLIO, 2002, p. 645.
262 Le Quesne, N., (2013), p.1.
263 *Ibid.*
264 Farrell, B., *Habeas Corpus in International Law*, Ph.D. Thesis, National University of Ireland Galway, 2013,p.2.

tained person.[265] When the court is satisfied that the detention is *prima facie* unlawful, the court orders the custodian to justify the detention. If the custodian cannot do so, the court releases the detained person.[266] The burden is on the custodian to satisfy the court that the detention is lawful.[267] Once the custodian produces authority for the detention, the burden shifts to the applicant to show where there is some defect in it.[268] If the custodian fails to establish lawful authority, the court will order individual released.[269] The release has nothing to do with the guilt or innocence of the detained person.[270] In modern times, *habeas corpus* is no longer of great practical significance in England. There are very few *habeas corpus* applications, as police generally follow the procedures required by the PACE.[271] However, *habeas corpus* has a mythical status in the country's psyche and still represents the fundamental principle that unlawful detentions may be challenged by immediate access to a judge.[272]

4.3.3. Compensation for unlawful detention

The rules governing state liability in England were made by ordinary courts that applied tort law to claims against public bodies.[273] With regard to compensation for unlawful detention, courts applied the tort law for false imprisonment to suits claiming unlawful detention against of civil servants or public bodies[274] and by integrating the ECHR into domestic legislation.[275] Thus, unlawfully detained persons are entitled to seek compensation before national courts in England.[276]

265 Le Quesne, N., (2013), p.1.
266 *Ibid.*
267 Nardell QC. G., *Habeas corpus: A Human Rights Lawyer's Perspective, Lessons from English Law's Approach to some Article 5(4) Issues,* August / September 2010, p.4.
268 Pollard, M., *Scope of remedies upon a successful challenge to the lawfulness of detention, united nations working group on arbitrary detention*, Global consultation on the right to challenge the lawfulness of detention *panel 1: framework, scope and content of the right to court review of detention,* 1-2 September 2014, room xx, Palais des Nations, Geneva, p.5.
269 Nardell QC, G., (2010), p.4.
270 Duker, W., (1980), p.62.
271 Nardell QC, G., (2010), p.3.
272 Zander QC, M., http://news.bbc.co.uk/2/hi/uk_news/magazine/4329839.stm, [accessed 10/05/2017].
273 Fairgrieve, D., (2003), p.1.
274 As explained by Graham MacBain, the words *"false imprisonment"* can be confusing in a modern context. *"False"* being derived from the Anglo-Norman (French Law) is, perhaps, better translated as *"unlawful."* and *"imprisonment"* summons up the image of a prison, whereas the offence covers any form of detention – whether in a building or not. Graham MacBain suggested that it would seem better if modern statutory false imprisonment turned into *"Unlawful Detention."* See Gr. MacBain, False Imprisonment & Refusing to Assist a Police Officer - The Need for Statutory Offences, *Journal of Politics and Law; Vol. 8, n°. 3; 2015,* Canadian Center of Science and Education, p.1.
275 The ECHR was adopted into domestic legislation by the Human Rights Act 1998.
276 Amos, M., Chapter 17 Damages for Violations of Human Rights Law in the United Kingdom, in Ewa_Baginska, *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems,* Springer, 2016, p. 374.

"[T]he remedy of *habeas corpus* and the tort of false imprisonment are important constitutional safeguards of the liberty of the subject against the executive."[277] Victims of unlawful detention in England may seek compensation for unlawful detention by filing a lawsuit for false imprisonment [278] against the person responsible for the deprivation.[279] A claim of false imprisonment may be brought by one who claims to have been unlawfully arrested and detained either by public authorities or private individuals.[280] When a public authority is responsible for the unlawful detention, victims may also sue and seek compensation under the Human Rights Act 1998(HRA).[281]

4.3.3.1. Who may be sued and what is the competent jurisdiction?

A plaintiff may file a tort action for false imprisonment against any person who authorized or directed the unlawful arrest or detention.[282] When the unlawful detention was not caused by a private person (i.e. not a civil servant), the suit is against that private person.[283] Additionally, where a public authority has acted or proposes to act in a way that is incompatible with the ECHR, section 7(1) of the Human Rights Act allows an individual to file a civil action against that authority before a national court. When a civil servant is responsible for the unlawful detention, the state is liable, because in England employers are strictly liable for damage caused to third parties by their employees.[284] Three conditions are required for an employer to be liable.[285] First, the person responsible for the damage must be an employee. Second, that person must have committed a tort.[286] Third, the tort must have occurred in the course of the person's employment.[287] Once those conditions are fulfilled, the employer is liable.[288] The tort action claims are brought before the civil courts.[289]

277 *R* v *Governor of Brockhill Prison ex parte Evans,* [2001] 2 AC 19 at 28C, HL.
278 *Ibid.*
279 Williams QC, H., Damages Claims against Public Authorities: Intentional Torts, in [2007] 12 *Judicial Review*, p. 145.
280 *Id.,* 91.
281 Du Bois, F., Human Rights and the Tort Liability of Public Authorities, 127 *Law Quarterly Review* (November 2011), p.594.
282 Salmon, J. W., *The Law of Torts, A Treatise on the English Law of Liability for Civil Injuries,* London, 1907, p.343.
283 *Ibid.*
284 Van Dam, C.,(2013), p.508.
285 *Ibid.*
286 *Ibid.*
287 *Ibid.*
288 *Ibid.*
289 *Id.,* p.546.

4.3.3.2. Fault

In England, due to a high regard for liberty, there is a presumption that all imprisonment is unlawful until shown otherwise.[290] A plaintiff need only plead and prove that the defendant either made an arrest or imprisoned the plaintiff, or that the defendant affirmatively instigated, encouraged, incited or caused plaintiff's arrest or imprisonment.[291] In other words, a plaintiff need not prove that the imprisonment was unlawful,[292] but must only establish a *prima facie* case of imprisonment;[293] then, the burden of going forward with the evidence shifts to the defendant to provide a justification for the detention.[294]

False imprisonment in England is a strict liability tort.[295] Therefore, the plaintiff does not have to prove fault on part of the defendant.[296] In *R* v *Governor of Brockhill Prison ex parte Evans,* the House of Lords confirmed the strict liability nature of the tort of false imprisonment. In that case, the plaintiff was held in prison for 59 days longer than he should have been as a result of the governor miscalculating the length of the term that the plaintiff was to serve by failing to consider time spent on remand. The governor's calculation was in accordance with what the Home Office and courts believed to be the correct method of calculation at the time.[297] The House of Lords ruled that the method of calculation was wrong. It further ruled that, although the miscalculation was the result of good faith, the plaintiff was nevertheless falsely imprisoned and, therefore, entitled to damages because the tort of false imprisonment is one of strict liability.

290 Williams QC, H., (2007), p.145.
291 Weisman, C.A., *A Treatise on Arrest and False Imprisonment*, 2nd edition, Weismann publication, 1996, p.4.
292 *Ibid.*
293 *Ibid.*
294 *Ibid.*
295 *R* v *Governor of Brockhill Prison ex p. Evans* [2001] 2 AC 19 at 28C. In tort law, strict liability is the imposition of liability on a party without a finding of fault (such as negligence or tortious intent). The claimant need only prove that the tort occurred and that the defendant was responsible.
296 Weisman, C. A., (1996), p.4.
297 In *ex p. Evans* the Divisional Court overruled that earlier approach, upheld the case for false imprisonment, and awarded compensation. The House of Lords upheld the decision on liability and agreed that the Court of Appeal was correct to increase the compensation award.

Hence, in a tort action for false imprisonment, the defendant's good faith or reasonable care are not defences.[298] In other words, unreasonable conduct is not a requirement for liability for false imprisonment.[299]

Moreover, section 6(1) of the Human Rights Act provides that it is unlawful in the United Kingdom for any public authority to act in a manner incompatible with a right guaranteed by the ECHR. Thus, acts in breach of the ECHR by civil servants create state liability without proof of fault by a civil servant.[300]

4.3.3.3. Damages

False imprisonment will always result in damages, including material and immaterial damages such as bodily pain; great physical inconveniences and discomfort, lost wages, loss of time with family, mental suffering, injury to reputation, emotional distress or mental anguish, humiliation, shame, public ridicule, negative publicity and public disgrace.[301]

Because the UK is a common law system, when UK judges decide a case, they rely on precedent.[302] Additionally, when the UK courts examine unlawful detention claims resulting from violations of the ECHR, they consider ECtHR jurisprudence.[303] English law distinguishes two main categories of damages: compensatory damages and exemplary or punitive damages when awarding damages to unlawfully detained persons.[304] Compensatory damages are intended to compensate the victim.[305] They are designed to compensate, so far as possible, the material or immaterial loss suffered by the victim by putting him or her in as good a position as if no wrong had occurred.[306] In contrast, exemplary or punitive damages aim to punish the wrongdoer.[307]

298 *R* v *Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19 at 28C.
299 *Ibid.*
300 Section 6 of the HRA.
301 Weisman, C.A., (1996), p.7.
302 Van Dam, C., (2013), p.93.
303 Section 2 of the Human Rights Act 1998.
304 *Thompson & Hsu* v *Commissioner of Police of the Metropolis* [1998] 1 QB 498, §47-48.
305 The Law Commission, A*ggravated, Exemplary and Restitution damages*, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/04/LC247.pdf, [accessed 16/03/2017].
306 The Law Commission, (1997), p. 95.
307 *Id.*, p. 1.

Awarding damages to a victim of false imprisonment against the police has been contentious issues.[308] As a jury is also involved in assessing damages awarded to members of the public for unlawful conduct towards them by the police; the Court of Appeal fixed a guideline for a jury in awarding these damages to establish some relationship between such awards and those obtained for personal injuries.[309] The guideline as to *quanta* of these damages was fixed by the Court of Appeal in *Thompson & Hsu* v *Commissioner of Police of the Metropolis* case.[310] In *Thompson,* the plaintiff, after having been lawfully arrested, was manhandled and assaulted by some police officers and also wrongly detained in a police cell for four hours.[311]

The *Thompson* guidelines state that, when calculating compensatory damages in a wrongful arrest and imprisonment case, the starting point should be £500 for the first hour.[312] This amount will be reduced as time continues with damages of around £3,000 expected for a detention of 24 hours.[313] A daily rate would then be applied at a much lesser rate.[314] Applying the *Thompson* guidelines to the *R. Governor of Brockhill Prison case,* the House of Lords awarded damages of £5,000 for 59 days unlawful detention after completing an 18 months prison sentence due to the fact that the plaintiff suffered no loss of reputation, shock or injury to feelings as he had already been lawfully imprisoned for 18 months.[315] In another case,[316] the Court of Appeal awarded damages of £25,000 for 42 days of unlawful imprisonment due to the fact that the entire period of detention had been unlawful and in consideration of the shock and stigma suffered by the plaintiff.[317] The *Thompson* guidelines also allow for aggravated damages,[318] which are awarded based on evidence of humiliating circumstances surrounding the detention, or malicious or oppressive conduct on the part of police officers. Aggravated damages are normally between a minimum of £1,000 and a maximum of double the base award.[319]

The exemplary damages, also called punitive damages, are awarded in exceptional cases, where there has been an abuse of power by oppressive or arbitrary conduct.[320] In this regard, the Court of Appeal has reaffirmed that exemplary damage awards can be made in claims brought against chief officers of police based on their (statutory) vicarious liability[321] for tortuous acts of officers in their force, in accordance with the *Thompson* principles and without regard to means of the individual officers. The court at chose that approach to ensure that adequate awards were made against those responsible for the conduct of officers involved.[322] The court's guidance also provides that exemplary damages should be awarded where the compensatory and aggravated damages are an inadequate punishment for the defendant.[323] Lord Devlin in *Rookes* v *Barnard* specified the following three categories of cases where it is appropriate to award exemplary damages: "(a) where there is 'oppressive or unconstitutional action by the servants of the government;' (b) where the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff and (c) where they are expressly authorized by statute."[324]

308 Andoh, B., Exemplary Damages and the Police; Some Reflection, *Mountbatten Journal of Legal Studies*, December 2001, 5(1&2), p.90.
309 Magrath, P., Law report: Juries to be given guidance on awards against police, Law Report: 28 February 1997, available at http://www.independent.co.uk/news/people/law-report-juries-to-be-given-guidance-on-awards-against-police-1281004.html, [accessed 15/11/2017].
310 *Thompson & Hsu* v *Commissioner of Police of the Metropolis* [1998] 1 QB 498, §47-48.
311 Andoh, B., (2001), p.96.
312 *Ibid*.
313 Nelsons, *Damages for False Imprisonment and Malicious Prosecution*, Posted on April 14, 2016, at 9:11 am. , available at https://www.nelsonslaw.co.uk/damages-for-false-imprisonment-and-malicious-prosecution/, [accessed 11/05/2017].
314 *Thompson & Hsu* v *Commissioner of Police of the Metropolis* [1998] 1 QB 498, §47-48.
315 *R* v *Governor of Brockhill Prison ex parte Evans* [2000] 3 WLR 843.
316 *Lunt* v *Liverpool City Justices*: CA 5 Mar 1991.
317 *R* v *Governor of Brockhill Prison ex parte Evans* [2000] 3 WLR 843.
318 The Law Commission defined aggravated damages as are "damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive 'aggravates' the injury done to the plaintiff, and therefore warrants a greater or additional *compensatory* sum." The Law Commission, Item 2 of the Sixth Programme of Law Reform: Damages, aggravated, exemplary and restitutionary damages, available at http://www.lawcom.gov.uk/app/uploads/2015/04/LC247.pdf, [accessed 12/05/2017].
319 *Thompson & Hsu* v *Commissioner of Police of the Metropolis* [1998] 1 QB 498.
320 The Law Commission, (1997), p.4.
Nelsons, (2016), p.1.
321 *Holden* v *Chief Constable of Lancashire* [1987] QB 380.
322 *Thompson & Hsu* v *Commissioner of Police of the Metropolis* [1998] 1 QB 498, §47-48.
323 The Law Commission, (1997), p.6.
324 [1964] AC 1129. Quoted by Andoh, B., (2001), p.92.

When courts award exemplary damages, they are likely not to be less than £5,000.[325] The maximum is likely to be £50,000 and a court would not award the maximum unless officers of at least the rank of superintendent were directly involved.[326] Those exemplary damages are awarded against the Chief Constable of the Force or Commissioner of Police in the case of the Metropolitan Police instead of the real wrongdoer being the police officer. In such cases, the individual officer is not personally liable; [327] instead, the state is vicariously liable for the acts of the officer. In such cases, it has been argued that there is no punishment and that the plaintiff has been over-compensated as the purpose of the exemplary damages is not to compensate the plaintiff, but to deter the defendant and others from engaging in similar conduct.[328] Still, it is important that exemplary damages be proportionate to the wrongdoing in question and not excessive.[329]

4.3.4. Conclusions about England and Wales

In sum, England has procedures to enforce the rights to be released from, and compensated for, unlawful detention. The English legal system recognises the right to *habeas corpus* and invests the High Court with jurisdiction to decide *habeas corpus* petitions. Once that court finds that a detention is unlawful, the court orders release. However, today, *habeas corpus* is no longer of great practical significance as there are very few *habeas corpus* applications in England, as police in practice follow the procedures required by the PACE.

With respect to the right to compensation for unlawful detention, unlawfully detained persons may obtain compensation by filing a tort action for false imprisonment. False imprisonment in England is a strict liability tort. When the unlawful detention was by a public authority, a victim may also seek compensation based on the Human Rights Act of 1998. The false imprisonment tort action is filed against

325 *Thompson* v *Metropolitan Police Commissioner* [1997] 3 WLR 403, 418A-B.
326 *Ibid.*
327 Andoh, B., (2001), p.95.
328 *Id.*, p.98.
329 *Id.*, p.100.

the Chief Constable of the Force or Commissioner of Police in the case of the Metropolitan Police, instead of the individual wrongdoer, i.e., the responsible police officer.

English case law provides for two categories of damages for unlawfully detained persons: compensatory damages and exemplary damages. The Court of Appeal in *Thompson & Hsu* v *Commissioner of Police of the Metropolis* developed guidance regarding the quanta of damages in cases of unlawful detention. Analysed cases show that a number of victims of unlawful detention in England and Wales sought and obtained compensation.

4.4. The role of European human rights mechanisms in the protection of unlawfully detained persons in France and England and Wales

Article 5(4) and (5) of the ECHR provides for the right to be released from, and compensation for, unlawful detention.[330] The ECHR established the European Court of Human Rights (ECtHR), as a supranational court[331] with jurisdiction to find against states that do not fulfil their undertakings.[332] Before 1 November 1998,[333] the right of a state's individuals to petition the Court and jurisdiction of the Court over the state was not compulsory for all member states, because they were conditioned upon acceptance by each state. Now, however, Article 34 of the ECHR grants individuals, non-governmental organizations and groups of individuals the right to make an application before the ECtHR when they claim that one of the member states violated a right guaranteed by the ECHR or its protocols.

330 ECHR, European Convention on Human Rights, available at http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer, [accessed 16/05/2017].
331 Garlicki, L., Cooperation of Courts: The role of Supranational Jurisdictions in Europe, *The International Journal of Constitutional Law*, July/October 2008, Vol. 6: 509,523.
332 Council of Europe, *European Court of Human Rights: The ECHR in 50 Questions, available at http://www.echr.coe.int/Documents/50Questions_ENG.pdf*, [accessed 13 March 2017].
333 Council of Europe, *Protocol n°. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, European Treaty Series - n°. 155, p.1.*

Although the UK was among the first states to ratify the ECHR,[334] it was initially reluctant to the Strasbourg institutions.[335] For two decades after its entry into force, the ECHR remained a largely symbolic document.[336] That reluctance was removed by allowing individuals to search remedies before established institutions of the ECHR since 1966.[337] Although the UK ratified the ECHR in 1951, the ECHR was not part of the UK's national law, and it was not obligatory for its domestic courts to follow it until the UK enacted the Human Rights Act of 1998 came into force in 2000.[338] The adoption of Human Rights Act was the result of efforts by eminent lawyers, civil societies, and political parties.[339]

France has been even more reluctant to ECHR institutions. It took two decades for France to ratify the ECHR, which it did in 1974.[340] After the ratification, it took more than seven years for France to allow individuals to petition before the ECtHR. France accepted the ECtHR's jurisdiction on 30 May 1981.[341] Its reluctance was motived by various reasons, the most important of which was general hostility to the regime's supra nationalism. French officials argued that ratification would be superfluous since national laws provided a sufficient guarantee of individuals' rights.[342] The change of heart in favour of the ECtHR resulted from politics; President François Mitterrand, during a general election, pledged to permit individuals to petition the ECtHR.[343] According to Article 55 of the French Constitution, "the ratified treaties

334 The UK ratified the ECHR on 8 March 1951.
335 Christoffersen, J. & Madsen, M.R., *The European Court of Human Rights between Law and Politics,* Oxford University Press, 2011, p.51.
336 Donald, A., Gordon, J., & Leach, Ph., *The UK and the European Court of Human Rights,* Human Rights and Social Justice Research Institute, London Metropolitan University, Equality and Human Rights Commission 2012, p.9.
337 *Id*., p.vi.
338 That Act incorporated the Convention, with exception of Article 13, into English domestic law and obliged national courts to adhere to the jurisprudence of the ECtHR and interpret national legislation in accordance with the Convention. See Articles 1, 2 and 3 of the Human Rights Act 1998.
339 Wadham, J. & Mountfield, H., *Blackstone's Guide to the Human Rights Act 1998,* Blackstone Press Limited, 1999, p.5; *Samantha Besson,* The Reception Process in Ireland and the United Kingdom, in Keller, H. and Stone Sweet, A., *A Europe of Rights*; *The Impact of the ECHR on National Legal Systems,* Oxford University Press Inc., New York, 2008, p.40.
340 Decree 74-360 publishing ECHR adopted on 3 May 1974, *J.O.*, 4 May 1974, p.4750.
341 Decree n° 81–917 dated 9 October 1981.
342 Abdelgawad, E. L. &Weber, A., The Reception Process in France and Germany, in Keller, H. and Stone Sweet, A., *A Europe of Rights The Impact of the ECHR on National Legal Systems,* Oxford University Press Inc., New York, 2008, p.108.
343 Christoffersen, J. & Madsen, M. R., (2011), p.52.

are considered as a supra-legislative status but infra-constitutional status."[344] The ECHR is part of, and superior to, French national law.[345] Thus, individual victims of human rights violations in France and the UK, including victims of unlawful detention, are entitled to petition the ECtHR, as well as national courts. Today, the European human rights system is widely accepted as the most advanced and effective regional regime for enforcing human rights in the world.[346] The below section discusses the role of the ECtHR in the enforcement of the individual rights in England and Wales and France. The first subsection discusses *habeas corpus,* while the second focuses on the right to be tried within a reasonable time. The third subsection discusses the right to compensation for unlawful detention.

4.4.1. Habeas corpus

Paragraph 4 of Article 5of the ECHR guarantees the right of *habeas corpus.*[347] It states, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." Thus, unlawfully detained persons in France, England and Wales may challenge the lawfulness of their detention under that article either before national courts or before the ECtHR. Detentions in contravention of Article 5 of the ECHR are "unlawful." Pursuant to Paragraph 4 of Article 5 of the ECHR, detained persons may challenge the lawfulness of their detention before a national court. If a national court concludes that a detention is unlawful, it must order the detained person's release.

Importantly, when unlawfully detained persons do not obtain relief from national courts, after exhausting their local remedies,[348] they may seek relief from the ECtHR. Paragraph 4 of Article 5 of the ECHR places the burden of proof on the State to show

344 Art. 55, French Constitution of 4 October 1958, consolidated version of 1st March 2017, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194, [accessed 07 March 2017].
345 Abdelgawad, E. L. & Weber, A., (2008), p.115.
346 Donald, A., Gordon, J., & Leach, Ph.,(2012), p.20.
347 Council of Europe/ European Court of Human Rights, *Guide on Article 5 of the Convention Right to Liberty and Security,* 2014, p.30.
348 Art. 35 § 1 of the ECHR requires exhaustion of all domestic remedies before the ECtHR may invoke jurisdiction, in accordance with the generally recognized rules of international law.

that the detention is lawful. Once the State produces evidence of the lawfulness of the detention, the burden shifts to the applicant to show that the detention is not in fact lawful, usually by demonstrating a defect in the procedure for the detention.[349] The ECtHR is empowered to order release if it determines that the detention is unlawful. For example, in *Assanidze* v *Georgia*, the ECtHR ordered the release of the applicant when it found he had been unlawfully detained by the respondent state. [350] In that case, the applicant, after being tried and imprisoned by Georgian courts, was eventually acquitted by the Georgian Supreme Court of Justice. Despite acquittal by the Supreme Court, the local authorities continued to detain him. The ECtHR held that his continued detention was unlawful. Therefore, the ECtHR ordered the state to release him.[351]

4.4.2. The right to be tried within a reasonable time

4.4.2.1. When does the length of criminal proceedings become unreasonable?

The right to be tried within a reasonable time is provided for in paragraph 1 of Article 6 of the ECHR. Interpreting that article, the ECtHR has ruled that the "reasonableness" of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: (1) the complexity of the case, (2) the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.[352] The first criterion (complexity of the case) depends on factors such as: the number of accused; the number of counts/charges; the nature (seriousness) of the charges; the volume of the case file and the number of documents, experts or witnesses to be examine; the number of hearings held; the need for cooperation from the authorities of a third State (in particular the need of rogatory commission); and even the length of the judgment rendered.[353]

349 Nardell QC, G., (2010), p.4.
350 Colandrea, V., On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases, *HRLR* 7 (2007), 396-411, p.400.
351 ECtHR, *Assanidze* v *Georgia*, 8 April 2004, *Application nº. 71503/01*, § 203, where the court stated: "*Holds* unanimously (a) that the respondent State must secure the applicant's release at the earliest possible date."
352 ECtHR, [GC], *Frydlender* v *France*, nº. *30979/96*, 27 June 2000, §43.
353 Edel, F., *The Length of Civil and Criminal Proceedings in the Case Law of the European Court of Human Rights*, 2nd ed., Human Rights Files, nº. 16 (Council of Europe Publishing, 2007), pp.39–43.

For the second criterion (the conduct of the applicant), the Court considers whether the applicant contributed to the length of the proceedings through numerous requests for adjournments or failure to appear in court.[354] The Court also considers whether the domestic authorities contributed to the length of proceedings by unusually lengthy investigations, delays in obtaining an expert opinion and adjournments.[355] The ECtHR has concluded that, when criminal proceedings are less than three years, they are reasonable. It has also determined, in the large majority of its cases in 2012, that criminal proceedings more than seven years in duration are unreasonable.[356] The difference between what is a reasonable length of time and an unreasonable length of time is five years. Predicting how the Court will rule regarding whether the length of criminal proceedings in a particular case is reasonable depends on the criteria and factors discussed above.[357]

4.4.2.2. Remedies for violation of the right to be tried within a reasonable time

States parties to ECHR are obliged to provide victims of delay with reasonable compensation.[358] Where there is an excessive delay of the proceedings, the European Court will award immaterial damages[359] and rarely material damages.[360] In most cases, the Court have stated that they cannot speculate as to how the proceedings would have turned out without the delay or extended proceedings.[361] Proving the causal link between the delay and damages is, therefore, an obstacle for plaintiffs.[362]

To equitably assess the immaterial damage sustained as a result of unreasonably lengthy proceedings, the Court considers a sum between €1,000 and 1,500 per year as a base figure for the duration (not delay) of the proceedings. Significantly, the outcome of the domestic proceedings (i.e., whether the applicant wins, loses or set-

354 *Dolutaş* v *Turkey*, nº. 17914/09, 17 January 2012, at paras 29–31.
355 Henzelin, M. & Rordorf, H., When Does the Length of Criminal Proceedings Become Unreasonable according to the European Court of Human Rights? 5 *New Journal of European Criminal Law* 88-90 (Intersentia 2014).
356 *Ibid.*
357 *Id.*, p.78.
358 Your best authority here is the paragraph 5 of Art.5 of the ECHR
359 *Apicella* v *Italy*, 29 Mar. 2006, *nº. 64890/01*, §93.
360 Edel, F., (1996), p.94.
361 *Bayrak* v *Germany*, no 27937/95, 20 December 2001, §38.
362 Edel, F., (1996), p.95.

tles) is immaterial to the non-pecuniary damage sustained from the length of the proceedings.[363]

The ECHR is rapidly becoming the basic framework for many judicial decisions in France, and French judges routinely refer to Articles 5 and 6 of the ECHR in their decisions.[364] Moreover, after numerous condemnations of France by the ECtHR for failure to try defendants in a reasonable time, [365] the French legislature amended Article 144-1 of the Criminal Procedure Code to comply with ECtHR case law. [366] The Law of 30 December 1996,[367] amended Article 144-1 of the Criminal Procedure Code to read: "Pre-trial detention may not exceed a reasonable length of time in respect of the seriousness of the charges brought against the person under judicial examination and of the complexity of the investigations necessary for the discovery of the truth."[368] Accused persons, in France and England and Wales, who have not been tried within a reasonable time, are entitled to claim compensation before the ECtHR.

4.4.3. Compensation for unlawful detention

Paragraph 5 of Article 5 of the ECHR provides, "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation." Thus, anyone in one of the state members of the Council of Europe, victims of unlawful detention are entitled to compensation. The ECtHR has stated that paragraph 5 of Article of the ECHR creates a direct and enforceable right to compensation before the national courts of the state members of the Council of Europe.[369] The violation of that right gives rise to liability in proceedings before the ECtHR.[370] In other words, the right to compensation presupposes that a violation of one of the other paragraphs of Article 5 has been established by either a domestic authority or the Court itself.[371]

In its interpretation of paragraph 5 of Article 5 of the ECHR, the ECtHR recognizes the right to compensation for unlawful detention even if the arrest or detention was lawful under the domestic legislation.[372] According to the court, for a detention to be lawful, it must have a basis in national law and may not be "arbitrary."[373] It has been argued that compensation for unlawful detention is required only where the victim was arrested or detained contrary to Article 5 sections 1 to 4.[374] However, the ECtHR has stated that effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty and must be available both in theory and practice.[375] Member states' courts vary as to the amount of compensation awarded, but the compensation must be proportionate to the duration of the detention.[376]

Unlawfully detained persons in the United Kingdom are entitled to seek remedies for unlawful detention before national courts through the Human Rights Act 1998 (HRA). By adopting the HRA into its domestic law, the United Kingdom has taken seriously the jurisprudence of the ECtHR.[377]

4.4.3.1. Material damages

In awarding compensation for unlawful detention, the ECtHR considers both material and moral damages.[378] In assessing compensation for pecuniary damage, the

363 *Apicella* v *Italy*, 2006, *n°. 64890/01*, §129§ &93.
364 Abdelgawad, E. L. & Weber, A., (2008), p.128.
365 Errera, R., (2008), p.87.
366 PHI, T. T. L., *La détention provisoire étude de droit comparé droit français et droit vietnamien*, Ph.D. Thèse, Université Montesquieu – Bordeaux Iv, 2012, p. 270, available on http://www.theses.fr/2012BOR40053/document, [accessed 16/11/2017].
367 *Act n°. 96-1235 of 30 December 1996, Art. 4 Official Journal of 1 January 1997 in force 31 March 1997.*
368 This issue has been discussed in detail in para.4.2.3.1 *supra*.
369 ECtHR, *A.* and *Others* v *The United Kingdom*, 19 February 2009, n°. 3455/05.
370 Macovei, M., The right to liberty and security of the person, A *Guide to the implementation of Article 5 of the European Convention on Human Rights,* Human rights handbooks, n°. 5, Council of Europe,2004, p.67.
371 Council of Europe/ European Court of Human Rights, (2014), p.34.
372 Macovei, M., (2004), p.68.
373 In *James, Wells and Lee* v *The United Kingdom*, *nos.* 25119/09, 57715/09 and 57877/09 at paragraphs 192-194, (2012), the Grand Chamber of the ECtHR explained that "arbitrariness" is determined by the following four criteria: (1)Where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. (2) The order to detain and/or the execution of the detention does not conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 section 1. (3) There is not a relationship between the ground of permitted deprivation of liberty and the place and conditions of detention. (4) Proportionality between the ground of detention and the detention is lacking.
374 *Harkmann* v *Estonia,* n°. 2192/03, § 50, 2006.
375 Council of Europe/ European Court of Human Rights, *Guide on Article 5 of the Convention: Right to Liberty and Security*, 2014, p.34.
376 *Id.*, p.35.
377 Bradley, A., "The Human Rights Act 1998 and the Development of Administrative Law in the United Kingdom," in Ziegler, K.S & Huber, P. M, *Current Problems in the Protection of Human Rights, Perspectives from Germany and the UK*, Hart Publishing, 2013, p.127.
378 Council of Europe/ European Court of Human Rights, (2014), p.34.

ECtHR endeavours to put the applicant, as far as possible, in a situation equivalent to the one in which he or she would have been in had there not been a breach of the ECHR.[379] This practice equates to the principle of *restitutio in intergrum* that UK courts apply when awarding damages in tort law. It is also equivalent to the principle of full compensation (*réparation integrale*) in France. For an award of compensation, the court must find a causal link between the violation of the ECHR and the claimed pecuniary damage.

The ECtHR requires claims of material damage to be supported by evidence and places the burden on the claimant to prove damages.[380] If there is no evidence, but it is clear that pecuniary loss has occurred, the ECtHR makes a speculative assessment, assessing pecuniary loss as a whole and on an equitable basis. The ECtHR has wide discretion to determine the amount of compensation and when an award of damages should be made.[381] In exercising its discretion, the Court considers all the circumstances of the case, including the nature of the violation, as well as any special circumstances pertaining to the case.[382] In *Lloyd and Others* v *The United Kingdom,* the ECtHR awarded one of the applicants €3,000 (three thousand euros) for pecuniary damage[383] when he was detained in breach of paragraph 1 of Article 5 of the ECHR. He lost wages because he couldn't work during his detention. The ECtHR has not set a limit on the amount that may be awarded for material damages, provided that the plaintiff establishes the causal link between the damages and the unlawful detention.[384]

4.4.3.2. Moral damages

Although the ECtHR has stated that "compensation" is inappropriate where there are no material damages or immaterial damages to compensate,[385] excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not in accord with the right to compensation.[386] The ECtHR has awarded moral damages for emotional distress and anxiety, loss of reputation, bouts of depression, enduring psychological harm, feelings of helplessness and frustration and feelings of injustice.[387] The ECtHR determines compensation on an 'equitable basis' and tends to be conservative in its awards, which range from €5,000 to €15,000.[388] However, on some occasions, the ECtHR has awarded a larger amount for immaterial damages. For example, in *Del Rio Prada* v *Spain,* the ECtHR awarded €30,000 to the plaintiff who was detained in prison for more than five years, in breach of paragraph 1 of Article 5 and Article 7 of the ECHR.[389] In *Johnson* v *UK,* the ECtHR found a breach of paragraph 1 of Article 5 section and awarded the plaintiff £10,000 for nonpecuniary damages sustained when his detention continued after he was no longer suffering from mental illness.[390] The ECtHR has stated that the amount of compensation awarded may not be considerably lower than that awarded by the ECtHR in similar cases.[391]

4.4.3.3. Punitive Damages

The ECtHR does not award punitive damages, even for serious violations of ECHR rights.[392] That approach is stated in the Court's Practice Directives of March 2007 and January 2016 on Just Satisfaction that states that "the purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, considered it inappropriate to accept claims for damages with labels such as "punitive," "aggravated" or "exemplary."[393]

379 Amos, M., Chapter 17, Damages for Violations of Human Rights Law in the United Kingdom, in Ewa_Baginska, *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems,* Springer, 2016, p.371.
380 ECtHR, *IncaL* v *Turkey,* 1998, 41/1997/825/1031, § 82.
381 Amos, M., (2016), p.379.
382 *A.* and *Others* v *The United Kingdom,* nº. *3455/05,* § 250 (ECtHR 2009).
383 *Lloyd and Others* v *The United Kingdom,* nº. 29798/96), § 7(a) (i) (ECtHR 2005).
384 Amos, M., (2016), p.381.
385 *Wassink* v *the Netherlands, 12535/86,* § 38 (ECtHR 1990).
386 Council of Europe/ European Court of Human Rights, (2014**)**, p.35.
387 Amos, M., (2016), p.382.
388 *Ibid.*
389 *Del Río Prada* v *Spain, nº. 42750/09,* §146 (ECtHR 2013).
390 *Johnson* v *the United Kingdom, The International Journal of Human Rights,* Volume 1, 1997 - Issue 4 1997, p. 79.
391 Council of Europe/ European Court of Human Rights, (2014), p.35.
392 Amos, M., (2016), p.384.
393 Para 9, Practice Directive issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 and with the same wording, Para 9, Practice Directive, Just Satisfaction of 1 January 2016, available at http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf, [accessed 13/02/2018].

4.5. Comparison between Rwanda and Uganda, France and England and Wales

This chapter set out to assess to what degree the right to be released from unlawful detention and the right to compensation, as provided for in paragraph 4 and 5 of Article 9of the International Covenant on Civil and Political Rights (ICCPR) has been introduced and enforced in practice in three different nations: Uganda, France and England and Wales. The objective of the following sections is to identify the best practices of those nations to inspire Rwanda to improve its laws and procedure to provide effective remedies for unlawful detention and to come into compliance with the ICCPR. Thus, the following sections compare those three countries with Rwanda.

4.5.1. Comparison of the allowed period of detention in police custody

The Human Rights Committee has stated that forty-eight (48) hours is ordinarily sufficient to bring a suspect before a judge and conduct a hearing on the detention.[394] Uganda, France and England and Wales meet the standard set by the Human Rights Committee. However, Rwanda does not. Uganda and France[395] have set forty-eight hours as the maximum period to bring a suspect to court following detention. England has set thirty-six hours as the maximum period that police may detain a person before presentation to a judge.[396] In sharp contrast, in Rwanda, the maximum period of detention before presenting a person to a judge is ten days. There is an eight-day difference between the time limit recommended by the Human Rights Committee and the time limit for detention before presentation to a judge set by Rwandan law.

4.5.2. Comparison of habeas corpus

The right to *habeas corpus* in Rwanda is similar to right to *habeas corpus* in the United Kingdom and Uganda. One significant difference, however, is the designation of courts to decide *habeas corpus* applications. As previously stated in sections 2.1.4.1 and 2.1.4.2, supra, Rwanda law requires that the *habeas* petition be filed in the court nearest the place of detention that is competent to try the offence with which the detainee is charged. In Rwanda, a detainee's access to court is dependent on identification of the detaining officer, place of detention and alleged offence.[397] In cases of secret detention or where the detainee is not aware of where he or she is being held or the responsible official, the detainee cannot know where to file the petition for a writ of *habeas corpus*. Also, if the detainee has not been charged, it is impossible for the detainee to determine the appropriate court. In contrast, in Uganda, both the Ugandan Human Rights Commission and the High Court of Uganda have jurisdiction to adjudicate *habeas corpus* applications regardless of the place of detention, the responsible official or the alleged offence.

Comparing Rwanda's procedures to those of England and Wales, Rwanda again falls short. In England and Wales, *habeas corpus* has been a remedy for unlawful detention for hundreds of years.[398] Conversely, in Rwanda, *habeas corpus* is a new and unfamiliar concept for detainees, police, lawyers and courts. Although it is little used today in the United Kingdom due to laws restricting police discretion, habeas *corpus* still is available as a remedy for unlawful detention.[399] In England unlawfully detained persons may apply for a writ of *habeas corpus* before the High Court.[400] When the victim is detained in prison or a police station, the writ is directed to the head of the prison or police station.[401] When the court is satisfied that the detention is *prima facie* unlawful, the custodian is then ordered to appear to justify the detention and if unable to do so, the court releases the detainee.[402] The burden is on the custodian of the detainee to satisfy the court that the detention is lawful.[403] In Rwanda, a detainee's access to court is dependent on identification of the detaining

394 Human Rights Committee, (2014), § 33.
395 Art. 63, II of the *Code de Procédure Pénale* (Code of Penal Procedure).
396 Shute, S.C. & Mora, P.D., (2012), p.332.
397 Art. 91 & 92 CCP.
398 Art. 1 CCP and Part 87 - Applications for *writ* of *habeas corpus* of civil procedures rules, CPR - Rules and Directions, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-87-applications-for-writ-of-habeas-corpus, [accessed 10/05/2017].
399 Nardell QC, G., (2010), p.3.
400 Part 87 - Applications for *writ* of *habeas corpus* of civil procedures rules.
401 Le Quesne, N., (2013), p.1.
402 *Ibid.*
403 Nardell QC, G., *Habeas corpus: a human rights lawyer's perspective, lessons from English law's approach to some articles 5(4) issues*, August / September 2010, p.4.

officer, place of detention and alleged offence.[404] In Rwanda, the judge has discretion to order release or to continue detention despite finding that the detention was unlawful.[405] Conversely, English courts must order the detainee's release if it finds the detention unlawful.[406] There are a number of reasons why it is difficult for unlawfully detained persons in Rwanda to obtain release. First, the law's lack of specification of the competent court to receive the *habeas corpus* application in cases where the detained person failed to identify (1) the detaining officer involved in the unlawful detention, (2) the place of detention and (3) the alleged offence. Second, lack of effective legal aid for indigent detained persons.

4.5.3. Comparison of compensation for unlawful detention

In previous sections, it was demonstrated that, as required by the International Covenant on Civil and Political Rights (ICCPR), all the compared countries have enacted domestic laws providing for the right to compensation for unlawful detention. In contrast, Rwanda has not.

4.5.3.1. Comparison of the legal framework

Section 4.1.2, *supra*, explained that Uganda included the right to compensation for unlawful detention in its 1995 Constitution, as required by the ICCPR and the African Charter.[407] France and Rwanda[408] follow the Civil Law legal system and share the same approach to tort law. Articles 1240, 1241, and 1242 of the French Civil Code[409] are identical to Articles 258, 259 and 260 of Rwanda's Civil Code Book III. Unlawfully detained persons in Rwanda cannot obtain compensation through tort law. However, in France, the legislature has enacted statutes that allow for compensation for unlawful detention. Since 1970, under influence of case law and criticism by many doctrinal writers, Legislators concluded that tort law in the Civil Law legal system did not effectively provide compensation for unlawful detention.[410] Thus, France has introduced into its domestic legislation a specific law related to compensation for unlawful detention. Today, the right to compensation in France exists not only for unlawful detentions but also for lawful pre-trial detentions ending in acquittal. In addition to the right to compensation, French law has established the procedure for filing a claim for compensation for unlawful detention.

As previously explained in section 4.3.3, *supra,* in England, a victim of unlawful detention may obtain compensation in two ways: (1) by filing a tort action for false imprisonment or (2) by filing an action under the Human Rights Act. If the person responsible for the unlawful detention is a civil servant, the victim is entitled to compensation from the State based on vicarious liability.[411]

Unlike Uganda, France and the United Kingdom, Rwanda has not complied with the ICCPR's requirement that all State parties to elaborate the procedural law into their domestic law in order to enable the enforcement of the right to compensation for unlawful detention. In Rwanda, there are no specific provisions regulating compensation for unlawful detention.

4.5.3.2. Comparison of the proper defendant and the proper court for adjudicating claims for compensation

French law imposes liability on the State for unlawful detentions and lawful detentions followed by acquittals or discharges.[412] Because detaining a person in violation of the law constitutes fault, it is not necessary for the plaintiff to prove the bad intention of the officer involved. In France, competent courts[413] to adjudicate remedies for unlawful detention related claims and compensable damages in France have been defined.

404 Art. 91 & 92 CCP.
405 Art. 91(2) CCP.
406 Rule 87.2, Part 87 - Applications for *writ* of *habeas corpus* of civil procedures rules. Art.5 (4) ECHR.
407 Art.23 (7) of the Constitution of Uganda.
408 Kosar, W. E.,(2013), p.1.
409 *Code civil,* consolidated version of 02 March 2017, available at https://www.legifrance.gouv.fr/telecharger_pdf.do?cidTexte=LEGITEXT000006070721, [accessed 14/07/2017].
410 Canivet, G., *The Responsibility of Judges in France,* Cambridge Yearbook of European Legal Studies, Volume 5, January 2003, p.19.
411 Vicarious liability in English law is a doctrine that imposes strict liability on employers for the wrongdoings of their employees who acted in the scope of their employment.
412 Art. 149 of the CPP.
413 The CNRD is included.

As previously explained in section 4.3.3.1, *supra,* in England, when the custodian is not a civil servant, a plaintiff seeking compensation for unlawful detention must sue the private person responsible for the unlawful detention.[414] However, when a police officer is involved in the unlawful detention, the plaintiff sues the Chief Constable of the Force or the Commissioner of Police in the case of the Metropolitan Police.[415] When the court awards damages against the Chief Constable or the Police Commissioner, the State pays those damages to the plaintiff.[416] English law defines competent courts to adjudicate such claims.[417]

Section 4.1.3.2, *supra*, explained that the Ugandan Constitution imposes liability on the State for unlawful detention performed by a civil servant. Plaintiffs claiming unlawful detention sue the Attorney General. The High Court and the Uganda Human Rights Commission have jurisdiction to adjudicate claims for unlawful detention and award damages. Also, Ugandan law defines compensable damages.

Unlike Uganda, France and England and Wales, Rwandan law does not impose state liability for unlawful detention by its employees.[418] Rwandan law requires that suits seeking damages for unlawful detention are to be brought only against the detaining officer. In such cases, where the court awards damages to the plaintiff, only the officer, and not the State, is liable for those damages. Additionally, legislation in Uganda, France and England and Wales clearly identifies the courts or commissions with jurisdiction to adjudicate claims for compensation for unlawful detention. In Rwanda, however, legislation does not identify the court in which an unlawfully detained person may seek compensation.

4.5.3.3. Comparison of compensable damages

In France, Uganda, and England and Wales, national courts awarded damages. In sharp contrast, in Rwanda, no unlawfully detained person has obtained compensation from a Rwandan court for unlawful detention.[419] In France, the *cour d'appel* and Commission *Nationale de Réparation des Détentions* (CNRD) have awarded damages for detention in numerous cases. In England and Wales, the *The Court of Appeal* has issued guidelines for juries in awarding damages for unlawful detention.[420] And, courts have awarded compensatory damages and punitive damages for unlawful detention.[421] Similarly in Uganda, the Uganda Human Rights Commission and courts have awarded compensatory damages and punitive damages for unlawful detention.

The difference between Rwanda and the compared countries is due, at least in part, to the differences between the laws in Rwanda and the laws in the compared countries. Those countries changed their laws to provide for compensation due to pressure of regional courts, debate in legal circles, and underlying values of individual liberty and presumption of innocence in the compared countries.

4.5.4. Remedies for unlawful detention through regional human rights mechanism

Rwanda and Uganda are parties to the same regional human rights agreements: (1) the East African Community (EAC) Treaty and (2) the African Charter on Human and Peoples' Rights. Under the EAC Treaty, individual victims of a treaty violation may apply to the East African Court of Justice (EACJ). Both Uganda and Rwanda, as parties to the African Charter, recognise the competence of the African Court of Human and Peoples' Rights.[422] And, both Uganda and Rwanda have limited the jurisdiction of the African Court by not allowing individuals and non-governmental organizations to complain to the African Court.[423]

This chapter has shown that, after their ratification of the ECHR, both the UK and France were reluctant to allow individuals direct access to the ECtHR. However, due

414 Van Dam, C., (2013), p. 508.
415 *Thompson* v *Metropolitan Police Commissioner* [1997] 3 WLR 403, 418A-B.
416 The Law Commission, (1997), p.88.
417 Van Dam, C., (2013), p.546.
418 Art. 92 CCP.
419 US Department of State, (2016), p.12.
420 *Thompson* v *Metropolitan Police Commissioner* [1997] 3 WLR 403, 418A-B.
421 Williams QC, H., (2007), pp.150-151.
422 See States parties to the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples', available at http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court, [accessed 09/03/2017].
423 Uganda never made the required declaration giving the African Court jurisdiction over such cases, and Rwanda withdrew its previously made declaration that allowed the African Court to consider such claims. See, also, section 3.2.3.2, *supra*.

to the influence of civil society, political parties and lawyers, those countries agreed to allow individual access to the ECtHR. Unlawfully detained persons in France, as well as England and Wales, have obtained compensation from the ECtHR.[424] Additionally, France and the United Kingdom have enacted domestic legislation, in accordance with their duties under the ICCPR and ECHR, to provide remedies for victims of unlawful detention.

Because Rwanda does not allow individuals to file claims in the African Court, access to that court is unavailable to unlawfully detained individuals in Rwanda. However, unlawfully detained individuals in Rwanda continue to have access to the East African Court of Justice.

All of the compared countries, including Rwanda, are parties to ICCPR, which recognizes the rights to be released from, and compensation for, unlawful detention. Thus, victims of unlawful detention in Uganda[425] and France are entitled to seek remedies, pursuant to the ICCPR, from the Human Rights Committee. However, individuals in Rwanda may not do so because Rwanda did not ratify the necessary Optional Protocol to the ICCPR.

4.6. Conclusion

This chapter's objective was to compare the right to *habeas corpus* and the right to compensation for unlawful detention in Uganda, France, and England and Wales compared to Rwanda. Regarding *habeas corpus*, unlike Uganda and England and Wales, *habeas corpus* in Rwandan law does not meet the standards set out in Article 9(4) of the ICCPR, because, in Rwanda, *habeas corpus* applications must identify the place of detention, detaining officer and alleged offence(s). With respect to compensation for unlawful detention, all three comparison countries have incorporated

424 See para. 4.4. The United Kingdom joined the European Union on 1 January 1973 and ratified the European Convention for the protection of human rights and fundamentals freedoms on 8 March 1951.

425 UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171, The Republic of Uganda acceded that protocol in November 1995, the status of ratification, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en, [accessed 03/03/2017].

into their domestic law the right to compensation for unlawful detention and the procedure to obtain compensation, in accordance with Article 9(5) of the ICCPR. However, Rwanda has not met the obligations it agreed to in the ICCPR.

Uganda's, France's, and England and Wales' protections of detained persons furnish a number of lessons on what are "best practices" to ensure release from unlawful detention and provide compensation to victims of unlawful detention. Applying the best practices of those countries to Rwanda, it is clear that, to ensure prompt release from unlawful detention, Rwanda must clearly designate the competent court to receive and hear the *habeas corpus* application without imposing any conditions. With regard to compensation for victims of unlawful detention, it is essential that Rwanda enact into its domestic law the right to compensation and provide the procedure for seeking that compensation. Furthermore, Rwanda should grant individual victims of human rights violations access to regional and international human rights courts. Such access would provide added protection to unlawfully detained persons.

This chapter identified the obstacles faced by unlawfully detained persons in Rwanda and having considered the best practices of the compared countries. The following chapter explores the improvements that Rwanda can make to ensure release from unlawful detention and provide compensation to victims.

Chapter 5: Towards effective remedies against unlawful detention in Rwanda

The preceding analysis of the existing mechanisms at the national, regional and international levels revealed a number of obstacles for unlawfully detained persons to obtain release from, and compensation for, unlawful detention in Rwanda. In this chapter, I propose improvements that Rwanda can make to ensure that unlawfully detained persons are released and awarded compensation.

5.1. Review of the existing institutional framework

If a legal framework lacks a functioning institutional framework, remedies remain only theoretical. Therefore, I start with improvements at the institutional level.

5.1.1. Improving supervision and accountability of persons involved in detention decisions

Section 4.1.3. *supra*, explained that judicial, prosecutors and correctional officers involve in detentions. With the new structure of the Rwandan Investigation Bureau of 2017, judicial police officers work under the supervision of prosecutors. The Inspectorate at the National Public Prosecution Authority was established to supervise and control the prosecution service.[1] The Inspectorate is responsible for investigating complaints relating to the performance of prosecutors and other staff of the prosecution service.[2] Article 10 of the Law Governing the Statute of Prosecutors and Other Staff of the NPPA provides for the discipline of prosecutors who fail to perform their duties.[3] The High Council of the National Public Prosecution

1 Art. 22 of the Organic Law N° 04/2011/OL of 03/10/2011 determining the organisation, functioning and competence of the National Public Prosecution Authority and the Military Prosecution Department, *Official Gazette n° 46 of 14/11/2011* (NPPA Law).

2 Art. 23 of the NPPA Law.

3 Art. 10 of the Law n°12/2016 of 02/05/2016, modifying and complementing law n° 44 bis/2011 of 26/11/2011 Governing the Statute of Prosecutors and other Staff of the National Public Prosecution Authority, *O.G. n°21 of 23/05/2016*.

Authority decides disciplinary cases filed against prosecutors.[4]

Article 6 (4° & 5°) of Rwanda correctional services Law states

> The High Council of Rwanda Correctional Services determines matters pertaining to the management, performance and conduct of RCS personnel according to the law. It also determines matters pertaining to the respect of detainees and prisoners' rights, and any other initiative contributing to the improvement of the management of detainees and prisoners.

With regards to the staff of Rwanda Investigation Bureau, the High Council of the Rwanda Investigation Bureau[5] decides disciplinary sanctions. Victims of unlawful detention may submit complaints to the High Council for the governmental organ that employs the detaining officer. The high councils are empowered to take the disciplinary measures against employees responsible for unlawful detentions.

However, in practice government employees involved in unlawful detentions are not disciplined by these High Councils due to the mind-set of the criminal justice institutions regarding rights of suspects. Pre-trial detention has become a common practice even for minor offences.[6] This mind-set is reflected by the fact that most Rwandans consider an unlawfully detained person a blessed or lucky person if he or she is released.[7]

Rwanda has taken effective steps to punish State employees involved in corruption and police misconduct. Rwanda established the Anti-corruption and Public Fund Embezzlement Unit in the Criminal Investigation Department (CID) to investigate and prosecute corruption offences. And, the Internal Anti-Corruption Unit of the Rwanda National Police investigates corruption cases. Also, from 2010 to 2015, the

4 Art. 23 of the NPPA Law.
5 Art. 14 of the RIB Law.
6 ILPD, (2013), p.92.
7 Interview with *KAREMERA Pierre*, Vice Chairperson of National Commission for Human Rights, 30/01/2017.

Rwanda National Police dismissed 400 police officers for graft and related offences,[8] in sharp contrast to the lack of discipline in cases involving unlawful detention. In practice, judicial police officers, prosecutors and prison officers are not prosecuted for misconduct in office.[9] Because unlawful detentions are committed by state agents employed by criminal justice institutions, it is difficult for those same institutions to investigate and prosecute their colleagues accused of committing unlawful detentions.

The United Nations Office on Drugs and Crime (UNODC) states that one feature of an effective accountability system is a procedure for dealing with complaints against police officers.[10] The UNODC notes that it is crucial that, to avoid conflicts of interest, police officers do not investigate their immediate colleagues. It is important that investigations are seen by the public as unbiased and impartial, which could contribute to restoring public confidence.[11] The UNODC suggests that police complaints bodies be independent of both the police and the prosecutor. To protect those making complaints against detaining officers, it is suggested that an independent body be created to receive such complaints.[12]

England and Wales have such an independent body. The Independent Police Complaints Commission (IPCC)[13] oversees and investigates complaints of police misconduct.[14] Rwanda should follow that example and create a similar independent body to investigate misconduct complaints against police, prosecutors and correctional officers.

In that vein, I recommend that Rwanda establish an Independent Detaining Officer Complaints Directorate (DOCD) within the NCHR (National Commission of

8 RNP, New Police unit to tighten grip against corruption, Thursday, 16 July 2015, available at http://www.police.gov.rw/news-detail/?tx_ttnews%5Btt_news%5D=4776&cHash=af4f395e329ad266767324760f4f3f39, [accessed 11/07/2017].
9 Interview with D. *Kaliwabo*, Inspector at National Public Prosecution Authority, on 16/01/2015.
10 UNODC, (2011), p.33.
11 *Id.*, p.41.
12 *Id.*, p.34.
13 Police Reform Act 2002, section. IPCC has been discussed in the para. 4.3.1.1. See also IPCC website at www.ipcc.gov.uk.
14 UNODC, (2011), p.60.

Human Rights) to investigate misconduct of police officers, prosecutors and prison directors with regard to the violation of detained person rights. The DOCD would also provide redress and justice to victims and ensure that disciplinary charges made against individual officers are enforced by the internal supervisory body in each institution. The DOCD should have the power to receive complaints from victims against police officers, prosecutors and prison directors, investigate and propose disciplinary sanctions for misconduct involved in the detention or continued detention. In cases of criminal culpability, the DOCD should be empowered to prosecute the unlawful detention offence. The DOCD should have the mandate to conduct regular visits to police holding facilities and prisons and to investigate claims of unlawful detentions. The proposed DOCD should liaise with *Maison d'Accès à la Justice* (MAJ) to receive complaints. The establishment of an Independent Complaints Directorate would hold detaining officers accountable for their actions. The effective oversight of the police, prosecutors and prison authorities will prevent inmates from getting "administratively lost" in prison[15] and eliminate or reduce prolonged detentions, where detainees are held beyond their sentences or other prescribed maximum time.

5.1.2. Extending legal assistance to all indigent detained persons

The lack of legal assistance in Rwanda makes remedies for unlawful detention unattainable for most victims. For detainees to take advantage of their right to *habeas corpus* and to seek compensation for unlawful detention, it is essential that Rwanda provide detained persons access to lawyers and free legal assistance if they are indigent.

5.1.2.1. Establishing legal assistance

Rwanda's National Legal Aid Policy states that legal representation shall be provided particularly to minors and indigent suspects awaiting trial, including genocide suspects transferred to Rwanda and to other indigent persons. The Legal Aid Policy states that the existing legal aid in criminal matters is insufficient.[16]

15 Legal Aid Forum (2013), p.viii.
16 Ministry of Justice, *National Legal Aid Policy*, October 2014, p.5.

Although the State, Civil Society Organizations and the Rwandan Bar Association currently provide legal assistance to indigent people, coordination among those groups is lacking. For that reason and others, the Minister of State in charge of Constitutional and Legal Affairs prepared a bill for the Parliament revamping legal aid in Rwanda. When submitting the draft bill on legal aid in the Parliament on March 14, 2017, the Minister of State in charge of Constitutional and Legal Affairs[17] stated that "the practice of providing legal aid services has been there but its function was not that efficient. The legislation and the administrative processes towards legal aid were a bit scattered and there was a need to provide a clear guidance."[18] The Bill would create and finance a fund for legal aid. The government, private sector, non-governmental agencies (NGOs) and development partners would finance it. Article 4 of the Bill would establish a Legal Aid Secretariat to provide technical support to the Legal Aid Steering Committee.[19]

However, Parliament has not acted on the Bill. Instead, the Prime Minister asked Parliament to send the Bill back to the Minister of State in charge of Constitutional and Legal Affairs for re-examination due to questions about eligibility for legal aid, budget concerns and coordination between State and non-State legal aid providers.[20] It is important that the Ministry of Justice should conduct a study to determine who will be eligible for legal aid, how much money will be required to implement it and how legal aid will be administered through existing legal aid providers.

5.1.2.2. Extending Maisons d'Accès à la Justice services to indigent detained persons

In 2007, the Rwanda government initiated its legal aid program, known as *Maisons d'Access à la Justice (*MAJ and, in English, Access to Justice Bureaus), in all of Rwanda's thirty districts. MAJ is part of the Ministry of Justice. MAJ serves as the first point of contact with legal aid services for Rwandans.[21] It provides legal information/education, as well as legal advice/mediation. Each MAJ office or bureau

17 Evode Uwizeyimana.
18 Rwirahira, R., Government Tables New Draft Law Seeking to Revamp Legal Aid, *The New Times of Rwanda*, March 14, 2017, available at http://www.newtimes.co.rw/section/read/208890, accessed 26/07/2018.
19 *Ibid.*
20 Letter n° 584/pm /2017 of 02/06/2017 from the Prime Minister to the Speaker of Parliament.
21 Ministry of Justice, *National Legal Aid Policy*, October 2014, p.13.

has three staff members: One in charge of court judgment and coordination of the *Abunzi Committee*,[22] another in charge of child protection and women and the third in charge of assisting and representing poor people in civil matters. According to Article 68 of Rwandan Bar Association law, Lawyers coordinating Access to Justice Bureaus may assist, counsel, represent and plead, before all courts, for indigents. When they represent and assist people, MAJ staff acts independently like other professional advocates. Each MAJ staff attorney takes an oath swearing to defend and to counsel with dignity, conscience, independence and humanity.[23] According to Articles 58 and 68 of the Law Regulating the Bar Association in Rwanda,[24] MAJ staffs are to provide legal and judicial aid to indigents people. They may assist, counsel, represent and plead before all courts for indigents.

However, MAJ staff are not allowed to assist a suspect at any stage of the criminal process.[25] The rationale behind limiting MAJ representation to civil matters is that it avoids conflicts of interest between two civil servants under the Ministry of Justice, namely the public prosecutor on the prosecution side and MAJ staff on the defence side.[26] That justification, however, is unsound, as MAJ staff are permitted to assist and represent indigent persons in administrative matters where opposing counsel is a government attorney.

Extending MAJ legal aid services to indigent detained persons would greatly improve their access to justice. Adding one MAJ staff member to each office or bureau would provide legal assistance to detained persons. That staff member could conduct regular visits to police custodial facilities and prisons in that MAJ district and could advise and represent unlawful detained persons in *habeas corpus* proceedings and/or claims for compensation.

22 The *Abunzi* Committee is responsible for conciliating parties involved in disputes under its jurisdiction. The service of members of *Abunzi* Committee is performed on a voluntary and non-remunerative basis. See Article 4 of the Law n° 37/2016 of 08/09/2016 determining organization, jurisdiction, competence and functioning of an *Abunzi* committee, *Official Gazette n° 37 bis of 12/09/2016*.

23 Art. 14 of the Rwandan Bar Association Law.

24 Law n° 83/2013 of 11/09/2013 establishing the bar association in Rwanda and determining its organization and functioning, *Official Gazette, n° 44 of 04/11/2013*.

25 Ministry of Justice, *The instructions to the head of Maison d'Accès à la Justice of 17 June 2015*, §A (3).

26 Interview with *Urujeni* Martine, Division Manager/Community Justice, on 31/01/2017.

5.1.2.3. Enhancing the coordination of State and non-State legal aid providers

Article 38 of the Rwandan Bar Association Law allows non-Governmental organizations that provide legal aid to vulnerable people to hire salaried advocates. Advocates working for non-governmental organizations are authorized to deal with only those issues pertaining to the mission of the organizations they work for and are governed by laws relating to the Bar Association. In fact, most of the legal assistance of State and non-State actors[27] in Rwanda focuses on civil matters, including protection of women and children. The non-governmental organization *Haguruka*[28] provides legal assistance for children and women.

There is a huge gap in legal aid assistance for indigent's detained person. In this regard, it is desirable that the non-Governmental organizations fill the gaps in providing advocates who can be assigned to that task. The Ministry of Justice must coordinate and provide funding. When a child is a defendant in a criminal case, the government appoints a contractual lawyer to represent the child. The government has at least two contractual lawyers who represent children in criminal cases.

Extending access to legal representation for all indigent detained persons, especially at the earlier stages of criminal proceedings can prevent prolonged unlawful detentions. Detained person will be tried expeditiously and the State will avoid needlessly spending its resources on maintaining people who have been unlawfully detained.[29]

5.1.3. The need to raise awareness of accused persons' rights in Rwanda

Some police and prosecutors prefer to detain suspects during investigations. And, pre-trial detentions have become the norm, even for minor offences.[30] The lack of knowledge in Africa, even among lawyers and judges, of rights in criminal cases makes it easy for police and prosecutors to disregard the rights of suspects and

27 Non-State legal aid providers like Legal Aid Forum and Haguruka focus on women and children.

28 HAGURUKA is a non-governmental organization, according to Rwandan law. HAGURUKA was established on the 16th of July 1991 and agreed by Ministerial Order n° 127/05 on 28th of December 1991. See http://www.haguruka.org.rw [accessed 25/07/2017].

29 Interview with *Mugisha*, Program Manager and *Mukashema*, senior Legal Aid Attorney at Legal Aid Forum, on 20/01/2017.

30 ILPD, (2013), p.7.

defendants.[31] That lack of knowledge is also true in Rwanda. A person who is detained by the police is considered by the Rwandan public and media as guilty. There is a need to raise awareness throughout Rwanda of the rights of accused persons.

5.1.3.1. How to raise awareness of accused persons' rights in Rwanda?

Rwanda's Constitution and the human rights instruments that Rwanda has ratified are the sources of accused persons' rights in Rwanda. There is a great need to provide police, prosecutors, prison officers, judges and advocates legal training on the rights of suspects and accused persons so that they are, at a minimum, familiar with the legal principles of due process, the presumption of innocence, fair trial, and *habeas corpus*. Rwanda's Institute of Legal Practice and Development already provides a wide variety of legal training to judges, prosecutors, lawyers, police and correctional officers throughout Rwanda. Therefore, with little effort, it could add training on rights of suspects and accused persons to its course list.

In addition to awareness of rights training, there is a need for a public information campaign. Appealing posters should summarize of the rights of accused persons that are stated in Article 9 of the ICCPR. The posters should also contain the maximum period for police detention and pre-trial detention, the right to *habeas corpus* and the right to be assisted by counsel. The posters should be placed in all police detention facilities and in prisons. The information on the posters should be published on the websites and social media pages of the NCHR, Rwanda investigational bureau, National Public Prosecution Authority, and Rwandan Correction Services.

Additionally, the NCHR should disseminate information to the public about their rights and remedies for unlawful detention through radio and television announcements and by visiting districts and sectors to hold information sessions on the public's rights. The NCHR should also organize public outreach programs focused on raising the public's awareness of their rights, such as designating Legal Aid Week.

31 Chenwi, L., *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective*, Pretoria University Law Press, 2007, p.216.

5.1.3.2. The role of Civil Society Organizations and NGOs in protecting the rights of detained persons

The Legal Aid Forum has stated that each and every detained person who is held in the prison is at the mercy of the criminal justice system.[32] When a person is detained, he or she is in the hands of the State and in a vulnerable position. Civil society organizations like the Legal Aid Forum advocate on behalf of detained persons. Civil society organizations and NGOs are crucial in protecting the rights of unlawfully detained persons in Rwanda. Those organizations are essential in reporting on the status of unlawful detentions in Rwanda and for providing legal aid and advocacy for unlawfully detained persons. Moreover, they lobby and push the government to make changes and, hopefully, enact laws providing for compensation to victims of unlawful detention.

5.1.3.3. The role of the media

The media is important in every society. "The media plays an indispensable role in implanting and maintaining the legal culture in any society. The media educates the population and entrenches accountability. Conversely, the media can be used to produce the very opposite effect."[33] Rwanda is no exception. Therefore, it is critical that the media understand the rights of suspects and accused persons, especially the presumption of innocence. Professional reporting on cases, while respecting the rights of suspects and accused persons will positively impact the entire criminal justice system and will educate the public.

5.2. Review of Rwanda's existing legal framework

"Arbitrary detention not only shatters public confidence in the State but also symbolizes a weak rule of law and tramples the dignity of individuals seeking to access justice."[34] This section proposes the improvement of Rwanda's laws to provide effective remedies for victims of unlawful detention in Rwanda.

32 Legal Aid Forum, (2013), p.29.
33 Nakayi, R., *The Annual State of Constitutionalism in East Africa 2009*, p.126.
34 El Hindi, D., *Guilty Until Proven Innocent, Report on the Causes of Arbitrary Arrest, Lengthy Pre-Trial Detention and Long Delays in Trial, ALEF - Act for Human Rights*, 2013, p.12.

5.2.1. The need to reduce the maximum periods of detention

In chapters two and three, I concluded that the maximum period of detention in the police custody before being brought before a judge and the maximum period of detention after the start of a hearing on the merits is too long and does not meet the standards of the ICCPR and the African Charter, which require that all arrested persons be brought promptly before a judge. Hence, there is a need to reduce those time limits.

5.2.1.1. Detention in the police custody

Detained persons in Rwanda may lawfully spend ten (10) days in police custody without being brought to court. During Rwanda's post- genocide period with numerous detainees and limited judicial and logistic resources, ten days was a reasonable time to detain a person. However, 24 years after the Genocide against the Tutsi, it is not reasonable to detain a person for ten days without presentation to a court. In those 24 years, the Rwandan government has built robust judicial and criminal justice institutions capable of promptly bringing a suspect before a judge. Therefore, the maximum period of detention before a suspect is brought before a judge should be reduced to 48 hours.

5.2.1.2. Detention after the start of the hearing on the merits and the right to be tried without undue delay

Based on the analysis in paragraph 2.1.3.3., the maximum period that a person can be detained when the court is seized to hear the case on the merits should be limited to a reasonable time. The easiest way to determine whether proceedings have been concluded within a reasonable time would be to fix a specific time limit. However, the one-size-fits-all approach does not work in the judicial realm. In some cases, the fixed time limit would be too short and in others it would be too long. Therefore, each case must be assessed on its own merits.[35]

35 Shelton, D., (2005), p.141.

The African Commission on Human and Peoples' Rights has explained that "the right to a trial without undue delay means the right to a trial which produces a final judgement and if appropriate a sentence without undue delay." [36] While examining if a person has been the victim of the violation of not being tried within a reasonable time, the Commission urged that the court should consider the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings and the interest of the person at stake in the proceedings.[37] The ECtHR takes the same approach. The ECtHR considers the complexity of the case,[38] the applicant's conduct,[39] and the conduct of the relevant administrative and judicial authorities.[40] What constitutes "a reasonable time" is, according to the Human Rights Committee, a matter of assessment of each particular case."[41] To protect detained persons in Rwanda against indefinite detention without trial, it is important to have the right to a trial within a reasonable time guaranteed by domestic law. Additionally, national courts should follow the lead of the African Court in determining if that right was violated by considering in each case the following factors: complexity, the applicant's conduct and the conduct of the relevant administrative and judicial authorities.

If a detainee is not tried within a reasonable time in Rwanda, the detainee should be entitled to compensation. In France, detainees who are not tried within a reasonable time are considered as victims of the malfunction of justice and entitled to

36 African Commission on Human and Peoples' Rights, (2003), ¶ N (5) (B).
37 African Commission on Human and Peoples' Rights, (2003), ¶ N (5) (C).
38 For example, the number and particular nature of the charges; the highly sensitive nature of the offences charged, relating to national security; the number of defendants and witnesses, the legal issues to be decided. See Edel, Fr., *The Length of Civil and Criminal Proceedings in the CaseLaw of the European Court of Human Rights*, 1996, p.41.
39 For example, requests for adjournment, further preliminary inquiries or extension of time-limits; making numerous appeals and so creating a procedural maze (e.g., challenges against judges, appeals against interlocutory orders). See Edel, F., (1996), p.51.
40 For example, the delay in opening proceedings; unaccustomed length of the investigation; delay by the public prosecutor in asking the court of cassation to designate the competent authority; delay in taking the first steps in the investigation or in obtaining documents from other courts; prolonged failure by the investigating judge to interrogate the persons charged and arrange a confrontation between them; delay by the judge in charge of preparations for the trial in hearing witnesses and ordering expert opinions. See European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (criminal limb)*, Council, 2014, p.34.
41 Communication n°. 336/1988, *N. Fillastre* v *Bolivia* (Views adopted on 5 November 1991), in UN doc. *GAOR*, A/47/40, p. 306, para. 6.5.

compensation for the malfunction of justice based on Article L-141-1 COJ.[42] This provision allows victims of the excessive length of proceedings to obtain financial compensation against the State. As debated in the paragraph 4.4.2., victims of a violation of that right in both France and England and Wales are entitled to claim financial compensation before the ECtHR. Once the ECtHR found that a plaintiff has been a victim of the violation of the right of being tried within a reasonable time has awarded compensation.[43]

Determining the reasonableness of a criminal procedure's length is not an exact science;[44] the law should guide the judge by determining the facts to be considered. I propose that the maximum period of detention after the start of the hearing on the merits be limited to five years. That period should be determined from the moment the person is officially charged with a criminal offence on merit. That period ends on the day the charge is determined by the final court decision, including the appeal proceedings. Once the case goes beyond the maximum period, a reasonable time requirement has been violated. However, as an ultimate exception, learning from the ECtHR experience, I suggest that in the consideration of the complexity of the case,[45] and the conduct of the parties proven by the prosecution the length of criminal proceedings may be extended by the court.

5.2.2. Review of the habeas corpus procedure

5.2.2.1. The head of prison or other place holding the detained person should be the respondent

Habeas corpus is a court order (a writ) that commands an individual or government official who has restrained another person to produce that person before the court at a designated time and place so that the court can determine the legality of that detention.[46] Its purpose is so "the court may decide without delay on the lawfulness of the person's detention and order his or her release if the detention is not lawful."[47] The purpose of *habeas corpus* is not to punish the detaining officer involved in an

42 Cass. civ. 1ère 25 mars 2009, Bull. n° 65. Quoted by Bonnemaison, J-L., (2011), p.160.
43 See Chapter four (section 4.4.2.2.)
44 Henzelin, M. & Rordorf, H., (2014), p.96.
45 For example, the genocide cases that have been transferred from other countries or ICTR.
46 Duker, W., (1980), p.13.
47 Art. 9(4) of the ICCPR.

unlawful detention but to release the detained person if the detention is not lawful. This study found that, in Uganda and the United Kingdom, the writ of *habeas corpus* is directed to the head of the prison or police station.[48]

Learning from the experience of Uganda and England and Wales, I recommend amendment of Article 92(3) of the CCP to specify that an action against unlawful detention must be directed to the head of the prison that holds that person. If the victim does not know the place of detention, then the victim should direct the *habeas corpus* application to the head of the organ that is holding that person. For example, if a person is being detained by the prosecution, the Prosecutor General should be the respondent. If a person is being held by military services, the Minister of Defense should be the respondent. If a person is being detained by the Rwanda Correctional Services, the Commissioner General of the Rwanda Correctional Services should be the respondent. Directing the *writ* of *habeas corpus* to the head of the organ or prison holding the person facilitates the process of challenging the lawfulness of detention. This change will ensure the right to access to the court for an unlawfully detained person. It will comply with the requirement of Article 9(4) of the ICCPR and the *ratio legis* of *habeas corpus*.

5.2.2.2. The burden to prove the lawfulness of the detention should be on the respondent

Chapter two of this study showed that failure to specify who has the burden of proof in cases of unlawful detention posed problems for detainees. The general rule in civil cases is that the burden of proof [49] is on the plaintiff. That general rule, however, is not appropriate in habeas *corpus* cases. Rather, it is important for the law to balance the competing interests of law enforcement and the protection of citizens against unlawful detention. The Rwanda Constitution holds that "a person's liberty and security are guaranteed by the state and no one shall be subjected to prosecution, arrest, detention or punishment unless provided for by laws in force at the time the offence was committed."[50] Moreover, Rwandan law compels detaining officers

48 See Chapter 4, sections 4.1.1.2. and 4.3.2, *supra*.
49 Art. 9 of the Law Relating to Civil Procedure.
50 Art.24 of the Rwandan Constitution.

to respect the law while performing their duties. Thus, detaining officers should be able to show to the court that they have followed the law. The head of the prison or detention centre has an obligation to keep a record of all detentions.[51]

Chapter four of this study showed that *habeas corpus* petitioners in Uganda and England and Wales do not need to prove that the imprisonment was unlawful or malicious but must only establish a *prima facie* case.[52] If the petitioner proves that he or she is imprisoned by the respondent; the burden shifts to the respondent to prove the lawfulness of the detention.[53] The Working Group on Arbitrary Detention explained that burden as follows: "[I]n every instance of detention a burden of establishing a legal basis, as well as reasonableness, necessity, and proportionality of detention, lies with the authorities responsible for detention."[54] Thus, once the petitioner proves a detention, the burden shifts to the respondent to demonstrate the legality of the detention.

If the respondent fails to prove the lawfulness of the detention, the court must release the detainee. However, if the respondent proffers sufficient reasons to believe that the detention is lawful, the burden shifts again to the petitioner to show that the detention is unlawful.

Therefore, I propose that the burden of proof in habeas proceedings should be introduced under the CCP by indicating that in every instance of detention, a burden of establishing the lawfulness of detention lies with the head of detention centre or prison.

5.2.2.3. The competent court for the habeas corpus application

Article 9(4) of the ICCPR provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court…." That provision provides the right to *habeas corpus* to anyone who is deprived of his liberty.

51 Art. 28 of Rwanda correctional services law.
52 To establish that there is a case to answer.
53 See paras. 4.1.1.3. & 4.3.2.
54 Principle 13 of the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, as adopted by UN Working Group on Arbitrary Detention, on 29 April 2015.

Article 91(1) of the CCP states that the competent court to adjudicate the *habeas corpus petition* is the court nearest the place where the person is detained and whose competence covers offences the detained person is alleged to have committed. Chapter two of this study pointed out that detained persons who have not been charged or who do not know the place of detention face a quandary as to where to file the *habeas corpus* petition.

A detainee's inability to identify the place of detention or alleged offence should not be an obstacle to challenging the lawfulness of one's detention. Secret or incommunicado detention is not a valid ground for depriving a detainee the right to challenge the lawfulness of his or her detention before a court of law.[55] Moreover, the African Commission on Human and Peoples' Rights indicates that Judicial bodies shall at all times hear and act upon petitions for *habeas corpus*, …. No circumstances whatever must be invoked as a justification for denying the right to *habeas corpus*." [56] This study showed that England and Wales, as well as Uganda,[57] have empowered the High Court to receive *habeas corpus* applications from any person challenging the unlawfulness of detention. In Rwanda, the Parliament should amend Article 91 of the CCP of the Criminal Procedure Code to permit detainees who have not been charged or who do not know where they are being held to file a petition for a writ of *habeas corpus* in the High Court.

5.2.2.4. Rwandan law should be amended to require the court to order release if it determines that the detention is unlawful

Article 91(2) of the Rwanda's Code of Criminal Procedure provides that, once a court finds that the detention is unlawful, it has discretionary power to order release or to continue the detention. The court's ability to continue the detention despite a determining that it is unlawful is also provided for by Article 105 of

55 Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Chapter 5 • Human Rights and Arrest, Pre-Trial and Administrative Detention*, New York and Geneva, 2003, p. 207.
56 African Commission on Human and Peoples' Rights, (2003), § M (5) (e).
57 Sections 14 & 34 of the Judicature Act of Uganda of 17 May 1996.

Rwanda's Code of Criminal Procedure.[58] Allowing judges to order continuation of the detention despite finding it unlawful discourages detainees from filing *habeas corpus* petitions. Even if a detainee succeeds in proving the unlawfulness of the detention, it is possible that the judge will not release him or her.

Rwanda's law permitting continued detention despite a determination that the detention is unlawful is in sharp contrast to international standards governing *habeas corpus*. Article 9(4) of the ICCPR and the interpretation of the African Charter by the African Commission on Human and Peoples' Rights require the court to order release if it finds that the detention is unlawful.[59] Those provisions do not give courts the alternative to order continued detention. Hence, Article 91(2) of Rwanda's Code of Criminal Procedure that allows courts to continue detention despite finding it to be unlawful violates the standards set out in those ratified instruments.

Furthermore, the comparative chapter showed that the only option to order release if the detention is not lawful also has been reflected in France and England and Wales in the article 5(4) of the ECHR that indicates that (...) "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." Similarly to Uganda, if a return to the *writ* fails to establish the lawfulness of the detention, the court should have no option but to order release.[60]

A major problem with continued detentions is that detainees are also frequently deprived of access to lawyers and their families. They are also sometimes subjected to torture and other forms of ill-treatment.[61] Courts should be particularly sensitive

58 Art. 105, 5 of the CCP states that "when during the examination of an action against provisional detention of a person suspected of a felony the judge finds that the provisional detention is unlawful, he/she shall in spite of such illegality order continuation of the detention of the suspect if there are serious grounds for suspecting that the person has committed the offence and the person who illegally detains the suspect shall be personally prosecuted."

59 African Commission on Human and Peoples' Rights, (2003), §M (4) and (5).

60 See para. 4.1.1.3, *supra*.

61 Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, (2003), p.161.

to ordering continued detention unless the State provides assurances that the continued detention will be in accordance with law.

The strict application of release as a remedy will prevent unlawful detention situation in Rwanda, as detaining officers will comply with the law while performing their duties, knowing that any acts performed contrary to the law during the detention may lead to the release of an unlawfully detained person. The court's release of a person who was unlawfully detained will not stop the criminal process, as the released person may still be prosecuted and again detained if convicted.

Some question whether release from unlawful detention is appropriate for offences like murder, terrorism and national security related offences. It is important to balance the need to protect society and the rights of the individual? If the only option is to order the release, then courts would order the release of detainees charged with such serious crimes simply because the detention exceeded the maximum period of detention in police custody. That would lead to an unintended and problematic result.

To avoid such a result, this study proposes that, as a general rule, courts should order release if the detention is unlawful. However, courts should have the option to order continued detention if two conditions are met. First, the detention becomes lawful.[62] Second, there reasonable cause grounds for believing that the detainee has committed the offense or there is reasonable cause for believing that the detainee may flee, if released.

In all cases of unlawful detention, the unlawfully detained person should be entitled to compensation from the State for the period of unlawful detention. Moreover, if the judge decides to continue the detention, the detainee should have the right to again challenge the continued detention through habeas corpus petition.

62 Arts. 96 & 98 of the CCP.

5.2.3. Compensation for unlawful detention

5.2.3.1. Rwanda should establish the right to compensation for unlawful detention

Rwanda should guarantee the right to compensation for unlawful detentions and arrests. By doing so, Rwanda will meet its obligations under international conventions to which it is a party. Rwanda will also join the many other countries that guarantee that right to their people.

The right of *habeas corpus* only partially addresses the problem of unlawful detention. Although it can result in the release of unlawfully detained persons, *habeas corpus* does not recompense unlawfully detained persons for the days, months or years of the loss of their freedom. Also, *habeas corpus* does not penalize the State for unlawfully detaining a person. Thus, there is no incentive for the State to detain persons lawfully and respect the rights of detainees.

The African Commission on Human and Peoples' Rights recognizes the importance of compensation for victims of unlawful arrest and detention. Interpreting the African Charter, the African Commission explained that "States shall ensure, including by the enactment of legal provisions and adoption of procedures that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation."[63]

Likewise, the ICCPR provides the right to compensation for unlawful arrest and detention. Article 9(5) of the ICCPR states, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Article 2(2) of the ICCPR states, "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Because Rwanda did not already have existing legislation providing the right to compensation for unlawful arrest and/or detention, by ratifying the ICCPR, Rwanda became obligated to enact legislation to provide for the right of compensation for unlawful arrests and/or detentions. Not surprisingly, the recent Concluding observation of the Human Rights Committee on Rwanda noted the lack of an effective remedy for victims of unlawful detention and recommended that Rwanda establish "an effective right to remedy and redress" for such persons.[64]

Although Rwanda is a party to both the African Charter and the ICCPR, Rwanda has failed to ensure that victims of unlawful arrest and/or detention are able to claim compensation. Rwanda has not enacted legal provisions or adopted procedures so that persons who have been unlawfully detained can seek and obtain compensation. By failing to meet its obligations under the African Charter and ICCPR, Rwanda has failed to provide its people with an important human right.

Finally, this study showed that all three compared countries (Uganda, France and the United Kingdom) had domestic legislation that provided the right to compensation for unlawful detention. Chapter two of this study concluded that existing tort law in Rwanda is not a sufficient remedy for compensating victims of unlawful detention. Thus, to comply with the requirements of the ICCPR and the African Charter that obligate Rwanda to establish an effective right to remedy and redress for unlawful detention, the Rwanda Parliament should add a provision guaranteeing the right to compensation for unlawful arrest and detention to the Code of Criminal Procedure.

5.2.3.2. State liability for unlawful detention

The power to arrest and to detain persons against their will is among the most powerful instruments a State has against its citizens. The abuse of such power is the basis for human rights violations worldwide.[65] Although the Rwandan Code of Criminal Procedures provides some safeguards for detained persons,[66] unlawful

63 African Commission on Human and Peoples' Rights, (2003), § M (1) (H).

64 "The State party should: Guarantee that persons who have been victims of unlawful detention, torture and ill-treatment have an effective right to remedy and redress." United Nations Human Rights Committee, *Concluding observations on fourth periodic report of Rwanda 2016*, §20(d).

65 African Policing Civilian Oversight Forum, (2011), p. 20.

66 Arts. 90 to 104 of the Rwanda Code of Criminal Procedure.

detentions still occur.[67] As explained in section 2.1.4.2, *supra*, of this study, Article 92 of the Code of Criminal Procedure excludes state liability for unlawful detentions. Accordingly, immunity of the state is an insurmountable obstacle for those seeking to obtain compensation for unlawful arrest or detention.

The international community's human rights approach to unlawful detentions reflects the idea that the State's authority manifested by its power to arrest and detain people that distinguishes it from even the most powerful private persons and institutions brings with it special responsibilities to those over whom it exercises such authority.[68] Although the ICCPR does not compel its member's States to establish state liability to compensate victims of unlawful detention, it requires them to have an effective legal framework that enables such victims to claim compensation. Article 11 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [69] highlights the State's obligation to compensate victims. It provides, "Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, victims should receive restitution from the state whose officials or agents were responsible for harm inflicted."

The establishment of State liability unlawful detention will enable victims of unlawful detention to claim and obtain compensation. By legislating state liability to compensate victims of unlawful detention, Rwanda's Parliament would be recognizing that the State, through the actions of its officers, has caused damage to unlawfully detained persons. The State should be held liable for the tortious acts of its servants.[70] This study showed that three comparison countries (Uganda, France and the England and Wales) have established State liability for detentions by civil servants as a result of criminal charges. Rwanda should follow the lead of those countries by making the State liable for detentions that are contrary to the Code of Criminal Procedure.

67 HRC, *Concluding observations 2016*, §6.
68 *R.* v *Bournewood Community and Mental Health NHS Trust Ex parte. L* [1999] 1 A.C. 458 HL; *HL* v *United Kingdom* (45508/99) (2005) ,40 E.H.R.R, 32 ECtHR. See, also, Pedain, A., "Requiem for a Fairytale," [2005] 64 C.L.J. 11, cited by Du Bois, F., (2011), p.595.
69 Art. 11 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly on November 29, 1985.
70 Fairgrieve, D., (2003), p.19.

The establishment of State liability for unlawful detentions may have a positive impact by reducing the number unlawful detentions in Rwanda. "[H]olding the government responsible may have such broad impact because the government can employ the incentives, education, constraints, and other conditions that influence officials' behaviour."[71] Hence, the Rwanda Parliament should amend Article 92 of the Code of Criminal Procedure, which currently excludes state liability for unlawful detentions, to require compensation from the State when a judge determines that a person has been unlawfully detained.

5.2.3.3. Rwandan law should identify the classes of persons eligible for compensation for unlawful detention

Currently, Rwandan law does not provide for the right to compensation for unlawful detention. Thus, it does not state who would be entitled to compensation if such a right existed. However, if the Rwandan legislature amends the law to provide for a right to compensation, it should also identify the classes of persons who would be entitled to compensation. In determining those persons eligible for compensation for unlawful detention, the legislature should consider the following points. First, all unlawfully detained persons should have the right to compensation, regardless of the stage of the criminal process during which it occurred and the outcome of the final decision on the criminal charges. Allowing all unlawfully detained persons to seek compensation conforms with international and regional human rights instruments. For instance, Article 9(5) of the ICCPR states, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." The African Commission agrees.[72] Therefore, in enacting domestic legislation, the Rwandan Parliament should clearly state that anyone who has been the victim of unlawful arrest or detention by a civil servant shall be entitled to compensation from the State.

71 Shelton, D., (2005), p.49.
72 African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, § M (1) (H) (2003).

Second, the right to compensation should be available, not only to the unlawfully detained person, but also to indirect victims,[73] who were negatively affected by the unlawful detention. Indirect victims are persons who suffered from the detention due to the rapport they have with the unlawfully detained person. Those affected by the unlawful detention could include family members of the detained person. This recommendation is in line with the requirement of the African Commission on Human and People's Rights, which has stated that "the right to compensation for illegal or arbitrary arrest and detention ... is a right extended to immediate family or dependents of the direct victim."[74] Additionally, French law provides that indirect victims (*victims par ricochet)* are entitled to compensation.[75]

Third, where an unlawfully detained person died during detention, the right to compensation should vest in his or her heirs. In other words, the right to apply for compensation for unlawful detention would devolve upon the heirs (*ayants droits*). At a minimum, the deceased's dependants should be able to claim compensation for the unlawful detention. For example, Article 197(2) of Rwanda's Code of Criminal Procedure provides that "if a person sentenced as a result of a miscarriage of justice is dead, the right to apply for moral damages shall devolve under the same conditions upon his/her heirs." The Rwandan Parliament should extend that right to the heirs of victims of unlawful detention.

5.2.3.4. Rwandan law should identify the types of damages that are compensable for unlawful detentions

The African Commission on Human and Peoples' Rights has stated that compensation for unlawful detention should include

> any quantifiable damages resulting from the rights violation and any physical or mental harm (such as physical or mental harm, pain, suffering and emotional distress), lost opportunities including education, material damage and loss of actual or potential earnings, harm to reputation or dignity, and costs required for legal services or expert assistance, medicines, medical services, and psychological and social services.[76]

Similarly, the UN General Assembly has explained that

> Compensation for human rights violations should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (*a*) Physical or mental harm; (*b*) Lost opportunities, including employment, education and social benefits; (*c*) Material damages and loss of earnings, including loss of earning potential; (*d*) Moral damage; (*e*) Costs required for legal or expert assistance, and medical services, and psychological and social services.[77]

This study found that all of the three compared countries define the compensable damages that may be awarded in cases of unlawful detention. In France, the compensable damages are determined by the court of appeal and the *Commission Nationale de Réparation de la Detention* by applying the "*Principe de réparation intégrale,*"[78] which aims to place victims in the same position they would have been in if the unlawful detention had not occurred. Compensation awards to unlawfully detained persons in France, Uganda and the England and Wales may include damages for both material and moral suffering. Importantly, where there has been an abuse of power by oppressive or arbitrary conduct, both Uganda and England and Wales award punitive damages. Rwanda should follow the example of those countries.

If Rwanda adopts the "*Principe de réparation intégrale* with respect to compensation for unlawful detention, judges will be able to award quantifiable damages to victims who prove them. Quantifiable damages include material damage and loss of actual

73 Winiger, B., Koziol, H, Ba Koch, and Zimmermann, R (Eds.), *Digest of European Tort Law*, Volume 2: *Essentials Cases on Damages*, De Gruyter, 2011, p.712.

74 African Commission on Human and Peoples' rights, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, 2015, p.29.

75 See para. 4.2.2.3, *supra*.

76 African Commission on Human and Peoples' Rights (2015), p.29.

77 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law* § 20 (2006).

78 See para 4.2.3.4, *supra*.

or potential earnings, lost opportunities including education, costs required for legal services or expert assistance, medicines, medical services, and psychological and social services. For example, if unlawfully detained persons claims lost wages or income during detention, they must prove to the court the wages or income received before detention. If the unlawfully detained person does not have lost wages (e.g. a student or unemployed) or cannot produce evidence of lost income, courts should apply the minimum wage per day, which courts have applied in other damage calculations. The current minimum wage per day in the Rwanda is 3,000 Rwandan francs.[79]

In addition to lost wages, non-economic damages, including mental harm, pain and suffering, emotional distress, loss of reputation or dignity and humiliation should be compensated. I In awarding compensation for such non-economic damages, courts should apply the maxim "*Ex aequo et bono*"[80] (equity and fairness), considering the duration and conditions of the deprivation of liberty and any of the above-mentioned non-economic damages sustained as a result of the unlawful detention.

5.2.3.5. Unlawfully detained persons should be able to seek non-monetary compensation

Sometimes, monetary compensation is insufficient to adequately compensate the unlawfully detained person. In such cases, plaintiffs should be able to request and obtain non-monetary compensation. The United Nations Human Rights Committee has specifically identified non-monetary compensation as appropriate to compensate victims of unlawful detention and wrongful conviction. It explained that

> where appropriate, reparation can involve restitution, rehabilitation **and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations**.[81] (Emphasis added.)

79 *SORAS AG Ltd.* v *Umuhoza Pacifique et crts*, R.C.A.A 0049/14/CS (Rwanda Supreme Court /2016).

80 "According to the right and good" or "from equity and conscience" is a Latin phrase allowing the tribunal to, instead of applying the law, consider solely what they consider to be fair and equitable in the case at hand.

81 Human Rights Committee, *General Comment nº. 31 [80]*, §16, interpreting Article 2(3) of the ICCPR.

The media is almost as powerful as the State. When the media broadcasts inferences or conclusions of defendants' guilt before or during a trial, it may deny the defendants a fair trial and it will inevitably harm the defendants' reputations, even if they are eventually acquitted. The media's long-lasting influence on the public may negatively affect the future life of a defendant. Thus, in addition to establishing the right to compensation from the State for unlawful detention, Rwandan law should permit the defendant to request a public apology from the State and, if such public apology is requested, require the State to issue it. The Rwandan Parliament should amend the Code of Criminal Procedure to specify that "Any person who is unlawfully arrested or detained shall be entitled to compensation and, if he or she requests, to a public apology from the appropriate authority that represents the institution that held that person unlawfully." The law should also require the public authority to publish the apology in Rwanda's major newspaper (currently The New Times of Rwanda and igihe.com) in order to reach the public. Requiring a public apology in addition to monetary compensation may have a positive impact on changing the mindset of the persons responsible for unlawful detentions in the criminal justice system and preventing future unlawful detentions in Rwanda.

Another form of non-monetary compensation is sentence reduction.[82] In the case of *Prosecutor v. Barayagwiza*, [83] the UN International Criminal Tribunal for Rwanda (ICTR) reduced the defendant's sentence as compensation for his unlawful detention. In that case, the unlawful detention resulted from delay in transfering *Barayagwiza* to the ICTR for 260 days. The ICTR Appeals Chamber determined that his unlawful detention entitled him to compensation in the event of an acquittal or a sentence reduction if convicted. Because *Barayagwiza* was subsequently convicted of inciting genocide, the ICTR compensated him for the unlawful detention by reducing his life sentence to 32 years.[84]

82 In the Dutch legal system, unlawful, as well as retrospective unjustified lawful detention, may be compensated by reduction of the prison sentence imposed for another unrelated criminal offence. See Tak, P.J.P., *The Dutch Criminal Justice System* , p. 60 (2003).

83 DeFrancia, C., "Due Process in International Criminal Courts: Why Procedure Matters," 87 *Virginia Law Review* 1405 (2001),

84 *The Prosecutor* v *Jean-Bosco Barayagwiza*, Case Nº. ICTR-97-19-AR72. Appeals Chamber 11/02/1999. Barayagwiza died in prison before completing his reduced sentence.

Rwandan law does not recognise the reduction of a sentence as a form of non-monetary compensation for unlawful detention. However, it is an appropriate way of compensating unlawfully detained persons when the unlawful detention is followed by a conviction and when the punishment is a prison sentence. It protects the public fisc while compensating the unlawfully detained person. Sentence reduction does not cost the State any money, and the victims of unlawful detention are satisfied because they know that they will regain their liberty sooner. Hence, the Rwandan legislature should amend the Criminal Code of Procedure to permit the State to use sentence reduction as a form of compensation for unlawful detention when the unlawful detention is followed by a conviction. The judge may decide whether sentence reduction is appropriate as an alternative to financial compensation.

5.2.3.6. Designation of the competent court

Within Rwanda's current legal framework, there is no procedure for determining the competent court to adjudicate a claim for compensation for unlawful detention. Therefore, it is difficult for unlawfully detained persons to know where to file a claim for compensation. Confusion about where to file a claim adds another hurdle for victims of unlawful detention. Therefore, it is crucial that Rwandan law clearly articulate the appropriate court to adjudicate such claims.

Learning from the experience of Uganda, France, England and Wales, all of which have designated the competent organs to adjudicate compensation claims,[85] I recommend that claims for compensation for unlawful detention be filed in the Intermediate Courts' Specialised Chamber on Administrative Matters. Those courts are competent to examine actions for damages arising from extra-contractual liability of government agents and public institutions.[86] The legislature should extend their jurisdiction to include claims for compensation for unlawful detention as those claims fall into the category of extra-contractual liability of government agents and public institutions. Moreover, those courts have experience in adjudicating claims against state or public institutions and in the assessing damages for unlawful acts resulting

85 See paras, 4.1.2.2.; 4.2.3.3; & 4.3.3.1, *supra*.
86 Art. 12 (3°) of 2013 OFJC Law.

from public services. The legislature should also provide for appeals in accordance with the hierarchy of Rwandan courts.

5.2.3.7. The prescription period for compensation claims

This study revealed that the prescriptive period, or statute of limitations, for claims for compensation for unlawful detention in France is limited to six months from when the decision to drop the case or the discharge or acquittal decision is made known to the victim. Article 149-2 of the *Code de procédure pénale* specifies that "The first president of the court of appeal, seised by an application made within the six months of when the decision to drop the case, the discharge or acquittal became final, rules in a reasoned decision".[87]

However, the *Commission de Suivi de la Détention Provisoire* indicated that this period is too short and the people in precarious situation seem particularly deprived to exercise their rights.[88] Victims of unlawful detention in Rwanda are also entitled to file a civil action for damages arising from the unlawful detention offense, and that civil action is subject to a prescriptive period of five (5) years from the date of the offence.[89] The prescriptive period for filing any claim for compensation for unlawful detention, whether by the victim or heirs should be five (5) years from the date when the final decision of unlawful detention has been made known to the victim.

5.3. Review of Rwanda's policy regarding granting individuals access to regional and international human rights courts

When domestic institutions fail to protect human rights, it may become necessary for victims to seek redress before sub-regional, regional and international human rights mechanisms. Regional and international conventions offer the victim the chance to bring his or her case before a regional or international body.[90] However, the national

87 Art.149-2 of France 's Code of Penal Procedure.
88 Commission de Suivi de la Détention Provisoire, *Rapport annuel* 2013, 2014, p.73.
89 Art. 15 of Rwanda's Code of Criminal Procedure states, "A civil action arising from a criminal offence shall be subject to a prescriptive period of five (5) years from the date of the commission of the offence.
90 Abdul Azeez, H., " Protection of Human Rights from the Police-Position in Regional Systems,"3 *International Journal of Social Science and Humanity,* p. 74 (2013).

legal framework also should grant individuals access to these bodies. This section discusses what Rwanda should do to afford unlawfully detained persons in Rwanda access to justice through regional and international human rights mechanisms.

5.3.1. EAC member states should approve the protocol to the EAC to extend EACJ jurisdiction for Rwandans claiming human rights violations

The East African Court of Justice (EACJ) does not have jurisdiction to order release and/or compensation for unlawful detention. The lack of human rights jurisdiction weakens the role of the EACJ in the protection of unlawfully detained persons in EAC members states includes Rwanda. To enhance the protection of unlawfully detained persons in EAC member states Rwanda, members' states of the East African Community should give the EACJ an explicit human rights mandate. Members states can do so by adopting the protocol which extends the EACJ's human rights jurisdiction, as provided for in Article 27(2) of the EAC Treaty. EAC member states' adoption of that protocol will enable the EACJ to adjudicate claims of human rights violations and order remedies if it finds a violation. I concur with the voices of scholars who have called for extension of the jurisdiction of the EACJ to encompass human rights violations.[91]

5.3.2. Rwanda should review its declaration that revoke individuals access to the African Court

Due to the Rwandan government's withdrawal from its declaration that allowed individuals in Rwanda access to the African Court on Human and Peoples' Rights, unlawfully detained persons in Rwanda are not allowed to seek redress before that court. To enable individual victims of human rights violations direct access to that court, Rwanda must review its decision to revoke the declaration to the Protocol, as required by Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights.

91 Ruhangisa, J. E., *The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)*, A Paper for Presentation During the Sensitization Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November 2011, p. 26. See also Possi, A., (2014), p.326.

The suggested review of its declaration will help the Rwandan government to comply with the UN Human Rights Committee's concluding observations on the fourth periodic report of Rwanda, which required the Rwandan government to consider making the declaration recognizing the competence of the African Court on Human and Peoples' Rights to receive cases from individuals and NGOs once again, with a view to providing supplementary protection for the rights enshrined in the Covenant at the regional level.[92] Similarly, this review will help the Rwandan government to react positively to the European Parliament resolution on human rights reforms in Rwanda that "Calls on the Rwandan authorities, as a matter of urgency, to proceed with the review of its declaration allowing individuals and NGOs to file complaints with the African Court on Human and Peoples' Rights and to restore and reintroduce it." [93]

5.3.3. Rwanda should ratify the Optional Protocol to the ICCPR

Although Rwanda has ratified the ICCPR, which provides in Article 9(5) for an enforceable right to be released and compensation to anyone who has been the victim of unlawful arrest or detention, unlawfully detained persons in Rwanda may not petition the Human Rights Committee for release or compensation. The UN established the Human Rights Committee to ensure the implementation of the ICCPR. However, the Rwanda government does not allow individual victims of human rights violations in Rwanda to seek remedies before that Committee. Due to Rwanda's failure to ratify the optional protocol to the ICCPR, unlawfully detained persons in Rwanda are not allowed to petition the Human Rights Committee for release from, or compensation for, unlawful detention.

Rwanda should ratify the Optional Protocol of the ICCPR to allow individual victims of human rights violations to file complaints with the Human Rights Committee.[94] The ratification of that First Optional Protocol will help the Rwandan government comply with the Human Rights Committee's concluding observations on the fourth

92 UN Human Rights Committee, *Concluding observations 2016*, §8.
93 European Parliament resolution on human rights reforms in Rwanda of 2016, RC \1106219 EN.docx, p.7.
94 Human Rights Committee, *Concluding observations 2016*, §6.

periodic report on Rwanda. The Committee recommended that the Rwandan government ratify the First Optional Protocol to the Covenant, which establishes an individual complaint mechanism.[95] Moreover, the ratification of that First Optional Protocol will enable the Human Rights Committee to receive and consider communications from individuals in Rwanda. If Rwanda ratified that Protocol, unlawfully detained persons in Rwanda would be entitled to claim and obtain compensation through individual communications to the Human Rights Committee.

If Rwanda ratifies the Optional Protocol, the Human Rights Committee could play a major role in the enforcement of the rights of unlawfully detained persons in Rwanda to be released from detention and to receive compensation.

5.4. Recommendations

This study calls on the following stakeholders in Rwanda to take action.

5.4.1. To the Rwandan government and Parliament

1. Amend the Law n°19/2013 of 25/03/2013 determining missions, organization and functioning of the National commission for human rights (NCHR), by establishing the Independent Detaining Officer Complaints Directorate within the NCHR;
2. Adopt the Legal Aid Law that extends legal assistance to all indigent detained persons;
3. Add one lawyer to the existing MAJ legal aid staffs in each district and task that lawyer to conduct regular visits to prisons and provide legal aid assistance for indigent detained persons;
4. Amend Article 37 of the Code of Criminal Procedure to reduce the maximum period of detention before a suspect is brought before a judge to 48 hours;
5. Amend Article 121 of the Code of Criminal Procedure to limit the maximum period of detention after the start of the trial to five years from the start of the first hearing to the final decision.

95 Human Rights Committee, *Concluding observations 2016*, §6.

6. Amend Article 121 of the Code of Criminal Procedure to provide the right to compensation for detention not followed by a conviction for an offence.
7. Amend Article 91 of the Code of Criminal Procedure by adding paragraphs that specify that:
   - The High Court is competent to receive the *habeas corpus* application when the place of detention or the alleged offence is not known.
   - The *habeas corpus* application should be directed against the head of the prison or the head of the organ that holds that person.
   - In every instance of detention, the burden of establishing the lawfulness of detention lies with the head of the detention centre or prison.
   - The court should order release if the detention is not lawful, except if the normal requirements for provisional detention are met.
8. Amend Article 92 of the Code of Criminal Procedure by adding paragraphs that specify that:
   - Anyone who has been the victim of unlawful arrest or detention shall be entitled to compensation from the State for material damages and moral damages resulting from the unlawful detention, as well as a public apology from the appropriate authority.
   - The State must compensate the victim of unlawful detention.
   - The right to compensation for unlawful detention shall be available to indirect victims of unlawful detention.
   - If an unlawfully detained person has died, the right to apply for compensation for the unlawful detention shall devolve under the same conditions to his/her heirs.
   - If the unlawful detention has been followed by a guilty verdict, the compensation for unlawful detention may consist of a sentence reduction;
   - The prescriptive period of compensation for unlawful detention claims shall be limited to five (5) years from the date when the unlawful detention decision became final.
9. Add a provision in Law determining the jurisdiction of courts that specifies that the Intermediate Court's Specialised Chamber on Administrative Matters that

is nearest to the victim of unlawful detention shall be the competent court to receive the compensation claim. The parties may make an appeal to the High Court following the procedural laws;

10. Approve the additional protocol to the EAC Treaty that extends the EACJ's jurisdiction over human rights violations;
11. Review its declaration to allow individuals access to the African Court on Human and Peoples' Rights;
12. Ratify the Optional Protocol to the International Covenant on Civil and Political Rights that allows individuals access to the Human Rights Committee;

5.4.2. Rwandan criminal justice institutions

1. Enforcement of the following existing legal provisions:
   - A prosecutor must conduct a weekly visit to police stations and must release unlawfully detained persons held by the judicial police;
   - The maximum period of detention in police custody and provisional detention and monthly review of pre-trial detention by the court;
   - Prison management must release unlawfully detained persons whose provisional detention period has elapsed without being informed in writing by the Public Prosecution that the application for extension of the provisional detention has been submitted to the court;
   - Prison management must release a prisoners who have served their entire court-ordered prison sentence;
2. The internal supervisory mechanism in the Rwanda Investigation Bureau, the prosecution, and Rwandan Correctional Service must effectively discipline any individual responsible for unlawful detention;

5.4.3. The National Commission for Human Rights, Civil Society Organisations and Rwandan Bar Association

1. Train advocates, judicial police, public prosecutors and judges to enhance their knowledge and skills on the rights of suspects;
2. Raise public awareness regarding the rights of suspects;

3. Raise public awareness regarding the existing regional and international human rights mechanisms;
4. Support the Rwandan government in the establishment of an effective legal aid system for all indigent detained persons.

In conclusion, this study has shown that to enable the realisation of remedies for unlawful detention in Rwanda as embodied in international and regional human rights instruments, Rwanda must amend its laws. Without assuming this research to be exhaustive, I have brought my intellectual contribution, minimal may it be, to the doctrinal arsenal in the matter of remedies for unlawful detention in Rwanda and I have opened doors for future researchers in this area. The recommendations made in this study are only lines of thought open to all critical and susceptible to be modified or contradicted by other researchers interested in the research question which I attempted to answer.

Summary

Despite the fact that Rwanda has ratified regional and international human rights instruments that provide for the right to *habeas corpus* and compensation for unlawful detention, unlawfully detained persons in Rwanda do not claim compensation or obtain release through national, regional and international mechanisms. Thus, effective remedies for obtaining release from, and compensation for, unlawful detention in Rwanda are necessary.

The central objective of this study was twofold. First to identify obstacles that unlawfully detained persons in Rwanda face in obtaining release and compensation through current national, regional and international mechanisms. Second, to suggest mechanisms which might be introduced in Rwanda to ensure release from unlawful detention and provide compensation to victims of unlawful detention, learning from the procedures and laws of international human rights organizations and other countries.

To that end, chapters two and three of the study explored existing national, sub-regional, regional and international mechanisms for possible remedies for unlawful detention in Rwanda. Since 1994, Rwanda has made significant progress in protecting people against unlawful detention by defining conditions which lead to unlawful detention, introducing *habeas corpus* and setting up institutions likes the National Commission for Human Rights to assist unlawfully detained persons.

This study revealed that sometimes unlawfully detained persons in Rwanda are detained under circumstances that make it impossible for them to challenge their detention. Also, the study found that existing laws do not provide a solution with regard to *habeas corpus* petitions in cases when an unlawfully detained person cannot identify the detaining officer, alleged offense or the place of detention. The study found that in some cases judges ordered the continuation of the detention even though it was unlawful.

With regard to compensation for unlawful detention, the study found that Rwanda has no law specifically providing for compensation for unlawful detention. The Rwanda Criminal Procedure Code allows victims of unlawful detention to file a civil action, but only against the individual(s) responsible for the unlawful detention, not the state. Therefore, the identification of the detaining officer who is responsible for unlawful detention is the first step for an unlawfully detained person to claim compensation. In addition, he or she is required to prove the fault of the detention officer as a pre-condition for obtaining compensation.

The study revealed that unlawfully detained persons in Rwanda do not seek or obtain compensation in Rwanda due to the lack of a defined procedure for obtaining compensation, specifically who is entitled to compensation, what are compensable damages, what court has jurisdiction to adjudicate such claims and what is the burden of proof. In addition to the lack of a defined legal framework, other identified obstacles to filing claims are fear of being detained again in retaliation for filing a claim, ignorance of the law, limited access to legal assistance, and being considered guilty by society.

With regard to sub-regional, regional and international human rights mechanisms, this study indicated that Rwanda has ratified a number of international and regional human rights instruments that provide for the right to be released from, and compensation for, unlawful detention. The study revealed that due to lack of a detailed domestic law procedure on enforcement of the right to be free from unlawful detention, ignorance of those instruments and limited legal assistance, unlawfully detained persons in Rwanda do not rely on those instruments to seek release from, or obtain compensation for, unlawful detention. Moreover, Rwanda is not a signatory to the Optional Protocol to the International Covenant on Civil and Political Rights that established the Human Rights Committee. Therefore, individual victims of human rights violations in Rwanda may not seek justice before that Committee. Moreover, due to Rwanda's withdrawal of its declaration, individual victims of human rights in Rwanda are not allowed to seek justice before the African Court. The non-ratification of the treaty bodies in charge of enforcement of these instruments

and limiting individual's access to the regional and international fora by the Rwandan government explains the lack of realisation of remedies for unlawfully detained persons in Rwanda through those established mechanisms.

Also, the East African Court of Justice(EACJ)'s the lack of jurisdiction over human rights issues limits its ability to decide complaints from or about unlawfully detained persons. It is suggested that the EAC should extend the EACJ's jurisdiction to include human rights issues, as provided for in Article 27(2) of the EAC Treaty.

Pursuant to the ICCPR, Uganda, France and England and Wales, have introduced into their domestic law specific provisions providing for compensation for unlawful detention. Rwanda has not. This study also revealed that in the jurisdictions of France, Uganda and England and Wales courts have decided cases brought by detainees and have ordered release from, and compensation, for unlawful detention. The difference in the realisation of release and compensation as remedies for unlawful detention in Rwanda compared to the other countries in the study may be partly explained by the differences between the laws of those countries and Rwanda. The study revealed that, unlike Rwanda, unlawfully detained persons in both France and England and Wales, are allowed to seek and obtain remedies before their regional human rights court (ECtHR). In fact, unlike such persons in Rwanda, unlawfully detained persons in France and England and Wales have sought and obtained compensation for unlawful detention before the ECtHR.

Edwin Busuttil, a former member of the European Commission on Human Rights aptly explained:

> No government on earth is immune from the possibility of error or injustice, even in countries with the best record for the administration of justice and civil liberties .... No state will fall short of its democratic credentials in the domain of human rights if it is prepared to make amends for its deficiencies. Error is human; it is only persistence in error that is reprehensible since democracy must necessarily ensure its own credibility.[1]

1 Edwin Busuttil, a former member of the European Commission of Human Rights, in the European Court of Human Rights, *The Conscience of Europe: 50 years of the European Court of Human Rights*, Council of Europe,p.169 (2010).

Unlawful detentions are the result of human error. To persist in such error is reprehensible. Rwanda, as a democracy, should be prepared to make amends for unlawful detentions by ensuring that unlawfully detained persons are swiftly released and adequately compensated. It can only do so by enacting clear laws requiring compensation for unlawful detention.

This study concludes that the Rwandan government should establish state liability for compensation for unlawful detention. State liability makes sense legally because where a right is violated, there should be a remedy. When a State employee unlawful detains a person, the State should be liable for at least five reasons. First, under the theory of *Respondeat superior*.[2] Second, under a theory of lack of training, i.e., had the State properly trained the employee, the unlawful detention would not have occurred. Third, because the responsible employee will not have adequate means to compensate the victim. Fourth, it would bring unlawful detention cases in line with other cases in Rwanda where the State compensates victims for injuries resulting from unlawful acts of its civil servants. Fifth, it would satisfy Rwanda's obligations under the international and regional human rights instruments to which it is a party. In ratifying those instruments, Rwanda agreed to adopt laws to give effect to the rights recognized in those instruments, including the enforceable right to compensation for unlawful detention.

Drawing from the experience of the three national legal systems discussed in chapter four, above, and other compensation of damages resulting from unlawful acts of Rwandan public servants, this study suggests that Rwanda enact specific laws that (1) establish a right to compensation whenever a detention is found to be unlawful, (2) establish state liability for unlawful detentions, (3) identify an administrative court or judicial court to adjudicate civil claims for compensation for unlawful detention, (4) identify the persons who may claim compensation, (5) identify the types of damage that are compensable, and (6) establish the statute of limitations, i.e., the time limit for filing such compensation claims.

2 Latin: "let the superior make answer". See Black's Law Dictionary, 7th ed., 1999, p.1313.

This study also suggests that Rwanda improve its *habeas corpus* procedure by identifying the court in which detainees should file *habeas corpus* petitions when the detainee is held incommunicado or does not know the place of detention and/or the detaining officer. Moreover, as has been suggested by the Human Rights Committee, Rwanda should enact legislation (1) to ensure that the maximum period of detention before a suspect is brought before a judge is 48 hours and (2) to ensure that detainees are brought to trial within a reasonable time or released.

With regards to regional and international human rights mechanisms, this study concludes that Rwanda should allow individual victims of human rights violations access to those mechanisms. Rwanda can do that by ratifying the first Optional Protocol to the ICCPR, which establishes an individual complaint mechanism. Rwanda should also make the declaration recognizing the competence of the African Court on Human and Peoples' Rights to receive cases from individuals and NGOs once again.

The right to compensation for unlawful detention has been recognized in international and regional human rights instruments. Rwanda has ratified the most of these instruments. Effective enforcement of these instruments in Rwanda remains a challenge. The progress of enforcement of that compensation for unlawful detention right depends on changing the mind-set of the justice sector and decision makers on rights of accused to understand that defendants are entitled to due process of law, irrespective of the kind of offense the person is accused of. The suggested legal reform should be accompanied by a supporting institutional framework. Access to justice for accused persons in Rwanda requires improving access to legal representation, requiring the National Public Prosecution Office to closely supervise and to ensure that Judicial Police Officers follow the law and raising the awareness of accused persons of their rights.

Samenvatting

Ondanks het feit dat Rwanda regionale en internationale mensenrechtenverdragen geratificeerd heeft die in het recht op *habeas corpus* en een schadeloosstelling voor onrechtmatige detentie voorzien, doen onrechtmatig vastgehouden personen in Rwanda geen beroep op schadeloosstelling en verkrijgen zij hun vrijlating niet via nationale, regionale of internationale mechanismen. Daarom zijn effectieve beroepsmogelijkheden nodig om vrijlating uit en vergoeding voor onrechtmatige detentie in Rwanda te verkrijgen.

Het hoofddoel van deze studie is tweeledig. Ten eerste het opsporen van belemmeringen waar onrechtmatig vastgehouden personen in Rwanda mee geconfronteerd worden als zij hun vrijlating en schadevergoeding via de huidige nationale, regionale of internationale mechanismen proberen te verkrijgen. Ten tweede om mechanismen voor te stellen die in Rwanda ingevoerd kunnen worden om vrijlating van onrechtmatige detentie te bewerkstelligen en vergoeding voor de slachtoffers van deze praktijk te voorzien, daarbij lerend van de procedures en wetten van internationale mensenrechtenorganisaties en andere landen.

Hiertoe verkennen hoofdstukken twee en drie van de studie de bestaande nationale, sub-regionale, regionale en internationale mechanismen voor mogelijke rechtsmiddelen ter zake van onrechtmatige detentie in Rwanda. Rwanda heeft sinds 1994 aanzienlijke vooruitgang geboekt in het beschermen van mensen tegen onrechtmatige detentie door situaties die tot onrechtmatige detentie leiden te definiëren, *habeas corpus* in te voeren en instanties zoals de Nationale Commissie voor de Rechten van de Mens op te richten om onrechtmatig vastgehouden personen te ondersteunen.

Deze studie heeft laten zien dat onrechtmatig gedetineerde personen in Rwanda soms onder omstandigheden worden vastgehouden die het hun onmogelijk maken om hun detentie aan te vechten. Uit de studie bleek ook dat de bestaande *habeas corpus* procedure niet voldoet in zaken waar de onrechtmatig vastgehouden persoon de functionaris die hem/haar gevangen houdt, het vermeende delict of de plaats van gevangenhouding niet kan identificeren. De studie heeft ook laten zien dat in sommige gevallen rechters de voortzetting van de detentie bevelen, ook al is deze onrechtmatig.

Wat de schadevergoeding voor onrechtmatige detentie betreft, blijkt uit de studie dat Rwanda geen wet heeft die hierin voorziet. Het Rwandese strafprocesrecht staat slachtoffers van onrechtmatige detentie toe een civiele procedure te starten, maar deze kan slechts gericht zijn tegen de verantwoordelijke perso(o)n(en), en niet tegen de staat. Daarom is het identificeren van de functionaris die verantwoordelijk is voor de onrechtmatige detentie de eerste stap voor een onrechtmatig vastgehouden persoon die schadevergoeding wil eisen. Daarnaast moet hij of zij ook diens schuld aantonen, als voorwaarde voor het verkrijgen van een vergoeding.

De studie heeft laten zien dat onrechtmatig vastgehouden personen in Rwanda geen schadevergoeding eisen of krijgen, wegens het ontbreken van een specifieke procedure voor het krijgen van een vergoeding, in het bijzonder voor wat betreft de rechthebbende, de schade die vergoed kan worden, de bevoegde rechtbank en de bewijslast. Naast het ontbreken van een duidelijk omschreven juridisch kader zijn er andere belemmeringen voor het aanspannen van een rechtszaak. Dit zijn de angst om opnieuw gevangen genomen te worden als vergelding voor het indienen van een schadeclaim, onbekendheid met de wet, een beperkte toegang tot juridische bijstand, en het als schuldig gezien worden door de maatschappij.

Wat de sub-regionale, regionale en internationale mechanismen inzake de mensenrechten betreft, blijkt uit de studie dat Rwanda een aantal internationale en regionale instrumenten inzake de mensenrechten geratificeerd heeft die het recht op vrijlating van, en vergoeding voor, onrechtmatige detentie erkennen. De studie laat zien dat wegens het gebrek aan een gedetailleerde nationale juridische procedure om tegen onrechtmatige detentie in het geweer te komen, onbekendheid met nationale

en internationale instrumenten en een beperkte juridische bijstand, onrechtmatig vastgehouden personen in Rwanda geen beroep doen op deze instrumenten om vrijlating van, of schadevergoeding voor onrechtmatige detentie te verkrijgen. Bovendien heeft Rwanda het Facultatieve Protocol bij het Internationaal Verdrag inzake Burger- en Politieke Rechten (Optional Protocol to the International Covenant on Civil and Political Rights), dat het Comité voor de Rechten van de Mens (Human Rights Committee) oprichtte, niet ondertekend. Hierdoor kunnen individuele slachtoffers van mensenrechtenschendingen in Rwanda geenklacht indienen bij dit Comité. Daarnaast heeft Rwanda het klachtrecht van burgers bij het Afrikaanse Hof (African Court) ingetrokken zodat individuele slachtoffers van mensenrechten ook daar geen procedure kunnen aanspannen. Het niet-ratificeren van de verdragsorganen die verantwoordelijk zijn voor de handhaving van deze instrumenten, en het beperken, door de Rwandese regering, van mensen hun toegang tot regionale en internationale fora verklaart het gebrek aan de totstandkoming van rechtsmiddelen voor onrechtmatige vastgehouden personen in Rwanda door deze vastgestelde mechanismen.

Ook speelt dat het Oost-Afrikaanse Hof van Justitie (East African Court of Justice, EACJ) een beperkte bevoegdheid heeft om over mensenrechtenschendingen te oordelen waaronder onrechtmatige detentie. In deze studie wordt gesuggereerd dat de East African Community de rechtsbevoegdheid van het EACJ uit moet breiden, zodat het ook over mensenrechtenkwesties kan oordelen zoals is vastgesteld in Artikel 27(2) van het EAC-verdrag.

Op grond van de ICCPR hebben Oeganda, Frankrijk, Engeland en Wales bijzondere bepalingen in hun nationale wetgeving opgenomen die in een schadevergoeding voor onrechtmatige detentie voorzien. Rwanda heeft dit niet gedaan. Uit de studie blijkt verder dat in bovengenoemde landen rechtbanken de vrijlating van onrechtmatig gedetineerden en schadeloosstelling voor onrechtmatige detentie bevolen hebben. De gevonden verschillen tussen de situatie in Rwanda en de andere onderzochte landen kunnen deels verklaard worden door de verschillen in wetgeving. De

studie heeft laten zien dat onrechtmatig vastgehouden personen in zowel Frankrijk als Engeland en Wales, in tegenstelling tot Rwanda, beroep kunnen aantekenen bij hun regionale hof voor de rechten van de mens (Het Europese hof voor de rechten van de mens, ECtHR). Onrechtmatig vastgehouden personen in Frankrijk en Engeland en Wales hebben schadeloosstelling voor onrechtmatige detentie geëist en verkregen bij het ECtHR.

Edwin Busuttil, een voormalig lid van de Europese Commissie voor de Rechten van de Mens (European Commission of Human Rights) legt uit waarom:

> Geen regering ter wereld is immuun voor mogelijke fouten of onrechtvaardigheid, zelfs in landen met de beste prestaties op het gebied van de rechtspleging en burgerlijke vrijheden .... Geen enkele staat zal tekortschieten in haar democratische legitimiteit in het domein van de mensenrechten als zij bereid is om haar tekortkomingen te compenseren. Fouten maken is menselijk; het is slechts de volharding in het maken van fouten die verwerpelijk is, omdat een democratie noodzakelijkerwijs haar eigen geloofwaardigheid moet verzekeren. [3]

Onrechtmatige detentie is het resultaat van menselijke fouten. Het is verwerpelijk om te volharden in zulke fouten. Rwanda, als democratie, zou bereid moeten zijn om onrechtmatige detentie te herstellen door ervoor te zorgen dat onwettig vastgehouden personen snel worden vrijgelaten en tevens een adequate schadevergoeding krijgen. De regering kan dit doen door duidelijke wetten in te voeren die schadeloosstelling voor onrechtmatige detentie verplicht stellen.

Deze studie concludeert dat de Rwandese regering overheidsaansprakelijkheid moet invoeren voor de schadeloosstelling voor onrechtmatige detentie. De aansprakelijkheid van de staat is juridisch goed te onderbouwen: als een recht geschonden wordt, moet er herstel plaatsvinden. Als een werknemer van de overheid een persoon onrechtmatig vasthoudt, is de staat aansprakelijk op basis van de volgende

3 Edwin Busuttil, The European Court of Human Rights, *The Conscience of Europe: 50 years of the European Court of Human Rights*, Council of Europe, p.169 (2010).

vijf argumenten. Ten eerste vanwege het beginsel van *Respondeat superior*.[4] Ten tweede op grond van een gebrek aan training. Als de staat de werknemer naar behoren getraind had, zou de onrechtmatige detentie niet hebben plaatsgevonden. Ten derde omdat een werknemer doorgaans niet de toereikende middelen heeft om het slachtoffer te compenseren. Ten vierde omdat zaken over onrechtmatige detentie in overeenstemming gebracht moeten worden met andere zaken in Rwanda waar de staat de slachtoffers schadeloos stelt ingeval van onrechtmatige handelingen van ambtenaren. Ten vijfde zou het Rwanda's verplichtingen onder de internationale en regionale instrumenten inzake de mensenrechten, waar zij deel van uitmaakt, vervullen. Door deze instrumenten te ratificeren is Rwanda ermee akkoord gegaan om wetten in te voeren die de rechten realiseren die in deze instrumenten erkend worden, waaronder het afdwingbare recht op schadeloosstelling voor onrechtmatige detentie.

Dit onderzoek put uit de ervaring van de drie nationale rechtssystemen die in hoofdstuk vier besproken worden. Op basis hiervan stelt de onderzoeker voor dat Rwanda specifieke wetten invoert die (1) een recht op schadeloosstelling vastleggen wanneer een detentie onrechtmatig wordt bevonden, (2) overheidsaansprakelijkheid voor onrechtmatige detentie invoeren, (3) een administratieve of rechterlijke instantie aanwijzen om uitspraak te doen in burgerlijke eisen voor schadevergoeding wegens onrechtmatige detentie, (4) de personen vinden die in aanmerking komen voor het eisen van een vergoeding, (5) de soorten schade die vergoed kunnen worden identificeren, en (6) de verjaringstermijn vaststellen, i.e., de tijdslimiet waarbinnen zulke vorderingen voor schadevergoeding ingediend moeten worden.

Deze studie suggereert bovendien dat Rwanda haar *habeas corpus* procedure zou moeten verbeteren door de rechtbank aan te wijzen waar gevangenen *habeas corpus* -verzoekschriften kunnen indienen als zij incommunicado vastgehouden worden of de plaats van detentie of functionaris die verantwoordelijk is voor de detentie niet kennen. Daarbij zou Rwanda, zoals voorgesteld door het Comité voor de Rechten van de Mens, wetgeving moeten invoeren waarin (1) de maximumtermijn van bewaring voordat een verdachte wordt voorgeleid 48 uur is en (2) gevangenen binnen een redelijke termijn hetzij voor de rechter worden gebracht hetzij worden vrijgelaten.

4 Latijn: "laat de superieur antwoorden" Zie Black's Law Dictionary, 7th ed., 1999, p.1313.

Wat de regionale en internationale mechanismen inzake de mensenrechten betreft, concludeert deze studie dat Rwanda individuele slachtoffers van mensenrechtenschendingen toegang tot deze mechanismen moet verschaffen. Rwanda kan dit doen door het eerste Facultatieve Protocol bij de ICCPR te ratificeren, dat een individuele klachtenprocedure instelt. Rwanda zou ook een verklaring moeten afleggen die de bevoegdheid van het Afrikaanse Hof inzake de Mensenrechten en de Rechten van Volkeren wederom erkent om zaken van individuen en NGO's te ontvangen.

Het recht op schadeloosstelling voor onrechtmatige detentie is erkend in internationale en regionale rechtsinstrumenten inzake de mensenrechten. Rwanda heeft de meeste van deze instrumenten geratificeerd. De effectieve handhaving van deze instrumenten in Rwanda blijft een uitdaging. Vooruitgang in de handhaving van het recht op schadeloosstelling voor onrechtmatige detentie is afhankelijk van het veranderen van de mentaliteit binnen de justitiële sector en van beleidsmakers omtrent de rechten van verdachten, zodat zij inzien dat verdachten recht hebben op een eerlijke rechtsgang, ongeacht het misdrijf waar de persoon van beschuldigd wordt. De voorgestelde juridische hervorming zou vergezeld moeten worden van een ondersteunend institutioneel kader. Toegang tot de rechtspraak voor verdachte personen in Rwanda vereist het verbeteren van de rechtsbijstand. Het Openbaar Ministerie (National Public Prosecution Office) moet de gerechtelijke politiefunctionarissen (Judicial Police Officers) nauwlettend controleren, ervoor zorgen dat zij de wet naleven, en dat zij beschuldigde personen wijzen op hun rechten.

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Table of interviews

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- Interview with P. Karemera, Vice Chairperson of the NCHR, 30/01/2017.
- Interview with Ch. Kaliwabo, President of the High Court, 13/01/2015.
- Interview with E. Itamwa, Inspector of the courts, 13/01/2015.
- Interview with J. Ndinda, Judge to the High Court, 13/01/2015.
- Interview with D. Kaliwabo Inspector at NPPA, 16/01/2015.
- Interview with E. Rubango, Principal Attorney of State at MINIJUST, 30/01/2017.

- Interview with A. Nabahire, JRLOS Secretariat Coordinator in MINIJUST, 30/01/2017.
- Interview with Pr. Umurungi, Head of International Justice and Judicial Co-operation Department, in MINIJUST, 30/01/2017.
- Interview with M. Urujeni, Division Manager/Community Justice MINIJUST, 31/01/2017.
- Interview with J. D. Gasana, President of the Primary Court of *Kacyiru,* 14/01/2015.
- Interview with H.M. Ngango, in charge of communication in the NCHR, 1/08/2014.
- Interview with J. Kabuye, the Chairperson of the ARDHO, 20/01/2017.
- Interview with Fr. Mugisha, Program Manager at LAF, 20/01/2017.
- Interview with M. L. Mukashema, senior Legal Aid Attorney at LAF, 20/01/2017.

ANNEX I: QUESTIONNAIRE FOR ADVOCATES

A. Instructions:

i. Fill in the information in spaces provided.

ii. Provide answers to all questions.

iii. Please use (v) to any answer you assume is appropriate.

iv. Please don't indicate your name on this questionnaire's paper.

B. Identification of respondents

1. Sex:

i. Male ☐

ii. Female ☐

2. Age

i. Between 21-35 ☐

ii. Between 36-65 ☐

3. The Level of education:

i. Graduate ☐

ii. Postgraduate ☐

4. Years of experience as advocate

i. Between 1-5 ☐

ii. Between 6-10 ☐

iii. Between 11-15 ☐

iv. Above 16 ☐

C. QUESTIONS

1. In your experience as an advocate, did you handle the cases related to unlawful detention?

i. Yes ☐ ii. No ☐

2. If yes, what kind of unlawful detention situation?

How Often / Category	Rarely	Sometimes	Always
Persons detained in unauthorized premises			
Persons detained beyond the legal maximum period of detention			
Persons detained despite the court order granting provisional release			
Persons detained despite acquittal granted by a court decision			
Other			

3. What do you when you client is unlawfully detained?

i. Ask release through *habeas corpus* application? ☐
ii. Ignore the unlawful detention and continue defending my client on merit? ☐

4. What challenges do you face in applying for *habeas corpus*?

i. Identification of the detaining officer ☐
ii. Identification of the competent court ☐
iii. Continuation of detention despite the unlawful detention found ☐
iv. Proving the unlawful detention situation ☐
v. Other ☐
Please Specify.....

5. What do you do to the detaining officer involved in the unlawful detention of your client?

vi. Ask the disciplinary sanctions for him from his supervisors ☐
vii. Ask the prosecution of unlawful detention offence to relevant institutions ☐
viii. Nothing ☐
ix. Other ☐
Please Specify.....

6. In your opinion, what is the cause of unlawful detention?

i. Insufficient means and equipment's ☐
ii. Insufficient staffs ☐
iii. Lack of knowledge and skills on in case preparation and investigation ☐
iv. Lack of knowledge and skills on detention legal framework ☐
v. Lack of supervision of detaining officer ☐
vi. Short period of maximum of detention ☐
vii. Unavailability of defence lawyers ☐
viii. Other ☐
Please Specify.....

7. In your opinion, what should be done to prevent the unlawful detention in Rwanda?

i. Regular training of detaining officers ☐
ii. Equipping the detaining officers ☐
iii. Increase the numbers of detaining officers ☐
iv. Establishment of electronic case management ☐
v. Enhancing the supervision of detaining officers ☐
vi. Enforce the existing disciplinary and criminal sanction against the detaining officer involved in unlawful detention? ☐
vii. Other ☐
Please Specify.....

8. What was your request to the court on behalf of your client who was unlawfully detained?

i. Asked the release from unlawful detention ☐
ii. Asked the compensation for unlawful detention ☐
iii. Asked the court to punish the detaining officer involved in unlawful detention offence ☐
iv. Other ☐
Please Specify.....

9. Have you ever asked the compensation for unlawful detention for your clients unlawfully detained?

i. Yes ☐ ii. No ☐

a. If Yes, Indicates the case number and parties

b. If No, what are reasons for not asking compensation for unlawful detention?

i. The right to compensation for unlawful detention is not provided under Rwandan law ☐
ii. Clients are afraid of being unlawfully detained again ☐
iii. Clients are under criminal proceedings ☐
iv. The competent court is not determined ☐
v. It is not easy to identify the detaining officer involved in unlawful detention ☐
vi. It is not easy to prove the fault in chief of the detaining officer ☐
vii. Other ☐
Please Specify.....

10. In your opinion, what is the legal basis for compensation for unlawful detention?

i. Articles 258 and 259 of CCBIII ☐
ii. Article 342 of the law relating to the civil procedure ☐
iii. Article 9(5) of the ICCPR. ☐
iv. Article 6 of the African Charter ☐
v. Other ☐
Please Specify.....

11. In your opinion, in case you fail to obtain remedies for unlawful detention before Rwandan courts are there other institutions that can help?

i. East African Court of Justice ☐
ii. African Court of human and people's rights ☐
iii. The UN Human Rights Committee ☐
iv. Other ☐
Please Specify .....

12. What are the reasons for no use of regional and international mechanisms for unlawfully detained persons in Rwanda?

i. There are not allowed to access them ☐
ii. They don't know these institutions ☐
iii. Lack of legal assistance ☐
iv. Other ☐
Please Specify.....

13. In your opinion, is it appropriate to award compensation for an unlawfully detained person?

i. Yes ☐ ii. No ☐

a. If yes, what are the benefits?

i. Rwandan government will be followed the rule of law ☐
ii. The rights of the suspects will be respected by the detaining officer ☐
iii. Unlawful detention situations will be reduced ☐

iv. People will trust the criminal justice system ☐

v. Detained person will be considered as other victims of unlawful acts for publics services ☐

vi. Other ☐

Please Specify.....

b. If yes, who should be the defendant?

vii. State ☐

viii. Detaining officer involved in unlawful detention ☐

ix. Individuals institution where the detaining officer belong ☐

x. Other ☐

Please Specify.....

c. If yes, what should be considered in determining the compensable damages?

i. The Law should determine the compensable damages ☐

ii. Sentence reduction in case of unlawful detention followed by condemnation

iii. Determine the daily lump sum on unlawful detention ☐

iv. Judge discretion power ☐

v. Real suffered losses ☐

vi. Other ☐

Please Specify.....

d. If yes, what should be the competent court for compensation for unlawful detention claims?

i. The same court that decides on unlawful detention ☐

ii. Administrative chamber in Intermediate Courts ☐

iii. Amicable settlement in MINIJUST before the courts process ☐

iv. Other ☐

Please Specify.....

f. If No, what are the disadvantages of compensating the unlawfully detained person?

i. It can affect the national budget as all unlawfully detained will claim against the state ☐

ii. The suspects will obtain compensation while all victims of offence do not obtain compensation in Rwanda ☐

iii. It is not possible in Rwanda as a developing country ☐

Thank You.

ANNEX II. INTERVIEW QUESTIONS

A. General questions

1. Have you heard cases related to unlawful detention in Rwanda?
2. What is your opinion on the current situation of unlawful detention in Rwanda?
3. What are the causes of unlawful detention situations in Rwanda?
4. What are the existing remedies for unlawful detention in Rwanda?
5. How effective is the existing *habeas corpus* in the protection of the individual against unlawful detention?
6. Is it appropriate to compensate the unlawfully detained person?
7. What should be done to improve the current situation of unlawful detention?

B. Specific questions to individual institutions

I. NCHR

1. What is the role of the NCHR in protecting the unlawfully detained person?
2. Do unlawfully detained person obtain release and compensation through the NCHR?
3. Do the NCHR assist the victims of unlawful detention in the court?

II. Civil Society Organization

1. What is the role of your organization in the protection of the unlawfully detained person in Rwanda?
2. What are the obstacles for an unlawfully detained person to obtain release and compensation within existing national mechanisms?
3. What are the obstacles for an unlawfully detained person to obtained release and compensation through UN, AU, and EAC mechanisms?

III. MINIJUST

1. How is the article 9 (5) of the ICCPR being enforced in Rwandan domestic law?
2. What are the reasons for excluding the state liability in case of unlawful detention?
3. How is the legal aid for detained person organized?
4. What are the obstacles for an unlawfully detained person to obtained release and compensation through UN, AU and EAC mechanisms?

IV. JUDGES AND INSPECTORS

1. Is there any case at your knowledge that the unlawfully detained person obtained compensation?
2. What are the obstacles for an unlawfully detained person to obtain release and compensation within existing national mechanisms?

About the Author

Born on New Year's Day in 1983, Tite Niyibizi is a lawyer in Rwanda. He obtained his L.L.B. from Kigali Independent University in 2007 and his L.L.M. in Business Law from the National University of Rwanda in 2010. In 2015, he earned a Post-Graduate Diploma in Legal Practice from the Institute of Legal Practice and Development (ILPD). Since 2009, Tite has been a lecturer at ILPD, where he teaches post-graduate law courses on pleading and legal research. Since 2011, he has also been a lecturer, teaching Labor Law, at Kigali Independent University. He is a member of the Rwanda Bar Association and has served on the High Council of the Judiciary (2014-2015), the Disciplinary Committee of Advocates (2014-15) and the Board of Directors of ILPD (2014-15). He was also a researcher for the 2013 "Study on the End to End Process Mapping of the Criminal Justice System in Rwanda." From 2008-09, he was Court Registrar of the Nyarugenge Commercial Court.