SAFEGUARDING THE RIGHT TO FREEDOM FROM ARBITRARY DETENTION IN CAMEROON

BY

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DECLARATION

I, Christopher Mba Weregwe, hereby declare that this thesis is originally mine and has never been submitted in any other academic institution. I also declare that all secondary information used has been acknowledged accordingly.

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DEDICATION

This work is dedicated to all victims of arbitrary detention, my late Aunt Timah Jessica Ndoh and to my late father, Pa Timah Emmanuel Weregwe, who died on 18 June 2011.

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KEYWORDS

Arbitrary

Arrest

Cameroon

Code

Constitution

Criminal

Detention

Procedure

Right

Safeguard

Torture

LIST OF ABBREVIATIONS

ACAT	Action for the Convention against Torture
ACHPR	African Charter on Human and Peoples' Rights
CHRDA	Centre for Human Rights and Democracy in Africa
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court on Human Rights and Fundamental Freedoms
FIACAT	International Federation of Action by Christians for the Abolition of Torture
HRC	Human Rights Committee
IACHR	Inter-American Convention on Human Rights
IACrtHR	Inter- American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
JOO	Judicial Organisation Ordinance
JPO	Judicial Police Officer
LRWC	Lawyers Rights Watch Canada
CHRC	Cameroon Human Rights Commission
NGO	Non-Governmental Organisation
PC	Penal Code
SCACUF	Southern Cameroons Ambazonia Consortium United Front
SPOD	Special Police Oversight Division
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America

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ABSTRACT

Arbitrary detention is a human rights violation. Its complete eradication is a major concern to the international community. The International Covenant on Civil and Political Rights (ICCPR) is the main treaty that protects and promotes civil and political rights. It outlaws arbitrary detention and obliges states parties to take effective legislative, judicial, administrative, and any other measures necessary to prevent the practice within their jurisdictions. Cameroon ratified the ICCPR in 1984, as well as other international treaties that prohibit arbitrary detention. According to Article 45 of the Cameroon Constitution, duly ratified international treaties and conventions enter into force following their publication in the official gazette, and they supersede domestic laws. This research critically examines the effectiveness of the legal regime put in place to safeguard the right to freedom from arbitrary detention in Cameroon. The author relies on relevant literature concerning measures to protect against arbitrary detention contained in books, case laws, articles, international and regional human rights treaties, reports from international bodies, Cameroon Constitution, Penal Code, Criminal Procedure Code, government reports and civil society organisations report on Cameroon. Findings reveal that, although Cameroon has put in place measures to protect against prohibited conduct, and to prescribe appropriate penalties for public officials and other persons working in official capacity who engage in it, arbitrary detention is normal, widespread and practised systematically in almost all regions in the country, by means of denial, and with impunity. Laws to protect against the prohibited conduct are adequate, regrettably, implementation is a serious problem. It is recommended that Cameroon should respect its international and domestic obligations to ensure that the practice is eradicated in the country.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study

Arbitrary detention is a universally condemned and prohibited practice, and no state has openly opposed its eradication. It is a violation of the right to personal liberty as arrests and/or detentions are effected with disregard for domestic and international law standards that protect against arbitrariness.[1] Millions of people worldwide are victims of arbitrary detention,[2] and are often subjected to torture and other forms of ill-treatment, enforced disappearances, or extrajudicial execution,[3] with little or no possibility of vindication of their legal rights.[4] Most international treaty-monitoring organs, scholarly works, state reports and some international bodies have observed and reported that arbitrary detention is prevalent in many countries, and have called for its complete eradication. The reasoning is that at domestic and international levels, arbitrary pre-trial detention violates a number of rights including the right to be presumed innocent; the right to liberty and security of the person; the right to a fair trial; and the right to full equality before the law,[5] enshrined in a number of international human rights instruments. The Universal Declaration of Human Rights,[6] adopted by

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[1] Trial International 'What is Arbitrary Detention' (2020) available at *https://trialinternational.org/topics-post/arbitrary-detention/* (accessed 25 January 2021).

[2] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 26, The Working Group on Arbitrary Detention*, May 2000, p. 2.

[3] Trial International 'What is Arbitrary Detention' (2020) available at *https://trialinternational.org/topics-post/arbitrary-detention/* (accessed 25 January 2021).

[4] Aphune K. Kezo 'Principles of International Law concerning Arbitrary Detention' (2012) 2 (3) *International Journal of Law and Legal Jurisprudence Studies* 1. For more, see Holmstrom L *Conclusions and Recommendations of the UN Committee against Torture* (2000) xiii ; Ratner S R & Abrams J S *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2001) 117.

[5] Lawyers' Right Watch Canada 'Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial Release at International Law' (2013) 1 available at *https://www.lrwc.org/ws/wp-content/uploads/2013/04/Pre-trial-release-and-the-right-to-be-presumed-innocent.pdf* (accessed 14 May 2021).

[6]Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). For more, see Amstrong D, Lloyd L & Redmond J *International Organisation in World Politics* (2004) 242.

the General Assembly of the United Nations in 1948, makes it clear that everyone has the right to life, liberty and security of person,[7] and that no one shall be subjected to arbitrary arrest, detention or exile.[8]

The adoption of the International Covenant on Civil and Political Rights (ICCPR)[9] is an important achievement in the universal struggle to promote and protect human rights generally and combat arbitrary detention. The ICCPR affirms in Article 9(1) that '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'. It also guarantees procedural safeguards against arbitrary detention for suspects and accused persons, such as the right to be promptly informed of the reasons for arrest and detention, and the nature of charges against them.[10] Furthermore, 'persons arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release'.[11] Furthermore, persons arrested or detained in arbitrary fashion have the right to challenge the lawfulness of arrest or detention by way of habeas corpus before a court of competent jurisdiction to secure their release,[12] and are entitled to adequate compensation.[13]

The enforcement mechanism of the ICCPR is the Human Rights Committee (HRC).[14]The HRC ensures that state parties comply with the Covenant's provisions. It uses several techniques to scrutinise state parties' compliance with the Covenant. These include the examination of state party reports,[15] individual communications,[16] interstate party complaints[17] and general comments.[18] State parties to the ICCPR are under

[7] Article 3 of the UDHR.
[8] Article 9 of the UDHR.
[9]Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 23 March 1976, in accordance with Article 49. UN Doc. A/6316 (1966), 999 U.N.T.S. 171.
[10] Article 9(2) of the ICCPR.
[11] Articles 9(3) and 14(1) of the ICCPR.
[12] Article 9(4) of the ICCPR.
[13] Article 9(5) of the ICCPR.
[14] Article 28 of the ICCPR. For more, see Shaw M N *International law* (4 ed) (1997) 234-240.
[15] Article 40(1-4) of the ICCPR.
[16] Article 1 of the Optional Protocol to the ICCPR.
[17] Article 41-42 of the ICCPR.
[18] Article 40(5) of the ICCPR.

obligation to take all necessary steps in accordance with the Covenant to adopt legislation or other measures that may be necessary to give effect to the rights recognized in the Covenant.[19] Some states like China,[20] Qatar,[21] Saudi Arabia,[22] and the United Arab Emirates,[23] that have not ratified the ICCPR, have gone a long way in prohibiting and criminalising arbitrary detention under their domestic legal systems.

Arbitrary detention is also condemned and prohibited by regional human rights treaties. These include the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[24] Article 5(1), Inter-American Convention on Human Rights (IACHR)[25] Article 7, African Charter on Human and Peoples' Rights (ACHPR)[26] Article 6 and Article 14 of the Arab Charter on Human Rights (Arab Charter). As of 26 August 2021, one hundred and seventy three states have ratified the ICCPR. Moreover, all states are parties to their respective continental human rights treaties that protect against arbitrary detention. The widespread ratification and commitment of states to international treaties that protect against arbitrary detention constitute a near universal State practice evidencing the customary nature of the protection against arbitrary detention.[27]

The International Court of Justice's (ICJ) judgment in the *United States Diplomatic and Consular Staff in Tehran (U.S. v Iran)* also confirms the customary international law nature of the prohibition on arbitrary detention. The ICJ held that

[19]Article 2(2) of the ICCPR.

[20]Article 37 of the Constitution of China.

[21]Article 40 of the Criminal Procedure Code of Qatar.

[22]Article 36 of the Saudi Basic Law of governance (1992) and Article 35 of the Saudi Law of Criminal Procedure (Royal Decree no. M/39) 16 October 2001.

[23]Article 26 of the Constitution of the United Arab Emirates (1971).

[24]The European Convention on the Protection of Human Rights and Fundamental Freedoms was signed 4 November 1950 and entered into force 3 September 1953, (E.T.S. 5), Rome 4.XI.1950. For more, see Rodley N *The Treatment of Prisoners under International Law* (1987) 54; Arnheim M *The Principles of the Common Law* (2004) 157.

[25]The American Convention on Human Rights, was signed on 22 November 1969, and entered into force on 18 July 1978. For more, see Rodley N (1987) 54.

[26]Adopted in June 1981 by the Organization of African Unity Heads of State, entered into force 1986, OAU Doc. CA/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), for more see Umozurike U O *The African Charter on Human and Peoples' Rights* (1997); Bassiouni M C & Motala Z The *Protection of Human Rights in African Criminal Proceedings* (1995) 23.

[27] UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 24 December 2012, A/HRC/22/44 p. 3.

> wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[28]

Although the international community has condemned, outlawed and called for the complete eradication of arbitrary detention, it is still widely practised. Most states, when challenged on issues of arbitrary detention after the September 2001 terrorist attacks in the United States of America (USA), justify their actions on the basis of national security, state of emergency concerns, controlling their national borders and regulating other abnormal circumstances.[29] For example, the USA violated customary international law norms[30] by arresting persons arbitrarily, detained them illegally, and subjected them to torture at Bagram Air Force Base in Afghanistan[31] and Guantanamo Bay prison off the coast of Cuba on the pretext of fighting terrorism.[32]

This study examines the effectiveness of the legal framework put in place to safeguard the right to freedom from arbitrary detention in Cameroon. The preamble to the Constitution[33] explicitly declares that the state has the duty to guarantee freedom and security to every individual, and that no person may be prosecuted, arrested or detained except in cases and according to the manner determined by law. Therefore, Cameroon is under obligation to take all the steps reasonably necessary to safeguard against arbitrary arrest or detention, and to protect civilians during security operations. It must ensure that persons lawfully arrested or detained are not subjected to other human rights violations such as torture and other forms of ill-treatment, enforced disappearance, refoulement and summary executions. Furthermore, arrest or detention must be effected

[28] *United States Diplomatic and Consular Staff in Tehran (U.S. v Iran),* 1980 I.C.J. 3 (May 24) para. 91.
[29]Zayas A 'Human Rights and Indefinite Deprivation of Liberty' (2005) available at *http://www.icrc.org/eng/assets/files/other/irrc-857-Zayas.pdf* (accessed 10 April 2018).
[30] *Jus cogens* are bodies of peremptory principles or norms (compelling law) from which no derogation is permitted. They are norms recognized and accepted by the international community as a whole as being fundamental for the maintenance of an international legal order.
[31]Ulbrick J T 'Tortured Logic: The (Il) legality of United States Interrogation Practices in the War on Terror' (2005) 4 (1) *Northwestern Journal of International Human Rights* 211-237.
[32]Centre for Public Integrity 'Broken Government: Arbitrary detention at Guantanamo' (2014) available at *https://www.publicintegrity.org/2008/12/10/6284/arbitrary-detention-guantanamo* (accessed 20 April 2018).
[33] Constitution of Cameroon, Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972.

by way of a valid warrant except in cases of flagrante delicto. Suspects or arrested persons must be informed of the reasons for arrest or detention and the nature of charges against them. They must also be allowed visits or consultation with third parties such as lawyers, be presented promptly before a judge or other judicial officer authorised by law to exercise judicial power, and shall be entitled to trial within a reasonable time, or to release.

Further safeguards against arbitrary detention are guaranteed in the Penal Code (PC)[34] and the Criminal Procedure Code (CPC)[35] of Cameroon. For example, section 291(1) of the PC provides that 'whoever in any manner deprives another of his liberty shall be punished with imprisonment from five to ten years and with fine of from twenty thousand to one million francs'. Section 584 of the CPC is the habeas corpus provision and provides that 'the president of the High Court of the place of arrest or any other judge of the said court shall have jurisdiction to hear applications for the immediate release based on grounds of illegality of arrest or detention or failure to observe the formalities provided by law'. Furthermore, section 53 of the PC provides that 'where the offender has been remanded in custody, the duration of such custody shall be wholly deducted from the computation of loss of liberty'.

In addition, Cameroon has acceded to the ICCPR, First Optional Protocol to the ICCPR[36] and ratified a number of international and regional human rights treaties[37] that promote and protect human rights, including the right to freedom from arbitrary detention. Article 45 of the Cameroon Constitution provides that international treaties that are ratified enter into force from the moment they are published in the official gazette and shall override national laws. In terms of institutional mechanisms for enforcing the promotion and protection of human rights, including the right to freedom

[34] Law No. 2016/007 of 12 July 2016 relating to the Penal Code of Cameroon.

[35] Law No. 2005/007 of 27 July 2005 on the Criminal Procedure Code of Cameroon.

[36] Cameroon acceded to the ICCPR and First Optional Protocol to the ICCPR on 27 June 1984.

[37] Cameroon ratified the Convention on the Elimination of all Forms of Discrimination against Women (23 August 1994) and acceded to the Optional Protocol of the same Convention on 7 January 2005. Furthermore, Cameroon has ratified or acceded to other international human rights treaties that protect against arbitrary detention. These include the Convention on the Rights of the Child (11 January 1993), the International Convention on the Elimination of all Forms of Racial Discrimination (24 June 1971) and the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (19 December 1986). In addition, Cameroon is a party to the African Charter of Human and Peoples' Rights.

from arbitrary detention, Cameroon has established the National Commission on Human Rights and Freedoms (NCHRF).[38] The NCHRF raises awareness against prohibited conduct and sometimes, in collaboration with domestic and international Non-governmental Organisations, carries out unannounced visits to detention centres.

Despite the legal framework put in place to safeguard the right to freedom from arbitrary detention, Cameroon is notorious for the practice. For example, Amnesty International (2017/18),[39] CHRDA 2018,[40] United States Department of State (2019)[41] and Human Rights Watch (2020)[42] have reported that arbitrary detention is prevalent, and practised in all regions of the country. Many victims of arbitrary detention are not versed in complaint mechanisms, while others are unwilling to initiate criminal proceedings against perpetrators, for fear of consequences.[43] Sometimes arrests and detentions are effected without warrant, and arrested persons are not informed of the reasons for arrest and detention, or the nature of charges against them, contrary to Article 9(2) of the ICCPR. Furthermore, contrary to Article 9(3) of the ICCPR., sometimes judicial police officers and state security agents fail to respect interrogation rules, and suspects are not presented promptly before a judge or other officer authorised by law to exercise judicial power. Many persons, including outspoken journalists, opposition party politicians, human rights activists and persons demonstrating for civil and political rights, [44] and sometimes even children,[45] are detained for some months,

[38] The National Commission on Human Rights and Freedoms of Cameroon, established by presidential Decree No. 90/149 of 8 November 1990.

[39]Amnesty International 'Amnesty International Report 2017/18 – Cameroon' available at *https://www.refworld.org/docid/5a993930a.html* (accessed 14 January 2021).

[40] Centre for Human Rights and Democracy in Africa 'Cameroon's Unfolding Catastrophe: Evidence of Human Rights Violations and Crimes against Humanity' (2019) available at *www.chrda.org* (accessed 30 October 2019).

[41] U S Department of State 'Human Rights Report for Cameroon 2017' available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 14 January 2021).

[42] Human Rights Watch 'World Report 2020' available at *https://www.hrw.org/world-report/2020/country-chapters/cameroon#* (accessed 14 January 2021)

[43] Enonchong L S 'Applying International Standards in Enforcing the Right to Personal Liberty in Cameroon: Challenges and Prospects' (2016) 60 (3) *Journal of African Law* 389-417.

[44] Contra Nocendi 'Arbitrary Arrest and Detention of Political Activists in Cameroon' (2021) available at *http://www.contranocendi.org/index.php/en/news/98-arbitrary-arrests-and-detention-of-political-activists-in-cameroon* (accessed 22 March 2021).

[45] Contra Nocendi 'Contra Nocendi calls for release of minor held in prolonged pre-trial detention in Cameroon' (2020) available at *https://www.contranocendi.org/index.php/en/news-press/226-contra-nocendi-calls-for-release-of-minor-held-in-prolong-pre-trial-detention-in-cameroon* (accessed 14 January 2021).

and even years, without access to lawyers[46] or the possibility of challenging the legality of their detention by way of habeas corpus as guaranteed in Article 9(4) of the ICCPR.

A number of domestic cases decided in favour of the victims, including *Nyo Wakai and 172 Ors v The State of Cameroon,*[47] *The People v Nya Henry*[48] and *The People v Dr Martin Luma,*[49] demonstrate that arbitrary detention is a normal practice in Cameroon. The verdicts of other decided cases reveal impunity. For example, in *The People v Warrant Officer Njiki Adolp* the culprit was prosecuted, but sentenced to a suspended term,[50] while in *The People v Ouseini Hamadou* (the Lawan of Badadji) the culprit was sentenced to very lenient terms[51] that did not reflect the gravity of the offences committed. At the international level, the fact that many HRC communications decided in favour of the victims[52] is evidence of the prevalence of arbitrary detention in Cameroon. Furthermore, other cases reveal that the victims were incarcerated in prolonged arbitrary detention without the possibility of vindicating their legal rights and securing their release. For example, in *Albert Womah Mukong v Cameroon*[53] and *Cyrille Gervais Moutono Zogo (on behalf of Achille Benoit Zogo Andela) v Cameroon*,[54] authorities held the victims in pre-trial detention for five years with no investigations and no reasons for continuing detention, in violation of Article 9(3) of the ICCPR. This conduct raises questions about the effectiveness of the legal

[46] Amnesty International 'Cameroon's Secret Torture Chambers: Human Rights Violations and War Crimes in the Fight against Boko Haram' (2017) available at *http://www.amnesty.org* (accessed 18 May 2018).

[47] *Nyo Wakai and 172 Ors v The State of Cameroon,* Judgement No. HCB/19 CMR/921 of 23 December 1992.

[48] *The People v Nya Henry* (2005) 1CCLR, 61, revd, BCA/MS/11C/2002.

[49] *The People v Dr Martin Luma & 18 Ors* Suit No. BA/13m/01-02, Court of First Instance, Bamenda (2002).

[50] *The People v Warrant Officer Njiki Adolp*, Judgment No. 32/6 of 11 May 2006.

[51] *The People v Ouseini Hamadou* (the Lawan of Badadji), Judgement No. 101/cor of 29 November 2006. The Guider Court of First Instance prosecuted the accused person, found him guilty of arbitrary detention, and sentenced him to one-year imprisonment suspended for three years and fine of 360,000 FCFA equivalent to five hundred and thirty Euros.

[52] *Ebenezer Akwanga v Cameroon,* Communication No. 1813/2008, CCPR/C/101/D/1813/2008; *Dorothy Kakem Titiahonjo v Cameroon*, Communication 1186/2003, CCPR/C/91/D/1186/2003 (2007); *Phillip Afuson Njaru v Cameroon,* Communication No. 1353/2005, U.N Doc. CCPR/C/89/D/1353/2005 (2007) and *Fongum Gorji-Dinka v Cameroon*, Communication No. 1134/2002, U.N. Doc. CCPR/C/83/D/1134/2002 (2005).

[53] *Albert Womah Mukong v Cameroon,* Communication No. 458/1991, CCPR/C/51/D/458/1991. For more, see De Than C & Shorts E *International criminal law and human rights* (2003) 219.

[54] *Cyrille Gervais Moutono Zogo (on behalf of Achille Benoit Zogo Andela) v Cameroon* (2016) Communication No. 2764/2016, CCPR/C/121/D/2764/2016, paras. 2.22 and 7.2.

framework put in place to safeguard the right to freedom from arbitrary detention in Cameroon.

1.2 Statement of the problem

The continued practice of arbitrary detention in Cameroon raises the question as to whether Cameroon has put in place the necessary and adequate legal framework to protect against this prohibited conduct. This is important as the practice is alarming and if not adequately address, can breed ground for other human rights violations such as torture, enforced disappearances and summary executions. The other issue at stake is whether Cameroon has complied with its international obligations to effectively implement and enforce the substantive and procedural safeguards recommended by the ICCPR and other international and regional human rights treaties relevant to protecting against arbitrary detention.

1.3 Objectives of the study

The main objective of this study is to examine the effectiveness of the legal framework put in place to safeguard the right to freedom from arbitrary detention in Cameroon.

Other specific objectives are:

1) To ascertain the role of international and regional human rights instruments and monitoring mechanisms in addressing the problem of arbitrary detention;
2) To analyse the pattern and practice of arbitrary detention in Cameroon so as to identify the causes;
3) To examine the effectiveness of habeas corpus in securing the unconditional release of persons arrested and detained arbitrary fashion in Cameroon; and
4) To identify existing gaps in Cameroon's domestic laws and practices and in international standards, and to recommend practical solutions to eradicate the prohibited conduct.

In order to address the issues raised above, the study seeks to answer the following questions:

1) How do international legal instruments to which Cameroon is party safeguard against arbitrary detention?

2) What legal framework is in place to safeguard the right to freedom from arbitrary detention in Cameroon?

3) What are the roles of the judiciary, auxiliaries of justice, legal professionals and oversight mechanisms in safeguarding the right to freedom from arbitrary detention in Cameroon?

4) What are the challenges to safeguarding the right to freedom from arbitrary detention in Cameroon?

5) What is the strength of habeas corpus to protect against arbitrary detention in Cameroon?

1.4 Significance of the study

This research is particularly significant as it explores the challenges faced by Cameroon namely, what is the reason for the prevalence of arbitrary detention, despite the measures and the efforts to eradicate the practice? Furthermore, the research is important as it highlights both the plight and the rights of victims of arbitrary detention, including awaiting-trial detainees in Cameroon's maximum-security prisons and other secret detention facilities. Upon completion of the study, persons arrested and detained in arbitrary fashion (including members of the public) will be better informed of the substantive and procedural rights against arbitrariness, and the procedures to challenge and secure their release by way of habeas corpus and for them to receive compensation.

The research is useful for legislators and policy-makers as it highlights the pattern of arbitrary detention, proposes solutions, and motivates Cameroon to re-assess its level of compliance with domestic laws and international standards put in place to protect against arbitrariness. Little research has been conducted to assess the effectiveness of the legal framework (CPC, PC, JOO, Constitution and other legislation) put in place to protect against arbitrary detention in Cameroon, and the results authoritatively indicate a serious gap in understanding, policy and practice. This research fills this gap.

The research also contributes to the ongoing debate on the prohibition and prevention of arbitrary detention and other human rights violations associated with detention in Cameroon. It considers and embraces recent developments in the promotion and protection of human rights including the problem of arbitrary detention, and thus adds to the existing body of knowledge in Cameroon necessary to develop a curriculum of taught courses and research in universities and other higher institutions of learning.

1.5 Research methods

This research reviews the relevant legal framework on the prohibition and prevention of arbitrary arrest, detention and other human rights violations such as torture and other forms of ill-treatment in Cameroon, against binding international standards that protect against arbitrariness at the pre-trial stage of the criminal justice system. It is based on the doctrinal method of analytical and critical interpretation of legal texts on the right to personal liberty and to protection against arbitrariness. Thus, the research makes use of scholarly works and publications relevant to this area of study such as books, journals, articles and primary sources such as the Constitution, P C, C P C, government reports and other relevant legal documents on the state of human rights in Cameroon. The research also reviews the ICCPR, UDHR and regional human rights treaties such as the ACHPR, IACHR and ECHR, and communications or judgements emanating from the HRC, African Commission, African Court on Human and Peoples' Rights (African Court), IACrtHR, ECtHR and the ICJ. Another important source of data for this research are the reports of interstate relations (US State Department and the UK Home Office) and reputable international NGOs including Amnesty International, Human Rights Watch, Lawyers Watch Canada and Contra Nocendi International.

1.6 Literature review

A lot has been written on the subject of the right to freedom from arbitrary detention. However, little has been written on the topic in the context of Cameroon. Ball researched on human rights abuses in Cameroon where she noticed that the arbitrary arrest, detention coupled with torture and other forms of ill-treatment and enforced disappearances of detainees and prison inmates are widespread and systematic. She further observed that victims of these human rights violations do not even know the complaint procedure or are too frightened to initiate legal criminal proceedings to vindicate their legal rights and receive adequate compensation and rehabilitation.[55]

[55] Ball M O 'Every Morning, just like Coffee: Torture in Cameroon' (2002) available, at *http://www.torturecare.org.uk/Cameroon/rtf* (accessed 17 November 2022).

Mbi examines Cameroon's obligation under international law in ratifying international treaties and conventions. He observes that international treaties and conventions, once ratified, become part of domestic law and their provisions are binding on Cameroon. He argues that despite the ratification of the ICCPR, arbitrary arrest coupled with torture and other forms of ill-treatment by elements of the police, gendarmerie and prison warders continue in the country.[56]

Enonchong concluded that even after the harmonisation of the Criminal Procedure Code in 2005, the rights to bail, habeas corpus and presumption of innocence are still being violated in Cameroon. She observed that sometimes courts order the release of suspects from custody, but their release is unlawfully blocked by State Prosecutors.[57]

Mandeng deals with the right to bail and argues, inter alia that the Procureur Général or State Counsel's decision whether to consent to bail is crucial in protecting against arbitrariness. She continued that notwithstanding, 'the decision whether to grant bail or not is considered on a case by case basis and as a result, the Procureur Général or State Counsel must act with objectivity, independence and fairness to avoid arbitrariness'.[58]

1.7 An outline of chapters

The thesis is divided into seven chapters. The first chapter is an introduction to the study which highlights the problem of arbitrary detention in Cameroon. It establishes the problem statement, research questions, significance of the study, literature review and the research methodology.

Chapter 2 examines the historical perspectives of arbitrary detention. It articulates the practice of arbitrary detention through the ages and its re-emergence in recent times. The chapter explains the Magna Carta and Habeas Corpus Acts of England, and the French Declaration of the Rights of Man and the Citizen. Although mediaeval England and revolutionary France adopted these three pieces of legislations at different times, the goal was specifically to safeguard the right to freedom from arbitrary detention.

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[56] Mbi J T (2007) 29.

[57] Enonchong L S 'Applying International Standards in Enforcing the Right to Personal Liberty in Cameroon: Challenges and Prospects' (2016) 60 (3) *Journal of African Law* 389-417, p. 5 and 6.

[58] Mandeng P C N 'The Role and Function of Prosecution in Criminal Justice' 164, available at *https://www.unafei.or.jp/publications/pdf/RS_No53/No53_18PA_Mandeng.pdf* (accessed 31 March 2021).

Chapter 3 examines the ICCPR and other international and regional instruments, and the mechanisms put in place to protect against arbitrary detention. The chapter attributes substantive meaning to key terms such as *arbitrary*, *arrest*, *detention* and *promptly* to identify the prohibited conduct. It highlights issues of prevention, prohibition, the responsibility to protect, and appropriate punishment for perpetrators of arbitrary detention. The chapter argues that international legal instruments impose responsibility on state parties to not encourage, practise or condone arbitrary detention, as its prohibition has attained customary international law status.

Chapter 4 critically examines the effectiveness of the legal framework put in place to safeguard the right to freedom from arbitrary detention in Cameroon. It particularly examines the Cameroon Constitution, the Penal Code, Criminal Procedure Code and other documents relevant to the protection against arbitrary detention. It highlights that, although Cameroon has prohibited, outlawed and put in place measures to protect against arbitrary detention, the practice persists, with the assistance of denial, impunity and state protection. Furthermore, the substantive and procedural safeguards put in place to protect against arbitrariness are not strictly followed, as suspects and accused persons are sometimes detained in an arbitrary fashion, and are often subjected to torture and other forms of ill-treatment. Most regrettably, the study highlights that the harmonised Criminal Procedure Code of 2005 and the Judicial Organization Ordinance of 2006 have not adequately strengthened the writ of habeas corpus to ensure that persons arrested and detained in an arbitrary fashion are released unconditionally on the strength of its rulings.

Chapter 5 focuses on auxiliaries of justice and their role in protecting against arbitrary detention in Cameroon. These include judges, prosecutors, lawyers and judicial police officers. The National Commission on Human Rights and Freedoms is included in this chapter since its chairperson and members play an important and active role in protecting against arbitrary detention in Cameroon.

Chapter 6 examines challenges to effective enforcement of the right to freedom from

arbitrary detention in Cameroon. The chapter highlights disregard for the rule of law, a human rights culture in ruins and the unorthodox cultures and practices that are to blame.

Chapter 7 concludes the study and recommends the urgent need to improve protection against arbitrary detention in Cameroon. The country is under the obligation to comply with the provisions of all ratified international treaties that outlaw arbitrary detention, and to punish state agents and non-state agents that engage in the prohibited conduct. The chapter also makes recommendations.

CHAPTER TWO

HISTORICAL PERSPECTIVES OF ARBITRARY DETENTION IN MEDIAEVAL EUROPE

2.1 Introduction

Protection against arbitrary detention in mediaeval Europe was codified in early human rights documents such as the Magna Carta (1215), the Petition of Right (1628), the Habeas Corpus Acts (1640, 1679), and the Declaration of the Rights of Man and of the Citizen, otherwise known as Declaration of Rights.[59] These documents outlawed arbitrary detention, and identified the prohibited conduct and executive power at the time of arrest and detention. The crucial role they played in protecting human rights and fundamental freedoms in mediaeval Europe justifies why many historians and legal scholars consider them the foundation of modern international[60] and regional[61] human rights treaties.[62] These documents have also influenced the constitutional development of states such as the USA, Canada (except Quebec), Australia, New Zealand, Malaysia, India, Macedonia and Indonesia.[63]

This chapter examines the historical perspectives of arbitrary detention in mediaeval Europe, and the legal framework put in place to eradicate the practice. The first part of this chapter examines the role of the Magna Carta, Petition of Right and Declaration of Rights that outlawed arbitrary detention, while the writ of habeas corpus later translated into law (Habeas Corpus Act of 1640 and 1679) to review the legality of detention forms the second part of this discourse. It argues that measures adopted to address arbitrary detention faced challenges from royal prerogatives and other arbitrary state

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[59] Laurent Marcoux Jr. 'Protection from Arbitrary Arrest and Detention Under International Law' (1982) 346 available at *http://pgil.pk/wp-content/uploads/2014/04/Protection-from-Arbitrary-Arrest-and-Detention-Under-Internationa.pdf* (accessed 30 March 2018).

[60] The UDHR and ICCPR.

[61] ACHPR, ECHR and IACHR.

[62] Fisher J 'Why Magna Carta still Matters Today' (2015) available at *https://www.bl.uk/magna-carta/articles/why-magna-carta-still-matters-today* (accessed 16/4/2018).

[63] Kamala P M G 'The Magna Carta and its Relevance to Parliaments Today' (2017) 10-11, available at *https://www.parlimen.gov.my/images/webuser/artikel/THE%20MAGNA%20CARTA%20AND%20ITS%20RELEVANCE%20TO%20PARLIAMENTS%20-%2028.11.2017.pdf* (accessed 3 May 2021).

practices, and that, as a result, there was the need to determine limits of the king's power to cause arrest and detention.

2.2 The role of the Magna Carta

This section examines the conceptual and practical components of Clause 39 of the Magna Carta in shaping the discourse governing issues of arbitrary detention in mediaeval England. The Magna Carta is arguably a very famous human rights document which exerted great influence on the historical and constitutional development of the right to personal liberty in mediaeval England.[64] The Magna Carta was extraordinary and groundbreaking because for the first time in mediaeval Europe a solemn document established standards that guaranteed right to liberty, (protection against arbitrary detention), due process or rule of law, trial by jury, and challenged inhumane and arbitrary rule.[65] Although originally adopted to curtail royal power, Magna Carta nevertheless went far beyond that and represented the first piece of legislation that outrightly outlawed arbitrary detention.[66] Clause 39 of the Magna Carta reads as follows,

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [King John] proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Clause 39 of the Magna Carta was important as it laid down the foundation of some important human rights law concepts. First, it guaranteed the right to personal liberty and outlawed arbitrary detention in strong terms, and made it absolutely clear that no free man could be deprived of his liberty without cause. Secondly, it advocated for due process or rule of law and superiority of the law above everyone including the king. Thirdly, it guaranteed trial by jury. This was an important development in safeguarding against arbitrary rule and detention without cause, as the right to personal liberty ceased

[64] Fisher J 'Why Magna Carta still Matters Today' (2015) available at <*https://www.bl.uk/magna-carta/articles/why-magna-carta-still-matters-today* (accessed 16/4/2018).
[65] Stefanovska V 'The legacy of Magna Carta and the Rule of Law in the Republic of Macedonia' (2015) 11 (1) *SEEU Review* 197-205, p.200.
[66] Fisher J 'Why Magna Carta still Matters Today' (2015) available at *https://www.bl.uk/magna-carta/articles/why-magna-carta-still-matters-today* (accessed 16/4/2018).

to depend on the king's arbitrary and discretionary powers, or on the Privy Council, but on the rule of law and the precepts of a fair trial.

Randall has argued that right to liberty and due process put together act as a deterrent against arbitrary rule because the limits of personal liberty, according to Clause 39 of the Magna Carta, can only be determined by the law of the land, based on the lawful judgments of peers in a fair trial, and not by regal power.[67]Although Clause 39 of the Magna Carta outlawed arbitrary detention and reaffirmed the supremacy of rule of law above all persons, the wording, 'law of the land' was considered to be ambiguous and required clarification. For example, first, can illegal orders emanating from the king take the form of statute law? Secondly, can the law of the land be construed to mean due process or trial by jury?[68] Responding to the above questions, Thompson is of the opinion that the wording 'law of the land' did not represent a concrete concept, but could be used in a similar manner to 'due process of law'.[69] Ely, on the other hand, held that the wording 'law of the land', read together with 'due process' did not represent a standard procedure because 'due process' seeks to regulate legal process and other executive actions.[70] Justice Scalia took sides with Ely and disagreed with Thompson, that the phrase 'law of the land' could be equated to mean due process, and stated:

> By its inescapable terms, [the Due Process Clause] guarantees only process. Property can he taken by the state; liberty can be taken; even life can he taken; but not without the *process* that our traditions require – notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.[71]

It is submitted that Justice Scalia and Ely are right to dis-equate 'law of the land' and due process because 'law of the land' (statute law) is adopted for specific purposes and attributed substantive meaning, while 'due process' or rule of law represents implementation and enforcement of the law in place. For example, the first statement

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[67] Randall M H 'Magna Carta and Comparative Bills of Rights in Europe' (2015) available at *https://magnacarta800th.com/articles/magna-carta-and-comparative-bills-of-rights-in-europe/* (accessed 5 April 2021).

[68] Turner R V *Magna Carta: Through the Ages* (2003) 71-72.

[69] Thompson F '*Magna Carta: Its Role in the Making of the English Constitution 1300-1629'* (1948)72.

[70] Cox P N & Ely H J 'Democracy and Distrust: A Theory of Judicial Review' (1981) 15 (3) *Valparaiso University Law Review* 637-665, p. 640.

[71] Greene J 'The Meming of Substantive Due Process' (2016) 24-25 available at *http://scholarship.law.umn.edu/concomm/21* (accessed 17 December 2018).

in clause 39, 'no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled', constitutes the substance, and defines the prohibited conduct and cannot be equated to mean due process. Contrarily, the 'due process of law' provision under Clause 39 of the Magna Carta functions in a double capacity, as it protected against arbitrary detention and secondly, it represented the legal requirement that obligated the state to respect the 'law of the land', legal and fundamental rights of its citizens, and ensure fairness and non-arbitrariness.

2.2.1 The influence of Clause 39 of the Magna Carta abroad

The importance of Clause 39 of the Magna Carta transcended its original time and place, and became an enduring worldwide symbol of personal liberty, equality, fair trial, trial by jury and the rule of law.[72] Clause 39 of the Magna Carta is also widely considered as the basis for constitutional guarantees of personal liberty, equality before the law and due process.[73] This is evident in the Fourteenth Amendment of the United States Constitution, which states that 'no citizen should forfeit his or her rights or freedom except by lawful judgment or the law of the land'. Furthermore, Clause 39 of the Magna Carta has greatly influenced outcomes of some decided cases in the USA.

The Magna Carta's most recent influence in US case law is evident in *Boumediene v Bush*[74] and *Rasul v Bush,*[75] that determine whether foreign nationals, alleged victims of arbitrary detention in Guantánamo Bay and Abu Ghraib prison could challenge their arrest and detention by way of habeas corpus. Supreme Court judges averred that the affirmative verdict in favour of the defendant's appeal in *Boumediene v Bush* was motivated and influenced by Clause 39 of the Magna Carta.[76]

The United Nations has often referred to the Magna Carta as the foundation of human rights movements worldwide and the first great act of a united world order.[77]

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[72] American Bar Association '800 Years of Magna Carta' (2015) 4 available at *http://missourilawyershelp.org/events/800-years-of-magna-carta/* (accessed 23 November 2018).

[73] Lock A 'Magna Carta in the 20th century' (2015) available at *https://www.bl.uk/magna-carta/articles/magna-carta-in-the-20th-century* (accessed 7 June 2018).

[74] *Boumediene v Bush*, 553 U.S. 723 (2008).

[75] *Rasul v Bush* (03-334) 542 U.S. 466 (2004).

[76] *Boumediene v Bush*, 553 U.S. 723 (2008).

[77] United Nations Foundation 'How One Woman Changed Human Rights History' (2018) available at *https://medium.com/@unfoundation/how-one-woman-changed-human rights-history-84fd8f67d54b* (accessed 4 October 2019).

Furthermore, Eleanor Roosevelt, chairperson of the United Nations Human Rights Commission that drafted the 1948 Universal Declaration of Human Rights, declared that the declaration was indeed the international Magna Carta of all mankind, presumably, as it spelled out fundamental rights and liberties that the Great Charter of liberties guaranteed in 1215.[78]

The Magna Carta's Clause 39 that outlawed arbitrary detention is embedded in the Constitutions of most African states, such as Ethiopia[79], South Africa[80], Namibia[81], Nigeria[82], Liberia[83] and Cameroon.[84] This is a welcome development in safeguarding the right to freedom from arbitrary detention because Constitutions, hierarchically, represent the highest law of almost all states, and inserting this right in them indicates the importance attached to its protection. Furthermore, the due process and trial by jury provisions contained in all common law jurisdictions, as well as civil law jurisdictions in Africa, (except trial by jury) originated from the Magna Carta's Clause 39.[85] Again, some great African human rights activists have also commemorated the importance of the Magna Carta. This was evident in Nelson Mandela's non-guilty plea in the 1964 Rivonia trial, where he made public his love for the Great Charter of Liberties and western democracy, and maintained that their arrest, detention and trial was arbitrary as it was politically and systematically motivated.[86] Similarly, on 28 July 2014, the then U S President Barack Obama, while addressing young African leaders, invoked and hailed the Magna Carta as he stated that, irrespective of any nation's resources and

[78] United Nations Foundation 'How One Woman Changed Human Rights History' (2018) available at*ahttps://medium.com/@unfoundation/how-one-woman-changed-human rights-history-84fd8f67d54b* (accessed 4 October 2019).

[79] Article 17 of the Constitution of the Federal Republic of Ethiopia.

[80] Section 12(1) (a) of the South African Bill of Rights.

[81] Article 7 of the Namibian Constitution, Third Amendment Act 8 of 2014.

[82] Section 35 of the 1999 Constitution of the Federal Republic of Nigeria.

[83] Article 11 (a) of the Constitution of Liberia (1986).

[84] Preamble to the Constitution of Cameroon.

[85] Ojo B 'What is the impact of the Magna Carta on Nigeria and other African countries ?'(2015) available at *https://www.pressreader.com/nigeria/thisday/20150421/282501477169580* (accessed 2 August 2018).

[86] Joffe J *The State vs Nelson Mandela: The Trial that Changed South Africa* (2007) xvii.

intellectual capability, success is an impossibility in the absence of rule of law and respect for basic human rights.[87]

It is submitted that the Magna Carta probably ranks higher than most human rights documents in history. It changed the status quo of English law from its custom-based approach to one governed by principles. It also established supremacy of the law and confirmed that loss of personal liberty must be in conformity with the law and in line with due process.[88] Unfortunately, Clause 39 of the Magna Carta did not completely resolve the issues of arbitrary detention in mediaeval England, as the Privy Council and the king continued to use royal prerogative powers as is evident in the future five knights' case. Radical measures were needed to remedy the crucial problem of arbitrary deprivation of liberty and as a result, Parliament adopted the Petition of Right in 1628.

2.3 Petition of Right (1628)

The Petition of Right was the second human rights instrument adopted in England, after the Magna Carta that guaranteed protection against arbitrary detention. It represented statements of civil rights and liberties drawn up by Members of Parliament in 1628, under the stewardship of Sir Edward Coke, opposing bad governance and excessive use of royal prerogative powers to cause arrest and detention without cause. This section examines the role played by the Petition of Rights in addressing issues of arbitrary detention due to the inadequacies of Clause 39 of the Magna Carta. Entangled in the thirty years' war, and at loggerheads with Parliament's refusal to generate funds, the king, with the backing and support of the Church of England, resorted to an arbitrary policy of non-Parliamentary taxation. Several clergymen, amongst them Roger Maynwaring and Robert Sibthorpe, spearheaded and defended the king's arbitrary forced loan policy, maintaining that by virtue of his royal personality and as god's representative on earth, the king was not to be subjected to any opposition or challenges

[87] International Bar Association 'Magna Carta and the Global Community' (2014) available at *https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=12DE3372-1EAE-4D6E-ABC3-FDFDD5F3C13F* (accessed 20 May 2018).

[88] American Bar Association '800 Years of Magna Carta' (2015) 4, available at *http://missourilawyershelp.org/events/800-years-of-magna-carta/* (accessed 23 November 2018).

from citizens or state institutions.[89] Elaborating more on the king's right to excessive, arbitrary and royal prerogative powers, Maynwaring stated:

> The King is not bound to observe the Laws of the Realm concerning the Subjects Rights and Liberties, but that his Royal Will and Command in imposing Loans and Taxes, without common consent in Parliament, doth oblige the Subjects Conscience upon pain of eternal damnation. That those who refused to pay this Loan, offended against the Law of God, and the King's supreme Authority, and became guilty of Impiety, Disloyalty, and Rebellion. And that the Authority of Parliament is not necessary for the raising of Aids and Subsidies; and that the slow proceedings of such great Assemblies, were not suited for the Supply of the State's urgent necessities, but would rather produce sundry impediments to the just designs of Princes.[90]

Without Parliament's approval, Charles I issued a proclamation otherwise known as the Forced Loan policy on 7 October 1626, and employed all means at his disposal to achieve this objective. The king dealt vigorously with all opposition and resistance to the Forced Loan scheme[91] and as a result, many knights were subjected to arbitrary arrest and detention.[92] The knights' arrest and detention was arbitrary for three main reasons. First, the king did not state any reason for ordering the arrest and detention of the seventy-five knights. Secondly, no formal charges were levied against them and thirdly, court judges refused to rule in favour of the Forced Loan policy.[93] This excessive arbitrary action of the king, was clearly in violation of Clause 39 and re-invented Clause 29 of the Magna Carta which explicitly banned arrest and detention without cause, and also made it clear that, if arrest and detention is unavoidable, it must be based on judgments of peers or the law of the land. In the present circumstances, it was most likely that the king's motivation not to prefer a formal charge against the five

[89]Sommerville J P 'The Forced Loan' available at *https://faculty.history.wisc.edu/sommerville/123/123%20293%20forcedloan.htm* (accessed 4 August 2018).

[90] Price T *The History of Protestant Nonconformity in England, from the Reformation under Henry the VIII* (2012) 29.

[91] Cust R 'Charles I, the Privy Council, and the Forced Loan' (1985) 24 (2) *Journal of British Studies* 208-235, p. 208.

[92] Willms, S 'The Five Knights' Case and Debates in the Parliament of 1628: Division and Suspicion Under King Charles I' (2006) 7 (1) *Constructing the Past* 92-100, p. 92-93.

[93] Gaunt J 'Five Knights for Freedom' (A talk delivered at the conference of the Property Bar Association on 12 November 2017) 6 available at *http://www.falcon-chambers.com/images/uploads/articles/five-knights-talk.pdf&gt* (accessed 5 June 2018).

knights was for fear that judges might rule against the legality of the Forced Loans Policy at a hearing.[94]

2.3.1 Events leading to the adoption of the Petition of Rights: The Five Knights' Case (1627)

This section discusses events leading to the 'Five Knights' Case', and argues that continued infringement of the right to liberty was the direct motivation for adopting the Petition of Right. Five knights, amongst those detained for failing to honour the forced loans scheme, seized the Court of King's Bench and demanded a review of their detention.[95] Selden, counsel for Edmund Hampden, one of the victims, demanded that the Crown show cause for the arrest and detention of the victims. He relied on mediaeval precedents and Clause 39, re-invented Clause 29 of the Magna Carta that outlawed arbitrary detention, and reiterated that all arrest and detention must follow due process of law. Attorney General Heath, arguing for The Crown, maintained that the king was entitled to excessive discretionary powers to order arrest and detention for state security reasons or for state interest, without cause for a limited period of time. He tried but failed to invoke and insert an old precedent in the court's records which pre-supposed that the king's decision to deprive the liberty of the five knights was in line with due process and law of the land, which permitted the king to cause arrest and detention of persons he presupposed posed danger to the proper functioning of the state.[96]

Selden opposed Heath, stating that the case at hand did not relate to matters of state security or national interest. Rather, he maintained that the case was one of high politics, secret diplomacy and conspiracy by the crown to hide behind state security and national interest to justify its arbitrary actions. He continued that the victims' predicaments resulted in their refusal to make available loans to the crown which would certainly

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[94] Sommerville J P 'The Forced Loan' available at *https://faculty.history.wisc.edu/sommerville/123/123%20293%20forcedloan.htm* (accessed 4 August 2018).

[95] Willms S (2006) 92-93.

[96] Reeve L J 'The Legal Status of the Petition of Right' (1986) 29 (2) *The Historical Journal* 257-277, p. 263.

never be repaid, and he challenged the crown to attest to this so that the legality of the loans could be made the subject of controversy and determination in the case.[97s]

The next issue to be determined was whether the king had the right to order arrest and detention without cause and in circumstances that superseded the 'law of the land'. Bramston, counsel for Heveningham, argued that detention without cause was arbitrary as it was clearly impossible for the courts to examine the legality of detention in the absence of any formal charge against the defendant.[98] Selden supported Bramston stating that neither does regal power on its own represent the law of the land, nor does it supersede it. Therefore the King had no power to order arrest and detention without cause. He continued that earlier on Parliament essentially took the same position when it stated as follows,

> Whereas it is contained in the Great Charter … that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land; It is accorded assented, and stablished, That from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same neighbourhood where such Deeds be done, in due Manner, or by Process made by Writ original at the Common Law … and forejudged of the same by the Course of the Law … . [99]

Attorney General Heath undermined the authority and purpose of the Great Charter of Liberty and argued that, although the Magna Carta protected and guaranteed rights and liberties in England. it must at all times be known that

> the king is the head of the same fountain of justice, which your lordship administers to all his subjects; all justice is derived from him, and what he doth, he doth not as a private person, but as the head of the commonwealth, as *justiciarius regni*, yea, the very essence of justice under God upon earth is in him.[100]

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[97] Gaunt J 'Five Knights for Freedom: The Story of the Petition of Right 1628' (2007) available at *https://www.falcon-chambers.com/publications/articles/five-knights-for-freedom-the-story-of-the-petition-of-right-1628* (accessed 5 April 2021).

[98] Gaunt J (2007).

[99] Tyler A L 'A Second *Magna Carta*: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege' (2016) 91 (5) *Notre Dame Law Review* 1949-1996, p. 1960.

[100] Tyler A L (2016) 1960.

He defended his position with a 1592 King's Bench decision precedent which stated that in the absence of reasons for detention ordered by regal power, courts will always remand suspects in custody assuming that 'it is intended to be a matter of State and that it is not right nor timely for it to appear' – the defence of *arcana imperii*.[101] He opined that the proper procedure the prisoners could have taken to vindicate their rights (if any in the present circumstance) was to petition for pardon rather than to challenge their detention.[102] Hyde CJ and Attorney Heath concluded that courts had no power to grant bail to detainees in the absence of reasons for detention assuming that remand is largely for state reasons which goes beyond the competence of judges. As a result, the motion failed and the knights were remanded in custody. Their appeal failed on grounds that, first, their detention order originated from the special command of his majesty with no charges levied against them. In these circumstances, the victims would remain in custody until the king was ready to bring them to trial because their offence was probably too dangerous to be discussed publicly and might have amounted to treason.[103] Secondly, this ruling was based on an interlocutory application for bail, pending a final ruling on the main issue, and therefore had nothing to do with the legality of the Forced Loan policy.[104]

This verdict presupposed that first, English citizens could not totally rely on the Magna Carta's guarantee against arbitrary detention,[105] and secondly, that the royal prerogative to order arrest and detention without cause was widely accepted in the case of seditious conspirators, but not against respectable citizens objecting to extraordinary arbitrary levies.[106] Although the Court's decision favoured royal prerogative powers, for the first time, issues of detention without cause surfaced as the main subject in Parliament for legal and public debate. The House of Commons took a very strong position on the matter and opposed the king's command to order arrest and detention without cause.[107]

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[101] U S Supreme Court, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830).

[102] Gaunt J 'Five Knights for Freedom: The Story of the Petition of Right 1628' (2007) 7 available at *https://www.falcon-chambers.com/publications/articles/five-knights-for-freedom-the-story-of-the-petition-of-right-1628* (accessed 5 April 2021).

[103] Gaunt J (2007) 7-8.

[104] Gaunt J (2007) 8.

[105] Willms S (2006) 96 and 99.

[106] Sommerville J P, 'The Forced Loan' available at *https://faculty.history.wisc.edu/sommerville/123/123%20293%20forcedloan.htm* (accessed 4 August 2018).

[107] McFeeley N D 'The Historical Development of Habeas Corpus' (1976) 30 *South Western Law Journal* 585-600, p. 588.

2.3.2 Parliamentary debate on the Five Knights' Case

Failing to resolve the Five Knights' Case in court, Selden, counsel for the knights, referred the matter to Parliament and had support of fellow House of Commons members. The debate in Parliament centered on whether the king had exceeded his royal prerogatives and violated fundamental rights, liberties and laws of England in causing the arrest and detention of the knights.[108] Two camps emerged; one, mostly Privy Council members, argued that the King had the right to order arrest and detention without cause, while the other camp thought otherwise. The king's supporters defended their position, maintaining that the Forced Loan policy was necessary to generate funds for the country. They further maintained that the crown's engagement in war was to assure state security from foreign invaders and it was compulsory for Parliament to make funds available, failing which the king could employ any means necessary to that effect. They concluded that the eventual arrest and detention of the knights was necessary, and in line with the law of the land.[109]

Two royal opponents, Cresheld and Saunders, opposed his majesty's arbitrary command and detention of the knights, reiterating that the law applies to all persons without exception, and that the law has always taken great care to protect against arbitrary detention and must continue to do so. Saunders further argued that the victim's due process rights were violated during the trial because they were arrested and detained without cause and no charge preferred against them. Cresheld supported Saunders and further stated that arrest and detention without cause or charge is bondage, and clearly at loggerheads with natural justice, and therefore unacceptable.[110]

Coke maintained that detention without reason is against reason and as a result against the law, and that such indefinite detention could last for a lifetime because the authority of he (the king) that orders the arrest and detention has no time limit. He continued that

[108] Willms, S 'The Five Knights' Case and Debates in the Parliament of 1628: Division and Suspicion Under King Charles I' (2006) 7 (1) *Constructing the Past* 92-100, p. 92.
[109] Willms S (2006) 93-5.
[110] Willms S (2006) 95 – 96.

it is unrealistic and ridiculous that a person can secure release of his animal in any form of detention, but not for his person in the same circumstances and equated incarceration of persons in arbitrary fashion similar to being in hell.[111]

Responding to Heath's arguments that his majesty has the power to cause arrest and detention for state reasons, Coke objected and maintained that the English was clear, and, in its written form, prohibits the arrest and detention of citizens for no just cause. He continued that if detention is authorised,

> *Per mandatum domini regis*, or 'for matter of state' . . . then we are gone, and we are in a worse case than ever. If we agree to this imprisonment 'for matters of state' and 'a convenient time,' we shall leave Magna Carta and the other statutes and make them fruitless, and do what our ancestors would never do.[112]

Members of Parliament realised that royal prerogative powers were still a serious threat to Clause 39 of the Magna Carta and, as a result, consented to codify citizen's right to liberty and protect against other arbitrary state actions in a solemn document in the form of a petition. Members of Commons probably presented their grievances and demanded solutions in the form of a petition to the king rather than as a formal bill, because their interest was to maintain existing rights, rather than to create new ones. The king reluctantly endorsed his signature on the Petition and attributed it the same status as an Act of Parliament, with the same guarantee of the subject's rights as Magna Carta itself.[113]

2.3.3 Adoption of the Petition of Right

Agreed upon and endorsed by both Houses of Parliament in 1628, the Petition of Right was a challenging document that attempted to put a definite check on the king's arbitrary power to collect forced loans and subject his political opponents to arbitrary detention. In other words, the Petition of Right was a declaration intended specifically

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[111] Harrison J & Breay C 'Magna Carta: An Introduction' (2014) available at *https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction* (accessed 7 July 2018).

[112] Tyler A L (2016) 1962.

[113] UK Parliament 'Charles I and the Petition of Right' (2021) available at *https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/petition-of-right/* (accessed 5 April 2021).

to address issues of arbitrary detention and taxation.[114]It contained four main points namely, re-affirmation of the Magna Carta,[115] no taxes without Parliamentary approval,[116] no arrest and detention without cause,[117] no quartering of soldiers in citizens' homes[118] and the ban of martial law in times of peace.[119] Section III and IV of the Petition of Right represented a formal reminder to the king of rights and liberties guaranteed in Clause 39 of the Magna Carta and reinvented Clause 29. Section V re-enforced sections III and IV, as it advocated that all victims of arbitrary arrest and detention be granted unconditional right to habeas corpus. The section reads as follows:

> Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

The Petition of Rights sections III, IV and V, read together, re-enforced the Magna Carta's ban on arbitrary detention, and went further in scrutinising royal prerogatives and the power of the Privy Council to order arrest and detention. Furthermore, the three sections pointed out that in order to avoid arbitrariness, all arrest and detention must be in accordance with the law of the land. Moreover, cause must be shown for all deprivation of liberty, and right to habeas corpus be readily available to anyone who alleged that his liberty had been deprived arbitrarily. A closer look at sections III, IV and V of the Petition of Right suggests that Parliament's main objective was to strengthen Clause 39 of the Magna Carta. Parliament addressed arbitrary detention with

[114] Zimmermann A 'Sir Edward Coke and the Sovereignty of the Law' (2017) (17) 7 *Macquarie Law Journal* 127-146, p. 138.
[115] Section III and IV of the Petition of Right.
[116] Section X of the Petition of Right.
[117] Section III of the Petition of Right.
[118] Section VI of the Petition of Right.
[119] Section VII of the Petition of Right.

resolutions mandating that all detention must be subject to review, and for release of victims if it should be determined that arrest and detention violated the law.[120]

The Petition of Right, as a safeguard measure against arbitrary detention faced a number of challenges. First, its legality and interpretation was questioned[121] despite its approval by Parliament in 1641. Secondly, it was considered as an appeal by individuals who suffered prejudice at the hands of the state to take action against the king, and therefore not legally binding. It has been argued that even if the Petition of Right was considered a private appeal, it commanded the strength of a public bill, and as such was a legislative act, and therefore legally binding.[122]

2.4 Emergence of Habeas Corpus

This section examines the role of habeas corpus in reviewing the legality of detention in mediaeval England. It highlights that two opposing practices in mediaeval England determined the limits of personal liberty in a series of confrontations between the Crown (regal power and authority) on the one hand, and habeas corpus (rule of law) on the other hand. Regal power employed arbitrary detention as a weapon to control and influence citizens to submission and obedience to royal command, while habeas corpus guaranteed citizen's right to liberty at all times, and ensured that all arrests and detentions must conform to strict procedures as established by law.

The term habeas corpus was attributed to a number of common law writs, commands or court orders, directed to a sheriff to produce a prisoner or his body in court for a judge to review his detention or for some other specified reasons.[123] The most direct

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[120] Farrell B 'Habeas Corpus in Times of Emergency: A Historical and Comparative View' (2010) (1) 9 *Pace International Law Review Online Companion* 74-96, 78.

[121] Flemion J S 'The Struggle for the Petition of Right in the House of Lords: The Study of an Opposition Party Victory' (1973) 45 (2) *The Journal of Modern History* 193-210.

[122] Reeve L J 'The Legal Status of the Petition of Right' (1986) 29 (2) *The Historical Journal* 257-277, 258.

[123] *Habeas corpus ad subjiciendum*, a production warrant to present a detainee or his body in court. *Habeas corpus ad deliberandum et recipiendum*: a writ for bringing an accused from a different county into a court in the place where a crime had been committed for purposes of trial, or more literally to return holding the body for purposes of 'deliberation and receipt' of a decision. *Habeas corpus ad faciendum et recipiendum* (also called *habeas corpus cum causa*): a writ of a superior court to a custodian to return with the body being held by the order of a lower court 'with reasons', for the purpose of 'receiving' the decision of the superior court and of 'doing' what it ordered. *Habeas corpus ad prosequendum*: a writ ordering return with a prisoner for the purpose of 'prosecuting' him before the

and vigorous interpretation of habeas corpus suggests that it guarantees the right to liberty as it affords detainees the opportunity to question and demand a review of their detention. The exact date of its first use in English law is a subject of constant debate. Some legal historians believed that it emerged in England during the period of Roman occupancy,[124] while others traced its roots back to Clause 39 of the Magna Carta.[125] One year before the adoption of the Magna Carta, the wordings used in *Tyrel's Case*, 'haberet corpus' being directives to a sheriff to bring a person before the king and court to facilitate adjudication of litigation is ample evidence of the use of habeas corpus at that time.[126] Other legal scholars opined that habeas corpus originated in mediaeval England in the 1300s, to enforce the Magna Carta's guarantee against arbitrary detention.[127]

2.4.1 Historical development of Habeas Corpus

By the mid-fourteenth century, the writ's importance grew, as detainees awaiting trial in lower courts demanded more of it. As a result, there was a need to increase its material and jurisdictional competence. The eventual increase in material competence of the great writ was dramatic as it was now competent to determine the legality of a person's detention but also went further to examine grounds for detention.[128] The writ's importance further developed in the fifteenth century as common law courts used it to investigate and review detentions caused by Ecclesiastical Court, Courts of Admiralty, Chancery and the Privy Council.[129] Although the writ of habeas corpus did not have an immediate impact because the courts continuously favoured the king and Privy Council's arbitrary actions, it nevertheless made it clear that all cases of arbitrary arrest

court. *Habeas corpus ad respondendum*: a writ ordering return to allow the prisoner to 'answer' to new proceedings before the court. *Habeas corpus ad testificandum*: a writ ordering return with the body of a prisoner for the purposes of 'testifying'. For more, see McFeeley N D (1976) 585.

[124] Glass A S (2014) 56.

[125] Landman J 'You Should Have the Body: Understanding Habeas Corpus' (2008) available at *https://www.americanbar.org/content/dam/aba/images/public_education/05_mar08_habeascorpus_landman.pdt* (Accessed 6/6/2018).

[126] Miller A P & Shepard R E 'New Looks at an Ancient Writ: Habeas Corpus Re-examined' (1974) 9 (1) *University of Richmond Law Review.* 49-86, p. 50-51.

[127] Clarke A 'Habeas Corpus: The Historical Debate' (1998) 14 *New York Law School Journal of Human Rights* 375-434, p. 375. For more, see Blackstone W 'Commentaries on the Laws of England 1765-69' (1979) available at *https://www.press.uchicago.edu/ucp/books/book/chicago/C/bo3613795.html* (accessed 5 July 2018).

[128] Farrell B R (2010) 77.

[129] McFeeley N D (1976) 586-7.

and detention must be subject to examination and review by courts of competent jurisdiction.[130] The next step in the development of habeas corpus witnessed its transformation from a mere procedural remedy and gained some substantive elements as it expanded its application and relationship to due process. The king's opponents in Parliament invoked Magna Carta to prove illegality of arrest and detention without due process of law, and attempted to use it to prevent unlawful detention by the Crown. Although this attempt failed during the Tudor reign, territorial competence of habeas corpus was subsequently extended and presented common law judges good grounds[131] and opportunity to resist and challenge arbitrary actions that were not in line with common law principles.[132] It is against this background of uncertainty of its future that Parliament realised that habeas corpus (a mere declaration) might never represent a lasting solution to issues of arbitrary detention in England. However, with the passage of time, it gained the prominence of statute law, and was transformed to the Habeas Corpus Acts of 1640 and 1679. It represented the efficient and appropriate procedure to review detention, checked royal prerogative power to cause arrest and detention, and firmly established that only courts had competence to issue the great writ of liberty.[133]

2.4.2 Habeas Corpus Ad subjiciendum: Hallmark to review detention in England

The right to review detention in courts of competent jurisdiction represented one of the most efficient mediums to guarantee the right to personal liberty in pre-modern England. This is a truism because this move empowered judges to challenge royal prerogatives and the Privy Council's arbitrary powers to cause arrest and detention without cause[134] Habeas corpus was intended to serve several purposes and took many forms. Its most important form that safeguarded against arbitrary detention was Habeas corpus *ad subjiciendum*. It was a command issued by a court of higher jurisdiction, addressed to custodians of lower courts, prison officials or private persons to present a detainee or his body before courts and give reasons for detention.[135]

[130] Farrell B (2010) 78.
[131] *Skrogges v Coleshil*, 73 Eng. Rep. 386 (K.B. 1560).
[132] McFeeley N D (1976) 587.
[133] Farrell B (2010) 77.
[134] Farrell B (2010) 76.
[135] Glass A S, (2014) 60-1.

The writ of habeas corpus was also used to address issues of solitary confinement and arbitrary detention caused and effected by private individuals. The 1772 Court of King's Bench Division case of *Somerset v Stewart*[136]where the right to personal liberty clashed with that to property is illustrative. Somerset's case raised two important issues. First, whether a slave master could seize and remove a slave from the land against his will, and secondly whether a slave could rely on habeas corpus to prevent such removal and gain his freedom. Somerset's counsel submitted that habeas corpus protected everyone inhabiting or residing in England, including slaves, against arbitrary arrest and detention, detainment or evacuation to other territories. In delivering judgment, although hesitant at first due to absence of legislation dealing with slavery and transfer of slaves, within and out of England, Lord Mansfield set free Somerset and re-emphasised the absolute and non derogable right to freedom from arbitrary arrest or detention in England.[137] The shortcomings of the Magna Carta and the Petition of Rights to adequately guarantee the right to freedom from arbitrary detention in England motivated the translation of the writ of habeas corpus to statute law. As a result, two habeas corpus Acts were adopted, in 1640 and 1679.

2.4.3 The Habeas Corpus Act (1640)

This Act was instrumental in combating arbitrary detention, as it greatly limited the king's discretionary powers to cause arrest and detention without cause, by abolishing all prerogative courts including the notorious Star Chamber, empowered with wide arbitrary powers to effect arrest and detention without cause.[138] The Act also guaranteed all victims of arbitrary detention caused by a court exercising jurisdiction similar to that of the Star Chamber, regal power or by the Privy Council the right to challenge the legality of such detention by way of habeas corpus to vindicate their legal rights.[139] Furthermore, judges were required to deliver a ruling for all habeas corpus petitions within three days, grant bail or discharge prisoners.[140] The Act also attempted to abolish

[136]*Somerset v Stewart* (1772) 98 ER 499.
[137]*Somerset v Stewart* (1772) 98 ER 499.
[138] Section I of the Habeas Corpus Act (1640).
[139] Section VI of the Habeas Corpus Act (1640).
[140] Section VI of the Habeas Corpus Act (1640).

impunity, by stating that any judge or state official who fails to respect provisions of the Act was liable to heavy fines and to pay damages to aggrieved parties.[141]

The Habeas Corpus Act of 1640 was limited, as it did not protect persons against arbitrary arrest and detention perpetrated by the king and his Privy Council. Furthermore, the 1640 Act was only a procedural remedy as it guaranteed protection only against detention forbidden by law. It did not guarantee the right to a fair trial, an essential tool to protect against arbitrary detention. As the circumstances at the time in England favoured executive prolonged detentions, habeas corpus was not a useful remedy. It did not address some crucial issues and left many unanswered questions and uncertainties thereby leaving opportunities for arbitrariness. For example, it did not clarify whether or not the writ could be issued while judges were on vacation and whether Courts of Common Pleas could grant the writ in ordinary criminal cases. Moreover, it did not guarantee total freedom to prisoners successful in their applications for habeas corpus against re-arrest. Again, the Act did not put in place a transfer mechanism of prisoners within and out of the country. As a result, some prisoners were transferred among jails within England and others to Scotland or overseas, in order to disadvantage and limit their chances of using the writ. Although Parliament intervened, and went so far as to impeach the Lord High Chancellor for such arbitrary actions, it did not close the gaps that hampered the effectiveness of habeas corpus in addressing issues of arbitrary detention.[142]

2.4.4 The Habeas Corpus Act (1679)

The adoption of a second habeas corpus act in 1679 had two objectives. First, the king had exploited loopholes in the 1640 Habeas Corpus Act and resorted to arbitrary deprivation of liberty, as royal courts were not competent to check executive use of royal prerogative powers to cause arrest and detention.[143] Secondly, there was the refusal of judges to issue the writ while on vacation. This implied that detainees could remain in prison indefinitely, thus undermining the very purpose of the writ's existence.

[141] Section V of the Habeas Corpus Act (1640).
[142] Farrell B (2010) 79.
[143] Tyler A L (2016) 1951.

Radical steps were necessary to remedy the situation, and as a result, Parliament adopted the Habeas Corpus Act of 1679.[144] It defined and strengthened the ancient prerogative writ and ensured its availability at all times, even during vacation, to victims of arbitrary detention.[145] Judges who refused to issue the writ while on vacation were liable to pay the victim punitive damages.[146] The Act also ensured that relief sought under it was not subject to obstructions or undue delays, as sheriffs or jailers were required to present detainees in court within three days upon service of habeas corpus, except in cases of felony, treason or disadvantaged distance factor.[147] Judges were required to deliver a ruling for all habeas corpus petitions within three days, and grant bail or discharge prisoners in case of wrongful deprivation of liberty.[148] Another important safeguard against arbitrary detention emanating from the Act was that the king or any other state authority could not recommit a person released by the writ for the same reason. This right was adequately guaranteed under section V of the Act and it is to the effect that

> no person or persons which shall be delivered or sit at large upon any Habeas Corpus shall at any time hereafter be again imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such Court wherein he or they shall be bound by recognizance to appear, or other Court having jurisdiction of the cause.

Furthermore, section V protected against impunity and criminalised recommitment of persons exonerated by the writ of habeas corpus, stating that

> if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offense or pretended offense, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds; any colourable pretense or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

[144] Tyler A L (2016)1951.
[145] Section IX of the Habeas Corpus Act (1679).
[146] Section IV of the Habeas Corpus Act (1679).
[147] Section I of the Habeas Corpus Act (1679).
[148] Section II of the Habeas Corpus Act (1679).

One of the most welcomed developments of the 1679 Habeas Corpus Act was the introduction of an appropriate procedure for litigants to challenge the legality of detention. Under the 1679 Habeas Corpus Act, a litigant or his agent commenced a habeas corpus action in court by way of a formal complaint, raising doubts on legality of the detention. This was a welcome initiative because victims were sometimes held in solitary confinement with no possibility to seize the courts. If the complaint successfully demonstrated that the detention warranted an examination, a judge issued a writ to the custodian compelling him to present the victim in court and give reasons for the deprivation of liberty. In order for the court to determine whether or not the prisoner was detained arbitrarily, the court had to verify and answer the following questions: Was due process of law observed? During the trial, did the judge exhibit a malicious attitude against the accused person? Was the jury under influence? Did the prosecution conceal vital evidence that could have helped to exonerate the accused person? Once all the above issues were determined, the courts would decide in one of two ways. First, that the custodian acted within the normal limits of his or her authority, thereby justifying the detention. Secondly, that if the custodian acted and was still acting beyond his or her authority, that no compelling reasons existed to justify the detention, that there was ample evidence of violating an existing right, or if the jailer failed to demonstrate adequately that the law or sufficient facts justified the detention, the accused person would be released unconditionally.[149]

Although the 1679 Habeas Corpus Act did not redress all the procedural gaps that frustrated its 1640 counterpart, it was important for three main reasons. First, as a writ of right, it substantially limited royal prerogative powers and that of the Privy Council to order arrest and detention without cause. This was justified in that it was a writ of right to men; it therefore should not be a prerogative of the king.[150] It also extended the scope and competence of common law courts to order release of prisoners arrested arbitrarily and detained illegally by royal command and Privy Council.[151] Secondly, it

[149] Garrett B L 'Habeas Corpus and Due Process' (2012) 98 (47) *Cornell Law Review* 47-126, p. 62.
[150] Longsdorf G F 'Habeas Corpus - A Protean Writ and Remedy' (1949) 10 *Ohio State Journal* 301-317, p. 307.
[151] Miller A P & Shepard R E 'New Looks at an Ancient Writ: Habeas Corpus Re-Examined' (1974) 9 (1) *University of Richmond Law Review* 49-86, p. 50-1.

greatly curtailed judicial discretion. As a writ of right, applicants or third parties interested in challenging the legality of detention would establish a prima facie case to prove unlawfulness of detention, and the judge would automatically issue a writ to that effect.[152] Thirdly, the Act was significant as it represented the appropriate medium to examine and review the legality of detention. Blackstone, an English lawyer and politician noted that the 1679 Habeas Corpus Act emerged to complete Magna Carta in guaranteeing the right to liberty. He continued that while Magna Carta outlawed arbitrary detention, the Habeas Corpus Act of 1679 went further to review the lawfulness of arrest and detention and to secure the unconditional and immediate release of persons arrested and detained in an arbitrary fashion.[153]

2.5 The role of the 'Declaration des Droits de L'homme et du Citoyen' (Declaration of the Rights of Man and of the Citizen) (1793)

(The Declaration of Rights)

The 'Declaration of the Rights of Man and of the Citizen' (The Declaration of Rights) was another important classic document that outlawed arbitrary detention in the 18th century. This section examines the theoretical and practical components of the 'Declaration of Rights', and the regime's failure to guarantee the right to freedom from arbitrary detention through an independent judiciary. It argues that abuses of legal procedure and excessive government actions resulting in arbitrary arrest and detention in 1789 revolutionary France were accomplished with the arbitrary Lettre de Cachet, one of the king's symbols of arbitrary rule.[154]

The 'Declaration of Rights' was drafted by Abbé Sieyès and the Marquis de Lafayette, in consultation with Thomas Jefferson, and adopted in 1789[155] by the French National

[152] Tyler A L (2016) 1972.

[153] Tyler A L (2016) 1973.

[154] Lellman C 'Lettres de Cachet and Eighteenth Century Crime' (2015) available at *https://blogs.haverford.edu/decentered/2015/06/21/lettres-de-cachet-and-eighteenth-century-crime/* (accessed 22 January 2021).

[155] It is important to note that a second and more detailed document known as the Declaration of the Rights of Man and Citizen was drafted in 1793 but it was never formally adopted. The 1793 document was particularly important for its egalitarian philosophy and protection of citizens against oppression by the governing class (Article 9, 33 and 34). The document's Article 10 also outlawed arbitrary arrest and detention in the same wordings as in Article VII of its 1789 predecessor.

Constituent Assembly.[156] It guaranteed the 'natural, inalienable, and sacred rights of man', which must be protected at all times, in that failure to do so might lead to arbitrary and excessive government action against the people.[157] Furthermore, it codified the basic rights of man in a comprehensive document that made it possible for the state to evaluate the dispensation of justice and protect citizens against arbitrary arrest, detention and imprisonment.[158] It was instrumental and timely as it defined the individual and collective rights of man such as equality[159], liberty[160] and fraternity,[161] and also helped to check abuses of legal procedure and excessive governmental actions,[162] including arbitrary arrest and detention.[163]

2.5.1 Events leading to the adoption of the Declaration of Rights: Arbitrary detention and excessive rule in 1789 revolutionary France

The French revolution of 1789 and the Reign of Terror signaled the breakup of the rule of law and good governance in France at the time. The Jacobin party[164] commenced an aggressive and ruthless policy of intimidation and arbitrary arrests and detention of any one sympathetic to the Girondins' cause.[165] They employed the Lettres de Cachet, a discretionary, illegal and arbitrary procedure, (one of the king's symbols of arbitrary rule) to initiate, effect, and enforce arrest and indefinite detention of citizens in state prisons or asylum centres such as the Bastille and Charenton.[166] Comte de Mirabeau, a French human rights activist, noticed a direct link between the Lettre de Cachet and arbitrary detention, maintaining that they were vital and necessary weapons used by the

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[156] Billias G A *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective* (2009) 92.

[157] Preamble to the Declaration of the Rights of man and of the citizen (1789).

[158] Preamble to the Declaration of the Rights of man and of the citizen (1789).

[159] Article I and VI of the Declaration of the Rights of man and of the citizen (1789).

[160] Article II and IV of the Declaration of the Rights of man and of the citizen (1789).

[161] Article IV of the Declaration of the Rights of man and of the citizen (1793).

[162] Article V of the Declaration of the Rights of man and of the citizen (1793).

[163] Article VII of the Declaration of the Rights of man and of the citizen (1793).

[164] The Jacobins party was the ruling club in Bordeaux during the French revolutionary era.

[165] Martin C 'Friend of the People, Enemy to the Cause: Jean Paul Marat, Charlotte Corday, and the Consolidation of Jacobin Power in Revolutionary France' (2013) 14-15, available at *https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1016&context=younghistorians* (accessed 20 December 2020).

[166] Lellman C 'Lettres de Cachet and Eighteenth Century Crime' (2015) available at *https://blogs.haverford.edu/decentered/2015/06/21/lettres-de-cachet-and-eighteenth-century-crime/* (accessed 22 January 2021).

king to facilitate arbitrary actions especially against his political opponents.[167] He argued that the infamous Lettre de Cachet and arbitrary detention were strong arms of arbitrary power that was often used by despotic monarchs to consolidate arbitrary rule.[168] He continued, saying that

> [p]risoners kept by lettre de cachet, without any judicial form, is an act of violence destructive of our *jus publicum'* and ' ... the use of *lettres de cachet* is tyrannical and its utility an illusion, which can never be weighed against the inconveniences resulting from so terrible a practice.[169]

Mirabeau concluded by exposing the arbitrary character of Lettres de Cachet stating that, first, they did not provide any legal mechanism for detainees to appeal their arrest and detention or to gain their release.[170] Secondly, the procedure was extrajudicial as it did not mention the duration of a prisoner's incarceration, meaning that prisoners were held in jail indefinitely and at times swallowed up in the criminal justice system without access to court and legal counsel to vindicate their legal rights.[171] These circumstances motivated the adoption of a solemn document to guarantee the natural, inalienable, and sacred rights of man, in line with 'simple and incontestable principles' as suggested by drafters of the Declaration of Rights, which must be readily available to question arbitrary and excessive governmental actions.[172]

2.5.2 Protection against arbitrary detention under the Declaration of Rights

The Declaration of Rights addressed fundamental human rights issues such as the right to freedom of expression, rights of accused persons, fair-trial rights and the right to freedom from arbitrary arrest or detention. Article VII of the Declaration of Rights provides:

> No man can be accused, arrested nor detained but in the cases determined by the law, and according to the forms which it has prescribed. Those who solicit,

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[167] Kastritis A 'Mirabeau On Lettres de Cachet, Symbols of tyranny and despotism' (2015) available at *http://www.academia.edu/14669641/Mirabeau_On_Lettres_de_Cachet_Symbols_of_tyranny_and_despotism* accessed 10 July 2018).
[168] Kastritis A (2015).
[169] Kastritis A (2015).
[170] Fling F M 'Mirabeau, a Victim of the Lettres de Cachet' (1897) 3 (1) *The American Historical Review* 19-30, P. 28 & 30. For more, see Kastritis A (2015).
[171] Fling F M (1897) 28 & 30. For more, see Kastritis A (2015).
[172] Preamble to the Declaration of the Rights of Man and of the Citizen (1789).

> dispatch, carry out or cause to be carried out arbitrary orders, must be punished; but any citizen called or seized under the terms of the law must obey at once; he renders himself culpable by resistance.

The article was particularly important as it outlawed arbitrary arrest and detention and ensured that all deprivation of liberty must be effected according to the manner determined by law to avoid arbitrariness. The same article also made it clear that state agents or other persons acting directly or indirectly to facilitate arbitrary actions or detentions must be prosecuted and punished in accordance with procedures determined by law.[173] Further safeguards against arbitrary detention were guaranteed under Article XII, to the effect that state officials or other persons authorised by law to effect arrest or detention, must not use excessive force during the process. Article IX also guaranteed that suspects must be presumed innocent at all times, unless proved guilty by a competent court. Freedom and liberty of citizens was the paramount consideration over arrest and detention at all times. It is submitted that Article VII did not adequately protect against arbitrary detention in revolutionary France, as the article seemed to protect only the rights of men and not that of women. This is a truism as the first statement of the article reads as follows: 'no man can be accused, arrested nor detained …'. This implied that women were still subjected to various forms of human rights violations such as arbitrary arrest, detention, torture and extra-judicial summary executions in 1789 revolutionary France. This explains why, in 1791, Olympe de Gouges published the Declaration of the Rights of Woman and of the Female Citizen that advocated for the promotion and protection of women's rights including the right against arbitrary detention.[174]

2.5.3 Limitations of the 'Declaration of Rights'

The abolition of the Lettre de Cachet in 1793 did not address unlawful deprivation of liberty in France, as revolutionary tribunals and the National Convention promulgated two laws namely; Law of Suspects[175] and Law of 22 Prairial[176] to justify arbitrary

[173] Article VIII of the Declaration of the Rights of Man and of the Citizen (1789).
[174] Rutgers University 'A Declaration of the Rights of Woman and the Female Citizen' available at *https://andromeda.rutgers.edu/~jlynch/Texts/degouges.html* (accessed 7 February 2019).
[175] Law of Suspects (France) 17 September 1793.
[176] The Law of 22 Prairial (France) 10 June 1794.

arrests and detentions. The Law of Suspects defined enemies of the state, and empowered local revolutionary committees to carry out indiscriminate arrest and detention of such persons termed or suspected to be enemies of the state.[177] This development required citizens to possess special certificates indicating their loyalty and duty-consciousness to the state.[178] Persons not in possession of these certificates were considered as suspects or enemies of the state and were often subjected to arbitrary arrest and detention.[179] To be identified as a suspect or an enemy of the state was tantamount to condemnation as a guilty person.[180] It is estimated that between 1793 and 1794, thousands of persons were indiscriminately and arbitrarily arrested under the Law of Suspects, while others died in prisons or faced summary execution.[181] Those who survived harsh prison conditions were deprived of their fair-trial rights including right to counsel, to call witnesses to testify on their behalf, and to appeal their sentences.[182]

The Law of 22 Prairial reinforced the Law of Suspects and granted the Committee excessive powers to deprive people of their liberty, including state officials deemed to be suspicious or disloyal in the conduct or discharge of their duties.[183] This totalitarian and arbitrary law strengthened the power of prosecutors to arrest and indict suspects before Revolutionary Tribunals. This law also violated fair-trial rights as it deprived suspects of their legal right to witnesses and counsel, thereby limiting their ability to defend themselves.[184]

2.5.4 Conclusion

This chapter has examined the historical perspective of arbitrary detention in mediaeval Europe. It has specifically examined early European human rights documents such as the Magna Carta, Petition of Right, Habeas Corpus and the Declaration of Rights, that took great strides in protecting against arbitrary deprivation of liberty in the continent. It has highlighted that Clause 39 of the Magna Carta specifically outlawed arbitrary

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[177] Johnson V R 'Declaration of the Rights of Man and the citizen of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris' (1990) (13) 1 *Boston College International & Comparative Law Review* 1-45, p. 28-9.

[178] Law of Suspects (France) 17 September 1793.

[179] Law of Suspects (France) 17 September 1793.

[180] Law of Suspects (France) 17 September 1793.

[181] Kennedy M L *The Jacobin Clubs In The French Revolution, 1793-1795* (2000) 73-75.

[182] Law of Suspects (France) 17 September 1793.

[183] The Law of 22 Prairial (France) 10 June 1794.

[184] The Law of 22 Prairial (France) 10 June 1794.

detention and instituted a new hierarchical order, placing the law of the land on a superior position to that of the Privy Council and royal prerogative powers. By doing so, it guaranteed that deprivation of liberty must be in accordance with due process and judgments by peers, and not by regal power. The king could therefore under no circumstances exempt himself from the law of the land to order arrest and detention without cause. This development led to clashes of interest and personality between the king and Parliament over rights to personal liberty that resulted in serious Parliamentary debates to determine the limits of royal prerogative powers, and that eventually led to the adoption by Parliament of the Petition of Right in 1628 and the two Habeas Corpus Acts in 1640 and 1679. These pieces of legislation abolished symbols of arbitrary rule such as the court of Star Chamber, and greatly limited the power of the king and that of the Privy Council to order arrest and detention without cause.

The chapter has also examined the role of the Declaration of Rights, which protected against arbitrary detention in France. It observed that the Declaration was limited as it did not extend its scope of protection to women, although women played a significant role in the French revolution by marching to Versailles, a move that played a leading role in the collapse of the French regime. It also highlighted that abuses of legal procedure and excessive governmental actions, which resulted in arbitrary actions in 1789 revolutionary France were accomplished with the help of the Lettre de Cachet, the Law of Suspects and the Law of 22 Prairial. Despite the fact that documents, from the Magna Carta to the Bill of Rights, have never provided a lasting solution to the problem of arbitrary deprivation of liberty in their respective countries, they nevertheless identified the heinous character of arbitrary deprivation of liberty, outlawed the practice, and regulated executive power at the time of arrest and detention to minimise arbitrariness. Above all, the crucial role that they played in guaranteeing the right to personal liberty in Europe has greatly influenced the development of modern international and regional human rights law, and the constitutions of most modern states. The next chapter examines international instruments, and the mechanisms necessary to protect against arbitrary detention.

CHAPTER THREE

INTERNATIONAL INSTRUMENTS AND MECHANISMS PUT IN PLACE TO COMBAT ARBITRARY DETENTION

3.1 Introduction

Arbitrary detention is prohibited by many international human rights instruments. The practice seems to be normal in many countries, as victims are often held in pre-trial detention for prolonged periods and are often deprived of their substantive and procedural pre-trial and fair-trial rights.[185] The Open Society Justice Initiative (OSJI) has reported that

> [o]n any given day, an estimated three million people are behind bars awaiting trial. In the course of a year, approximately 10 million people will pass through pre-trial detention. Many will spend months and even years in detention—without being tried or found guilty—languishing under worse conditions than people convicted of crimes and sentenced to prison …
>
> Many pre-trial detainees are exposed to torture, extortion, and disease. They are subject to the arbitrary actions of police, corrupt officials, and even other detainees. Throughout their ordeal, most never see a lawyer or legal advisor and often lack information on their basic rights. When they eventually reach trial—without representation and likely beaten down by months of confinement—the odds are stacked against them: persons in pre-trial detention are more likely to be found guilty than defendants from similar backgrounds, facing similar charges, who are released awaiting trial.[186]

Arbitrary detention can lead to permanent and irreversible devastating consequences such as stigmatisation, loss of employment, psychological damage and dread diseases contracted in prison. The crucial need to eradicate arbitrary detention worldwide

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[185] Trial International 'What is Arbitrary Detention' (2020) available at *https://trialinternational.org/topics-post/arbitrary-detention/* (accessed 25 January 2021).

[186] Open Society Justice Initiative 'The Socioeconomic Impact of Pre-trial Detention. A Global Campaign for Pre-trial Justice Report' (2011) *http://www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impactdetention-20110201* (accessed 14 May 2021). For more, see Lawyers' Right Watch Canada 'Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial Release at International Law' (2013) 2 available at *https://www.lrwc.org/ws/wp-content/uploads/2013/04/Pre-trial-release-and-the-right-to-be-presumed-innocent.pdf* (accessed 14 May 2021).

motivated the adoption of binding treaty mechanisms relevant to all persons in detention.

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) are the most widely invoked human rights instruments that prohibit arbitrary detention. The UDHR is the first modern international legal instrument that guarantees fundamental human rights such as the right to liberty[187] and freedom from arbitrary detention.[188] Although the UDHR is not a treaty, its character is compelling by nature as its provisions have been incorporated into many domestic constitutions and legal frameworks.

The ICCPR has also played an important role in the universal struggle to combat arbitrary detention. Article 9(1) prohibits arbitrary detention and calls on state parties to criminalise the practice, and to ensure that perpetrators are punished accordingly. States have an obligation to put in place the necessary domestic legal framework[189] to protect the rights of persons deprived of their liberty. Furthermore, domestic laws regulating arrest and detention must clearly include the substantive and procedural safeguards against arbitrariness underlined in Article 9 of the ICCPR.[190]

[187] Article 3 of the UDHR.

[188] Article 9 of the UDHR.

[189] Article 2 of the ICCPR.

[190] It is important to note that children enjoy the rights provided for under Article 9 of the ICCPR in the same way as adults. However, the Convention on the Rights of the Child (CRC), adopted specifically to protect children's rights, prohibits arbitrary detention. Article 37(b) of the CRC provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily'. The article introduces the principle of legality and non-arbitrariness, maintaining that the arrest, detention or imprisonment of a child shall be in conformity with the law. Therefore, pieces of legislation that regulate arrest and detention of children must be consistent with domestic and international law standards, must not be vague, must be specific, and must contain a procedure for redress. To further comply with Article 37(b) states should ensure that laws regulating the juvenile justice system clearly establish time limits for arrest, detention, imprisonment, and also ensure that the detention period of children should be kept at a minimum. In this regard, the Committee on the Rights of the Child, in its General Comment No. 24 (2019), discourages unnecessarily extended pre-trial detention and excessively long prison sentences of children without possibility of parole (para. 86 and 88). Article 37(b) of the CRC also requires that arrest and detention of children must only be used as a measure of last resort and for the shortest appropriate period. The Committee has embraced the 'last resort' and 'shortest appropriate period of time' rule (paras. 77 and 85) and gone further to suggest that deprivation of children's liberty should be avoided as much as possible, and has recommended non-custodial measures such as supervised probation and placement in foster homes (para 86). For more, see U N Committee on the Rights of the Child (CRC): *General Comment No. 24 (2019): On Children's Rights in the Child Justice System,* 18 September 2019, CRC/C/GC/24.

Three continental human rights treaties, namely the African Charter on Human and Peoples' Rights (ACHPR) Article 6,[191] the Inter-American Convention on Human Rights (IACHR) Article 7(3) and the European Convention on Human Rights (ECHR) Article 5(1), also prohibit arbitrary detention. Like the ICCPR, these regional treaties provide for procedural safeguards and minimum standards that states must comply with to protect against the prohibited conduct. Apart from the above-mentioned binding instruments, principles,[192] guidelines,[193] codes of conduct,[194] resolutions,[195] standards and rules[196] exist that have contributed positively to combat the practice. Although non-binding, they are persuasive in nature and have proposed guidelines that states may rely on when adopting policies and legislation that protect against arbitrary detention. States are encouraged to ratify and commit to international and regional human rights treaties that prohibit arbitrary detention. This initiative is important as it represents an efficient and effective starting point to obligate states to comply with their norms,[197] and to account for implementation measures, and any violations.[198]

[191] The African human rights system has adopted the African Charter on the Rights and Welfare of the Child (ACRWC) to protect children's rights. Although the ACRWC does not expressly prohibit arbitrary detention of children, it has, however, put in place procedural safeguards to protect against arbitrariness. For example, the ACRWC prohibits torture and other forms of ill-treatment of children deprived of their liberty (Article 17 (2) (a)) and also the detention of children and adults in the same prison cell, except for the child's best interest (Article 17(2) (b)). Furthermore, every child in conflict with the law shall:

be presumed innocent until proven guilty, and shall be informed promptly of the nature of charges in a language that they understand best. They are also entitled to the assistance of an interpreter if they do not understand the language used, and to legal and other appropriate assistance in the preparation and presentation of their defence. Moreover, they must be tried as speedily as possible by an impartial court and, if found guilty, must be provided with the opportunity to appeal his or her case before a higher court (Article 17 (2) (c) of the ACRWC).

[192] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.

[193] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) adopted at the African Charter on Human and Peoples' Rights meeting, 32nd ordinary session, held in Banjul, the Gambia from 17-23rd October 2002.

[194] Southern African Regional Police Chiefs Cooperation Organisation Code of Conduct for Police Officers.

[195] Security Council resolutions 181 of 7 August 1963; 182 of 4 December 1963 and 190 of 9 June 1964 on South Africa; U N General Assembly resolution 62/159 and Resolution on Fair Trial Rights in Africa.

[196] UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela rules) 2015/16, UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985 and United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) 2010.

[197] Article 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT), adopted on 23 May 1969, entered into force 27 January 1980.

[198] Article 27 of the VCLT.

Chapter three examines the international and regional legal framework put in place to combat arbitrary detention at the pre-trial stage of the criminal justice system. It highlights the need for states to ratify and commit to international and regional human rights treaties that protect against arbitrary detention, identify the prohibited conduct, and guarantee all the procedural safeguards put in place to protect against arbitrary detention. It examines the legal responsibilities of state actors such as police officers, custody personnel, state prosecutors and judges, to protect against arbitrariness. Reference is made to the jurisprudence of the Human Rights Committee (HRC), the African Commission, the African Court on Human and Peoples' Rights (African Court), the Inter-American Court of Human Rights (IACrtHR) and the European Court of Human Rights (EctHR), as their verdicts provide a better interpretation and understanding of the international legal rules governing arrest and detention. Although closely related to the subject matter of this study, the chapter does not discuss treatment of persons in detention or vulnerable categories of persons such as women, children, persons with mental health problems, asylum seekers and refugees.

3.2 Principles of legality and non-arbitrariness

The ICCPR[199] and the three continental human rights instruments[200] that protect against arbitrary detention have stated in divergent terminologies that all arrest and detention must be lawful (Principle of legality) and non-arbitrary (Principle of non-arbitrariness). The monitoring organs of the ICCPR (HRC), ACHPR (African Commission), IACHR (IACrtHR) and the ECHR (ECtHR) have attempted to give meaning to the terms 'lawfulness' and 'arbitrariness', and to consider factors that render domestic legislation adopted to protect against arbitrary detention and their application unreasonable and unenforceable. They have also developed jurisprudence on the diverse and complex issues relating to arrest and detention, and interpreted the meaning of key terms such as 'arrest', 'detention', 'lawful', 'promptly', 'speedily' and 'without delay', that are relevant in protecting against arbitrariness.

3.2.1 ICCPR

[199] Article 9(1) of the ICCPR.
[200] Articles 6 of the ACHPR, 7(2) of the IACHR and 5(1) of the ECHR.

With regard to Article 9(1) of the ICCPR, the jurisprudence of the HRC makes it clear that the 'principle of legality' is violated where authorities deprive persons of their liberty on grounds and through procedures that are not clearly and expressly established in domestic legislation.[201] The word 'law' denotes a recognised written law in the form of a parliamentary statute or some other domestic legislation.[202] The said law must be accessible, precise and applicable to everyone including authorities, enumerate permissible grounds for deprivation of personal liberty and be consistent with international standards.[203] Regrettably, the ICCPR does not enumerate grounds for lawful arrest and detention. However, the consensus is that 'Article 9(1) recognises that persons may be detained on criminal charges, while Article 11 expressly prohibits imprisonment on grounds of inability to fulfil a contractual obligation'.[204] The HRC in its General Comment also requires that states should establish other permissible grounds for arrest and detention accompanied by procedures that protect against arbitrariness.[205] In *Gridin v Russian Federation*, state security agents arrested the accused without the use of a valid warrant contrary to the domestic law of the Russian Federation. Although authorities issued a warrant for his arrest after three days, [206] the HRC held that the state party had breached Article 9(1) of the Covenant, as the accused's arrest and detention had been effected outside the confines of 'in accordance with such procedures as are established by law'.[207]

Furthermore, arrest and detention that lack a legal basis contravene the 'procedure as established by law' requirement. In *Yklymova v Turkmenistan,* state security agents deprived the accused of her liberty from 25 November 2002 to 30 December 2002 without the use of a valid warrant and without communicating the reasons for arrest and charges.[208] Secondly, she was placed under house arrest for nearly four years

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[201] *Clifford McLawrence v Jamaica*, Communication No. 702/1996 (26 April 1996), CCPR/C/60/D/702/1996, para. 5.5.
[202] HRC: General Comment No. 35 (2014) para. 23.
[203] HRC: General Comment No. 35 (2014) para. 22.
[204] HRC: General Comment No. 35 (2014) para. 14.
[205] HRC: General Comment No. 35 (2014) para. 14.
[206] *Dimitry L. Gridin v Russian Federation*, Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000) para. 8.1.
[207] *Dimitry L. Gridin v Russian Federation* (1997) para. 8.1.
[208] *Marral Yklymova v Turkmenistan,* Communication No. 1460/2006, U.N. Doc. CCPR/C/96/D/1460/2006 (2009) para. 2.3.

without any explanation.[209] The HRC held that the accused's detention and house arrest were arbitrary and constituted a violation of Article 9(1) of the Covenant.

The principle of 'non-arbitrariness' in Article 9(1) denotes that no one shall be subjected to arbitrary detention. The notion of what amounts to arbitrariness is adequately set out in *Mukong v Cameroon.*[210] State security agents deprived the accused of his liberty in arbitrary circumstances for more than seven months at some time in 1988 for criticising the President and his dictatorial regime, and in 1989 for plotting to force the introduction of multi-party politics in Cameroon.[211] The state maintained that Mukong's detention was lawful as first, it was linked to his illegal political activism,[212] an offence contrary to Ordinance No. 62/OF/18 of 12 March 1962[213] and secondly, that his detention was effected in line with Cameroon's criminal procedure rules and Article 9 of the Covenant.[214] Even if Mukong's arrest and detention were lawful, the question remained whether it was reasonable, necessary and not arbitrary. In addressing this issue, the HRC clarified that 'arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.[215] This implies that detention in consonance with lawful arrest must not only be lawful but should also be reasonable and necessary in all the circumstances; for example, to prevent flight, interference with evidence or the recurrence of crime. [216]

The state party failed to demonstrate the reasons and necessity for Mukong's arrest and detention, other than that it was for national security reasons, to maintain public order and for the territorial integrity of the state.[217] The HRC held that Mukong's arrest and prolonged detention coupled with torture was not the solution to Cameroon's political

[209] *Marral Yklymova v Turkmenistan* (2006) para. 7.2.

[210] *Womah Mukong v Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

[211] *Womah Mukong v Cameroon* (1994) para. 2.3, 2.4 and 2.5.

[212] *Womah Mukong v Cameroon* (1994) para. 6.6

[213] *Womah Mukong v Cameroon* (1994) para. 4.1.

[214] *Womah Mukong v Cameroon* (1994) para. 9.8.

[215] *Womah Mukong v Cameroon* (1994) para. 9.8.

[216] *Womah Mukong v Cameroon* (1994) para. 9.8.

[217] *Womah Mukong v Cameroon* (1994) para. 9.7.

woes.[218] In these circumstances, even if his initial arrest and detention were lawful, the eventual use of torture and prolonged incommunicado detention may otherwise render lawful arrest and detention arbitrary, as detainees must be treated in a manner consistent with international standards.[219] The HRC noted that the surrounding circumstances leading to Mukong's arrest, detention and treatment in custody were unreasonable or unnecessary in the circumstances of the case, and thus contravened Article 9(1) of the Covenant.[220]

The arbitrariness test adopted in Mukong's case is also applicable after arrest and detention, for example, where detainees remain in custody after a competent judicial authority has ordered their release,[221] or where clemency, pardon, parole or some other amnesty law grants them liberty but detention continues.[222] Therefore, to avoid or greatly minimise the risk of arbitrariness, states must adhere to the substantive and procedural safeguards that protect against arbitrariness.[223]

3.2.2 ACHPR

Concerning the 'principle of legality' guarantee in Article 6 of the ACHPR, the African Commission has stated that arrest or detention must be lawful and should be effected in accordance with the procedure established by domestic law.[224] To satisfy this requirement, authorities must ensure that law enforcement officers or state agents empowered to effect arrest or detention must comply with the prerequisites of the relevant domestic law, international standards and provisions of the Charter.[225] In *Abdel Hadi, Ali Radi & Others v Republic of Sudan,* security agents randomly arrested scores

[218] *Womah Mukong v Cameroon* (1994) para. 9.7.
[219] *Robert John Fardon v Australia*, Communication No. 1629/2007, U.N. Doc. CCPR/C/98/D/1629/2007 (2010) 7.4 (a).
[220] *Womah Mukong v Cameroon* (1994) para. 9.8.
[221] *Beatriz Weismann Lanza and Alcides Lanza Perdomo v Uruguay*, Communication No. R. 2/8, U.N. Doc. Supp. No. 40 (A/35/40) at 111 (1980) para. 16.
[222] *Abbassi (on behalf of Abbassi Madani) v Algeria*, Merits, Communication No 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (2007) para. 8.4.
[223] HRC: General Comment No. 35 (2014) para. 23.
[224] *Hadi and Ors. v Republic of Sudan,* African Commission on Human and Peoples' Rights Comm. No. 368/09 (2014) para. 80.
[225] *Kazeem Aminu v Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 205/97 (2000) para. 20.

of persons without ascertaining individual culpability contrary to Sudanese law which requires that arrest and detention must be backed by reasonable suspicion or probable cause to believe that a person has committed an offence or is about to do so.[226] The Commission held that random arrest with no legal basis violates Article 6 of the Charter.[227]

The article brings forth a new requirement 'previously laid down by law'. This presupposes that authorities are under every obligation to comply with, and not override pre-existing laws such as constitutional provisions, or undermine fundamental rights guaranteed by the Constitution or international human rights standards designed to protect against arbitrary detention.[228] Unfortunately, the 'previously laid down by law' requirement is confusing and subject to controversy as it is uncertain whether this provision is subject to domestic or international law standards. If it is subject to domestic law, there is the possibility that the state may curtail it at any time without good reasons, deprive persons of their liberty in arbitrary fashion and escape liability.[229] For example, in *Dawda Jawara v The Gambia*, the military junta in Gambia stated that arbitrary arrest and detention was necessary to ameliorate the deteriorating state of the rule of law in the country, and that the detentions alleged to be arbitrary were effected in line with the 'previously laid down by law' requirement guaranteed in Article 6 of the Charter.[230] The African Commission objected, stating that authorities should not enact provisions which limit the 'previously laid down by law' requirement. It continued:

> The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution or international human rights standards … For a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter.[231]

[226] *Hadi & Others v Republic of Sudan* (2014) para. 80.
[227] *Hadi & Others v Republic of Sudan* (2014) para. 80.
[228] *Dawda Jawara v The Gambia*, African Commission on Human and Peoples' Rights, Comm. Nos. 147/95 and 149/96 (2000) para. 43.
[229] Manisuli Ssenyonjo *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012) 38.
[230] *Dawda Jawara v The Gambia* (2000) para. 58.
[231] *Dawda Jawara v The Gambia* (2000) para. 59.

The Commission determined that Gambia violated the 'previously laid down by law' requirement guaranteed under Article 6 of the Charter.[232]

With regard to the meaning and prohibition of arbitrariness, the African Commission adopted the HRC's position in *Mukong v Cameroon* as it stated in *Article 19 v Eritrea* that 'arbitrariness' does not imply against the law, but should be understood to mean unorthodox reasons and methods to effect arrest and detention. [233] The jurisprudence of the African Commission also makes it clear that 'prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it'.[234] Except otherwise, arrest must be carried out by way of a valid warrant, based on reasonable suspicion or probable cause to believe that the arrested person committed a crime that warrants arrest and detention.[235] Even if a person's arrest or detention is effected by virtue of a decree, it must not be motivated by discrimination,[236] social or political belief[237] or based on ambiguous reasons.[238] Thus, a decree granting a minister of state powers to indefinitely extend the period of detention and prohibit the victim from challenging the lawfulness of his detention contravenes Article 6 of the Charter.[239] Furthermore, laws that authorise prolonged pretrial detentions without charge and possibility for bail,[240] suspension of habeas corpus remedy[241] and detention without charge for state security reasons constitute arbitrariness.[242]

[232] *Dawda Jawara v The Gambia* (2000) para. 59.

[233] *Article 19 v State of Eritrea* (Communication No. 275/2003) [2007] ACHPR 79; (30 May 2007) para. 93.

[234] *Purohit and Anor v Gambia* (Communication No. 241/2001) [2003] ACHPR 49; (29 May 2003) para. 65.

[235] *Hadi & Others v Republic of Sudan* (2014) para. 79.

[236] *Organisation Mondiale Contre La Torture and Others v Rwanda*, African Commission on Human and Peoples' Rights, Comm. Nos. 27/89, 46/91, 49/91 and 99/93 (1996) para. 28.

[237] *Media Rights Agenda v Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 224/98 (2000) paras. 51 & 52.

[238] *Amnesty International and Others v Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999) para. 59.

[239] *Dawda Jawara v The Gambia* (1996) para. 61.

[240] *Media Rights Agenda v Nigeria* (2000) para. 55.

[241] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* African Commission on Human and Peoples' Rights, Communication Nos. 140/94, 141/94, 145/95 (1999) para. 28.

[242] *Constitutional Rights Project v Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 153/96 (1999) paras. 12, 14 & 20.

Similarly, the jurisprudence of the African Court has made it clear that the principles of legality and non-arbitrariness are important components of the African human rights system. All arrest or detention shall have a legal basis, and must be effected in 'accordance with the law'. Therefore, arrest or detention that lacks a legal basis is arbitrary.[243] In *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*, the applicants (two Kenyan men) were arrested and detained on conspiracy to commit crimes and armed robbery charges. A Magistrate Court acquitted them of all the charges and ordered their release. Unfortunately, they were re-arrested and subsequently charged with new armed robbery crimes based on the same facts under different sections of the Penal code of the United Republic of Tanzania.[244] The African Court held as follows:

> In the context of criminal proceedings, once an accused is acquitted of a particular crime by a court of law, the fundamental right to liberty and also the standard of reasonableness require that s/he shall be released forthwith and be allowed to enjoy his liberty unhindered ….
>
> it is inappropriate, unjust, and thus, arbitrary to re-arrest an individual and file new charges based on the same facts without justification after s/he has been acquitted of a particular crime by a court of law. The right to liberty becomes illusory and due process of law ends up being unpredictable if individuals can anytime be re-arrested and charged with new crimes after a court of law has declared their innocence. The Court thus finds that there was no reasonable ground for the re-arrest of the Applicants in the time between their acquittal by the Resident Magistrate's Court and their conviction by High Court for the initial charges.[245]

Thus, the arrest and detention of the applicants confronted with the principle of legality as it lacked a legal basis, were unnecessary and unreasonable.

With regard to the prohibition of arbitrariness, the jurisprudence of the African Court has made it clear in *Kennedy Owino Onyachi and Charles John Mwanini Njoka v*

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[243] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzani*a, Application No. 003/2015, Judgment of 28 September (2017) 2017 2 AfCLR 65, para. 132.

[244] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzani*a (2017) para. 136.

[245] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzani*a (2017) para. 137.

*United Republic of Tanzani*a that Article 6 of the Charter prohibits arbitrary arrest or detention. Any arrest or detention that is 'contrary to the law or against the reasons and conditions specified by the law' is arbitrary.[246] The notion of arbitrariness also implies that any arrest or detention effected contrary to the standard of reasonableness, necessity and proportionality is arbitrary.[247] The African Court suggested that to determine whether a not an arrest or detention is arbitrary, a number of factors must be taken into consideration viz, 'the lawfulness of the deprivation, the existence of clear and reasonable grounds and the availability of procedural safeguards against arbitrariness'.[248] Non-compliance with any of these conditions makes the arrest or detention arbitrary and is thus contrary to the principle of the 'prohibition of arbitrariness'.[249]

3.2.3 IACHR

With respect to the 'principle of legality', the IACrtHR has made it clear that Article 7(2) of the IACHR contains regulatory provisions to ensure that arrest or detention is lawful and non-arbitrary. As a result, the IACrtHR has stated:

> According to the first of these regulatory provisions, no one shall be deprived of his personal liberty except for reasons, cases or circumstances specifically established by law (material aspect) but, also, under strict conditions established beforehand by law (formal aspect). In the second provision, we have a condition according to which no one shall be subject to arrest or imprisonment for causes or methods that – although qualified as legal – may be considered incompatible with respect for the fundamental rights of the individual, because they are, among other matters, unreasonable, unforeseeable or out of proportion.[250]

In *Castillo-Páez* v *Peru*, the IACrtHR found a breach of articles 7(2) and (3) of the IACHR, as elements of the Peruvian National Police Force, without a valid warrant or

[246] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzani*a (2017) para. 130.
[247] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzani*a (2017) para. 130.
[248] *Robert John Penessis v United Republic of Tanzania*, Application No. 013/2015, Judgement of 28 November 2018, para. 108.
[249] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzani*a (2017) para. 130.
[250] *Maritza Urrutia v Guatemala*, Series C No. 103, Inter-American Court of Human Rights (IACrtHR), Judgement of 27 November 2003 para. 65.

documented order from a competent state authority, caused the accused's arrest and detention.[251] Furthermore, in *Cesti Hurtado v Peru,* the IACrtHR found violations of articles 7(1) (2) and (3) of the IACHR, as the Peruvian military 'authorities defied the order of the Public Law Chamber in its entirety and proceeded to detain, prosecute and convict Gustavo Cesti Hurtado, in flagrant violation of a clear order issued by a competent tribunal'.[252]

With regard to the meaning and prohibition of arbitrariness, the IACrtHR confirmed in *Wong Ho Wing v Peru* that the term 'arbitrariness' should not be equated to mean 'against the law' but should be elucidated 'more broadly in order to include elements of impropriety, injustice and unpredictability'.[253] Therefore, the decision to effect arrest or detention must be reasonable, predictable, proportionate,[254] and necessary in all the circumstances.[255] As such, arbitrariness in the context of Article 7(3) of the Convention has its own prerequisites, which must be analysed only in the cases of lawful detentions. That notwithstanding, 'the domestic law, the applicable procedure, and the relevant general express or tacit principles must, in themselves, be compatible with the Convention'.[256]

In *Chaparro Álvarez & Lapo Íñiguez v Ecuador,* the IACrtHR noted that *Chaparro Álvarez's* arrest and detention was arbitrary as the method and procedure used to deprive him of his liberty did not comply with domestic norms. The reasoning is that state agents did not possess a valid warrant, he was not informed of reasons for his arrest and he did not have access to his lawyer.[257] With regard to Mr Lapo's arrest and detention, the IACrtHR noted procedural irregularities as the dates of his arrest, detention and release did not conform to the dates on his arrest warrant and release

[251] *Castillo Páez Case v Peru,* Inter-American Court of Human Rights, Judgment of 3 November 1997 (Merits) para. 56.
[252] *Cesti-Hurtado v Peru,* Inter-American Court of Human Rights (IACrtHR), Judgment of 29 September 1999 (Merits) paras. 141-143.
[253] *Wong Ho Wing v Peru,* Inter-American Court of Human Rights (IACrtHR), Judgment of June 30, 2015 (Preliminary objection, merits, reparations and costs) para. 238.
[254] *Argüelles et al. v Argentina,* Inter-American Court of Human Rights (IACrtHR), Judgment of November 27, 2013. Series C No. 275 (Preliminary Objection, Merits, Reparations and Costs) para. 119.
[255] *Acosta-Calderón v Ecuador,* Inter-American Court of Human Rights (IACrtHR), Judgment, of 24 June 2005 (Merits, Reparations and Costs) para. 111.
[256] *Wong Ho Wing v Peru* (2015) para. 238.
[257] *Chaparro Álvarez & Lapo Íñiguez v Ecuador*, Inter-American Court of Human Rights (IACrtHR), Judgment of November 21, 2007 (Preliminary Objections, Merits, Reparations, and Costs) para. 48.

orders. These irregularities suggest that Mr Lapo's arrest and detention violated Ecuadoran domestic law and Article 7(2) of the IACHR.[258]

3.2.4 ECHR

The ECtHR has ruled on a vast number of cases that have helped to clarify the prerequisites of the 'principle of legality' underlined in Article 5(1) of the ECHR. Unlike the ICCPR, ACHPR and IACHR, the ECHR has enumerated permissible grounds for deprivation of personal liberty in its Article 5(1).[259] To satisfy the requirements of Article 5(1), arrest and detention must be lawful, carried out in line with domestic law,[260] the ECHR[261] and must not be arbitrary.[262] Furthermore, domestic laws regulating arrest and detention must comply with the Convention's expressed or implied general principles,[263] be accessible, precise and foreseeable in its application to avoid or greatly minimise the risk of arbitrariness.[264] In *Voskuil v The Netherlands,* the ECtHR found a breach of Article 5(1) as state security agents arrested the victim without the use of a valid warrant and no detention order for three days contrary to the

[258] *Chaparro Álvarez & Lapo Íñiguez v Ecuador* (2007) para. 66.

[259] (1) Execution of a sentence after conviction by a competent court;
(2) Non-compliance with a lawful court order or legal obligation;
(3) Reasonable suspicion of having committed an offence, to prevent flight having done so, or to prevent the commission of an offence where the ultimate aim is to bring the person before a competent court;
(4) Educational supervision in the case of minors;
(5) Prevention of the spread of infectious diseases;
(6) Where persons are of unsound mind, alcoholics, drug addicts, or vagrants; and
(7) Prevention of unauthorised entry into the state or where action is being taken with a view to deportation or extradition.

[260] *Del Rio Prada v Spain*, European Court of Human Rights, Application No. 42750/09, Judgment of 10 July 2012, para. 125.

[261] *Toniolo v San Marino & Italy,* European Court of Human Rights, Application No. 44853/10, Judgment of 26 June 2012, para. 46.

[262] *Winterwerp v Netherlands,* European Court of Human Rights, Application No. 6301/73, Judgement of 24 October 1979, para. 41. For more, see the *Criminal proceedings against Spetsializirana Prokuratu* case. The Court of Justice of the European Union stated that 'the right to liberty in EU law has the same meaning and scope as the corresponding provision of the European Convention of Human Rights (ECHR), that is Article 5 thereof. The right to liberty is a fundamental protection against arbitrariness, expressed through the prohibition to detain anybody unless in the cases and according to the procedures established by the law'. *Criminal proceedings against Spetsializirana Prokuratu*, CJEU Case C-653/19 PPU / Judgment, para. 13.

[263] *Plesó v Hungary,* European Court of Human Rights, Application No. 41242/08, Judgement of 2 October 2012, para. 59.

[264] *Nasrulloyev v Russia,* European Court of Human Rights, Application No. 656/06, Judgement of 11 October 2007, para. 71. For more, see, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, Odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor, Case C-528/15 Al Chodor*, C-528/15, European Union: Court of Justice of the European Union, para. 38 and 40.

24-hour time limit stipulated by law.[265] Again, continued pre-trial detention of a person by the trial courts after a superior court had determined that the detention is arbitrary or unlawful is not in consonance with Article 5(1) of the ECHR.[266]

Concerning the prohibition of 'arbitrariness' the jurisprudence of the ECtHR makes it clear that all deprivation of personal liberty should be accompanied by measures aimed to protect the individual against arbitrariness,[267] as arrest and detention effected in line with national legislation may still be arbitrary and thus in breach of Article 5(1) of the ECHR.[268] For example, in *Conka v Belgium*, the ECtHR determined arbitrariness as authorities maliciously and in bad faith used deception to lure the applicants to present themselves at a police station to complete their asylum applications, only to be served with deportation papers and were also incarcerated.[269] It is important to note that safeguards relating to liberty, such as those contained in articles 5 and 6 of the ECHR, 'consists in particular in the protection of the individual against arbitrariness'. Therefore, any measure(s) adopted to effect arrest or detention must also protect suspects and accused persons against arbitrariness. This implies in particular that 'there can be no element of bad faith or deception on the part of the authorities' at the time of arrest or detention.[270]

This section has demonstrated that arrest and detention under the ICCPR, ACHPR, IACHR and ECHR must be lawful, non-arbitrary and must conform to domestic and international law standards. Any arrest and detention outside the ambit of the requirements of these instruments is arbitrary. A close look at the requirements for lawfulness and non-arbitrariness of arrest and detention guaranteed under these instruments denotes that they vary in scope and application, while other provisions are

[265] *Voskuil v The Netherlands,* European Court of Human Rights, Application No. 64752/01, Judgement of 22 November 2007, para. 83.
[266] *Şahin Alpay v Turkey,* European Court of Human Rights, Application No.16538/17, Judgement of 20 March 2018, para. 118.
[267] *Witold Litwa v Poland*, European Court of Human Rights, Application No.26629/95, Judgement of 4 April 2000, para. 78
[268] *Creangă v Romania,* European Court of Human Rights, Application No. 29226/03, Judgement of 23 February 2012, para. 84.
[269] *Conka v Belgium,* European Court of Human Rights, Application No. 51564/99, Judgement of 5 February 2002, para. 36.
[270] *Policie ČR, Krajské ředitelství policie Ústeckého kraje, Odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, C-528/15, European Union: Court of Justice of the European Union, para. 39.

more elaborate. For example, two regional instruments bring forth new requirements as follows: 'previously laid down by law', Article 6 of the ACHPR, and 'conditions established beforehand' Article 7(2) of the IACHR. Article 5(1) of the ECHR goes further than the ICCPR and regional human rights instruments to define permissible grounds for deprivation of personal liberty. On the other hand, the ICCPR and continental human rights instruments allow the determination of grounds for arrest and detention exclusively to domestic legislators, a situation that can prepare the perfect grounds for arbitrariness.

The next section examines the procedural safeguards put in place to protect against arbitrary detention under international and regional human rights instruments. The measures put in place to protect against the prohibited conduct underlined in relevant provisions of the ICCPR and in regional human rights instruments are afforded greater meaning by jurisprudence. For example, the ICCPR and the three main regional human rights instruments all make provisions for: the right to prompt notification of reasons for arrest and charges; the right to prompt judicial control of detention; the right to access legal counsel; the right to challenge the lawfulness of detention; and the right to compensation.

3.3 Right to inform suspects and detainees of reasons for arrest or detention and nature of charges

The right to notify arrested persons promptly of reasons for arrest and charges against them in a language they understand best is an important measure to protect against arbitrary detention, and is guaranteed in international and regional human rights instruments. This right is underlined in articles 9(2) of the ICCPR, 7(4) of the IACHR and 5(2) of the ECHR. Although the ACHPR contains no specific provision in this respect, the gap is filled by section M (2) (a) of the Principles on the Right to Fair Trial in Africa.

3.3.1 ICCPR

With regard to Article 9(2) of the ICCPR, the HRC has stated that one of the most important reasons for this requirement is to enable a detainee to request a prompt

decision on the lawfulness of his detention before a court of competent jurisdiction.[271] In its Concluding Observations on Ukraine[272] and Uzbekistan[273] and in a number of decided cases, the HRC has stated that reasons for arrest must be communicated promptly to the detainee[274] in the language he best understand[275] and that delay of 45 days,[276] seven days[277] and 24 hours violates this rule.[278]

However, the HRC has noted that in some exceptional cases, it may not be possible to satisfy this requirement. For example, the HRC found no violation in *Michael & Brian Hill v Spain*, as investigating officers delayed for eight hours for interpreters and legal counsel to arrive before communicating the reasons for arrest to the suspects.[279] In Hill's case, the delay was necessary and reasonable, as the need for an interpreter implied that the arrested persons were not familiar with the language used, and as a result would not have understood the reasons for their arrest unless communicated to them in their own language. Similarly, in *D. McTaggart v Jamaica* the HRC found no breach of Article 9(2) of the Covenant as it was 'highly unlikely that neither the author nor his ... counsel were aware of the reasons for his arrest' after several consultations with his lawyer in the previous weeks.[280]

The HRC has also clarified the level of detail in information on reasons for arrest and nature of charges required by Article 9(2) of the Covenant. It makes it clear that information on reasons for arrest or detention must be sufficient, precise, provided in

[271] *Barrington Campbell v Jamaica*, Communication No. 618/1995, U.N.Doc. CCPR/C/64/D/618/1995 (1998) para. 6.3.

[272] UN Human Rights Committee (HRC), *Concluding Observations: Ukraine*, 12 November 2001, CCPR/CO/73/UKR, para. 17.

[273] UN Human Rights Committee (HRC), *Concluding Observations: Uzbekistan*, 26 April 2001, CCPR/CO/71/UZB, para. 12.

[274] *Ebenezer Akwanga v Cameroon,* Communication No. 1813/2008, CCPR/C/101/D/1813/2008, para. 7.4.

[275] *Albert Wilson v Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003) paras. 3.3 & 7.5.

[276] *G. Campbell v Jamaica*, Merits, Communication No. 248/1987, UN Doc CCPR/C/44/D/248/1987, IHRL 2371 (UNHRC 1992), 30 th March 1992, para. 6.3.

[277] *Peter Grant v Jamaica*, Communication No. 597/1994, U.N. Doc. CCPR/C/56/D/597/1994 (1996) para. 8.1.

[278] *Krasnova v Kyrgyzstan,* Communication No. 1532/2006, CCPR/C/101/D/1532/2006, para. 8.5.

[279] *Michael and Brian Hill v Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997) para. 12.2.

[280] *Deon McTaggart v Jamaica*, Communication No. 749/1997, U.N. Doc. CCPR/C/62/D/749/1997 (3 June 1998) para. 8.1.

detail and must not be too general[281] in order to enable the detainee to take the necessary steps to secure his release if he believes that the reasons given for his detention are invalid or unfounded. In *Adolfo Drescher Caldas v Uruguay*, the HRC held that 'it was not sufficient to simply inform the applicant that he was being arrested under the "prompt security measures" of Uruguay without any indication of the substance of the complaint against him'.[282] The European Court concurred with the HRC, as it stated that it is not enough for police officers effecting arrest to base their decision, for example, on a particular law that brands arrested persons as terror suspects.[283] Conversely, police officers are under obligation to inform detainees why they are considered as terrorists, precise occasions where they may have participated in terrorism-related activities and the particular terrorist organisation to which they belong.[284] Therefore, arrest and detention of a person in the belief of his involvement in subversive or terrorist activities without providing an explanation as to the scope and meaning of 'subversive or terrorist activities', which constitute a crime under the domestic law of the country in question does not satisfy the prerequisites of Article 9(2) of the Covenant.[285] Furthermore, detaining a person on the orders of a senior state official is not in consonance with Article 9(2) of the Covenant. In *Mika Miha v Equatorial Guinea,* the HRC held that 'it is not sufficient under Article 9(2) simply to inform the person arrested and detained that the deprivation of liberty has been carried out on the orders of the President of the country concerned'.[286]

The second requirement of Article 9(2) is to the effect that persons arrested and detained 'for the purpose of investigating crimes that they may have committed or for the purpose of holding them for criminal trial must be promptly informed of the crimes of

[281] *Willy Wenga Ilombe and Nsii Luanda Shandwe v Democratic Republic of the Congo*, Communication No. 1177/2003, U.N. Doc. CCPR/C/86/D/1177/2003 (2006) para. 6.2.
[282] *Adolfo Drescher Caldas v Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2 at 80 (1990) para. 13.2.
[283] *Fox, Campbell and Hartley v The United Kingdom*, appl. No. 12244/86; 12245/86; 12383/86), Council of Europe: European Court of Human Rights, 30 August 1990, para. 41.
[284] *Fox, Campbell and Hartley v United Kingdom* (1990) para. 41.
[285] *Leopoldo Buffo Carballal v Uruguay*, Communication No. R.8/33, U.N. Doc. Supp. No. 40 (A/36/40) at 125 (1981) para. 12.
[286] *Essono Mika Miha v Equatorial Guinea*, Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994) para. 6.5.

which they are suspected or accused'.[287] The HRC in its General Comment No. 32 stated,

> this guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges … The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such.[288]

Prompt notification of charges is important as it enables the arrested person to understand the exact nature of the accusation and case against him, and 'to facilitate the determination of whether the provisional detention was appropriate or not'.[289] It also helps the arrested person to make a decision whether to take a plea, or proceed to court to explain his case and exonerate himself of the allegations against him.[290] As a rule, charges, which are exact and specific accusations in the legal sense of the word, as opposed to reasons of arrest, that are of a general nature, must be communicated to arrested persons promptly in a language they best understand.[291] In *Morrison v Jamaica*, the HRC held that a delay of three to four weeks in custody without informing the accused of the charges against him violated articles 9(2) and 9(3) of the Covenant.[292]

3.3.2 ACHPR

The ACHPR does not contain a provision that guarantees the right of arrested persons to be informed of reasons for arrest and the nature of charges against them. However, the African Commission has stated that this right is implicit in the right to a fair trial[293] and has developed vast jurisprudence to this effect. In *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, the African Commission stated that failure to inform arrested persons of the reasons for their arrest and the nature

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[287] HRC: General Comment No. 35 (2014) para. 29.
[288] HRC: General Comment No. 32 (2007) para. 31.
[289] General Comment No. 32, para. 31. For more, see *Clifford McLawrence v Jamaica* (1996) para. 5.9.
[290] *G. Campbell v Jamaica* (1987) para. 6.3.
[291] *Griffin v Spain*, Communication No. 493/1992, U.N. Doc. CCPR/C/53/D/493/1992 (1995) para. 9.2.
[292] *Mccordie Morrison v Jamaica,* Communication No. 663/1995; U.N. Doc. CCPR/C/64/D/663/1995 (1998) para. 9.
[293] *Media Rights Agenda v Nigeria* (2000) para. 43.

of charges against them constitutes a violation of the right not to be subjected to arbitrary detention guaranteed in Article 6 of the ACHPR.[294] Thus, in *Huri-Laws v Nigeria*, the Commission held:

> Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them …[295] The failure and/or negligence of the security agents of the Respondent Government to scrupulously comply with these requirements is therefore a violation of the right to fair trial as guaranteed under the African Charter.[296]

Reasons for arrest must not be vague, but must be clear and precise enough to demonstrate proven facts and reasonable suspicion that the suspect or arrested person did in fact commit or participate in committing the offence.[297] In *Alhassan Abubakar v Ghana,* the Commission found a violation of Article 6 of the Charter as authorities arrested the complainant in the interest of national security under the 1992 Preventive Custody Law of 1992 of Ghana. He was not informed of reasons for his arrest, never charged with any offence and never stood trial until his escape from a prison hospital seven years later.[298] The Commission also found a violation of Article 6 in *Media Rights Agenda and Others v Nigeria*, as the victims were not informed of the reasons for their arrest, or the nature of charges against them, for more than two and a half months.[299] The Commission also held that the indiscriminate mass arrest and detention of scores of persons without reason and charges for more than 12 months violates Article 6 of the Charter.[300]

The jurisprudence of the African Court has also made it clear that failure on the part of police officers or state security agents to inform arrested persons of the reason(s) for

[294] *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, African Commission on Human and Peoples' Rights, Communication No. 379/09 (2014) paras. 106 and 107.
[295] *Huri-Laws v Nigeria* (Communication No. 225/98) [2000] ACHPR 23; (6 November 2000) para. 43 (1) (b).
[296] *Huri-Laws v Nigeria* (2000) para. 44.
[297] *Amnesty International and Others v Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999) para. 59.
[298] *Alhassan Abubakar v Ghana* (1996) paras. 9 and 10.
[299] *Media Rights Agenda and Others v Nigeria* (1998) paras. 42, 43 and 44.
[300] *Hadi & Others v Republic of Sudan* (2013) para. 83 and 84.

arrest and/or detention amounts to arbitrariness. In *Mohamed Abubakari v The United Republic of Tanzania*, the African Court noticed that the police did not inform the applicant of the reason(s) for his detention and the nature of charges against him. Furthermore, records submitted by the respondent state before the African Court revealed no trace of a police report to suggest that the applicant was informed of the reasons for his detention.[301] Consequently, the Court determined that the United Republic of Tanzania violated the applicant's right to be informed of the reason(s) for detention and the nature of charges against him.[302]

Similarly, in *Sebastien Germain Ajavon v Republic of Benin*, the African Court has reiterated the importance of the right to prompt notification of reasons for arrest or detention and the nature of charges against an arrested person. The applicant submitted that he was not informed of the reasons for his arrest, detention and the nature of charges against him. The respondent state maintained that

> 'it is superfluous to re-notify the charges, the notification or the right to information having been satisfied at the preliminary inquiry or before the court. It asserts that the Applicant was notified of the role of CRIET as it was clearly stated that he was being prosecuted for "high risk international drug trafficking".[303]

The African Court rebutted this position and stated that in all proceedings, especially criminal cases, 'the purpose of notification of charges is to enable the accused to be informed of the nature of the charges brought against him to enable him to properly prepare his defence'.[304] The Court held that the respondent state violated the applicant's right to be informed of the 'nature of charges levelled against him and to understand the stakes involved in the case'.[305]

3.3.3 IACHR

[301] *Mohamed Abubakari v The United Republic of Tanzania,* Application No. 007/2013, Judgement, para. 118.
[302] *Mohamed Abubakari v The United Republic of Tanzania* (2013) para. 119.
[303] *Sebastien Germain Ajavon v Republic of Benin*, Application No. 013 / 2017 Judgement (Merits) of 29 March 2019, para. 160.
[304] *Sebastien Germain Ajavon v Republic of Benin* (2019) para. 161.
[305] *Sebastien Germain Ajavon v Republic of Benin* (2019) para. 162.

Similar to articles 9(2) of the ICCPR and 5(2) of the ECHR, Article 7(4) of the IACHR guarantees that all detainees must be promptly informed of reasons for their arrest and charges against them in a language they understand best and in sufficient detail. This provision is important as it enables arrested persons to understand the exact reasons of their arrest and the nature of charges against them and facilitates the preparation of their case.[306] The information on 'motives and reasons' for arrest and charges against an arrested person need not be in writing,[307] but must be explicit enough to state the legal grounds and merits on which the arrest is based.[308] Therefore, mere citing of the legal grounds for arrest and detention is not in consonance with Article 7(4) of the IACHR.[309] The suppression of this right retards the detainee's ability to launch a legal challenge in the courts of law to secure his release.[310]

3.3.4 ECHR

With regard to Article 5(2) of the ECHR, the jurisprudence of the ECtHR has made it clear that failure on the part of authorities to inform an arrested person of the exact reason for his arrest is a violation of Article 5(2) of the ECHR.[311] In *Fox, Campbell and Hartley v the United Kingdom,* the ECtHR held that Article 5(2)

> contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in *simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4*. ... Whilst this information must be conveyed '*promptly*' (in French: *'dans le plus court délai'*), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.[312]

[306] *Juan Humberto Sanchez v Honduras*, Inter-American Court of Human Rights (IACrtHR), Judgment, of June 7, 2003 (Preliminary Objections, Merits, Reparations and Costs) para. 82.
[307] *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (2007) para. 76.
[308] *Juan Humberto Sanchez v Honduras* (2003) para. 82.
[309] *Juan Humberto Sanchez v Honduras* (2003) para. 82.
[310] *Yvon Neptune v Haiti,* Inter-American Court of Human Rights, Judgment of May 6, 2008 (Merits, Reparations and Costs) para. 109.
[311] *Shamayev and Others v Georgia and Russia,* European Court of Human Rights, Application No. 36378/02, Judgment 12 April 2005, para. 413.
[312] *Fox, Campbell and Hartley v the United Kingdom* (1990) para. 40.

Indicating the legal basis for arrest is not sufficient to satisfy the prerequisites of Article 5(2) of the ECHR.[313] It is not enough for police officers effecting arrest and detention to base their decision on a particular law that brands arrested persons as terror suspects.[314] As such, police officers or state security agents who arrest persons suspected to engage in terrorist activities are under obligation to inform them why they are considered terrorists.[315] In *Kerr v The United Kingdom,* the ECtHR held that although the suspect was not informed of the reasons for his arrest, it was clear that during interrogation the suspect was aware of the reasons for his arrest and why he was considered a terrorism suspect.[316]

3.4 Right to present arrested persons or persons detained on a criminal charge promptly before a judge or other officer

The right to present arrested persons or persons charged with criminal offences promptly before a judge or other officer authorised by law to exercise judicial power is an effective measure to protect against arbitrary detention. This right is particularly important as it determines first, whether the initial detention is justified, secondly whether continued detention is necessary and thirdly whether to release the arrested person on bail 'subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should the occasion arise, for execution of the judgment'.[317] This right is guaranteed in articles 9(3) of the ICCPR, 7(4) of the IACHR and 5(3) of the ECHR. While the ACHPR does not expressly set out this right, it is contained in standards established by the African Commission, such as the Resolution on the Right to Recourse and Fair Trial,[318] the Principles on the Right to Fair Trial in Africa,[319] the

[313] *Kerr v The United Kingdom,* European Court of Human Rights, Application No. 40451/98 (1999) para. A (3).
[314] *Fox, Campbell and Hartley v United Kingdom* (1990) para. 41.
[315] *Fox, Campbell and Hartley v United Kingdom* (1990) para. 41.
[316] *Kerr v The United Kingdom* (1999) para. 38.
[317] Article 9(3) of the ICCPR.
[318] ACHPR Resolution on the Right to Recourse and Fair Trial (1992), para. 2(c).
[319] Principles on the Right to Fair Trial in Africa, Section M (3).

Robben Island Guidelines[320] and the jurisprudence of the African Commission and Court.

3.4.1 ICCPR

The first sentence of Article 9(3) of the ICCPR requires that arrested persons or persons detained on a criminal charge are presented without delay before a judge or other officer authorised by law to exercise judicial power to determine the legality of the initial detention and whether or not remand in custody pending trial is necessary.[321] This right is automatic and must be initiated by the state,[322] and presents the arrested person, person detained on a criminal charge or his agent the first opportunity to demand a review of his detention.[323] Although the ICCPR does not attribute meaning to the term 'promptly', in *Kone v Senegal,* it was interpreted to mean not more than a 'few days'.[324] Therefore, detention for more than three days without presenting an arrested person or person detained on a criminal charge before a judge or other officer authorised by law to exercise judicial power is not in consonance with Article 9(3) of the Covenant.[325] However, the HRC has set a standard time of a maximum of 48 hours to this effect.[326] The 48-hour rule also applies to serious offences such as terrorism-related offences and offences against national security.[327]

A judge or other officer authorised by law to exercise judicial power is the authority competent to order continuous remand or release of arrested persons or persons detained on a criminal charge. As a result, she or he is under obligation to respect and apply the substantive and procedural safeguards put in place to protect against

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[320] Robben Island Guidelines, Guideline 27.

[321] HRC: General Comment No. 35 (2014) para. 36.

[322] *Zhanna Kovsh (Abramova) v Belarus*, Communication No. 1787/2008, CCPR/C/107/D/1787/2008, paras. 7.3-5.

[323] HRC: General Comment No. 35 (2014) para. 36.

[324] *Kone v Senegal*, Communication No. 386/1989, U.N. Doc. CCPR/C/52/D/386/1989 (1994) para. 8.6.

[325] *Rostislav Borisenko v Hungary*, Communication No. 852/1999, U.N. Doc. CCPR/C/75/D/852/1999 (2002) para. 7.4.

[326] UN Human Rights Committee (HRC), *Concluding Observations: Czech Republic*, 27 August 2001, CCPR/CO/72/CZE, para. 17.

[327] UN Human Rights Committee (HRC), *Concluding Observations: Mauritania*, 21 November 2013, CCPR/C/MRT/CO/1, para. 18.

arbitrariness. A such, a judge or other officer authorised by law to exercise judicial power must be independent, impartial, objective[328] in conducting proceedings and competent to order the victim's release without external influence if the detention is arbitrary.[329] While the attributes of a judge are not in doubt, that of the other officer authorised by law to exercise judicial power is a subject of controversy. However, s/he must possess the qualities of a regular judge and be capable of ordering the person's release if it is determined that the detention is arbitrary.[330]

Some states have maintained that a state prosecutor can satisfy the requirement of the 'other officer authorised by law to exercise judicial power' over arrest or detention. For example, in *Vladimir Kulomin* v *Hungary,* authorities arrested a Russian national on murder charges in Hungary. The public prosecutor remanded him in custody for more than one year and exercised judicial control over his detention. The state party submitted that under Hungarian law, the public prosecutor is competent to perform the role of the 'other officer' and therefore competent to exercise judicial control over the author's pre-trial detention.[331]In considering the state party's submission, the HRC made it clear that

> it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of Article 9 (3).[332]

The rule in *Vladimir Kulomin v Hungary* was also invoked in *Sandzhar Ismailov v Uzbekistan*,[333] *Munarbek Torobekov v Kyrgysztan*[334] and *Yevgeni Reshetnikov v Russian Federation.*[335] It is submitted that prosecutors are members of the National

[328] HRC: General Comment No. 35 (2014) para. 32.
[329] HRC: General Comment No. 35 (2014) para. 36.
[330] *Vladimir Kulomin v Hungary*, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992 (1996) para. 11.3.
[331] *Vladimir Kulomin v Hungary* (1992) para. 10.4.
[332] *Vladimir Kulomin* v *Hungary* (1992) para. 11.3.
[333] *Sandzhar Ismailov v Uzbekistan,* Communication No. 1769/2008, CCPR/C/101/D/1769/2008, para 7.3.
[334] *Munarbek Torobekov v Kyrgyzstan*, Communication No. 1547/2007, U.N. Doc. CCPR/C/103/D/1547/2007 (2011) para. 6.2.
[335] *Vevgeni Reshetnikov v Russian Federation,* Communication No 1278/2004, U.N. Doc. CCPR/C/95/D/1278/2004 (2009) para. 8.2.

Public Prosecution Authority and their independence, impartiality and objectivity would be in doubt where they exercise judicial control over detention ordered by the same body they represent.

3.4.2 ACHPR

The right to prompt presentation of arrested persons or persons detained on a criminal charge before a judge or other officer authorised by law to exercise judicial power is not provided for in the ACHPR. However, the jurisprudence of the African Commission in *Article 19 v The State of Eritrea* indicates that Article 7(1) (d) of the Charter has been extended to include this provision.[336] Technically, this marks the end of detention in police custody[337] as the judge or other officer authorised by law to exercise judicial power can either order the detainee's release, or transfer him to another facility beyond the control of investigating authorities where the conditions are more favourable for detention not exceeding a few days. A cause for concern arises as to whether a public state prosecutor is competent to review judicial detention. The African Commission has clarified in *Egyptian Initiative for Personal Rights and Interights v Egypt* that a public prosecutor is not appropriate for this purpose as s/he represents (the National Public Prosecution Authority) and may have a vested interest in the case, and may be a formal party against the detainee in the course of the proceedings.[338] In these circumstances, his or her independence, impartiality and objectivity may be subject to question.

The African Court has also guaranteed the right to prompt presentation of arrested persons before a judge or other officer authorised by law to exercise judicial power. In the *African Commission on Human and Peoples' Rights v Libya*, on 19 November 2011, the National Transitional Council (the then Government of Libya) subjected Mr Saif Al-Islam Gadhafi to detention incommunicado without access to his family, friends, or lawyer and he was not presented before a judge or other officer authorised by law to exercise judicial power.[339] On 23 December 2012, he was arraigned before a special

[336] *Article 19 v State of Eritrea* (Communication no. 275/2003) [2007] ACHPR 79; (30 May 2007) para. 96.
[337] Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa, Guideline 7(b) (ii).
[338] *Egyptian Initiative for Personal Rights and Interights v Egypt* (334/06), ACHPR (2011) para. 187.
[339] *African Commission on Human and Peoples' Rights v Libya*, Application No. 002/2013, Judgement, para. 7, 9, 49 and 78.

court (The People's Court) in a process that the Libyan Supreme Court declared unconstitutional.[340] The African Court held that Libya violated Mr Gadhafi's right to be presented promptly before a judge or other officer authorised by law to exercise judicial power. The spirit of the Charter requires that 'any person arrested or detained for a criminal offence should be brought with minimum delay before a judge or any other authority entitled by law to exercise judicial function'. Furthermore, Mr Gadahfi was arraigned before an extraordinary court (The People's Court)[341] which was declared unconstitutional.[342]

3.4.3 IACHR

With regard to Article 7(5) of the IACHR, the IACrtHR has stated that the purpose of 'prompt judicial control' is to ensure that an arrest or detention is not effected in arbitrary fashion, as judges or other officers authorised by law to exercise judicial power are under obligation to review the legality of all arrest or detention.[343] For this right to be effective, authorities must promptly present all arrested persons or persons detained on a criminal charge before a competent judge or other judicial officer authorised by law to exercise judicial power. Thus, mere awareness of a person's detention by a judge or other officer authorised by law to exercise judicial power is not enough to satisfy this requirement. The reasoning is that arrested persons or persons detained on a criminal charge must appear personally and present their case before a judge or other officer authorised to review detention.[344] In *Castillo-Páez v Peru*, state security agents arrested and detained the victim in arbitrary circumstances and did not present him promptly before a judge or other officer authorised by law to exercise judicial power. Police officers exhibited bad faith by denying his arrest and detention, and did not include his name in the registration note book.[345] As a result, the IACrtHR found a violation of Article 7(5) of the IACHR, and Article 2(20) (c) of the Constitution

[340] *African Commission on Human and Peoples' Rights v Libya* (2013) para. 69 and 90.
[341] This court lacked the attributes of a regular court and consequently was not competent to exercise judicial power.
[342] *African Commission on Human and Peoples' Rights v Libya* (2013) para. 91
[343] *Acosta-Calderón v Ecuador* (2005) paras. 76 & 77.
[344] *Acosta-Calderón v Ecuador* (2005) para.78.
[345] *Castillo Páez Case v Peru* (1997) para. 51.

of Peru.[346] This right can also be in violation where arrested persons or persons detained on a criminal charge never appear before a competent 'judge' or 'other officer' at any time during the entire proceedings.[347]

With regards to whether a public prosecutor can play the role of the 'other officer', in *Acosta Calderón v Ecuador,* the IACrtHR stated that prosecutors do not have the attributes to be considered as the 'other officer' authorised by law to exercise judicial power within the meaning of Article 7(5) of the Convention. Moreover, Article 98 of the Political Constitution of Ecuador in force at the time did not empower a public prosecutor to carry out judicial functions, or to exercise judicial power over an arrest or detention.[348]

3.4.4 ECHR

Concerning Article 5(3), the ECtHR has made it clear that the main purpose of the Article is to eliminate the risk of arbitrariness by ensuring that judges exercise prompt judicial control over all arrests or detention effected in accordance with the provisions of Article 5(1) (c) of the ECHR, and protect against ill-treatment of the detained.[349] The term 'promptly' in Article 5(3) implies that authorities must present arrested persons or persons detained on a criminal before a judge or other officer authorised by law to exercise judicial power within four days.[350] Shorter periods can violate the 'four-day' requirement in the absence of tangible reasons to the contrary.[351] A judge or other officer's knowledge of an arrested person or persons detained on a criminal charge is

[346] *Castillo Páez Case v Peru* (1997) para. 57.
[347] *Suárez Rosero v Ecuador* (1997) paras. 53-56.
[348] *Acosta Calderón v Ecuador* (2005) para. 80.
[349] *Ladent v Poland*, European Court of Human Rights, Application No. 11036/03, Judgement of 18 March 2008 para. 72.
[350] *O'Hara v The United Kingdom,* European Court of Human Rights, Application No. 37555/97, Judgment of 16 January 2002, para. 46.
[351] *İpek and Others v Turkey*, European Court of Human Rights, Applications Nos. 17019/02 and 30070/02, Judgment of 3 February 2009, paras. 36 and 37.

not sufficient for the purpose of this requirement, as judicial control of detention must be automatic and initiated by the state.[352]

Automatic review of detention is important and necessary as authorities may subject an arrested person to detention incommunicado, and as a result the detained person may not be able to petition the courts to review the lawfulness of his detention.[353] The judge or other officer authorised by law to exercise judicial power over arrest or detention is under obligation to listen to the arrested person or person detained on a criminal charge in person before taking the appropriate decision for continuing remand in custody or release.[354] Therefore, the first judicial review of detention must adequately demonstrate whether the arrested person or person detained on a criminal charge committed or participated in committing the crime.[355] It is recommended that, to minimise delay, the same judicial officer who conducted the first review of detention should also be competent to release the arrested person on bail subject to that person presenting himself in court if the need arises.[356] In *Assenov and Others v Bulgaria,* the ECtHR found a violation of Article 5(3) of the ECHR, as authorities did not present the applicant before a judge or other officer authorised by law to exercise judicial power in due time, and the courts entertained his application for release three months after his detention. To quote the words of the ECtHR, 'this was clearly insufficiently "prompt" for the purposes of Article 5 (3)'.[357]

With regard to the attributes and competence of the other officer authorised by law to exercise judicial power within the meaning of Article 5(3) of the ECHR, in *Assenov and Others v Bulgaria,* the ECtHR stated that the

> 'officer' must be independent of the executive and the parties. ... In this respect, objective appearances at the time of the decision on detention are material: if it

[352] *McKay v United Kingdom*, Decision on merits, App No 543/03, [2006] ECHR 820, (2007) 44 EHRR 41, IHRL 2583 (ECHR 2006), 3rd October 2006, European Court of Human Rights; Grand Chamber, para. 34.
[353] *McKay v The United Kingdom* (2006) para. 34.
[354] *Schiesser v Switzerland*, European Court of Human Rights, Application No. 7710/76, Judgement of 4 December 1979, para. 31.
[355] *McKay v The United Kingdom* (2006) para. 40.
[356] *McKay v The United Kingdom* (2006) para. 40.
[357] *Assenov and Others v Bulgaria* (1998) para. 147.

> appears at that time that the 'officer' may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt. ... The 'officer' must hear the individual brought before him in person and review, by reference to legal criteria, whether or not the detention is justified. If it is not so justified, the 'officer' must have the power to make a binding order for the detainee's release ...'[358]

The issue at stake is whether an investigator or public prosecutor is competent to exercise judicial power within the meaning of Article 5(3) of the ECHR. A critical look at *Assenov's* case reveals that an investigator interrogated and eventually preferred a criminal charge against him and ordered his continued remand in custody, a decision approved by state prosecutors.[359] Even if investigators in Bulgaria are institutionally independent as submitted by the state,[360] Bulgarian law does not accord investigators the power to make legally binding decisions pertaining to detention or release of an arrested person or a person detained on a criminal charge. Instead, prosecutors in Bulgaria have the power to overturn an investigator's decision and withdraw the case from him if dissatisfied with his approach.[361] In this case, the investigator is not totally independent and as such does not meet the prerequisites to be described as the other officer authorised by law to exercise judicial power within the meaning of Article 5(3).[362] The ECtHR also made it clear that a state prosecutor is not competent to exercise judicial power as his impartiality and independence may eventually be compromised in the course of the criminal proceedings, as he may be required at some point in time to take part in the prosecution.[363]

3.5 Right to trial within a reasonable time or release pending trial

The right to trial within a reasonable time or to release pending trial is an important measure to protect arrested persons against arbitrary detention. This right is adequately guaranteed in articles 9(3) of the ICCPR, 7(1) (d) of the ACHPR, 7(5) of the IACHR

[358] *Assenov and Others v Bulgaria* (1998) para. 146.
[359] *Assenov and Others v Bulgaria* (1998) paras.33 and 148.
[360] *Assenov and Others v Bulgaria* (1998) para. 145.
[361] *Assenov and Others v Bulgaria* (1998) paras. 66-69 and 148.
[362] *Assenov and Others v Bulgaria* (1998) para. 148.
[363] *Assenov and Others v Bulgaria* (1998) para. 149.

and 5(3) of the ECHR. This right is also important as it guarantees that persons charged with criminal offences have to be presumed innocent until proven guilty by a court of competent jurisdiction, and that detention must be used only in exceptional circumstances and as a measure of last resort.[364] Therefore, detention of persons awaiting trial should be the exception rather than the rule.

3.5.1 ICCPR

The second sentence of Article 9(3) requires that accused persons should be granted provisional release in the absence of justification for continuing detention, or once continuing detention ceases to be reasonable. As such, the state, at all times, is under obligation to justify continuing detention.[365] The HRC has adequately clarified this position as it stated in *Sextus v Trinidad and Tobago* that accused persons are entitled to trial within a reasonable time or to release on bail pending trial.[366] Reasonable time is determined according to the circumstances of each case, and usually commences upon the date of arrest or commencement of detention until the date of final judgment. For example, the HRC

> concludes that a delay of almost four years between the judgement of the Court of Appeal and the beginning of the retrial, a period during which the author was kept in detention, cannot be deemed compatible with the provisions of article 9, paragraph 3, and article 14, paragraph 3(c), of the Covenant, in the absence of any explanations from the State party justifying the delay.[367]

Similarly, in *Kone v Senegal,* the HRC held that a delay of four years and four months without trial is not compatible with this requirement.[368] The reasoning is that

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[364] Lawyers' Right Watch Canada 'Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial Release at International Law' (2013) 1 available at *https://www.lrwc.org/ws/wp-content/uploads/2013/04/Pre-trial-release-and-the-right-to-be-presumed-innocent.pdf* (accessed 14 May 2021).

[365] HRC: General Comment No.35 (2014) para. 37.

[366] *Sandy Sextus v Trinidad and Tobago,* Communication No. 818/1998, U.N. Doc. CCPR/C/72/D/818/1998 (2001) para. 7.2.

[367] *Shalto v Trinidad and Tobago*, Communication No. 447/1991, U.N. Doc. CCPR/C/53/D/447/1991 (1995) para. 7.2.

[368] *Koné v Senegal* (1994/5) para. 8.6.

> delay of almost 31 months from arrest to conviction plus a further three years before the completion of the Appeal proceedings cannot be deemed compatible with this provision, in the absence of any explanations from the State party justifying the delay.[369]

The HRC has also clarified in *Del Cid Gómez v Panama* that, concerning homicide or murder cases where bail is not usually an option, the courts must ensure expeditious trials to avoid arbitrariness.[370] Even if genuine reasons exist that hinder expeditious proceedings,[371] general conditions such as staff shortage or limited resources will not suffice to this effect.[372] Whatever the case, if delay to commence proceedings against an accused person is inevitable, judges should consider other alternatives to incarceration to eliminate or greatly minimise the risk of arbitrariness.[373]

In *Michael & Brian Hill v Spain,* the HRC stated that detention should be the exception rather than the rule and that pre-trial detainees are entitled to bail except in the likelihood that they may abscond, influence witnesses or distort the proceedings. The HRC also made it clear that refusing bail to foreign nationals on the pretext that they may abscond is inconsistent with Article 9(3). Therefore, the state party must provide good grounds for refusing bail and explain the intricacies connected with setting it and other constraints to releasing the accused person. In the Hills' case, the HRC noted that the state party violated Article 9(3) of the Covenant, as authorities provided no tangible reasons for not granting bail to the applicants.[374]

However, if detention is inevitable, for example to prevent accused persons from absconding, interfering with the conduct of the case, committing further crimes,[375] or where the accused person clearly constitutes a danger to society[376] or if the seriousness

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[369] *Maurice Thomas v Jamaica*, Communication No. 532/1993, U.N. Doc. CCPR/C/61/D/532/1993 (4 December 1997) para. 6.2.

[370] *Del Cid Gómez v Panama*, Communication No. 473/1991, U.N. Doc. CCPR/C/54/D/473/1991 (1995) para. 46.

[371] *Clement Boodoo v Trinidad and Tobago*, Communication No. 721/1996, U.N. Doc. CCPR/C/74/D/721/1996 (2002) para. 6.2.

[372] *Sandy Sextus v Trinidad and Tobago* (1998) para.7.2.

[373] *Abdelhamid Taright et al. v Algeria*, Communication No. 1085/2002, U.N. Doc. CCPR/C/86/D/1085/2002 (2006) para. 8.3.

[374] *Michael & Brian Hill v Spain* (1993) para. 12.3.

[375] *Michael & Brian Hill v Spain* (1993) para. 12.3.

[376] *David Alberto Cámpora Schweizer v Uruguay*, Communication No. 66/1980, U.N. Doc. CCPR/C/OP/2 at 90 (1990) para 18.1.

of the crime warrants further investigation,[377] detention must be for the shortest possible period of time.

3.5.2 ACHPR

With regard to Article 7(1)(d) of the ACHPR, the African Commission has stated that the main reason for this provision is to ensure that detainees are entitled to expeditious proceedings or to release if it is certain that continued detention is unreasonable, unwarranted and in the absence of appropriate justifications to that effect.[378] As a result, this right may not be restricted unless it is sufficiently necessary to do so.[379] Regrettably, just like the HRC, the ACHPR does not attribute any precise period for the phrase 'reasonable time'. However, the Commission seems to have adopted the ECtHR's position in *Kalashnikov v Russia*, to the effect that 'reasonable time' or 'the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance'.[380]

This is ambiguous as states may interpret this position differently and to the detriment of detainees. For example, the Commission found a violation of Article 7(1) (d) of the ACHPR in *Constitutional Rights Project & Anor. v Nigeria*, as authorities remanded detainees in custody for more than 2 years without charge,[381] negatively impacting on the right to trial within a reasonable time or release pending trial. In *Abubakar v Ghana,* the detained man had no trial for 7 years, until his eventual escape from custody from a police hospital.[382] Similarly, the Commission found a breach of Article 7(1)(d) of the ACHPR in *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon,* as Mr.

[377] *Floresmilo Bolanos v Ecuador,* Communication No. 238/1987; U.N. Doc. CCPR/C/36/D/238/1987, para. 8.1.
[378] *Haregewoin Gebre-Sellasie & IHRDA (on behalf of former Dergue officials) v Ethiopia,* Decision, Comm. 301/2005 (ACmHPR, Nov. 07, 2011) para. 234.
[379] African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M (1) (e).
[380] *Kalashnikov v Russia,* European Court of Human Rights, Application No. 47095/99, Judgement of 15 July 2002, para. 110.
[381] *Constitutional Rights Project & Anor. v Nigeria* (1998) para. 55. Simi
[382] *Ahalssan Abubakar v Ghana* (1996) para. 12

Mazou's case had been pending before the Supreme Court of Cameroon for more than 2 years without judgment or any reason for the delay.[383]

The jurisprudence of the African Court reveals that the right to trial within a reasonable time is adequately guaranteed in the African human rights system, and is applicable at all stages of the criminal justice system.[384] In *Wilfred Oyango Nganyi and others v United Republic of Tanzania,* the Court held that

> the deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time, while innocent suspects, undeniably have a huge interest in a speedy determination of their innocence.[385]

It has adopted a case by case approach to determine what constitutes reasonable time, taking into consideration factors such as the 'nature and complexity of the case, the length of domestic proceedings and whether the national authorities exercise due diligence in the circumstances of the case, for the finalisation of the matter'.[386] With regard to the nature and complexity of the case, in *Andrew Ambrose Cheusi v United Republic of Tanzania,* the African Court maintained that the delay was not due to the complexity of the case, 'but by factors extraneous of the applicant's will and stemming from the malfunctioning of the respondent state's judicial system'.[387] With regard to the length of the proceedings, the African Court maintained that a period of more than 10 years to finalise the matter was excessive and thus cannot be considered as a reasonable time. The Court found a violation of Article 7(1) (d) as the applicant was not tried within this reasonable time.[388] Concerning the due diligence factor, in *Wilfred Onyango Nganyi and others v United Republic of Tanzania,* the African Court held that

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[383] *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*, African Commission on Human and Peoples' Rights, Comm. No. 39/90, (1997) para. 2 & 3.
[384] *Benedicto Daniel Mallya v United Republic of Tanzania*, Application No. 018/2015, Judgment (Mertts) of 26 September 2019, para. 49.
[385] *Wilfred Oyango Nganyi and others v United Republic of Tanzania,* Application No. 006/2013, Judgement of 1/03/2016, para. 127.
[386] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, (Reparations) (2015) 1 AfCLR 258 para. 152. For more, see *Benedicto Daniel Mallya v United Republic of Tanzania*, Application No. 018/2015, Judgment (Mertts) of 26 September 2019, para. 50.
[387] *Andrew Ambrose Cheusi v The United Republic of Tanzania*, Application No. 004/2015, Judgement of 26 June 2020, para. 118.
[388] *Andrew Ambrose Cheusi v The United Republic of Tanzania* (2015) para. 119, 120 and 122.

'it cannot condone the respondent state's action of putting the case on ice for almost two years on the ground that the authorities were still investigating the matter or because they were waiting for the extradition of the co-accused from another foreign jurisdiction'.[389] The Court determined that the United Republic of Tanzania violated Article 7(1) (d) of the Charter, as the applicant was not tried within a reasonable time.[390]

Excessive and wide arbitrary powers in the hands of state officials in some countries have defeated the right to trial within a reasonable time requirement. For example, the Minister of Interior in Gambia, by virtue of Decree No. 3 of July 1994, is empowered to cause arrest and detention for more than six months without trial, indefinitely extend detention and suspend the use of habeas corpus.[391] To avoid or minimise the risk of arbitrariness, states should ensure that such wide, naked, excessive and arbitrary powers are not concentrated in the hands of an individual.[392]

Udombana argues that the 'reasonable time' rule may be a future predicament due to the divergent approach adopted in common law and civil jurisdictions in the Continent. This is true as, in inquisitorial civil law jurisdictions, criminal investigations are generally concluded within a longer period, as opposed to the accusatorial common law approach.[393] He has recommended that there is an urgent need for the harmonisation of the continent's criminal procedure rules to ensure that litigants from these two varying legal jurisdictions are treated equally.[394]

3.5.3 IACHR

Concerning Article 7(5) of the IACHR, the IACrtHR has made it clear that detainees are entitled to trial within a reasonable time or to release on bail pending trial as preventive detention,

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[389] *Wilfred Oyango Nganyi and others v United Republic of Tanzania,* Application No. 006/2013, Judgement, para. 155.
[390] *Wilfred Oyango Nganyi and others v United Republic of Tanzania* (2013) para.155.
[391] *Dawda Jawara v Gambia* (1996) para. 5.
[392] *Dawda Jawara v Gambia* (1996) para. 61.
[393] Udombana N J (2006) 318-19.
[394] Udombana, N J (2006) 318.

> 'is the most severe measure that can be applied to a person charged with an offense; hence, its use should be exceptional, limited by the principle of lawfulness, the presumption of innocence, and the need and proportionality, in keeping with what is strictly necessary in a democratic society', because 'it is a precautionary rather than a punitive measure'.[395]

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However, release of detainees on bail pending trial is possible on two conditions: first, the detainee's release must not negatively affect the proceedings and secondly, guarantees must exist that the detainee will present himself in court whenever the need arises.[396] This right is particularly important as it scrutinises arbitrary state powers, prevents excessive and lengthy pre-trial detention and guarantees prompt and diligent conduct of criminal proceedings.[397] The state has every obligation to ensure that pre-trial detention does not exceed a reasonable time, and should substitute detention with other less stringent alternatives to incarceration that will ensure the detainees presence when required by the courts.[398]

In *Bayarri v Argentina,* the IACrtHR stated that detention for more than thirteen years without bail is not in consonance with the ACHR, as pre-trial detention must not exceed two years without a final judgment.[399] National authorities defended their position for refusing the victim bail on three occasions, maintaining that if Mr Bayarri was granted bail, he would have evaded justice as he was a police sergeant and knew the punishment for his crimes.[400]The IACrtHR rejected this position stating that the personal character of the accused and the serious nature of the alleged offence committed were not sufficient justification for refusing the detainee bail. Even if sufficient reasons exist for preventive detention, Article 7(5) makes it clear that it should not exceed a reasonable time.[401]

3.5.4 ECHR

[395] *Bayarri v Argentina*, Inter-American Court of Human Rights (IACrtHR), Judgment of 30 October, 2008 (Preliminary objection, merits, reparations and costs) para. 69.
[396] Article 7(5) of the IACHR.
[397] *Bayarri v Argentina* (2008) para. 70.
[398] *Bayarri v Argentina* (2008) para. 70.
[399] *Bayarri v Argentina* (2008) para. 71.
[400] *Bayarri v Argentina* (2008) para. 85.
[401] *Bayarri v Argentina* (2008) paras. 74, 76 and 77.

The second provision of Article 5(3) of the ECHR guarantees all detainees the right to trial within a reasonable time or release on bail pending trial if the situation demands. Drawing examples from Article 5(1) of the ECHR, the Council of Europe has stated that remand in custody pending trial is only permitted in the likelihood that the detainee may either: 'abscond, commit further offence, interfere with the course of justice, or fourthly, pose a serious threat to public order'.[402] In *Tomasi v France,* the ECtHR held that detaining the victim for 5 years and 7 months without justification violated the reasonable time standard, as the excessive detention period was not due to the complex nature of the case or Mr Tomasi's conduct.[403] Contrarily, in *Van der Tang v Spain,* the ECtHR found no violation of Article 5(3) of the ECHR for the author's three years and two months pre-trial detention. First, the ECtHR noted the complex nature of the case, as drug-trafficking related offences were merged with other criminal offences, and secondly, the accused's conduct throughout the investigations demonstrated that he was a flight risk. Furthermore, the ECtHR established that delays in the investigation were not due to laxity, malice or bad faith on the part of the investigating officers.[404]

That notwithstanding, pre-trial detainees are entitled to release on bail pending trial.[405] Therefore, detention pending trial is the exception, while release on bail pending guarantees appears to be the rule. To maximise the advantage of bail over detention, authorities must justify the amount set for bail and ensure that the accused person has the means and capacity to pay or provide the guarantees for bail.[406] Thus, the continued detention of an accused person after being granted bail, due to inability to pay or provide the guarantees for bail, implies that judicial authorities failed to take the necessary care in fixing the amount for bail.[407]

[402] Council of Europe: Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (2006) para. 6.
[403] *Tomasi v France* (1992) para. 102.
[404] *Van der Tang v Spain* (1995) para. 76.
[405] *Merabishvili v Georgia,* European Court of Human Rights (Grand Chamber), Application No. 72508/13, Judgement of 28 November 2017, para. 223.
[406] *Gafà v Malta*, European Court of Human Rights, Application No. 54335/14, Judgement of 22 May 2018, para. 33.
[407] *Gafà v Malta* (2018) para. 73.

3.6 Right of detainees to access legal counsel and to defence

International and regional human rights treaties require that all arrested persons and persons detained on a criminal charge shall have the right to access and consult with legal counsel of their choice. This right is underlined in articles 14(3) (b) (d) of the ICCPR, 7(1) (c) of the ACHPR, 8(2) (d) of the IACHR, 6(3) (c) of the ECHR, 48(2) of the European Union Charter of Fundamental Rights and 3(2) of the European Union Directive on the Right of Access to a Lawyer. It applies to every detainee irrespective of the nature of the alleged crime.[408] In criminal cases, particularly felony and misdemeanour, states are required to provide detainees with legal counsel of their choice free of charge if they cannot afford to pay. The provision of counsel is important as this ensures equality of arms, protects against arbitrariness such as forced confessions, facilitates the preparation of the defence by gathering evidence necessary to exonerate the detainee and challenge the legality of detention. Furthermore, counsel is also important as they can easily identify arbitrariness, alert officers of statutory limits to effect arrest and detention, brief detainees of their rights and the type of information that they can reveal to investigating officers.

3.6.1 ICCPR

With regard to right to counsel, the jurisprudence of the HRC in *Selyan v Belarus*, has made it clear that denial of the right to access and consult with counsel is tantamount to a violation of other rights guaranteed under the Covenant. For example, the right to 'adequate time and facilities to prepare a defence and communicate with counsel' is guaranteed under Article 14(3) (b) and the right to 'defend, including through counsel' is guaranteed in Article 14(3) (d).[409] Moreover, the HRC has reiterated in its Concluding Observations on the Syrian Arab Republic,[410] Vietnam and[411] Morocco,[412] that the right of arrested persons to access and consult with counsel is applicable upon arrest until the

[408]UN Human Rights Committee (HRC), *Concluding Observations: Finland,* UN Doc. CCPR/C/FIN/CO/6 (2013) para. 11.
[409] *Selyan v Belarus*, HRC, UN Doc. CCPR/C/115/D/2289/2013 (2015) para. 7.6.
[410] CCPR A/56/40 (2001) 81 (14).
[411] CCPR A/57/40 vol. I (2002) 82 (13).
[412] CCPR A/55/40 (2000)108.

conclusion of the trial. In *Campbell v Jamaica*, the accused had no access to counsel and representation for more than four months. The HRC held that this compromised his ability to challenge the lawfulness of his detention.[413] It is therefore obvious that the risk of arbitrariness is higher where detainees have no possibility of consulting with counsel[414], as absence of counsel during interrogation may lead officers to obtain confessions from detainees by way of torture that may eventually be admissible in evidence against them in court.

3.6.2 ACHPR

Concerning Article 7(1) (c) of the ACHPR, the African Commission clarified that every detainee has the right to prompt access to,[415] and to consult with counsel,[416]and that restriction of these rights constitutes a violation of the right to defend oneself guaranteed in Article 7(1) (c) of the African Charter.[417] It is important to note that this right applies at all stages of the criminal justice system. This is particularly important as it provides counsel with the opportunity to intervene at police stations and other detention centres on behalf of detainees, where the risk of arbitrariness is greatest.[418]

Depriving detainees of legal representation negatively impacts on the preparation of their case and defence, and is thus not in consonance with the African Charter.[419]A corollary right exists, that of choosing counsel of the detainee's choice. This is important as it ensures and guarantees confidence in the entire proceedings.[420] Therefore, even if the state must provide lawyers in criminal proceedings, detainees still reserve the right to choose one from the list of state advocates.

The right to counsel and representation also implies that the detainee's counsel has access to all legal documents concerning the case in the custody of the police,

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[413] *G. Campbell v Jamaica* (1987) para. 6.4.
[414] *G. Campbell v Jamaica* (1987) para. 6.4.
[415] *Liesbeth Zegveld and Messie Ephrem v Eritrea*, African Commission on Human and Peoples' Rights, Comm. No. 250/2002 (2003) para. 55.
[416] *Liesbeth Zegveld and Mussie Ephrem v Eritrea* (2003) para. 55.
[417] *Hadi & Others v Republic of Sudan* (2013) paras. 89-90.
[418] *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*, African Commission on Human and Peoples' Rights, Comm. No. 231/99 (2000) para. 26.
[419] *Hadi & Others v Republic of Sudan* (2013) para. 90.
[420] *Civil Liberties Organisation v Nigeria* (1999) para. 24.

prosecution and the court.[421] In *International Pen and Others v Nigeria,* the Commission stated that denying detainees and counsel access to documents and evidence on which the prosecution based its case violated the right to defence and legal representation. In this case, security forces had confiscated confidential files and documents from the offices of the detainees that were necessary for their case.[422] It is important to note that in criminal proceedings, the prosecution is under obligation to furnish the defence with all information and evidence, including exculpatory evidence, that may help to exonerate the suspect of the allegations against him, a move that can go a long way to prevent arbitrariness.[423]

Although Article 7(1) (c) of the ACHPR does not make mention of legal aid for detainees, the jurisprudence of the African Court has demonstrated that legal aid is an important component of detainees' rights in Africa. In *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania,* counsel for ten detainees charged with serious crimes withdrew from the criminal proceedings and discontinued representing them. The African Court held that the failure of Tanzania, also a state party to the ICCPR, to provide legal aid or at least to inform the detainees of their right to legal aid after their counsel withdrew, violated Article 7(1)(c) of the African Charter.[424] Similarly, the African Court held in *Mohamed Abubakari v United Republic of Tanzania*[425] and *Amiri Ramadhani v United Republic of Tanzania* [426] that 'an indigent person under prosecution for a criminal offence is particularly entitled to free legal assistance where the offence is serious, and the penalty provided by law is severe'. The Court held that Tanzania violated Article 7(1) (c) of the Charter as it failed to provide the applicants with lawyers or free legal assistance throughout the judicial proceedings in the domestic courts.[427]

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[421] African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2001), Guidelines N(3)(d) and N(3)(e)(3) (i-v).
[422] *International Pen and Others v Nigeria* (1998) paras. 99-101.
[423] *Jean-Marie Atangana Mebara, v Cameroon,* Communication 416/12, ACHPR (2012) para. 106.
[424] *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania,* African Court on Human and Peoples' Rights, application no. 006/2013, Judgement of 18 March 2016, para. 163.
[425] *Mohamed Abubakari v The United Republic of Tanzania* (2013) para. 138-142.
[426] *Amiri Ramadhani v United Republic of Tanzania,* Application No. 010/2015, Judgement of 11 May 2018, para. 68.
[427] *Amiri Ramadhani v United Republic of Tanzania,* Application No. 010/2015, Judgement of 11 May 2018, para. 69.

3.6.3 IACHR

With regard to Article 8(2) (d) of the IACHR, the IACrtHR has stated that the state is under obligation to ensure that detainees have access to counsel promptly or at least at the commencement of criminal investigations.[428] In *Acosta Calderon v Ecuador* the victim was arrested and held in preventive detention for seven years on suspicion of drug trafficking.[429] He was not represented by counsel at his initial interrogation contrary to Ecuadoran law.[430] The IACrtHR noted a breach of Article 8(2) (d) and held that all detainees, including foreign nationals, have the right to consult with counsel even before the first interrogation.[431]

The IACHR also requires that communication between counsel and detainees must be as confidential and private as possible. Supervised communication between the detainee and counsel is not in consonance with Article 8(2) (d) of the IACHR. In *Castillo Petruzzi et al. v Peru,* the IACrtHR found a breach of Article 8(2) (d) of the IACHR as military presence made it impossible for counsel to consult privately with their clients.[432] Given the crucial need for counsel in criminal proceedings, the state has the duty to provide free legal assistance to detainees if they cannot afford to pay for it themselves.[433] Furthermore, the right to counsel also requires that counsel is competent to 'examine witnesses present in court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts'[434] and evidence that can exonerate the accused persons and thus protect against arbitrariness.

3.6.4 ECHR

[428] *Barreto Leiva v Guatemela,* Inter-American Court of Human Rights (IACrtHR), Judgment of November 17, 2009 (Merits, Reparations and Costs) para. 62.
[429] *Acosta Calderon v Ecuador* (2005) para. 3.
[430] *Acosta Calderon v Ecuador* (2005) para. 124.
[431] *Acosta Calderon v Ecuador* (2005) para. 125.
[432] *Castillo Petruzzi et al. v Peru* (1999) para. 136 g.
[433] Article 8(2) (e) of the IACHR.
[434] Article 8(2) (f) of the IACHR.

The right to counsel and legal assistance is adequately guaranteed under the European human rights system,[435] as all detainees are entitled to counsel, and to defend themselves in person or by counsel of their choice, or by state funded legal assistance if they cannot afford to pay or 'when the interests of justice so require'.[436] The European Union Directive emulates the case law of the ECtHR regarding the importance of early access to counsel and legal assistance in *Salduz v Turkey,* as it maintains that the right to access counsel must be made available to detainees upon commencement of interrogation except when compelling reasons exist to the contrary.[437] Even if such is the case, the restriction must not be detrimental to the detainee and his case.[438] The right of access to counsel and to legal assistance also requires that state must make it possible for counsel to adequately represent detainees, communicate privately with them and to be present before[439] and during interrogation.[440] Furthermore, counsel must also have unrestricted access to the fundamental aspects of the detainee's defence for example, 'discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation of questioning, support of an accused in distress and checking the conditions of detention'.[441]

Although the ECHR makes provision for detainees to waive their right to counsel and legal assistance, considering the importance of criminal cases, a waiver is considered only in very limited circumstances.[442] A detainee may waive his right to counsel orally or in writing.[443] However, this must be unequivocal and associated with the necessary corresponding safeguards.[444] Furthermore, it must be voluntary and the accused person waiving his right must be intelligent, reasonable and understand the consequences of

[435] Article 3(2) of the European Union Directive on the Right of Access to a Lawyer.
[436] Article 6(3) of the ECHR.
[437] *Salduz v Tukey*, European Court of Human Rights, Application No. 36391/02, Judgement of 27 November 2008, para. 55.
[438] *Salduz v Tukey* (2008) para. 55.
[439] *A.T. v Luxembourg* (2015) para. 86. For more, see Article 3(3) (a) of the European Union Directive on the Right of Access to a Lawyer.
[440] *Sebalj v Croatia*, European Court of Human Rights, Application No. 4422/09, Judgement of 28 June 2011, para. 257. For more, see Article 3(3) (b) of the European Union Directive on the Right of Access to a Lawyer.
[441] *Dayanan v Turkey* (2009) para. 32.
[442] *A.T. v Luxembourg* (2015) para. 59
[443] Article 9(2) of the European Union Directive on the Right of Access to a Lawyer.
[444] Article 9(1) (b) of the European Union Directive on the Right of Access to a Lawyer.

the waiver.[445] In *Pishchalnikov v Russia*, the applicant waived his right to counsel and legal assistance during interrogation, and confessed to having committed aggravated robbery.[446] He eventually accepted legal representation and during subsequent interrogation in his counsel's presence, he retracted his statements. The court relied on statements made on his initial interrogation to secure his conviction. The ECtHR held that the absence of counsel and legal assistance at his initial interrogation affected the proceedings to the applicant's detriment[447] and as result breached articles 6(3) (C) and 6(1) of the ECHR.[448]

3.7 Right to challenge the lawfulness of detention before a court of competent jurisdiction

The right of detainees to take proceedings before a court of competent jurisdiction to challenge the lawfulness of their detention to secure their release if the detention is unlawful (otherwise known as habeas corpus) is an important measure to protect against arbitrariness. The lawfulness of detention must be determined promptly by an independent and impartial court competent to review the substantive as well as procedural grounds for the detention and to order the unconditional release of the victim if determined that the detention is arbitrary or unlawful.[449]

Foley argues that habeas corpus is also important as it provides essential protection against other human rights violations associated with deprivation of personal liberty, such as the non-derogable right to life, freedom from torture, secret and incommunicado detention, and enforced disappearance.[450] Therefore habeas corpus is applicable at all times and must not be subject to restriction or derogation, even during exceptional

[445] *Pishchalnikov v Russia*, European Court of Human Rights, application no. 7025/04, Judgement of 24 September 2009, para. 77.
[446] *Pishchalnikov v Russia* (2009) para.7.
[447] *Pishchalnikov v Russia* (2009) para. 91.
[448] *Pishchalnikov v Russia* (2009) para. 92.
[449] Articles 9(4) of the ICCPR, 7(6) of the IACHR, 5(4) of the ECHR and 7(1) of the ACHPR.
[450] Foley C 'Combating Torture: A manual for Judges and Prosecutors' (2003) 31 available at *https://www.refworld.org/docid/4ec0e9062.html* (accessed 12 April 2021).

periods such as internal or international armed conflict, state of siege, state of emergency or internal political disturbances or insurrections.[451] Habeas corpus is adequately guaranteed under articles 9(4) of the ICCPR, 7(6) of the IACHR and 5(4) of the ECHR. Although not expressly set out in the ACHPR, the jurisprudence of the African Commission and Court suggest that habeas corpus is inherent in Article 7(1) of the ACHPR.[452]

3.7.1 ICCPR

With regard to Article 9(4), the HRC has stated in its General Comment No. 35 that habeas corpus is applicable to all forms of deprivation of liberty and may not be subject to restriction.[453] In *Gavrilin v Belarus,* the HRC stated that this procedural remedy is adopted to make it possible for persons deprived of their liberty in arbitrary fashion to seize the competent courts and challenge the lawfulness of their detention.[454] Therefore, state practices and policies that retard a suspect, accused person or detainee's ability to benefit from habeas corpus, such as secret detention and unnecessary detention incommunicado or enforced disappearances are not in consonance with Article 9(4) of the ICCPR.[455] Furthermore, continued detention of persons where the state party has made it absolutely clear that the victims will not benefit from habeas corpus irrespective of the situation is a clear violation of Article 9(4) of the Covenant.[456] For habeas corpus to achieve its intended goal, it must be effectively and readily available to detainees at all times[457] and subject to constant periodic review at regular intervals by a court of

[451] HRC: General Comment No. 35 (2014) para. 67.

[452] *Constitutional Rights Project v Nigeria* (1999) para. 18.

[453] Habeas corpus is applicable to detention in connection with criminal proceedings. It also applies to 'military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, wholly groundless arrests, vagrancy or drug addiction, detention for educational purposes of children in conflict with the law and other forms of administrative detention'. HRC: General Comment No. 35 (2014) para. 40.

[454] *Maksim Gavrilin v Belarus*, Communication No. 1342/2005, U.N. Doc. CCPR/C/89/D/1342/2005 (2007) para 7.4.

[455] *Berry v Jamaica*, Communication No. 330/1988, U.N. Doc. CCPR/C/50/D/330/1988 (1994) para. 11.1. For more, see HRC: General Comment No. 35 (2014) para. 46.

[456] *Edgardo Dante Santullo Valcada v Uruguay*, Communication No. R. 2/9, U.N. Doc. Supp. No. 40 (A/35/40) at 107 (1980) para. 12.

[457] *Mario Inés Torres v Finland*, Communication No. 291/1988, U.N. Doc. CCPR/C/38/D/291/1988 (1990) para. 7.2.

competent jurisdiction.[458] The said court must be a regular body or institution that is impartial, objective, independent[459] and capable of ordering the detainee's release if the detention is arbitrary.[460]

The prerequisites of an independent court presuppose that judges who entertain habeas corpus petitions must be free from influence from the executive and legislative arms of government to order the unconditional release of all persons arrested and detained in arbitrary fashion.[461] Furthermore, to comply with the prerequisite of an independent court, only civilian courts are competent to entertain and review the legality of detention of civilians and military courts that of military personnel.[462] The independent court must also be impartial and should impose a moral duty on judges to review the legality of detention on the basis of the law, without bias or prejudice.[463] Impartiality also presupposes that judges or courts that order arrest or detention must not be competent to review the legality of the arrest or detention.

Because it is a procedural remedy, adopted mainly to review the legality of detention, the procedure must be fast and expeditious and comply with domestic and international law standards.[464] Victims or their agents can institute a habeas corpus application.[465] It is filed ex parte supported by an affidavit and the matter is heard on merit in the appropriate high court. It is important to point out that in common law jurisdictions, habeas corpus proceedings are conducted in adversarial, rather than inquisitorial fashion. This implies that in the course of the proceedings, the detaining authority and the detainee are placed on the same platform in court which provides the detainee and

[458] *A v Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) para. 9.4.
[459] *Torres v Finland*, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC), 5 April 1990, para. 7.2.
[460] *Danyal Shafiq v Australia*, Communication No. 1324/2004, U.N. Doc. CCPR/C/88/D/1324/2004 (2006) para. 7.4.
[461] HRC: General Comment No. 35 (2014) para. 45.
[462] HRC: General Comment No. 32 (2007) para. 22.
[463] HRC: General Comment No. 32 (2007) para. 21.
[464] *Torres v Finland* (1990) para. 7.2.
[465] *Stephens v Jamaica*, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995) para. 9.7.

his lawyer with the perfect opportunity to personally attend the hearings,[466] and argue his case.[467] If determined that the detention is arbitrary, the judge orders the detainee's immediate and unconditional release.[468] Habeas corpus rulings are generally not subject to appeal.[469] If for any reason a state party's domestic law makes provisions for appeal or further instances, the process must be fast and expeditious as well.[470]

3.7.2 ACHPR

Although not expressly provided for in the ACHPR, the jurisprudence of the African Court in the *African Commission on Human and Peoples' Rights v Libya*[471] and the African Commission in *Purohit v The Gambia*[472] makes it clear that all detainees, including persons facing deportation, have the right to challenge the legality of their detention by way of habeas corpus.[473] As a result, this procedural remedy must be readily available at all times and must not be subject to restriction or derogation, even during periods of exceptional circumstances such as state of emergency.[474] Habeas corpus goes further than protecting against arbitrary detention, to prevent and uncover other human rights violations common with deprivation of personal liberty such as torture, enforced disappearance and incommunicado detention.[475] In *African Commission on Human and Peoples' Rights v Libya,* the African Court stated that

> incommunicado detention constitutes in itself a gross violation of human rights that can lead to other violations such as torture, ill-treatment interrogation without appropriate due process safeguards. On this score, the Human Rights Committee notes that "arrest and detention incommunicado for seven days and the restrictions

[466] *Dieter Wolf v Panama*, Communication No. 289/1988, U.N. Doc. CCPR/C/44/D/289/1988 at 80 (1992) para. 6.6.
[467] *Kampanis v Greece,* European Court of Human Rights, Application No. 17977/91, Judgment of 13 July 1995, para. 58.
[468] *Isidora Barroso v Panama*, Communication No. 473/1991, U.N. Doc. CCPR/C/54/D/473/1991 (1995) paras. 2.4 and 8.2.
[469] HRC: General Comment No. 35 (2014) para. 48.
[470] *J S v New Zealand*, Admissibility, UN Doc CCPR/C/104/D/1752/2008, IHRL 1952 (UNHRC 2012), 26th March 2012, paras. 6.3 and 6.4.
[471] *African Commission on Human and Peoples' Rights v Libya* (2013) para. 68 and 69.
[472] *Purohit and Anor. v Gambia* (Communication No. 241/2001) ACHPR 49; (29 May 2003) para. 72.
[473] *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (1992) paras. 30 and 31.
[474] *Article 19 v Eritrea* (2007) paras. 87 and 99. For more, see *African Commission on Human and Peoples' Rights v Libya* (2013) para. 76.
[475] *African Commission on Human and Peoples' Rights v Libya* (2013) para. 77. Principle M (5) (e) of the Principles on the Right to Fair Trial in Africa.

> on the exercise of the right of habeas corpus constitute violations of Article 9 of the Covenant as a whole".[476]

The African Court held that detaining the victim incommunicado without the possibility to challenge the legality of his detention, constitutes 'a violation of his right to liberty and to the security of his person as set forth under Article 6 of the Charter'.[477]

The detainee or his agent initiates a habeas corpus process rather than waiting indefinitely for the authorities to make a decision on when, and under what conditions, to release the detainee.[478] This is important as the detainee may be subjected to detention incommunicado and as a result, it may be difficult for him to commence the process.[479] Furthermore, it is also important and vital in the absence of charges against the detainee, such as in cases of unacknowledged detentions.[480] A habeas corpus petition is filed ex-parte before an independent, impartial and objective court supported by an affidavit stating reasons as to why the detention is arbitrary. The court examines the case on its merits and if convinced that the arrest or detention is arbitrary, it orders the detainee's release. It is important to note that only a competent court is authorised to review the legality of detention.[481] Therefore, mayors, police officers, state administrators and even prosecutors are not competent for this task.[482] Furthermore, habeas corpus also warrants detention to be open to constant periodic review by a court of competent jurisdiction to determine whether the initial reasons and grounds for the detention remain valid.[483]

3.7.3 IACHR

Like the ICCPR, the IACHR has also expressly stated that persons arrested and detained in arbitrary circumstances have the right to seize the competent court to secure their

[476] *African Commission on Human and Peoples' Rights v Libya* (2013) para. 84.
[477] *African Commission on Human and Peoples' Rights v Libya* (2013) para. 85.
[478] *Article 19 v Eritrea* (2007) para. 69.
[479] *Article 19 v Eritrea* (2007) para. 72.
[480] *Article 19 v Eritrea* (2007) para. 72.
[481] *Liesbert Zegveld and Mussie Ephraim v Eritrea* (2002) para. 56.
[482] *Constitutional Rights Project v Nigeria* (1991) paras. 12 and 13.
[483] *Liesbert Zegveld and Mussie Ephraim v Eritrea* (2002) para. 56.

release.[484] The applicant or his or her agents must state reasons for arbitrariness, and the trial judge determines the matter on its merits and if appropriate orders the detainee's release.[485] The IACrtHR has made it clear that only a judge or court is competent to rule on habeas corpus petitions,[486]and must also be capable of ordering and securing the victim's release, if it is determined that the detention is arbitrary.[487]

Because of its immense importance in protecting against arbitrary detention, habeas corpus must be readily available in theory and practice[488] at all times,[489] even in times of public emergency.[490] As a result, it must not be subject to derogation or arbitrary laws designed to deprive persons of their liberty in arbitrary fashion. In *Espinoza Gonzáles v Peru,* the complainant's right to habeas corpus was restricted by virtue of Decree Law No. 25,659 of August 7, 1992, which made it categorically clear that 'applications for habeas corpus were inadmissible for detainees accused of, or being prosecuted for, the crime of terrorism established in Decree Law No. 25,475'.[491] The IACrtHR held that Peru violated articles 7(6), 1(1) and 1(2) of the IACHR as the arbitrary law enforced throughout the complainant's detention made it practically impossible for her to challenge the competent courts to secure her release.[492] Similarly, in *Castillo Petruzzi et al. v Peru,* the IACrtHR found a violation of articles 7(6) and 25 of the ACHR as enforcement of the domestic law regulating state of emergency in Peru practically denied the victims of the possibility to seize the courts by way of habeas corpus to secure their release.[493] The IACrtHR held as follows:

> Of the essential judicial guarantees not subject to derogation or suspension, habeas corpus is the proper remedy in "ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts

[484]Article 7 (6) of the IACHR.
[485] Article 7 (6) of the IACHR.
[486] *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (2007) para. 128.
[487] *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (2007) para. 128.
[488] *Espinoza Gonzáles v Peru* (2014) 135.
[489] *Acosta Calderón v Ecuador* (2005) para. 97.
[490] *Suárez Rosero v Ecuador* (1997) para.63.
[491] *Espinoza Gonzáles v Peru* (2014) 136.
[492] *Espinoza Gonzáles v Peru* (2014) 136.
[493] *Castillo Petruzzi et al. v Peru*, Inter-American Court of Human Rights (IACrtHR), Judgment of May 30, 1999, at para. 188.

> secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment".[494]

It is important to point out that the guarantee in Article 7(6) must be efficient as it was adopted specifically to decide without delay 'on the lawfulness of arrest or detention,' and to secure the victim's release if the detention is arbitrary. In *Suárez Rosero v Ecuador,* the IACrtHR invoked its Advisory Opinion on Habeas Corpus in Emergency Situations, where it held that

> in order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him (emphasis added). Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhuman or degrading punishment or treatment. ... [495]

The IACrtHR determined arbitrariness in Mr. Suárez Rosero's case because the President of the Supreme Court had disposed of his writ of habeas corpus more than 14 months after it was filed. This practically deprived him of 'access to simple, prompt and effective recourse', contrary to articles 7(6) and 25 of the ACHR.[496]

3.7.4 ECHR

With regard to Article 5(4), the ECtHR has stated in *A and Others v The United Kingdom* that detainees have the right to challenge the lawfulness of their detention before a court of competent jurisdiction in line with domestic, international law requirements as well as the text of the Convention.[497] A court within the meaning of Article 5(4) is a legal authority vested with the power to exercise proceedings and provide fundamental safeguards against arbitrary detention for persons deprived of

[494] *Castillo Petruzzi et al. v Peru* (1999) para. 187.
[495] *Suárez Rosero v Ecuador* (1997) para.63.
[496] *Suárez Rosero v Ecuador* (1997) para.64-66.
[497] *A and Others v United Kingdom*, Application No. 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009, para. 202.

liberty.[498] The court must be independent, impartial[499] and must be capable of securing the detainee's release if proved that the detention is arbitrary.[500] Habeas corpus is applicable to all forms of deprivation of liberty and is initiated by detainees or their agents.[501] It is conducted in adversarial fashion and requires an oral hearing.[502] This is important as it presents the perfect opportunity for the detainee[503] and the authority that ordered or effected the arrest and detention to present themselves in court and argue their case.[504]

Habeas corpus proceedings must be expeditious. This implies that the judge must decide and rule speedily on the legality of detention. In *Bezicheri v Italy*, the ECtHR held that a five and a half months interval period from the time the applicant lodged his habeas corpus application until the time that it was dismissed did not comply with the expeditious or speedy requirement.[505] The state party's defence of case backlogs and excessive workload was irrelevant as the ECHR reiterated that the courts must programme their activities to ensure that habeas corpus guarantees are available to detainees at all times.[506] Article 5(4) of the ECHR also requires that detention must be subject to constant periodic review to eliminate or greatly minimise the risk of arbitrariness. In *Assenov, Ivanova, Ivanov v Bulgaria*, the ECtHR held that Bulgaria violated Article 5(4) of the ECHR, as authorities remanded the victims for two years without the possibility to take proceedings before the competent courts at regular intervals to secure their release.[507]

3.8 Right to compensation for arbitrary detention

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[498] *Weeks v United Kingdom,* Merits, App No. 9787/82, A/114, [1987] ECHR 3, (1988) 10 EHRR 293, IHRL 68 (ECHR 1987), 2 nd March 1987, European Court of Human Rights, para. 61.

[499] *Stephens v Malta* (2009) *Stephens v Malta*, European Court of Human Rights, Application No. 11956/07, Judgement of 21 April 2009, para. 95.

[500] *Singh v the United Kingdom,* European Court of Human Rights, Application No. 56/1994/503/585, Judgement of 21 February 1996, para. 70.

[501] *Khlaifia and Others v Italy,* European Court of Human Rights, Application No.16483/12, Judgement of 15 December 2016, para. 128.

[502] *Derungs v Switzerland*, European Court of Human Rights, Application No. 52089/09, Judgement of European Court of Human Rights, 10 May 2016, paras. 72 and 75.

[503] *Derungs v Switzerland* (2016) paras. 72 and 75.

[504] *Kampanis v Greece* (1995) para. 58.

[505] *Bezicheri v Italy* (1989) para. 22-26.

[506] *Bezicheri v Italy* (1989) para. 25.

[507] *Assenov and Others v Bulgaria* (1998) para.162.

International and regional human rights instruments require that all victims of arbitrary arrest or detention must be entitled to an enforceable right to an effective remedy and reparation, including compensation. For this right to be effective, states are under obligation to put in place a legal framework to compensate victims of arbitrary arrest or detention. This right is guaranteed in treaties and a wide range of standards such as articles 9(5) of the ICCPR, 63(1) of the IACHR, 5(5) of the ECHR, 7(1)(a) of the ACHPR and section M(1)(h) of the Principles on the Right to Fair Trial in Africa.

3.8.1 ICCPR

Article 9(5) of the ICCPR guarantees compensation to all persons deprived of liberty in violation of the provisions of articles 9(1-4). Compensation for human rights violations, including arbitrary detention, is a right and not a privilege, grace, discretion or the goodwill of the state.[508] As a result, state parties are expected to provide remedy to victims of arbitrary detention by granting them financial compensation and prevent recurrence of the prohibited conduct.[509] The HRC in its General Comment No. 32 stated:

> Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes 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.[510]

[508] HRC: General Comment No. 35 (2014) para. 50.

[509] *Beresford Whyte v Jamaica,* Communication No. 732/1997; U.N. Doc. CCPR/C/63/D/732/1997, para. 7.4.

[510] UN Human Rights Committee (HRC), *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13. para. 16.

In *Bolanos v Ecuador,* the HRC held that the author was entitled to compensation[511] as he was deprived of his liberty on murder charges before indictment for five years contrary to the 60 days maximum pre-trial detention period provided under Ecuadorian law.[512] As a result, the HRC found violations of articles 9(1), 9(3), 14(1) and 3(c) of the Covenant.[513] The HRC has called on state parties to set up the necessary structures to compensate victims of arbitrary detention.[514] Applications for compensatory damages can be commenced by victims or their agents against the wrongdoer.[515] The state has every obligation to ensure availability, in theory and practice, of the compensatory damages, and to ensure that they are payable within a reasonable period.[516]

3.8.2 ACHPR

Although not expressly provided for in the Charter, the jurisprudence of the African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* stated that Article 7(1) (a) of the ACHPR must be interpreted to include right to compensation for arbitrary detention.[517] In *African Commission on Human and Peoples' Rights v Libya*, the African Court stated that, if it is determined that human rights have been violated, including arbitrary arrest or detention, domestic courts shall ensure that the victim(s) receive appropriate compensation or reparation.[518] Compensation for arbitrary detention must be readily available, sufficient, appropriate and proportionate to the damage caused by the unlawful or arbitrary detention. Compensatory damages for arbitrary detention is awarded depending on the case at hand, taking into consideration

[511] *Floresmilo Bolanos v Ecuador* (1987) para 10.
[512] *Floresmilo Bolanos v Ecuador* (1987) paras. 2.1 and 9.
[513] *Floresmilo Bolanos v Ecuador* (1987) para. 9.
[514] HRC: General Comment No. 35 (2014) para. 50.
[515] *Marcel Mulezi v Democratic Republic of the Congo*, Communication No. 962/2001, U.N. Doc. CCPR/C/81/D/962/2001 (2004) para. 5.2.
[516] *Corinna Horvath v Australia*, Communication No. 1885/2009, U.N. Doc. CCPR/C/110/D/1885/2009 (2014) para. 8.7.
[517] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2002/6) para. 213.
[518] *Benedicto Daniel Mallya v United Republic of Tanzania*, Application No. 018/2015, Judgment (Mertts) of 26 September 2019, para. 68.

the rights violated and the surrounding circumstances of the case, ranging from administrative and judicial measures to financial compensation.[519]

Despite the guarantee for adequate compensation for arbitrary detention, the Commission seems to be uncertain on the right approach to follow. For example, in *Kalenga v Zambia*, the Commission discontinued proceedings for arbitrary detention based on information from the state party suggesting that the matter had been settled amicably without contacting the complainant. It also did not take into consideration the length or consequences of the detention or the award of compensatory damages to the complainant.[520] Furthermore, in *Embga Mekongo Louis v Cameroon*, the victim claimed damages in the sum of 105 million US Dollars for arbitrary detention.[521] The Commission held that Cameroon had violated articles 6 and 7 of the Charter and therefore the complainant was entitled to compensation. Notably, the Commission stated that it was 'unable to determine the amount of damages' and thus recommended that 'the quantum should be determined under the law of Cameroon'.[522] Similarly, in *African Commission on Human and Peoples' Rights v Libya*, the African Court held that the victim was subjected to arbitrary incommunicado detention for over two years without the possibility to seize the appropriate courts to vindicate his legal rights.[523] Conspicuously, the Court did not award the victim remedy in the form of reparation or compensatory damages.

However, from at least the year 2003 onward, the Commission seems to have been more consistent in awarding compensatory damages to victims of arbitrary detention. For example, concerning administrative and other judicial measures for reparation for arbitrary detention in *Mebara v Cameroon*, the Commission called on the state party to

[519] *Good v Republic of Botswana* (Communication No. 313/05) [2010] ACHPR 106; (26 May 2010) para. 244.
[520] *Henry Kalenga v Zambia*, African Commission on Human and Peoples' Rights, Comm. No. 11/88 (1994). For more, see Manisuli Ssenyonjo 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018) (2018) 7 *International Human Rights Law Review* 1- 42, p. 38.
[521] *Embga Mekongo Louis v Cameroon* (Communication No. 59/91) [1991] ACHPR 7; (1 January 1991) para. 1.
[522] *Embga Mekongo Louis v Cameroon* (2000) para. 2.
[523] *African Commission on Human and Peoples' Rights v Libya* (2013) para. 96.

release the victim,[524] sanction the perpetrators and prevent a recurrence of the prohibited conduct.[525] With regard to financial compensation, the Commission awarded the complainant 400,000,000 CFA francs as compensation for the material and non-material damages resulting from the arbitrary detention.[526]

3.8.3 IACHR

Remedy for arbitrary detention under Article 63(1) of the IACHR suggests two forms of satisfaction, either reparation or compensation. Victims receive compensation for arbitrary detention in the form of pecuniary damages compensating for the loss or harm caused to the victim's income, expenses and any other consequences resulting from the detention.[527] In *Argüelles et al. v Argentina,* the IACrtHR did not award pecuniary damages due to lack of evidence that the monetary compensation had a direct and reasonable causal link with the states' violations.[528] The court can also award non-pecuniary damages for arbitrary detention. For example, in the same case the IACrtHR awarded each of the victims non-pecuniary damages in the sum of $3,000.00. Although the victims failed to establish the exact nature of their violated rights, the IACrtHR stated that the compensatory award was intended to compensate for the arbitrariness of their detention.[529]

The IACrtHR has also made it clear that compensation for arbitrary detention must be effective and readily available to victims and their next of kins. Thus, the courts must set precise time limits for the payment of compensatory damages, publish the summary of the judgment in the official gazette,[530] indicate compliance with the ruling[531] and the reimbursement of the victims' legal assistance fund if applicable.[532]The right to compensation and reparation for arbitrary detention also implies that states have the

[524] *Jean-Marie Atangana Mebara v Cameroon* (2012) para. 145 (i).
[525] *Jean-Marie Atangana Mebara v Cameroon* (2012) paras. 137 and 145 (ii).
[526] *Jean-Marie Atangana Mebara v Cameroon* (2012) paras. 132 and 145 (iii).
[527] *Bámaca Velásquez v Guatemala* (2002) para. 43.
[528] *Argüelles et al. v Argentina* (2014) para. 288.
[529] *Argüelles et al. v Argentina* (2014) para. 288.
[530] *Argüelles et al. v Argentina* (2014) para. 254.
[531] *Argüelles et al. v Argentina* (2014) para. 14.
[532] *Argüelles et al. v Argentina* (2014) para. 302.

duty to promptly investigate arbitrary detention cases without favouritism, and establish the corresponding administrative, disciplinary or criminal measures to prosecute and punish perpetrators.[533]

3.8.4 ECHR

With regard to compensation for arbitrary detention, the ECtHR has stated that Article 5(5) of the ECHR

> is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 and 4. It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 § 5, ... the status of 'victim' may exist even where there is no damage, but there can be no question of 'compensation' where there is no pecuniary or non-pecuniary damage to compensate.[534]

Therefore, for an action for compensation to be enforceable, the victim must establish that he suffered moral harm or some sort of material loss resulting from a breach of articles 5(1-4)[535] before a court or any other competent domestic authority.[536] Compensation for arbitrary detention must not only exist in theory. It must be readily, practically available and accessible to the victim or his agents[537] and reflect the seriousness of the damage caused by the arbitrary detention.[538] It is important to note that, in determining the amount for compensatory damages, the court has to take into consideration its own practice under Article 41 of the Convention, and rulings in cases of a similar magnitude in the state concern 'as well as to the factual elements of the case, such as the duration of the applicant's detention'.[539] It is immaterial whether domestic courts award compensatory damages lower than that which the ECtHR would

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[533] *J v Peru*, Inter-American Court of Human Rights, Judgment of 27 November 2013 (Preliminary objection, merits, reparations and costs) para. 389.
[534] *Wassink v The Netherlands,* European Court of Human Rights, Application No. 12535/86, Judgement of 27 September 1990, para. 38.
[535] *Wassink v The Netherlands,* European Court of Human Rights, Application No. 12535/86, Judgement of 27 September 1990, para. 38.
[536] *Vachev v Bulgaria* (2004) para. 78.
[537] *Abashev v Russia*, European Court of Human Rights, Application No. 9096/09, Judgement of 27 June 2013, para. 39.
[538] *Vasilevskiy and Bogdanov v Russia,* European Court of Human Rights, Application Nos. 52241/14 and 74222/14, Judgement of 10 July 2018, para. 22.
[539] *Vasilevskiy and Bogdanov v Russia* (2018) para. 23.

have awarded.[540] However, compensatory damages that do not reflect the seriousness of the damage caused by the arbitrary detention violate Article 5(5) of the Convention.[541]

Apart from compensatory damages, victims of arbitrary detention can also receive redress in the form of just satisfaction.[542] In *Aliyev v Azerbaijan,* the ECtHR stated that, in case of rights violation guaranteed in the ECHR, and if the domestic law of the state concerned allows only partial reparation, the Court shall, if necessary, award the victim just satisfaction.[543] The need for just satisfaction arises where deprivation of personal liberty may be in consonance with domestic law but unlawful under Article 5 of the ECHR, and thus victims may not be entitled to compensation.[544] Therefore, 'just satisfaction' makes up for 'pecuniary or non-pecuniary damage, such as mental or physical suffering, as well as for legal costs and expenses'[545] incurred by the detainee as a result of the arbitrary detention.

3.8.5 Conclusion

Chapter three has provided a detailed analysis of international (UDHR and ICCPR) and regional human rights treaties (ACHPR, IACHR and ECHR), and their supervisory mechanisms (HRC, African Commission, African Court, IACrtHR and ECtHR) that regulate states' power to cause arrests and detentions, and of the measures put in place to protect against arbitrariness. The chapter authoritatively points out that respect for international and regional human rights treaties that protect against arbitrariness is a function of the rule of law as compliance at the domestic level is an indispensable condition to protect against prohibited conduct. Thus, states are under obligation to put in place measures to prevent arbitrary detention, hold perpetrators accountable and thus

[540] *Mehmet Hasan Altan v Turkey*, European Court of Human Rights, Application No. 13237/17, Judgement of 20 March 2018, para. 176.
[541] *Vasilevskiy and Bogdanov v Russia* (2018) paras. 22 and 26.
[542] Article 41 of the ECHR.
[543] *Aliyev v Azerbaijan*, European Court of Human Rights, Application No. 68762/14 and 71200/14, Judgement of 20 September 2018, para. 229.
[544] *Aliyev v Azerbaijan* (2018) para. 232.
[545] *Berdzenishvili and Others v Russia* (2019) 26.

put a stop to impunity, as the prohibited conduct has attained customary international law status.

This has been attained by the monitoring mechanisms of international and regional human rights treaties that entertain cases of human rights violations including arbitrary detention and rule to that effect. Consequently, sufficient jurisprudence exists that has clarified the substance of arbitrary detention, meaning of arbitrariness, and modus operandi of international and regional human rights treaties that protect against arbitrariness and award compensation to victims. Although the measures put in place by the ICCPR, ACHPR, African Court, IACHR and ECHR to protect against arbitrariness are similar, the ECHR has stepped up to specify situations where arrest or detention is arbitrary, thus minimising the risk thereof.

However, some provisions seem to be inadequate to guarantee protection against arbitrary detention. For example, the 'previously laid down by law' requirement contained in Article 6 of the ACHPR has put to the test the effectiveness of the 'principle of legality' and 'non-arbitrariness' as some states have made use of the provision to the detriment of suspects and accused persons. Furthermore, the ICCPR and continental human rights treaties seem to focus more on petitioning state parties to ensure the existence of procedural safeguards against arbitrary detention, rather than compelling states to refrain from the prohibited conduct and hold perpetrators accountable, and so putting a stop to impunity. Therefore, some provisions in international human rights treaties that protect against arbitrary detention need to be reshaped and made more enforceable to ensure greater compliance. The next chapter examines the measures put in place to protect against arbitrary detention in Cameroon.

CHAPTER FOUR

SAFEGUARDS AGAINST ARBITRARY DETENTION IN CAMEROON

4.1 Introduction

The essence of the criminal justice system is to regulate societal behaviour by ensuring strict observance of the rule of law. Positive behaviour demands positive rewards while negative or deviant behaviour demands negative sanctions. Negative sanctions result in fines, warnings, community labour, arrest, detention, and in some cases death. Although the state has the legitimate right to cause the arrest and detention of persons in conflict with the law, the law also makes it clear that state agents authorised to effect arrest and detention must respect the rights of arrested persons. Therefore, arrest or detention must be lawful, effected according to domestic and international law standards, and must be non-arbitrary.

As mentioned earlier, Cameroon is a party to the ACHPR. It has also acceded to the ICCPR, First Optional Protocol to the ICCPR and a number of international treaties that prohibit arbitrary detention. In line with its international commitment to protect against arbitrary detention, it has adopted pieces of legislation that prohibit and criminalise the practice. For example, the Constitution, Penal Code (PC), Judicial Organisation Ordinance (JOO) and the Criminal Procedure Code of 2005 (CPC)[546] have provisions that adequately protect against arbitrary detention. The CPC is important as it harmonises the criminal justice process in Cameroon's bi-jurial Common and Civil law traditions.[547] It also spells out conditions and procedures for arrest or detention, and

[546] Law No. 2005/007 of 27 July 2005 on the Criminal Procedure Code of Cameroon (CPC). The CPC entered into force on 01/01/2007 in accordance with Law No. 2006/008 of 14 July 2006 to amend and supplement the provisions of Section 747 of Law No. 2005/007 of 27 July 2005 on the Criminal Procedure Code. The Criminal Procedure Code is one of the most important pieces of legislation that deals with arrest and detention in Cameroon. It outlines the ways in which law enforcement officers can legally restrict personal liberty, and lays out the process and sets timelines for arrest and detention. Failure to comply with the process invalidates the arrest and detention and renders it arbitrary. Moreover, the code makes it possible for detainees to be released on bail at each stage of the criminal justice system, subject to guarantees, and to appear before the competent authorities when so required.

[547] Cameroon has a hybrid or mixed legal system, formed by merging a number of distinct legal traditions, for example, the common law and civil law systems inherited from colonial Britain and France, respectively, a customary law system inherited from indigenous African customary laws and practices and international law by virtue of the ratification of international and regional human rights treaties.

regulates the power of police officers, prosecutors and judges with regard to arrest, detention, criminal investigations, adjudication and imprisonment.

Regrettably, the CPC seems to be a shadow of itself as human rights violations continue in Cameroon with near impunity. Police and gendarmerie officers, military personnel, administrative authorities, prosecutors and even judges abuse the powers vested in them by subjecting persons to prolonged pre-trial and arbitrary detention. The criminal justice system seems to be at loggerheads with the poor indigenes, suspected terrorists, suspected separatists, journalists, political opponents and critics of the regime in power as they are often targets of arbitrary arrest and detention. Moreover, counsel avoid representing some detainees for fear of state reprisal, while unqualified or poorly qualified counsel represent others, as they cannot afford to pay for quality legal services. State authorities often deprive arrested persons of their substantive and procedural pre-trial rights and sometimes they are held in pre-trial detention for months and even years without the possibility of challenging the legality of their detention before the competent courts.

This chapter makes two arguments. First, insufficient implementation of the legal framework put in place to protect against arbitrary detention, and the imperfect and discriminatory nature of the criminal justice system are to blame for failure to address the predicament of suspects and accused persons in their constant conflict with the law and the criminal justice system. Secondly, Cameroon has failed to comply with its domestic and international obligations to protect against arbitrary detention.

The first section examines the daily practice and prevalence of arbitrary detention in the context of the country's political history from independence to present date. This section is particularly important as it exposes the complicated and malicious nature of the country's political history. It cites bad faith, constitutional manipulation and the adoption of egregious pieces of legislation by the Francophone-dominated Parliament meant to exclude, discriminate against, and marginalise the Anglophone minority in the country. These vices have led to opposition and rebellion, paving the way for excessive military crackdown on demonstrators. This has created a situation conducive to gross human rights violations including torture, enforced disappearances, arbitrary arrests, detentions and, at times, summary executions. The second section examines the substantive and procedural provisions of the Constitution, Penal Code, CPC, JOO and

other domestic pieces of legislation, international treaties ratified by Cameroon and their role in protecting against arbitrary detention.

4.2 Prevalence of arbitrary detention in Cameroon

4.2.1 Independence to the advent of multi-party politics

France and Britain partitioned the former German colony Kamerun into two parts and renamed them the Republic of Cameroon (the part occupied by France) and Southern Cameroon (the part occupied by Britain).[548] On 11 February 1961, Southern Cameroon, in a plebiscite organised under the auspices of the UN voted to join the Republic of Cameroon, and the two entities became the Federal Republic of Cameroon. Each entity was entitled to elect its prime minister,[549] adopt and implement its educational and legal systems,[550] thereby preserving its state-hood and sovereignty.[551] Regrettably, the federal state system was dissolved on 20 May 1972. As a result, the former British Southern Cameroons lost its autonomy and became part of the Republic of Cameroon.[552] Veteran Anglophone politician and lawyer, advocate Gorji Dinka in a 20 March 1985 memorandum demanded a restoration of the statehood of the former British Southern Cameroon.[553] To deal with the situation, the regime in power resorted

[548] *Fongum Gorji-Dinka v Cameroon*, Communication No. 1134/2002, U.N. Doc. CCPR/C/83/D/1134/2002 (2005) para. 2.2.

[549] *Fongum Gorji-Dinka v Cameroon* (2005) para. 2.3.

[550] Human Rights Watch 'These killings can be stopped: Abuses by Government and Separatist Groups in Cameroon's Anglophone Regions' (2018) 13 available at *https://www.hrw.org/report/2018/07/19/these-killings-can-be-stopped/abuses-government-and-separatist-groups-cameroons* (accessed 7 April 2020).

[551] *Fongum Gorji-Dinka v Cameroon* (2005) para. 2.3.

[552] *Fongum Gorji-Dinka v Cameroon* (2005) para. 2.3.

[553] Gorji Dinka 'The New Social Order' (1985) 8-9 available at *http://www.agcfreeambazonia.org/pdf/others/The_New_Social_Order.pdf* (accessed 7 April 2020). The HRC noted that the 'New Social Order' paved the way for Gorji Dinka's arbitrary arrest and detention. It continued that 'Mr Dinka's rights violations were strongly connected with his political activism in Anglophone Cameroon. Specifically, Mr Dinka is credited with founding the separatist entity Ambazonia, in opposition to President Paul Biya's symbolic changes to the official name and flag of Cameroon, seen as a call-back to the pre-unification République'. *Fongum Gorji-Dinka v Cameroon* Communication No 1134/2002, UN Doc CCPR/C/83/D/1134/2002 (2005). For more, see Willis R, McAulay J, Ndeunyem N & Angove J 'Human Rights Abuses in the Cameroon Anglophone Crisis' (2019) 16 available at *https://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2019/11/Cameroon-Anglophone-Crisis-Report-online.pdf* (accessed 12 April 2021).

to an intimidation policy that led to indiscriminate and prolonged arbitrary arrest and detention of citizens of the former British Southern Cameroons.[554]

Demands for greater representation and the advent of multi-party politics in the continent led to the promulgation of Law No. 90/56 of 19 December 1990. This law paved the way for multi-party politics and first presidential elections in 1992 in Cameroon, rigged in favour of the incumbent President Paul Biya. Its aftermath led to nationwide demonstrations and the declaration of a state of emergency in the North West Region of the country. The conduct of the state of emergency was horrifying as the military resorted to random and indiscriminate arbitrary arrest and detention.[555] Ever since, government policy towards opposition party leaders and their militants has been one of intimidation, molestation, harassment, arbitrary arrest, detention and torture.[556] Further crackdown against Cameroonians and opposition party leaders was evident in 2008 as citizens protested nationwide against considerable increase in fuel prices, other basic commodities and the announcement of a possible Constitutional amendment aimed at abolishing presidential term limits. As usual, the military responded by way of indiscriminate arbitrary arrest and the prolonged detention of more than 1,600 peaceful demonstrators; there were more than 140 deaths.[557]

4.2.2 Advent of the Anglophone crisis

The close of 2015 and beginning of 2016 proved to be the most precarious period in the history of Cameroon as Anglophone lawyers and teachers held meetings geared at identifying solutions pertaining to the marginalisation of the Anglo-Saxon educational

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[554] Willis R, McAulay J, Ndeunyem N & Angove J (2019) 17. For more, see Centre for Human Rights and Democracy in Africa, 'Cameroon Prisoners' Rights in Flames' (2018) *https://www.chrda.org/cameroon-prisoners-rights-in-flames/* (accessed 8 March 2021). Immigration and Refugee Board of Canada 'Cameroon: Situation of Anglophones, including returnees, in Bamenda, Yaoundé and Douala; treatment by society and by the authorities' (2016-August 2018) [CMR106141.E] available at *https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=457577&pls=1* (accessed 9August 2020).

[555] *Nyo Wakai and 172 Ors v The State of Cameroon* (1992). Post presidential election violence in Cameroon led to random and indiscriminate arrest and detention of thousands of persons nationwide.

[556] United States Bureau of Citizenship and Immigration Services 'Cameroon: Information on Ambazonia, Cameroon Democratic Party, Social Democratic Front (SDF), and Anti-Gang Brigade (2002) available at: *https://www.refworld.org/docid/3f51e5a92.html* (accessed 10 April 2019).

[557] Human Rights Watch 'These killings can be stopped: Abuses by Government and Separatist Groups in Cameroon's Anglophone Regions' (2018) 14 available at *https://www.hrw.org/report/2018/07/19/these-killings-can-be-stopped/abuses-government-and-separatist-groups-cameroons* (accessed 7 April 2020).

and legal system in the country. Peaceful protest marches organised by teachers, lawyers and other Anglophone civil society stakeholders in the major Anglophone cities and towns between October and December 2016 were confronted with extreme brutality as elements of the military arbitrarily arrested and detained hundreds of persons.[558] In early 2017, attempts to solve the Anglophone crisis met a dead end as the Cameroon Anglophone Civil Society Consortium (Consortium)[559] and government representatives could not arrive at a consensus. The government maliciously and in bad faith banned the Consortium, and, in arbitrary fashion, arrested and detained four of its leaders.[560] Although a presidential decree eventually released three of them, after immense pressure from international and local stakeholders, on 30 August 2017 the Yaoundé military tribunal sentenced the fourth to a fifteen- year imprisonment term on trumped-up terrorism related charges.[561] Random arrests and detention continued in the Anglophone regions as in early January, late September and mid-October 2017 state security agents indiscriminately arrested more than 500 persons in various cities, towns and villages in the Anglophone Region of Cameroon.[562] Worth mentioning, is the 13 December 2017 invasion of Dadi village where armed soldiers in collaboration with elements of the Rapid Intervention Battalion (BIR) indiscriminately arrested hundreds of persons including women and children, and summarily executed those who attempted to escape.[563]

[558]The Law Society of England and Wales 'Trial Observation Report- Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé'(2017) para. 15 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021).

[559] The government's policy of crackdown, intimidation and indiscriminate arrest and detention of Anglophone leaders and other peaceful demonstrators led to the formation of the Cameroon Anglophone Civil Society Consortium (Consortium) to protect the interest of Anglophones in Cameroon.

[560] The Law Society of England and Wales 'Trial Observation Report- Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé' (2017) para. 20 and 22 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021). For more, see Lawyers Rights Watch Canada 'In the Matter of Mancho Bibixy Tse: Lawyers' Rights Watch Canada (LRWC) Reply to The Republic of Cameroon (2019) para.1 available at *https://www.lrwc.org/ws/wp-content/uploads/2019/02/WGAD.Mancho-Bibixy-Tse.LRWC-Reply-to-Cameroon.13.02.19.pdf* (accessed 1 April 2021).

[561] Amnesty International 'Cameroon: Release of Anglophone leaders a relief but others still languish in prison' (2017) available at *https://www.amnesty.nl/actueel/cameroon-release-of-anglophone-leaders-a-relief-but-others-still-languish-in-prison* (accessed 22 December 2019).

[562] Amnesty International 'Cameroon: Inmates packed like sardines' in overcrowded prisons following deadly Anglophone protests' (2017) 9, available at *https://www.amnesty.org/en/press-releases/2017/10/cameroon-inmates-packed-like-sardines-in-overcrowded-prisons-following-Anglophone-protests* (accessed 7 April 2020).

[563] Amnesty International 'Cameroon: Inmates packed like sardines' in overcrowded prisons following deadly Anglophone protests' (2017) 20 available at *https://www.amnesty.org/en/press-*

The government's policy of intimidation and indiscriminate arrest and detention of Anglophone leaders and other peaceful demonstrators led to the formation of the Southern Cameroons Ambazonia Consortium United Front (SCACUF). On 8 July 2017, SCACUF named Sisiku Julius Ayuk Tabe the interim President of the 'Federal Republic of Ambazonia', and on 1 October 2017, he declared the independence of the new republic.[564] The Cameroon government responded on 30 November 2017 by declaring war on the Federal Republic of Ambazonia and issued an arrest warrant for its leaders. State security agents, in collaboration with their Nigerian counterparts, on 5 January 2018, and in arbitrary circumstances, arrested Sisiku Ayuk Tabe and Tassang Wilfred, frontline Ambazonian separatist leaders, and eight members of their cabinet, and extradited them to Cameroon.[565] It is important to note that Cameroon and Nigeria have no extradition treaty and as a result, their arrest and detention in Nigeria and eventual deportation to Cameroon is a clear violation of the right to be free from arbitrary arrest and detention, and the international law principle of non-refoulement.[566]

Authorities subjected the Anglophone separatist leaders to detention incommunicado for more than ten months without charge,[567] and with no access to counsel;[568] they were not presented promptly before a judge or other officer[569] to exercise judicial control over their arrest and detention.[570] However, on 20 August 2019, the Yaoundé military tribunal sentenced the Anglophone separatist leaders to life imprisonment. It is important to note that the men were not in possession of arms nor were they military

releases/2017/10/cameroon-inmates-packed-like-sardines-in-overcrowded-prisons-following-Anglophone-protests (accessed 7 April 2020).

[564] Centre for Human Rights and Democracy in Africa **'**Cameroon's Unfolding Catastrophe: Evidence of Human Rights Violations and Crimes against Humanity' (2019) 9 available at *https://www.chrda.orgwww.chrda.org* (accessed 25 April 2020).

[565] Muma E C 'The Principle of Non-Refoulement and the Obligations of the United Nations in Ensuring the Accountability of States toward Refugee Protection: Lessons from Nigeria and Cameroon' (2018) 350-351, available at *http://rais.education/wp-content/uploads/2018/11/054EM.pdf* (accessed 20 March 2021).

[566] Muma E C (2018) 350-351.

[567] Sections 119 (a) and 122(1) (a) of the CPC of Cameroon.

[568] Sections 37 and 122(3) of the CPC of Cameroon.

[569] Sections 19 (1) (2b) (3) (4) of the CPC of Cameroon.

[570] Human Rights Watch 'These Killings Can Be Stopped: Abuses by Government and Separatist Groups in Cameroon's Anglophone Regions' (2018) available at *https://www.hrw.org/report/2018/07/19/these-killings-can-be-stopped/abuses-government-and-separatist-groups-cameroons* (accessed 23 March 2020). For more, see Muma E C (2018) 351.

personnel and had nothing to do with arms. As such, their arrest, detention and sentence is arbitrary and contrary to international treaty law mechanisms binding on Cameroon.[571] Ever since, conflict has raged between government forces and Ambazonian guerrillas, marred by human rights violations on both sides. Relying on the Counter-Terrorism law of 23 December 2014,[572] state security agents have arbitrarily arrested and detained opposition political party leaders and their militants,[573] including innocent frontline Anglophone leaders, hard-line separatists and thousands of others demanding equal civil and political rights, with no possibility of challenging their arrest and detention in the appropriate courts.[574]

4.3 Status of ratified international treaties and protection against arbitrary detention in Cameroon

Ratification of international human rights treaties that protect against arbitrary detention is an important measure to protect against the practice. Upon ratification, states are obliged to comply with their measures and account for any violations.[575] Cameroon is a party to most international and regional treaties that promote and protect human rights including freedom from arbitrary detention.[576] The recent widespread

[571] This is true as the HRC has stated that 'the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel'. (U.N. Doc. E/CN.4/2006/58 (2006) 4). Furthermore, the African Commission has also stated that 'trying civilians in military courts presided over by active service members still under military regulations violated the right to a fair trial'. *Law Office of Ghazi Suleiman v Sudan*, African Commission on Human and Peoples' Rights, Comm. Nos. 222/98 and 229/99 (2003) para. 64. The reasoning is that military tribunals are mainly composed of soldiers with little or no regard for human rights and fundamental freedoms including substantive and procedural safeguards that protect against arbitrariness.

[572] Law No 2014/028 of 23 December 2014. This law is arbitrary as it restricts rights guaranteed in the Cameroon Constitution and other international human rights law instruments. For example, it permits detention of suspects without charge for more than two weeks, renewable indefinitely, and its Article 2 defines terrorism outside of the context of what is provided for by international law thus making space for arbitrariness.

[573] Amnesty International 'Cameroon: Widespread Human Rights Violations' (2018) 8, available at *https://www.amnesty.org/download/Documents/AFR1777032017ENGLISH.pdf* (accessed 11 January 2019).

[574] Cameroon has resorted to prosecuting civilians in military courts despite international standards recommending otherwise. For example, the HRC and the ACHPR have repeatedly condemned the trial of civilians in military courts without exception, as they are designed and competent to entertain only military-related offences committed by military personnel. For more, see Human Rights Watch 'Cameroon: Separatist Leaders Appeal Conviction' (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 13 April 2021).

[575] Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

[576] Cameroon ratified the ICCPR and its first Optional Protocol (1984), Convention on the Elimination of all Forms of Discrimination against Women and its first Optional Protocol (in 1994 and 2004

ratification of international human rights treaties by Cameroon, and withdrawal of reservations on some treaties previously made by the state before 1994, are vital steps in the right direction to promote and protect human rights in the country.[577] The Constitution makes it clear that international treaties take precedence over domestic law. Article 45 provides that upon ratification and publication in the national gazette, international treaties shall override national laws. Commitment to international treaties that protect against arbitrary detention implies that Cameroon is under every obligation to prevent the practice and hold perpetrators accountable. Failure to prevent arbitrary arrest, detention and other human rights violations implies that victims can seize the monitoring organs of international and regional human rights treaties such as the HRC, the African Court and the African Commission to vindicate their legal rights.

Despite the fact that Cameroon has ratified many international treaties that protect against arbitrary arrest and detention including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), regrettably it is reluctant to ratify the First Optional Protocol of the UNCAT (OPCAT). This is unfortunate as the OPCAT obligates state parties to put in place a national preventive mechanism for regular visits by independent national and international observers to detention facilities, a move that can go a long way to protect against arbitrary detention, enforced disappearances,[578] torture and other forms of ill-treatment.[579] Similarly, Cameroon has signed the Rome Statute of the International Criminal Court (ICC)[580] which prohibits, inter alia, crimes against humanity[581] and war crimes,[582] but is reluctant

respectively), Convention on the Rights of the Child (1993), International Convention on the Elimination of all Forms of Racial Discrimination (1971), Convention against Torture on 19 December (1986). Moreover, Cameroon is a party to the UDHR and African Charter of Human and Peoples' Rights (1984).

[577] For example, on 3 March 1994, 'the Government of Cameroon, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, recognized as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes. 'This declaration shall remain in force for a period of five years. It shall then continue to have effect unless the Government of the Republic of Cameroon makes a statement to the contrary or submits a written amendment hereto.' For more, see United Nations, *Treaty Series,* vol. 1770 (1994) 27 and 28 available at *https://treaties.un.org/doc/Publication/UNTS/Volume%201770/v1770.pdf* (accessed 4 October 2020).

[578] Preamble to the First Optional Protocol to the Convention against Torture.

[579] Article 1 of the First Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[580] Cameroon signed the ICC on 17 July 1998.

[581] Article 7 of the ICC.

[582] Article 8 of the ICC.

to ratify it. Failure to ratify the ICC implies that Cameroon is not bound by the ICC's provisions and as a result the ICC cannot investigate or prosecute state agents for crimes against humanity and war crimes.[583] The present author submits that most probably, Cameroon is hesitant to ratify the ICC as its modus operandi makes use of gross human rights violations, including arbitrary arrest, detention and torture.

4.4 Protection against arbitrary detention in Cameroon

The preamble to the Constitution prohibits arbitrary detention in all parts of the country.[584] Despite this prohibition, neither the Constitution nor statutory laws have attributed substantive meaning to the prohibited conduct. However, section 236(2)(a) of the CPC is to the effect that arrest or detention is arbitrary under Cameroon's domestic law if it is carried out by elements of the judicial police force in disregard of sections 119 to 126 of the CPC. Section 236 (b) of the CPC also considers detention to be arbitrary if effected on the orders of the State Counsel or the examining magistrate in disrespect of sections 218 to 235, 258 and 262 of the CPC. In line with its international commitment, Cameroon has complied with articles 9(1) of the ICCPR and 6 of the ACHPR and ensured that arrest or detention are lawful and non-arbitrary (principles of 'legality' and 'non-arbitrariness'). The section highlights that insufficient legislation, bad faith and negative state practices play a leading role in undermining the effectiveness of the principles of 'legality' and 'non-arbitrariness', and their role in protecting against arbitrary detention.

4.4.1 Principles of 'legality' and 'non-arbitrariness'

The preamble to the Constitution provides that 'no person may be prosecuted, arrested or detained except in the cases and according to the manner determined by law' and 'every accused person is presumed innocent until found guilty during a hearing

[583] Most recently, the ICC has made it clear in its decisions on Sudan and Israel that it had jurisdiction to investigate crimes against humanity and war crimes by states that have not ratified the ICC Statute. Joseph Krauss 'Israel rejects ICC probe, saying it lacks jurisdiction' (2018) available at *https://apnews.com/article/israel-war-crimes-west-bank-courts-crime-a85e2c4b06b2b298961686f1fd7bfa52* (accessed 8 August 2021). For more, see Institute for Security Studies 'Sudan needs the ICC for more than its Darfur war crimes' (2021) available at *https://issafrica.org/iss-today/sudan-needs-the-icc-for-more-than-its-darfur-war-crimes* (accessed 8 August 2021).

[584] Preamble to the Cameroon Constitution of 18 January 1996.

conducted in strict compliance with the rights of defence'.[585] The principles of 'legality' and 'non-arbitrariness' contained in the preamble to the Constitution denote that all arrests or detention must have a legal basis, be non-arbitrary and effected in line with the preamble, provisions of the Penal Code, CPC and international and regional human rights treaties binding on Cameroon.[586] The existence of a legal basis (in isolation) is immaterial as arrest or detention must be predictable, reasonable and necessary (principle of necessity) in all the circumstances. Therefore, JPOs and gendarmerie officers can only effect arrest or detention in 'the cases and according to the manner determined by law'.[587]

To further comply with the principles of 'legality' and 'non-arbitrariness', arrest or detention in Cameroon can only be effected where a reasonable suspicion or probable cause[588] exists to indicate that a crime has been committed and liability points to a particular person or persons.[589] Even if there is strong suspicion that a person has committed a crime, arrest or detention may be arbitrary if it is not carried out in 'cases and according to the manner determined by law'. However, the arrested person must be presented promptly before a judge, in most cases, an examining magistrate to review the detention and determine whether or not continued detention is necessary. In the absence of sufficient evidence to justify continued detention, the detainee must be released immediately.

Despite the fact that the Constitution guarantees the principles of 'legality' and 'non-arbitrariness', elements of the police and gendarmerie forces have resorted to causing

[585] It is important to note that the preamble is part of the Constitution and has the force of compelling law. This implies that all rights guaranteed in the preamble are enforceable.
[586] With regard to the 'principle of non-arbitrariness', section 236 (2) (a) of the CPC makes it clear that arrest or detention is 'arbitrary' if effected by a judicial police officer in disrespect of the provisions of sections 119 to 126. The CPC also considers arrest or detention to be arbitrary under section 236 (1) (b) of the same code if effected by the State Counsel or the examining magistrate in disrespect of the provisions of sections 218 to 235, 258 and 262.
[587] Preamble to the Cameroon Constitution of 18 January 1996.
[588] Reasonable suspicion or probable cause surpasses more than just a feeling or contemplation, to justifiable suspicion based on specific facts, information or circumstances which will satisfy an objective observer that the suspect committed or took part in the offence. It is important to note that even a true or genuine suspicion of a Judicial Police Officer (JPO) is not necessarily sufficient to satisfy an objective and right thinking person that the suspicion is reasonable. Thus, a suspect fleeing the scene of a robbery with items from the robbery scene may satisfy the prerequisite for reasonable suspicion.
[589] *The People v Ngoa Jean Bienvenue and Tachoula Jean*, Judgment No 19/CIV/LI/TGI of 19 July 2002.

the arrest, and/or detention of persons in violation of these principles.[590]This is commonplace; recently state security agents indiscriminately arrested and detained hundreds of persons on the pretext that they were either sympathisers or members of the Anglophone separatist movement[591] or Boko Haram.[592] The victims include opposition political party leaders, human and civil rights activists and outspoken journalists critical of the regime in power.[593] In some cases, victims were arrested during the weekend, without the use of valid warrants,[594] were not informed of the reasons for arrest or nature of charges against them and deprived of the right to counsel.[595] Furthermore, they were subjected to torture and other forms of ill-treatment, not presented promptly before a judge or other officer, held for prolonged periods without trial and at times incommunicado, and with no possibility of challenging the legality of their arrest or detention before the competent courts by way of habeas corpus.[596] These arrests and detentions are in breach of the principles of 'legality' and

[590] For example, the U N Working Group on Arbitrary Detention reported that Amadou Vamoulké's provisional detention for more than four years has 'no legal basis', as it 'exceeds the maximum limit set by the law' (one year and eight months maximum) and because authorities have also failed to explain why his provisional detention is 'reasonable and necessary'. Reporters Without Borders (RSF), 'UN asks Cameroon to free Amadou Vamoulké' (2020) *https://rsf.org/en/news/un-asks-cameroon-free-amadou-vamoulke* (accessed 2 April 2021). For more, see U S Department of state 'Country Reports on Human Rights Practices: Cameroon' (2019) 9.

[591] Immigration and Refugee Board of Canada 'Cameroon: Situation of Anglophones, including returnees, in Bamenda, Yaoundé and Douala; treatment by society and by the authorities' (2016-August 2018) [CMR106141.E] available at *https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=457577&pls=1* (accessed 9August 2020).

[592] Amnesty International 'Cameroon's Secret Torture Chambers: Human Rights Violations and War Crimes in the Fight against Boko Haram' (2017) 18 available at *http://www.amnesty.org* (accessed 18 May 2018).

[593] The Law Society of England and Wales 'Trial Observation Report - Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé' (2017) para. 20 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021). For more, see Lawyers Rights Watch Canada 'In the Matter of Mancho Bibixy Tse: Lawyers' Rights Watch Canada (LRWC) Reply to The Republic of Cameroon (2019) para.38 and 39 available at *https://www.lrwc.org/ws/wp-content/uploads/2019/02/WGAD.Mancho-Bibixy-Tse.LRWC-Reply-to-Cameroon.13.02.19.pdf* (accessed 1 April 2021).

[594] It important to note that arrest may be effected without warrants in cases of *flagrante delicto*.

[595] Equinoxe TV 'The inside Paul Ayah Abine' (2017) available at *https://www.google.com/search?q=Equinoxe+TV+%E2%80%98The+inside+Paul+Ayah+Abine%E2%80%99+(2017)&oq* (accessed 4 October 2020). The former assistant Attorney General of the Supreme Court was arrested and detained for 223 days in violation of all the procedural safeguards put in place to protect against arbitrariness, and released by a military tribunal ruling that 'no evidence of crime existed against him'.

[596] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 9 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

'non-arbitrariness' guarantee in the preamble to the Constitution, as no legal basis exists for the excessive use of administrative powers on innocent civilians demanding equal civil and political rights.

The principles of 'legality' and 'non-arbitrariness' are backed by measures adopted to criminalise arbitrary detention and punish perpetrators with fines or imprisonment terms depending on the gravity of the offence. Penalties for arbitrary detention in Cameroon may take a form of legal, administrative or political sanctions. As a result, state agents alleged to perpetrate arbitrary detention are interrogated and prosecuted before courts of competent jurisdiction, and if found guilty, are punished in accordance with the relevant provisions of the Penal Code (P C). For example, section 291(1) of the Penal Code is to the effect that perpetrators of false arrest or arbitrary detention shall be punished with imprisonment of from five to ten years and a fine of from 20,000 to 1000,000 FCFA. Punishment for a repeat offence shall be imprisonment from 10 from 20 years,[597] if the detention lasted for more than a month[598] or accompanied by torture,[599] fraudulent means or by an impersonator.[600]

Despite the comprehensive legal framework, the principles of 'legality' and 'non-arbitrariness', are often violated as sometimes persons are arrested and detained in blatant disregard for these principles, and the courts are reluctant to punish perpetrators. Even when perpetrators are prosecuted and sentenced, sanctions fall short of the required standard provided under section 291(1) of the Penal Code. For example, in *The People v Wakou Bassai,* the Mokolo Court of First Instance found the defendant, *Wakou Bassai,* Commander of the Roua-Souleyde Gendarmerie guilty of arbitrary detention, sentenced him to 10 months' imprisonment and to pay a fine of FCFA 15,000.[601] Similarly, in *The People v Warrant Officer Njiki Adolphe,* the Douala Military Tribunal found the defendant guilty of arbitrary detention, and sentenced him to a two-year prison term suspended for three years and to pay a fine of FCFA

[597] Section 291(2) of the P C.
[598] Section 291(1) (a) of the P C.
[599] Section 291(1) (b) of the P C.
[600] Section 291(1) (c) of the P C.
[601] *The People v Wakou Bassai,* Judgment No.115/cor of 13 November 2006. For more, see CCPR/C/CMR/4, (2009) 38.

500,000.[602] In *The People v Senior Police Inspector Ambata Hermès René and Police Constable Ngoumba Jean Dejoli Major*, the court of first instance found the accused guilty of arbitrary arrest, detention, torture, assault and other offences and ordered each of them to pay a fine of 50,000 FCFA.[603]

The courts have also punished traditional rulers guilty of perpetrating arbitrary detention, and in some cases, sanctions reflect the provision of section 291(1) of the PC. It is important to note that traditional rulers in Cameroon are auxiliaries of the administration and are classified as first, second and third class chiefs, depending on their territorial and material competence.[604] Regrettably, rather than performing their administrative duties, some traditional rulers have resorted to arrest and/or detention of persons without cause. For example, in *The People v Baina Dedaidandi,* the Benoue High Court found the traditional ruler of Dore-Tongo village guilty of arbitrary detention and sentenced him to 10-year imprisonment.[605] *The People v Baina Dedaidandi,* can be considered as a positive verdict that sanctions arbitrary detention. In *The People v Ouseini Hamadou* (the Lawan of Badadji), the Court of First Instance found the defendant guilty of arbitrary detention, and sentenced him to 12 months' imprisonment suspended for three years.[606]

4.4.2 Shortcomings of the Principles of 'legality' and 'non-arbitrariness'

A closer look at the Principles of 'legality' and 'non-arbitrariness' guaranteed in the preamble to the Cameroon Constitution seems not to meet the requirements of Article 9(1) of the ICCPR and can create avenues for arbitrariness and impunity. Article 9(1) of the ICCPR provides that 'no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. First, the preamble replaces the wordings 'procedure as are established by law' with 'manner

[602] *The People v Warrant Officer Njiki Adolphe,* Judgment No.115/cor of 13 November 2006. For more, see CCPR/C/CMR/4 (2009) 39.
[603] *The People v Senior Police Inspector Ambata Hermès René and Police Constable Ngoumba Jean Dejoli Major*, default judgement of 14 December 2005. For more, see CCPR/C/CMR/4 (2009) 33.
[604] Decree No. 77/245 of 15 July 1977 to Organize Chiefdoms in Cameroon.
[605] *The People v Baina Dedaidandi,* Judgement No.13/crim of 16 August 2006. For more, see CCPR/C/CMR/4 (2009) 34.
[606] *The People v Ouseini Hamadou* (the Lawan of Badadji), Judgement No. 101/cor of 29 November 2006. For more, see CCPR/C/CMR/4 (2009) 34.

determined by law'. Procedure, in Article 9(1) of the ICCPR implies compliance with domestic and international law standards and that the said procedure must be reasonable, fair, non-arbitrary and 'must not violate the safeguards contained in articles 9(2) to 9(4) ICCPR or other rights under the Covenant'.[607] The said law must also contain principles of natural justice and due process, which enables the courts to determine whether the law fulfils the requisite elements of a reasonable procedure.[608] The wording 'manner determined by law' is vague, as it does not give room for procedural fairness, due process and non-arbitrariness. In this circumstance, if the law that authorises arrest or detention is contrary to principles of natural justice, equity and good conscience, the arrested person has no remedy as the provision 'manner determined by law' presupposes that the arrest or detention is lawful and non-arbitrary as it is effected in accordance with the manner determined by law.

Secondly, the preamble to the Constitution replaces the word 'grounds' with 'cases'. Grounds signify reasons or legal basis for arrest or detention while cases presuppose situations or instances and are thus not in consonance with the aspirations of Article 9(1) of the ICCPR. This is problematic, as officers effecting arrest or detention might not comply with the procedural requirements to protect against arbitrary detention, such as the requirement to notify arrested persons at the time of arrest and detention of reasons or grounds for arrest and detention; this may amount to arbitrariness. These discrepancies can enable public officials effecting arrest and detention and other persons acting in official capacity to cause arrest and detention in arbitrary circumstances and escape liability. In this regard, Cameroon should redefine the paragraph in the preamble to the Constitution that spells out legality of arrest and detention to meet the requirements of Article 9(1) of the Covenant. Thirdly, the principles of 'legality' and 'non-arbitrariness' guaranteed in the preamble are not persuasive as legislators prefer to use the word 'may' (conditional) instead of 'shall' (commanding or compulsory) as in Article 9(1) of the ICCPR. The present author submits that for the principles of 'legality' and 'non-arbitrariness' to be more

[607] *Abbassi (on behalf of Abbassi Madani) v Algeria*, Merits, Communication No. 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (2007) para. 8.3 & *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia*, Communication No. 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003) para. 9.4.

[608] Zimbabwe Legal Information Institute 'A Guide to Administrative and Local Government Law in Zimbabwe' available at *https://zimlii.org/content/guide-administrative-and-local-government-law-zimbabwe* (accessed 12 April 2021).

authoritative, the word 'may' should be replaced with 'shall' and the statement 'manner determined by law' with 'except on such grounds and in accordance with such procedure as are established by law' as in Article 9(1) of the ICCPR. It is important to note that the preamble is part of the Constitution and is as binding as any other provision.

4.5 Legislative protection: procedural safeguards against arbitrary detention in Cameroon

This section examines the effectiveness of the procedural safeguards put in place to protect against arbitrariness in Cameroon. It argues that all persons arrested or detained on a criminal charge must be informed of the reasons for arrest or detention and presented promptly before a judge for judicial review of their detention. Furthermore, they have the right to challenge the legality of their detention by way of habeas corpus and are entitled to compensation in case of arbitrary detention. The section also argues that persons arrested or detained on a criminal charge are entitled to counsel and must not be subjected to torture and other forms of ill-treatment. For clarity's sake, these procedural safeguards are examined individually and in detail.

4.5.1 Right to inform arrested persons of reasons for arrest and nature of charges

International law requires that upon arrest, arrested persons must be informed of the reasons for arrest and the nature of charges against them.[609] The purpose of arrest in Cameroon is to apprehend a person suspected to have committed a criminal offence in line with provisions of the CPC, and present him promptly before the competent authorities.[610] By virtue of section 31 of the CPC, arrested persons must be informed promptly of reasons for arrest in the language that they understand best. This information should include the wrongful act committed by the arrested person and the legal basis for the arrest. The information must be explicit to enable the arrested person to understand why s/he is under arrest so that s/he can make use of the substantive and

[609] Article 9(2) of the ICCPR.
[610] Section 30 of the CPC.

procedural rights provided for in the law to regain his freedom if s/he believes that his arrest is invalid or unfounded.

Exceptionally, the right to inform arrested persons of reasons for arrest may not be applicable where persons are arrested committing a misdemeanour or felony in flagrante delicto.[611] *Flagrante delicto* is the legal terminology used to indicate that a suspect is caught red-handed committing a felony or misdemeanour[612] or is pursued by the public after committing the offence[613] or a vital object or article is found in his possession which strongly suggests that he committed or took part in the offence.[614] Therefore, persons arrested in these circumstances need not be informed of the reasons for arrest as, by implication, they are aware of the reasons for their arrest. In the same vein, section 33 of the CPC is to the effect that a magistrate in Cameroon who witnesses a felony or misdemeanour committed in flagrante delicto is not under obligation to inform the suspect of the reasons for his arrest if he proceeds to do so.

Authorities are also under an obligation to inform the suspect or accused persons of the charges against them. This is guaranteed in section 119(a) of the CPC, to the effect that where remand in custody is inevitable, the judicial police officer (JPO) is under the obligation to inform the suspect of the grounds for suspicion and of the allegations against him. This position is reiterated in section 122(1) (a) of the CPC, to the effect that persons suspected to have committed a crime shall immediately be informed of the allegations against them. Information on reasons for arrest and charges is important as it provides the arrested person the perfect opportunity to clarify any misunderstanding and distance him/herself from a crime and thus avoid unnecessary arrest and detention. Such information should be communicated orally, and in writing at a later stage, in the language that the arrested person understands best. JPOs should maintain a standard form that outlines the rights of an arrested person in a straightforward manner and in different languages, and this should be handed to him or her immediately its content has been read to them. Furthermore, JPOs must ensure that arrested persons

[611] Section 30(3) and 31 of the CPC.
[612] Section 103(1) of the CPC.
[613] Section 103(2) (a) of the CPC.
[614] Section 103(2) (b) of the CPC.

acknowledge this in writing and signature, attesting that they have been informed of their rights upon arrest or detention.

Although the law in Cameroon is very clear that upon arrest, arrested persons must be informed of the reasons for arrest, detention and charges against them, this is not always the case. For example, in *D. S. Oyebowale v Company Commander of Gendarmerie for Fako*, the Company Commander of the Gendarmerie Company of Fako Division (respondent) arrested a Nigerian sailor (applicant) on Cameroon waters on 11 June 2009 and detained him. In the course of the proceedings, although the respondent was absent, the trial judge determined that the victim's arrest and detention were arbitrary as the applicant was neither informed of the reasons for his arrest nor the charges against him at the time of arrest. Moreover, no purported evidence existed to suggest that the applicant had committed a crime or was about to do so, or that he was in possession of any incriminating material at the time of his arrest that posed a security risk or danger to the country.[615] The trial judge therefore held that the respondent's action was contrary to sections 30, 31 and 119 of the CPC and ordered the applicant's immediate release. The respondent refused to release the applicant, and also failed to appear before court to explain the reasons for the applicant's initial arrest and continued detention. Although the victim eventually regained his liberty, the situation clearly reveals arbitrariness and impunity as the Company Commander was neither prosecuted nor punished.

Furthermore, a number of international cases, decided in favour of the victims against Cameroon, relating to the rights of arrested persons to be informed of reasons for arrest and the nature of charges against them are ample evidence that Cameroon is not fully committed to the provisions of Article 9(2) of the Covenant. For example in *Phillip Afosun Njaru v Cameroon*[616] and *Dorothy Kakem Titiahonjo v Cameroon (on behalf of her husband),*[617] the HRC held that Cameroon violated Article 9(2) of the Covenant as state security agents arrested the victims without providing information on the reasons for their arrest and the nature of charges against them. This state of affairs makes it

[615] *D.S Oyebowale v Company Commander of Gendarmerie for Fako*, Suit No. 0040/HB/09 of High Court Fako (2009) para. 14.
[616] *Phillip Afuson Njaru v Cameroon* (2007) paras. 6.2 and 6.3.
[617] *Dorothy Kakem Titiahonjo v Cameroon* (2007) paras. 6.5 and 6.6.

extremely difficult for victims or their agents to seize the competent courts and secure their release from custody.

That notwithstanding, in a number of cases, courts have adequately guaranteed the right to inform arrested persons of the reasons for arrest and nature of charges against them. For example, in *The Public Prosecutor v Ms. Thérèse Meuntcham,*[618] and *The Public Prosecutor v Ms. Edith Merline Nguefack Momo*[619] the High Court of the Ocean Division ordered and secured the release of the victims on 26 January 2012 on grounds of violations of articles 119 and 122(1) (a) of the CPC. The reasoning is that elements of the central police arrested and detained them for nine days without informing them of the reasons for arrest, detention and nature of charges against them.[620] In a separate development, in *The Public Prosecutor v Liboire Ze* the High Court of Lom et Djerem Division ordered and secured the unconditional release of Boris Mpagou Ze, arrested and detained by state security agents for more than 11 days without providing information on reasons for arrest and nature of charges against him.[621]

4.5.2 Right to remain silent (privilege against self-incrimination) and exclusion of evidence obtained by way of torture

The right to 'remain silent' is a legal rule and protection accorded to arrested persons undergoing interrogation, not to answer questions or make statements that may eventually be used in court as evidence against them. Therefore, the right to 'remain silent' seeks to prevent self-incrimination, as it requires that JPOs and judicial officers must not apply the use of force or torture suspects or accused persons to answer questions or make confessions of guilt against themselves at any stage of the criminal justice system.[622] This right is adequately guaranteed in Cameroon. For example,

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[618] *The Public Prosecutor v Ms. Thérèse Meuntcham (married name: Toumaga)*, Océan Department *Tribunal de Grande Instance*, Ordinance No. 02/ORD/PTGI/O of 26 January 2012. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, paras. 29 and 32.

[619] *The Public Prosecutor v Ms. Edith Merline Nguefack Momo et al.*, Océan Department *Tribunal de Grande Instance*, Ordinance No. 01/ORD/PTGI/O of 25 January 2012. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, paras. 29 and 32.

[620] *The Public Prosecutor v Ms. Thérèse Meuntcham (married name: Toumaga)*, Océan Department *Tribunal de Grande Instance*, Ordinance No. 02/ORD/PTGI/O of 26 January 2012. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, paras. 29 and 32.

[621] *The Public Prosecutor v Liboire Ze,* Ordinance of the Lom et Djerem Department, *Tribunal de Grande Instance,* 26 March 2013. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 32.

[622] Article 14(3) (g) of the ICCPR.

section 116 (3) of the CPC stipulates that 'as soon as investigations are opened, the judicial police officer shall, under the penalty of nullity, inform the suspect of his right to remain silent'.

It is important to note that section 116(3) also requires that the suspect or accused person's decision to remain silent must not be interpreted as a possible admission of guilt, and should not negatively impact the proceedings to his or her detriment. The wordings 'under the penalty of nullity' implies that a violation of section 166(3) can lead to an annulment of the proceedings as per section 3 of the CPC. For example, in *The Public Prosecutor v Abbass Nsangou*[623] and *The Public Prosecutor and Mindzie Mbarga v Koffi Morere,*[624] the Mbalmayo Court of First Instance annulled police reports on grounds that JPOs failed to inform the arrested persons of their right to silence (privilege against self-incrimination) and to consult with counsel.

The right to remain silent (privilege against self-incrimination) is also guaranteed under section 122(2) of the CPC to the effect that

> the suspect shall not be subjected to any physical or mental constraints, or to torture, violence, threats or any pressure whatsoever, or to deceit, insidious manoeuvres, false proposals, prolonged questioning, hypnosis, the administration of drugs or to any other method which is likely to compromise or limit his freedom of actions or decision, or his memory or sense of judgment.[625]

Therefore, JPOs are under obligation to treat suspects or accused persons humanely, 'both morally and materially',[626] and not to torture them to incriminate themselves, as this amounts to arbitrariness. Moreover, Decree No. 92/052 (1992) prohibits the use of whips and batons and other unorthodox means such as torture to obtain confessions during criminal investigations. This is important as the use of torture and other unorthodox means may weaken and force suspects or accused persons to confess and

[623] *The Public Prosecutor v Abbass Nsangou*, criminal judgment of 19 November 2010. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 28.
[624] *The Public Prosecutor and Mindzie Mbarga v Koffi Morere*, criminal judgment of 14 February 2013. For more, see Mbalmayo Police Report No. 410 of 11 November 2009. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 28.
[625] Section 122(2) of the CPC.
[626] Section 122(1) (a) of the CPC.

incriminate themselves or testify against others to crimes they know nothing about, thus paving the way for arbitrariness.

Prior to the harmonisation of the CPC in 2005, investigation reports including confessions and evidence submitted by JPOs were admissible in evidence in the courts of law irrespective of the manner in which they were obtained. The CPC reverses this position as section 332 permits examination of witnesses; meaning that submissions made by JPOs after criminal investigations are no longer considered as conclusive evidence against suspects or accused persons in court. Section 332 is important as it provides counsel with the perfect opportunity to question the credibility of the confession or evidence, and the judge or examining magistrate to question JPOs with regard to the conduct of criminal investigations, circumstances in which confessions and evidence were obtained, and to uncover any arbitrary motive(s) that may pave the way for arbitrariness. Unfortunately, section 332 seems to apply in full force only in the Anglophone part of the country as Francophone magistrates and judges have the discretion whether or not to allow the examination of witnesses including JPOs. Moreover, JPOs in Francophone Cameroon need not appear in court in person as their criminal investigation reports substitute for their physical presence or appearance.[627]

Although the right to silence (privilege against self-incrimination) is adequately guaranteed in Cameroon, JPOs make use of loopholes in the system to extract confession from suspects or accused persons by way of torture, other forms of ill-treatment and other unorthodox means. For example, sometimes JPOs rely and go beyond the provisions of section 30(2) of the CPC 'use of reasonable force', to obtain confessions from arrested persons. So unorthodox means to obtain confessions that may impact negatively on the right to remain silent may otherwise become legitimate and may not amount to arbitrariness.[628] Furthermore, JPOs may also rely on section 92 of the CPC to violate the right to remain silent as paragraph (1) (a) empowers the JPO, in the course of an investigation to question any person whose statement (confession or

[627] *D. S. Oyebowale v Company Commander of Gendarmerie for Fako* (2009).

[628] International Federation of Action by Christians for the Abolition of Torture 'Concerns of FIACAT and ACAT Cameroon regarding Torture and Ill-treatment in Cameroonian Prisons' (2008) 4 available *at https://www.upr-info.org/sites/default/files/document/cameroon/session_4_-_february_2009/* (accessed 9 March 2021).

testimony) is likely to establish the truth. Failing to comply with the section may lead to arrest by virtue of a writ of capias for presentation before a State Counsel.[629]

However, in a number of cases, the courts have taken positive steps to ensure that the right to silence (privilege against self-incrimination) prevails and that JPOs do not force or compel suspects or accused persons to incriminate themselves during interrogations and criminal investigations. For example, in *The People v Tonfact Julienne & Kandem Robert*[630] and *The People v Mengue Junette*[631] *& Djessa Jean Dennis,* the trial courts refused to admit in evidence confessions extracted through duress, coercion, threats, intimidation, torture and other forms of ill-treatment. Similarly, the Court of Appeal also excluded confessions and evidence obtained by unorthodox means. For example, in *Jonas Singa Kumié and Franky Djome's case*, the court overturned the trial court's verdict, on grounds that the trial court admitted in evidence confessions obtained from the accused persons by way of torture.[632] Despite these few exceptions, confessions obtained by way of torture during preliminary investigations, continue to be admissible in evidence in criminal proceedings.[633]

4.5.3 Right to present suspects and arrested persons promptly before a judge or other officer

The right to present suspects and arrested persons promptly before a judge or other officer authorised by law to exercise judicial power over arrest or detention is adequately guaranteed in Cameroon. This right is underlined in section 19(1) of the

[629] Section 92(1) (b) of the CPC.

[630] *The People v Tonfact Julienne and Kandem Robert*, Judgement No. 69/00 of 21 September 2000. For more, see Human Rights Committee, consideration of reports submitted by state parties under article 40 of the International Covenant on Civil and Political Rights: Cameroon, fourth periodic report, CCPR/C/CMR/4 11 May 2009, paras. 292-294.

[631] *The People v Mengue J and Djessa J,* Judgement No. 182/COR of 24 February 2005. For more, see Human Rights Committee, consideration of reports submitted by state parties under Article 40 of the International Covenant on Civil and Political Rights: Cameroon, fourth periodic report, CCPR/C/CMR/4 11 May 2009, para. 295.

[632] Human Rights Watch 'Cameroon: Letter to the Prosecutor General of the Central Appeals Court' (2013), available at *https://www.hrw.org/news/2013/05/17/cameroon-letter-prosecutor-general-central-appeals-court* (accessed on 10 July 2020).

[633] International Federation of Action by Christians for the Abolition of Torture 'Concerns of FIACAT and ACAT Cameroon regarding Torture and Ill-treatment in Cameroonian Prisons' (2008) 4 available *at https://www.upr-info.org/sites/default/files/document/cameroon/session_4_-_february_2009/* (accessed 9 March 2021). For more, see Human Rights Watch 'Cameroon: Routine Torture, Incommunicado Detention' (2019) available at *https://www.hrw.org/news/2019/05/06/cameroon-routine-torture-incommunicado-detention* (accessed 22 October 2020).

CPC, and it is to the effect that persons arrested by way of warrant are entitled to be presented promptly before an examining magistrate or the president of the trial court who issued the warrant. This presents the first opportunity for the judge or 'other officer' to examine the allegations against the arrested person, determine the lawfulness of initial arrest and detention, and make a decision as to whether or not continued remand in custody is necessary. The examining magistrate may, first, order release if no incriminating evidence exists against the arrested person, or secondly, release him or her on bail subject to sureties or monetary deposit taking into consideration the defendant's resources,[634] or order his continued remand in custody.[635]

Section 19(2)(b) of the CPC also provides that the examining magistrate or the president of the trial court who issued the warrant is under obligation to interrogate the detainee within 48 hours, or as the case may be, at the court's next sitting. Although section 19(2) (b) of the CPC is in consonance with Article 9(3) of the ICCPR and other international human rights instruments, the phrase, 'the court's next sitting' is ambiguous and subject to controversy. The section presupposes that although authorities are under every obligation to present detainees before a judge within 48 hours', the surrounding circumstances of the case at hand may warrant that detainees are presented before a judge at 'the court's next sitting'. This is not in line with Article 9(3) of the ICCPR as 'the court's next sitting' date may be after many days,[636] weeks and months.[637] Non-compliance with the 48 hours' rule may not contravene domestic law, but is arbitrary under international law standards. This explains why Article 9(3) of the ICCPR is categorical that in the absence of a judge, persons arrested or detained on a criminal charge shall be presented promptly before the 'other officer authorised by law to exercise judicial power'.

Even if the suspect or arrested person is arrested in a jurisdiction other than that of the examining magistrate or of the trial court that issued the warrant, the law requires that

[634] Section 19 (2) (a) of the CPC.
[635] Section 19 (3) of the CPC.
[636] Sometimes courts may not sit for many days due to long weekends, public disturbances and emergency periods.
[637] Appeal Courts do not sit regularly in Cameroon due to an incomplete panel and other emergency situations.

authorities must still respect the 48-hour rule and present arrested persons promptly before a judicial authority.[638] In this circumstance, authorities shall present him or her promptly before the state counsel of the jurisdiction of arrest, who in turn shall immediately inform the authority that issued the warrant of the arrest, and transfer the arrested person to the original jurisdiction of the warrant.[639] Unfortunately, the practice in Cameroon suggests that sometimes suspects and arrested persons are incarcerated for lengthy periods and are not promptly presented before a judge. For example, many persons[640] including prominent journalists,[641] politicians and citizens like the former Chief Justice, have been detained for several months awaiting trial for trumped-up charges.[642]

The question arises as to whether the 48-hour rule to present detainees before a court to exercise judicial control guaranteed in section 19(2)(b) of the CPC is applicable to persons caught in flagrante delicto, as the law is silent on the prerequisites of arrest effected without the use of a valid warrant. Enonchong is of the opinion that this can be determined on an ad hoc basis depending on individual cases.[643] The present author differs from Enonchong and argues that one of the prime objectives of Article 9(3) of the ICCPR is to guarantee prompt judicial control of arrest or detention irrespective of whether it was effected by way of a valid warrant or in flagrante delicto. Therefore,

[638] Section 19(4) of the CPC.

[639] Section 19(4) of the CPC.

[640] *The Public Prosecutor v André Meheloune*, Ordinance No. 002/OHC/CAB/PTGI/Mifi of 19 February 2010. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 36. *The Public Prosecutor v Pierre René Djomo Mbanzeu,* Ordinance No. 19/OHC/CAB/PTGI/Mifi of 23 September 2010. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 36.

[641] Mooya N 'Cameroon: Ongoing Due Process Violations in Cases of Journalists Reporting on the Anglophone Crisis' (2021) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon--ongoing-due-process-violations-in-cases-of-journalists/* (accessed 25 February 2021).

[642] Contra Nocendi 'Innocent Cameroonian man walks free from prison with Contra Nocendi's legal aid' (2019) available at *https://www.contranocendi.org/index.php/en/news/189-innocent-cameroonian-man-walks-free-from-prison-with-contra-nocendi-s-legal-aid* (accessed 22 March 2020); Trial Observation Report: Cameroon (2017) para. 91; CIVICUS 'Adjournment of Civil Society Activists' Trial in Cameroon Shows State Has No Case' (2017) available at *https://www.civicus.org/index.php/media-resources/media-releases/2904-adjournment-of-civil-society-activists-trial-in-cameroon-shows-state-has-no-case* (accessed 22 March 2020);
Contra Nocendi Cameroon 'Rejection of habeas corpus claim maintains arbitrary detention of the Deputy Attorney General of the Supreme Court of Cameroon' (2017) available at *http://contranocendi.org/index.php/en/news-press/102-rejection-of-habeas-corpus-claim-maintains-arbitrary-detention-of-the-deputy-attorney-general-of-the-supreme-court-of-cameroon* (accessed 23 April 2020).

[643] Enonchong L S 'Applying International Standards in Enforcing the Right to Personal Liberty in Cameroon: Challenges and Prospects' (2016) 60 (3) *Journal of African Law* 389-417, p. 4.

section 19(2) (b) of the CPC is applicable to persons caught in flagrante delicto. However, they are entitled to be presented before a judge or other judicial authority immediately they are apprehended as the evidence and possible charges against them are glaring and beyond contestation at the time of arrest. This seems to suggest that persons arrested by way of a valid warrant must wait for 48 hours before presentation before a judge, while flagrante delicto suspects are presented before a judge upon arrest. However, the 48 hour rule is justified as it accords the police and gendarmerie officers the appropriate time to question persons arrested by way of a valid warrant and come to a conclusion as to whether or not they committed a crime or participated in committing a crime before presenting them before a judge or other officer.

Regrettably, the 'promptness requirement' guarantee in sections 19(1) and 19(2)(b) is overshadowed by other provisions in the CPC and legislations in Cameroon. For example, section 119(2)(a) of the CPC empowers police officers to cause the arrest and detention of suspects for up to 48 hours renewable once, or twice with written approval of the State Counsel,[644] provided good reasons are submitted to that effect.[645] Furthermore, section 221 of the CPC empowers the examining magistrate to remand suspects in custody for a period not exceeding six months. However, by virtue of a reasoned ruling, the examining magistrate can extend remand in custody for the maximum of twelve months in felony and six months for misdemeanour related cases. It is submitted that extension of detention by elements of the judicial police force, state prosecutor or state counsel as demonstrated in sections 119(2)(a) and 221 of the CPC is not extension by 'a judge' or 'other officer' authorised by law to exercise judicial control over arrest or detention. The reasoning is that the State Counsel and the Procureur Général in Cameroon are directly under the control of the Minister of Justice and may not perform their duties judiciously without prior consultation or authorisation from their boss. In this circumstance, it is clear that the state counsel and state prosecutor lack the prerequisite of independence expected from a judge or 'other officer authorised by law to exercise judicial control over arrest or detention'.

[644] Section 119(2) (b) of the CPC.
[645] Section 119(2) (c) of the CPC.

Some domestic pieces of legislation designed for emergencies have also undermined the right to prompt presentation of suspects and accused persons before a judge or other judicial officer. For example, sections 11 of the Law on Counter Terrorism[646] and 2(4) of the Law on the Maintenance of Law and Order in Cameroon[647] empower administrative authorities to order a person's detention for a renewable period of 15 days to combat banditry and terrorism. These laws are arbitrary as there is no stated limit on the number of extensions, and they fail to clarify the circumstances and conditions that may warrant an extension.[648]

4.5.4 Length of pre-trial detention in Cameroon

Pre-trial detention is the incarceration of a person suspected to have committed a criminal offence before his trial, due to failure to post bail or where statute law of the state in question deprives the detainee of the right to bail.[649] The pre-trial detention period is determined according to the particular case, and authorities are under the obligation to ensure that it is reasonable and should not be unnecessarily long. As such, all pre-trial detainees are entitled to trial 'without undue delay' or 'within a reasonable time'.[650] This presupposes that authorities are under obligation to ensure that all pre-trial detainees are entitled to expeditious proceedings, and any unnecessary delay on the part of the courts or authorities without a valid reason constitutes arbitrariness.[651] That said, insufficient court infrastructure, limited number of judges and other personnel, inadequate case management systems, excessive caseload or backlogs of cases cannot atone for unjustified prolonged pre-trial detention.

Pre-trial detention is a feature of the Cameroon criminal justice system. For example, section 218(1) of the CPC makes it clear that pre-trial detention is an exceptional measure that can only be used in serious offences such as felony or misdemeanour. The section continues that authorities must establish that pre-trial detention is necessary, for example, 'for the preservation of evidence, the maintenance of public order, protection

[646] Law No. 2014/028 of 23 December 2014.
[647] Law No. 90/024 of 19 December 1990.
[648] Enonchong L S (2016) 4-5.
[649] Article 9(3) of the ICCPR.
[650] Article 9(3) of the ICCPR.
[651] *Womah Mukong v Cameroon* (1994).

of life and property, or to ensure the appearance of an accused before the examining magistrate or the court'. Furthermore, a person with a known place of abode or fixed address is exempted from pre-trial detention except in the case of a felony. Therefore, pre-trial detention can only be used in Cameroon as a measure of last resort and for the shortest possible period. Section 221(1) of the CPC guarantees that the pretrial detention period in Cameroon is valid for six months.[652] However, this period may, by a reasoned ruling of the examining magistrate, be extended for a maximum of six (6) months in misdemeanour and twelve (12) months in felony related cases. Therefore, 18 months is the maximum period for pre-trial detention in Cameroon, and any pre-trial detention in excess of the 18 months' prescribed by section 221(1) is unreasonable, arbitrary and contrary to articles 9(3) of the ICCPR and 6 of the ACHPR. Upon expiry of these deadlines the accused person is entitled to unconditional release. For example, the Mfoudi High Court ordered the release of Mboul Kem Victorine[653] and Mbambou Claude[654] as their pre-trial detention period was unnecessarily long. While in *Diboundou Ndoko Thomas Geraldin v Public Prosecutor*,[655] the judge ordered the accused person's release as he had been subjected to prolonged detention without an extension order of the initial remand warrant. Similarly, in the *Aboubakar Sidiki and Soufiyanou Mamadou* case, the judge stated that

> whereas the warrant of detention of 30 May 2014 was issued for a period of six (6) months, which therefore expired on 30 November 2014; and consequently, both on

[652] It is important to note that. Although the pre-trial detention period in Cameroon is six months, failure to extend or renew the remand warrant for six or twelve months in misdemeanour or felony cases respectively, and continuous remand of the detainee amounts to arbitrariness. For example, see:
(1) *The Public Prosecutor v André Mehelou* (Ordinance No. 002/OHC/CAB/PTGI/Mifi of 19 February 2010),
(2) *The Public Prosecutor v Joseph Talla* (Ordinance No. 12/OHC/CAB/PTGI/Mifi of 8 July 2010), (3) *The Public Prosecutor v Pierre René Djomo Mbanzeu* (Ordinance No. 19/OHC/CAB/PTGI/Mifi of 23 September 2010),
(4) *The Public Prosecutor v Christophe Kamdem* (Ordinance No. 011/OHC/CAB/PTGI/Mifi of 22 October 2014 of the Mifi Tribunal de Grande Instance. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 36.

[653] Tribunal de Grande Instance du Mfoundi, Ordonnance no. 47/HC du 17 Décembre 2009. For more, see Wakata B F 'Media and Justice in Cameroon or the Dynamics of a Dual Interaction (2017) 5 *Advances in Journalism and Communication* 98-119, p. 107.

[654] Tribunal de Grand Instance du Mfoundi, Ordonnance no. 47/HC du 17 Décembre 2009. For more, see Wakata B F (2017) 107.

[655] Wakata B F (2017) 107.

> 4 February 2015, the date on which the Court sat, the application for release filed in consideration of this detention became null and void.[656]

Although paragraph 2 of section 221 guarantees immediate release of accused persons upon expiry of the remand warrant, unless s/he is detained for other reasons, the section does not specify the circumstances of release and is left to the discretion of the examining magistrate. This can create reasons for arbitrariness, as the examining magistrate's decision to order or not to order the detainee's release may be politically motivated, influenced by unorthodox judicial cultures and practices or inadequate mastery of provisions in legislation adopted to protect against excessive pre-trial detention and arbitrariness.

Although section 221(1) of the CPC protects against excessive pre-trial detention, concerns highlighted in the Concluding Observations of the Committee against Torture on the Fifth Periodic Report of Cameroon demonstrate that Cameroon has not taken the necessary steps to address the problem of excessive use of pre-trial detention in the country.[657] This is true as, in disregard and contrary to section 221(1) of the CPC, the practice in Cameroon suggests that, more often than not, suspects and accused persons are held in pre-trial detention for many years, exceeding the 18 months' timeline recommended by law. For example, the HRC held that detaining complainants for two years and six months,[658] six years[659] and close to seven years[660] in prolonged pre-trial detention is excessive, unnecessary and constitutes a clear violation of Article 9(3) of the Covenant. It is interesting to note that Cameroon has often raised a frivolous defence of court backlogs, and stated that examining magistrates entertaining matters involving detainees whose pre-trial detention period had exceeded the maximum statutory period of eighteen (18) months provided in section 221(1) of the CPC, are overloaded with cases.[661] This confirms Cameroon's blatant disregard for the recommended period of

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[656] *Affaire Aboubakar Sidiki c/MP et Soufiyanou Mamadou*, C.S. ruling n 104/P of 20 August 2015. For more, see Wakata B F (2017) 107.
[657] UN Committee against Torture (CAT), *Concluding observations on the fifth periodic report of Cameroon,* 18 December 2017, CAT/C/CMR/CO/5. para. 8.
[658] *Ebenezer Akwanga v Cameroon* (2011) para. 7.4.
[659] *Cyrille Gervais Moutono Zogo (on behalf of Achille Benoit Zogo Andela) v Cameroon* (2016) para. 7.3
[660] *Pierre Désiré Engo v Cameroon* (2005) paras. 7.2 and 8.
[661] *Jean-Marie Atangana Mebara v Cameroon* (2015) para. 69.
Jean-Marie Atangana Mebara v Cameroon (2015) para. 69.

pre-trial detention, and its domestic laws. Certainly, as of 31 December 2017, pre-trial detainees in Cameroon numbered 17,845, accounting for 58.1 % of the prison population.[662] However, these figures may have risen sharply due to the ongoing armed conflict in the Anglophone Regions of the country,[663] the war against Boko Haram in the Far North Region[664] and the frequent socio-political insurgencies orchestrated by political party leaders.[665]

It is argued that section 221(1) of the CPC is limited, and does not adequately protect against unnecessary and lengthy pre-trial detention. For example, the section empowers an examining magistrate to extend the pre-trial detention period by way of a 'reasoned ruling' without indicating the circumstances, reasons and legal basis for the extension. Although it may not be possible for the law to provide a comprehensive list of circumstances to this effect, section 221(1) of the CPC seems to fall short of its intended goal, and is more likely to breed the perfect grounds for arbitrariness. A further set-back in the law regulating pre-trial detention is evident in sections 2(4) of the law relating to the Maintenance of Law and Order[666] and 11 of the Law on Counter-Terrorism in Cameroon.[667] These two pieces of legislation permit administrative authorities to cause the arrest and detention of suspected bandits and terrorists without charge for 15 days extended indefinitely, without stating the reasons, circumstances or conditions of the extension, and with no possibility of appeal.[668] On the basis of these pieces of legislation the military tribunal of Yaoundé ordered the indefinite detention of many politicians without specifying the duration and conditions of their detention.[669]

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[662]World Prison Brief 'Cameroon' (2017) available at *https://www.prisonstudies.org/country/cameroon* (accessed 15 December 2020).

[663] Amnesty International 'Cameroon: Inmates packed like sardines' in overcrowded prisons following deadly Anglophone protests' (2017) 9, available at *https://www.amnesty.org/en/press-releases/2017/10/cameroon-inmates-packed-like-sardines-in-overcrowded-prisons-following-Anglophone-protests* (accessed 7 April 2020).

[664] Amnesty International 'Cameroon: Amnesty report reveals war crimes in fight against Boko Haram, including horrific use of torture' (2017) available at *https://www.amnesty.org/en/latest/news/2017/07/cameroon-amnesty-report-reveals-war-crimes-in-fight-against-boko-haram-including-horrific-use-of-torture/* (accessed 12 September 2018).

[665] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019)1 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

[666] Law No. 90/024 (19 December 1990).

[667] Law No. 2014/028 of 23 December 2014 Repressing Acts of Terrorism.

[668] Law No. 90/024 (19 December 1990).

[669] The Law Society of England and Wales 'Trial Observation Report - Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé'

This is a clear violation of section 218(1) of the CPC, which is to the effect that pre-trial detention is an exceptional measure that shall be used only in felony and misdemeanour cases. Indefinite detention is also a clear violation of the victims' human rights and a breach of articles 9(3) of the ICCPR and 6 of the ACHPR.[670] It is argued that the government uses indefinite detention to intimidate and punish political opponents and critics of the regime, rather than to maintain law and order, national security or to facilitate criminal investigations.[671]

4.5.5 Right to bail in Cameroon

International human rights law requires that all persons charged with criminal offences have the right to apply for and may be released on bail pending appearance before the courts when required.[672] This right is guaranteed in section 221(2) of the CPC to the effect that the examining magistrate may grant bail on his own accord, during or at the close of preliminary investigation, or as of right upon expiry of the remand warrant. In this circumstance, the examining magistrate may withdraw the remand warrant and grant bail to the detainee.[673] If bail is not granted on any of these conditions, it may be granted upon application of the defendant or his lawyer after the detainee guarantees appearance before the examining magistrate whenever s/he is needed, in the form of cash deposit or one or more sureties.[674]

The right to bail is also guaranteed in section 224(1) of the CPC to the effect that 'any person lawfully remanded in custody may be granted bail on condition that he fulfils one of the conditions referred to in section 246(g), in particular to ensure his appearance either before the judicial police or any judicial authority'. The conditions referred to in section 246(g) of the CPC include, but are not limited to, sureties in the form of cash deposit, 'the amount and conditions of payment of which shall be fixed by the

(2017) para. 22 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021).

[670]The Law Society of England and Wales 'Trial Observation Report - Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé' (2017) paras. 90 and 91 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021).

[671] Enonchong LS (2016) 4-5.

[672] Articles 9(3) of the ICCPR, 7(1)(d) of the ACHPR, 7(5) of the IACHR and 5(3) of the ECHR.

[673] Section 222(1) of the CPC.

[674] Section 222(2) of the CPC.

examining magistrate, taking into consideration the resources of the defendant.[675] This is an important measure to protect against arbitrariness as it ensures that judicial authorities do not demand exorbitant amounts or put stringent conditions for bail that they know is out of the detainees' means. However, section 224(1) is not absolute, as section 224(2) of the CPC is to the effect that persons charged with felony punishable with life imprisonment or death are not entitled to bail.[676]

This may imply that these categories of persons are presumed guilty even without a trial. The present author argues that this is discriminatory and may amount to arbitrariness as the decision to grant bail must be scrutinised on a case-by-case basis, taking into consideration whether the suspect or accused person may abscond, distort the conduct of the case or is possibly a perpetual offender. It is important to note that the presumption of innocence is a constitutional and unconditional right and therefore must not be subject to limitations as this may amount to arbitrariness.[677] Moreover, the accused person may remain in jail for many months and even years and eventually be exonerated of the allegations against him/her by a court of competent jurisdiction.

The Judicial Organisation Ordinance (JOO) of 2006 also makes provisions for bail in Cameroon under section 25(3) (d). Under the section, a bail application and ruling must be finalised within five days and in case of appeal within ten days. Applications for bail are directed to the judicial police officer, State Counsel, examining magistrate or the competent court in the jurisdiction where the detainee is detained, depending on the circumstances of the detention. However, as indicated earlier, the right to bail is not

[675] Section 246(g) of the CPC of Cameroon. The practice in Cameron (especially in the English speaking parts) is that, if the detainee is not in the possession of liquid cash at the time bail is posted, the courts can accept some sort of real estate or landed property certificate as a substitute. Moreover, section 397 of the CPC provides that persons sentenced to not more than one year imprisonment who haves indicted their intention to appeal the court's verdict, are entitled to bail until the expiry period of the appeal on condition that they fulfils any o the conditions provided in section 246(g) of the CPC.

[676] On a rare occasion, the Court of Appeal set aside a 15-year jail term for murder (felony) and granted bail to Fon Doh Gah Gwanyin III. Fon Doh was a former member of parliament representing the ruling party in Cameroon. Critics argue that the stage was set for a successful appeal as the judiciary purposefully brought in two judges from foreign jurisdictions. Justice Damian Ambe Suh, Vice President of the Northwest Court of Appeal and Justice Eni Mokube, President of the High Court of Donga-Mantung joined Justice Beatrice Tayong at the Ndop High Court seat of the matter. Counsel for the appellant argued that the Ndop High Court was not properly constituted and thus not competent to entertain the matter and that the 15 years jail term was a nullity and thus arbitrary.

[677] Preamble to the Constitution of Cameroon.

absolute under Cameroon's domestic law, as it excludes felons charged with crimes punishable with a life imprisonment or the death penalty.[678]

A bail application in Cameroon is commenced by the detainee himself or third parties such as his family members, friends, organisations or his lawyer. Depending on the circumstance of the case and the level of the criminal justice system in which the detainee finds himself, an application for bail is usually addressed to either the judicial police officer, the state counsel, the examining magistrate or the president of the high court of competent jurisdiction.[679] A judicial police officer or State Counsel can grant bail instantly with no formal procedure if the matter is at the level of police investigation, and if no sufficient evidence exists to incriminate the suspect or if the surrounding circumstances of the case so require. Conversely, bail applications before an examining magistrate must follow a unique procedure. This procedure is underlined in the Judicial Organisation Ordinance of 29 December 2006.[680] The process commences with a formal application for bail directed to the examining magistrate who in turn forwards it to the State Counsel within 24 hours of receipt. He reviews and returns the file together with his report to the examining magistrate within 48 hours. The examining magistrate delivers a final ruling, granting or refusing bail within 48 hours of receiving the file and report from the State Counsel.[681] The law makes it clear that the monetary consideration for bail should be determined in the amount that the detainee or his agents can afford.[682] This is a welcome development as it reflects international standards[683] and can go a long way to eliminate or minimise unnecessary prolonged pre-trial detention. Although a bail application is interlocutory in nature, the law makes provision for an appeal just like any other proceeding if not granted.[684] The applicant can lodge his bail appeal before the inquiry chamber of the Court of Appeal and a ruling must be delivered within 10 days.[685]

[678] Section 224(2) of the CPC.
[679] Section 225 of the CPC.
[680] Law No. 2006/015 of 29 December 2006.
[681] Section 25(3) (d) of Judicial Organization Ordinance.
[682] Section 246(g) of the CPC.
[683] *Gafà v Malta* (2018) paras. 33 and 73.
[684] Section 25(3) (f) of the JOO.
[685] Section 25(4) of the JOO.

The present author argues that despite the simple and clear procedure put in place to regulate the bail application process in Cameroon, pre-trial detainees continue to languish in jail for prolonged periods without trial. The courts rarely grant bail to suspects and awaiting trial detainees, particularly political opponents of the regime and outspoken journalists critical of state policies.[686] However, in a few cases when granted, the terms and conditions are far beyond the means of detainees.[687] Case law demonstrates that bail seems to be the exception rather than the rule. Furthermore, on occasions, the right to bail suffers serious setbacks as the Legal Department of the High Court challenges release orders for unconditional release on bail emanating from the High Court and proceeds to bring new charges against the victims as they continue to languish in jail.[688]

The issue at stake is whether continued detention of the victims in breach of an order for bail violates their right to be released on bail pending trial. The answer to this question is in the affirmative. Continued detention of the victims after a court of competent jurisdiction has granted them bail, and bad faith exhibited by the prosecutor general ensuring that they languish in jail, is ample evidence of a system in catastrophe and without procedures. In this circumstance, one is tempted to conclude that the additional charges preferred against the five victims was an indirect way to compel the judge to convict and sentence them, thereby violating their right to bail.

In *The Esu Youths Case*, the Mezam High Court on two occasions ordered the release on bail of nine Esu youth leaders arrested and detained in arbitrary fashion in 2016 on

[686] World Organisation against Torture 'Cameroon: Enforced disappearance and rumoured torture and killing of Mr. Samuel Ajiekah Abuwe' (2020) available at *https://www.omct.org/en/resources/urgent-interventions/enforced-disappearance-and-rumoured-torture-and-killing-of-mr-samuel-ajiekah-abuwe* (accessed 20 January 2021). Mr Wazizi's application for bail was unsuccessful on grounds that his arrest and detention was motivated by terrorism related activities (felony) which did not warrant bail. The irony is that he was never charged with any criminal offence and thus could not be refused bail on grounds of terrorism related offences in the first place. Moreover, it is trite law in Cameroon that in the absence of sufficient reasons for detention or criminal charge(s) suspects are entitled to release.

[687] Advocates for Human Rights 'Report on the Death Penalty and Detention Conditions in the Republic of Cameroon' (2013) para. 33.

[688] *The People v Dr Martin Luma & 18 Ors* Suit No. BA/13m/01-02, Court of First Instance, Bamenda (2002); *The People v Nya Henry* (2005) 1CCLR, 61, revd, BCA/MS/11C/2002. For more, see Enongchong L S 'Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship' (2012) 5 *African Journal of Legal Studies* 313–337, p. 325-6.

charges of 'depredation by Band'.[689] The Legal Department through the Procureur Général of the North West Court of Appeal challenged the court order as four of the detainees continued to languish in jail for many months.[690] *The Esu Youths Leader's Case*, presents a clear example of deliberate disregard of sections 221(1), 224 (1) of the CPC, and 25(3) (d) of the JOO. The refusal of bail for no apparent reasons, and continued detention of the victims for more than seven months even after a competent court had granted them bail twice, is a violation of their right to bail and to be free from arbitrary detention.

4.5.6 Right of access to counsel and representation in Cameroon

The right of arrested persons to access and consult with counsel of their choice is an important measure to protect against arbitrary detention. The right to counsel also presupposes that the state has to provide arrested persons with legal counsel free of charge if they cannot afford to pay, or in cases of extreme necessity. The necessity requirement is determined on a case-by-case basis taking into consideration the gravity of the offence and sentence.[691] In line with its international and domestic commitments, the right of arrested persons to access, consult privately, and be represented by counsel of their choice is guaranteed in Cameroon. For example, section 116(3) of the CPC is to the effect that 'as soon as investigations are opened, the judicial police officer shall, under the penalty of nullity, inform the suspect of his right to counsel'. The statement 'under the penalty of nullity', implies that failure to abide by this rule renders the arrest or detention arbitrary. To ensure that JPOs inform arrested persons of their right to

[689] The Observatory for the Protection of Human Rights Defenders 'Urgent appeal: New information on judicial harassment in Cameroon' (2017) 3 available at *https://www.omct.org/files/2017/05/24335/056.3_cmr_001_0716_obs_056.3.pdf* (accessed 7 May 2021).
[690] The Observatory for the Protection of Human Rights Defenders 'Urgent appeal: New information on judicial harassment in Cameroon' (2017) 4 available at *https://www.omct.org/files/2017/05/24335/056.3_cmr_001_0716_obs_056.3.pdf* (accessed 7 May 2021).
[691] Article 14(3) (d) of the ICCPR.

counsel, section 116(4) of the CPC obligates them to clearly indicate to this effect in the investigation report, while failure to do so can invalidate the investigation report.[692]

Further guarantees of right to counsel are contained in section 37 of the CPC. Section 122(3) of the CPC complements section 37 to the effect that pre-trial detainees are entitled to visits by their lawyers at all times within the period of detention and working hours to obtain legal advice and make preparations for their defence.[693] Moreover, section 172(2) of the CPC guarantees that authorities are under obligation to notify the detainee's lawyer in writing of the date and time of the preliminary investigations at least forty-eight (48) hours before, if he resides within the court's jurisdiction, and at least seventy-two (72) hours if not.[694]

Regrettably, sometimes arrested persons are deprived of their right to access and to consult with counsel of their choice, as authorities often restrict this right, particularly in sensitive cases involving 'individuals suspected of complicity with Boko Haram, Anglophone separatists, or political opponents'.[695] Moreover, most detainees cannot afford the services of counsel and, even when provided by the state, the process is often burdensome,[696] lengthy, and the quality of legal assistance is poor as inexperienced or unqualified lawyers often represent indigenes.[697] The practice in Cameroon

[692] Section 90(3) of the CPC.

[693] Section 170(2) (b) of the CPC.

[694] Section 172(2) of the CPC.

[695] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 11 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021). For more, see Amnesty international, 'Right Cause, Wrong Means: Human Rights Violated and Justice Denied in Cameroon's Fight against Boko Haram' (2016) 11 available at *https://www.amnesty.org/en/documents/afr17/4260/2016/en/* (accessed 25 February 2021).

[696] Under the new law, an application for legal aid may be made to the secretary of the legal aid commission in the appropriate court either orally or in writing. The secretary then forwards the petition to the chairperson of the legal aid commission, who in turn, in consultation with counsel, makes a determination on whether an applicant qualifies for aid. U.K. Home Office, 'Country Policy and Information Note, Cameroon: Anglophones' (2020) para. 7.5.1 available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873402/Cameroon _-_Anglophones_-_CPIN_-_v1.0__March_2020_.pdf* (accessed 13 March 2021).

[697] U S Department of State, '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 11 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

demonstrates that sometimes arrested persons are held for many days,[698] months,[699] or more than a year[700] while some have died in custody[701] without access to counsel. In some cases, especially in cases related to state security and territorial integrity, counsel are often intimidated and harassed.[702] Furthermore, although the law clearly states that persons suspected to have committed felony or misdemeanor related offences are entitled to compulsory assistance by counsel, complexities and bad faith on the part of authorities have dealt a serious blow to this procedural safeguard against arbitrariness.[703]

In some cases, counsel are not granted the opportunity to access their client's case files. This is contrary to section 172(3) of the CPC which is categorical that '[t]he case file of the inquiry shall be placed at the disposal of the counsel at the chambers of the inquiry twenty-four (24) hours before each interrogation or confrontation'. Authorities have often deliberately violated section 172(3) of the CPC to the detriment of the defence by invoking section 171(1) of the CPC, which makes it clear that the examining magistrate may not make available the case file of the inquiry in advance to defence team if they were present during the first appearance.[704] These tactics and schemes

[698] Human Rights Watch 'Cameroon Court Denies Request to Release Opposition Leaders: Free Arbitrarily Arrested Opponents, Ensure Freedom of Assembly' (2021) available at *https://www.hrw.org/news/2021/01/15/cameroon-court-denies-request-release-opposition-leaders* (accessed 13 April 2021).

[699] Human Rights Watch **'**Cameroon: Separatist Leaders Appeal Conviction' (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 13 April 2021). For more, see U S Department of State '2020 Country Reports on Human Rights Practices: Cameroon (2020) available at *https://www.ecoi.net/en/document/2048145.html* (accessed 13 April 2021).

[700] Relief Web 'Cameroon: Routine Torture, Incommunicado Detention' (2019) available at *https://reliefweb.int/report/cameroon/cameroon-routine-torture-incommunicado-detention* (accessed 13 April 2021).

[701] Reporters Without Borders 'Cameroon Findings of enquiry into journalist Samuel Wazizi's death in detention must be published' (2020) available at *https://rsf.org/en/news/cameroon-findings-enquiry-journalist-samuel-wazizis-death-detention-must-be-published* (accessed 5 April 2021).

[702] Human Rights Watch 'Cameroon: Separatist Leaders Appeal Conviction: Grave Questions About Fairness of Trial' (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 2 February 2020).

[703]The Advocates for Human Rights 'Cameroon: Sixteenth Session of the Working Group on the Universal Periodic Review, United Nations Human Rights Council 22 April–3 May' (2013) para.17 available at *https://www.theadvocatesforhumanrights.org/uploads/cameroon_african_commission_death_penalty_detention_conditions_october_2013.pdf* (accessed 7 May 2021).

[704] *Jean-Marie Atangana Mebara v Cameroon* (2015) para. 108.

employed by the courts to frustrate the defence are in violation of the right to defence, counsel and representation.

An important issue that needs urgent attention is whether counsel[705] can assist arrested persons at the police stations and gendarmerie brigades in Cameroon. Cameroon's domestic law seems to be silent to this effect. Investigation officers have exploited this deficiency in legislation to their advantage as arrested persons are often denied access to counsel in police stations and other detention centres.[706] In some cases, counsel are intimidated, harassed and even threatened with arrest and detention for intervening on detainee's behalf at police stations or gendarmerie brigades.[707] These and other incidents motivated members of the Cameroon Bar Association to stage a five-day lawyers' strike in September 2019 against the authorities for consistently undermining, harassing and restricting lawyers' ability to consult with their clients in various detention centres.[708]

The right of arrested persons to access and consult with counsel of their choice is subject to a number of limitations. For example, the practice in Cameroon reveals that upon arrest, an arrested person's mobile telephone is confiscated, but he may be allowed to make a single call, usually to a family member or spouse. Moreover, no legal obligation exists on the part of investigating officers to help an arrested person to secure the services of counsel. Another hindrance to counsel is that the law does not explicitly provide that counsel can intervene at police stations and gendarmerie brigades on behalf of arrested persons, as this is only possible when authorities present arrested persons before a judge or examining magistrate for preliminary investigations.[709] Whatever the

[705] It is important to note that Cameroon's domestic law does not specify or define who can represent arrested persons at the level of police investigations. Therefore, by implication, anybody versed in the law, including trained lawyers, paralegals, or human rights defenders can perform this task. See Ngatchou T C 'The Responsibility of the Judicial Police Officer under Cameroonian Law' (2019) 990.

[706] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 5 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

[707] The Advocates for Human Rights 'Cameroon: Sixteenth Session of the Working Group on the Universal Periodic Review, United Nations Human Rights Council 22 April–3 May' (2013) 17 available at *https://www.theadvocatesforhumanrights.org/uploads/cameroon_african_commission_death_penalty_detention_conditions_october_2013.pdf* (accessed 7 May 2021).

[708] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 9 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

[709] Section 172(1) of the CPC.

case, it is imperative that arrested persons have access to counsel at all times. This is important, as counsel can effectively monitor the investigation process and thus help to prevent the violation of substantive and procedural rights that protect against arbitrariness.

Cameroon's domestic law also guarantees the right to legal aid for arrested persons involved in serious cases such as felony or misdemeanor.[710] The state is under obligation to provide arrested persons with free legal assistance if they cannot afford to pay.[711] The necessity requirement is determined on a case-by-case basis taking into consideration the gravity of the offence and sentence. Unfortunately, it does not guarantee free legal assistance immediately after arrest and during interrogation at the police station or gendarmerie brigade. The law regulating legal aid sets out conditions for providing legal aid and puts in place commissions at all levels of the courts to examine and process legal aid applications.[712] This law is particularly important as it allows detainees to make use of habeas corpus, and enforce court rulings intended to secure the release of persons arrested and detained in an arbitrary fashion.[713]

Regrettably, the law regulating legal aid in Cameroon is plagued with irregularities and uncertainties. For example, lack of human rights knowledge and non-awareness of legal aid services amongst vulnerable persons from underprivileged backgrounds in Cameroon results in a very limited number of applications.[714] Furthermore, the law grants the legal aid commission the sole power to determine the extent and cost of legal aid for arrested persons, a provision that can breed room for bias and bad faith.[715] Counsel have also inadequately or deliberately failed to represent detainees on legal aid, as in most cases the service is free of charge.[716] Another shortcoming in the law that regulates legal aid is that arrested persons have the onus of proving their indigene nature by attaching specific documentation with the application.[717] This is daunting as

[710] Law No. 2009/004 of 14 April 2009 on the Organization of Legal Aid in Cameroon.
[711] U.K. Home Office (2020) para. 7.5.1.
[712] U.K. Home Office (2020) para. 7.5.1.
[713] Law No. 2009/004 of 14 April 2009 on the Organization of Legal Aid in Cameroon.
[714] U.K. Home Office (2020) para. 7.5.3.
[715] U.K. Home Office (2020) para. 7.5.1.
[716] U.K. Home Office (2020) para. 7.5.3.
[717] Section 19 of the law regulating Legal Aid in Cameroon.

document collection can be difficult, especially for arrested persons who are not indigenes in the jurisdiction of incarceration. Most regrettably, the Legal Aid Commission mandated to scrutinise legal aid applications rarely 'sit because of a lack of a quorum and the remuneration is "quite low and discouraging" for lawyers'.[718]

4.5.7 The right to challenge lawfulness of detention in Cameroon (habeas corpus)

The right of persons arrested or detained to take proceedings before a court of competent jurisdiction to challenge the lawfulness of arrest or detention otherwise known as habeas corpus is guaranteed in international human rights law instruments.[719] This right is guaranteed in section 584 of the Criminal Procedure Code (CPC) of Cameroon. Deficiencies in the criminal justice system and failure of the Judicial Organisation Ordinance,[720] to guarantee detainees maximum protection against excessive state actions, arbitrary arrest and detention motivated for the adoption of a harmonised CPC in 2005. The present author argues that the new law regulating habeas corpus proceedings guaranteed in sections 584-588 of the CPC is not adequate or has little impact in protecting against arbitrary detention in Cameroon. This is evident as administrative officers and law enforcement personnel still exhibit excessive arbitrary powers in causing arrest and detention of persons, in disregard for habeas corpus rulings, and with impunity.

4.5.7.1 Early habeas corpus jurisprudence in Cameroon: The law prior to the adoption of the CPC (2005)

As mentioned earlier, prior to the adoption of the harmonised CPC of Cameroon in 2005, the Judicial Organisation Ordinance (JOO) regulated habeas corpus proceedings in the country. Section 16(1)(c) of the JOO empowered High Courts to entertain habeas corpus applications for the immediate and unconditional release of persons arrested and detained in arbitrary fashion. Although amendments in certain provisions of the JOO in

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[718] United Nations Office on Drugs and Crime 'Access to Legal Aid in Criminal Justice Systems in Africa' (2011) 20 available at *https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf* (accessed 13 April 2021). For more, see U.K. Home Office (2020) para. 7.5.2.

[719] Articles 9(5) of the ICCPR and 7(5) of the ACHPR.

[720] Judicial Organisation Ordinance (JOO), Law No. 72/04 of 26 August 1972 on the Organisation of the Judiciary. The JOO regulated habeas corpus proceedings in Cameroon prior to the adoption of the harmonised CPC in 2005.

1989[721] greatly limited the scope of the writs of certiorari, prohibition and mandamus to non-administrative matters,[722] by virtue of section 16(d) of the new ordinance, habeas corpus maintained its status and scope of application. The Fako High Court echoed this position in *Ekollo Moundi Alexandre v The People,* as Ngassa J held that section 16 (d) of the JOO reserves the power of the High Courts in Anglophone Cameroon to entertain and rule on all habeas corpus applications. He held further that this is particularly important as the scope of its sister writs have been greatly limited, and the vital need for habeas corpus to check against arbitrary detention and excessive executive powers has become more significant.[723]

Unfortunately, the JOO was limited, as it provided neither a procedure for habeas corpus, nor a course of action to compel a jailer to present a detainee in court or to secure his release.[724] As a result, courts in Francophone Cameroon relied on French Civil Law and its procedure, which were lacking in habeas corpus rules and procedures, while courts in Anglophone Cameroon relied on their own jurisprudence and those of the English Common law courts.[725] These shortcomings paved the way for administrative and law enforcement officers to cause arrest and detention of persons and refusal to release them even after a court order to that effect. For example, responding to a habeas corpus application, the High Court of Mezam ordered the release of 173 persons (including a prominent retired Chief Justice) arrested and detained in arbitrary fashion in Bamenda (Common Law jurisdiction) in 1992 after post-presidential election demonstrations.[726] The court stated that 'the action of the administration was a gross violation of the fundamental rights of the person and could be likened to an administrative assault'.[727] Conspicuously, authorities disregarded the

[721] Ordinance No 89/019 of 29 December 1989.
[722] *Ekollo Moundi Alexandre v The People*, Suit No HCF/155/ IR/04-05, para. 4–5.
[723] *Ekollo Moundi Alexandre v The People*, Suit No HCF/155/ IR/04-05, para. 5-6.
[724] Enonchong L S 'Habeas Corpus Under the New Criminal Procedure Code of Cameroon: Progress or Status Quo?' (2014) 52.
[725] This position is motivated by virtue of Section 10 of the Southern Cameroon's High Court Law 1955, which provides that 'where domestic law is silent on a point of procedure, courts can rely on the procedure applicable in the high court in England at the time'. See also Endeley J in *Ogoke v Linus Ihe* (1965–1967) WCLR 44, 45 and Enonchong L S 'Habeas Corpus Under the New Criminal Procedure Code of Cameroon: Progress or Status Quo?' (2014) 52.
[726] *Nyo Wakai and 172 Ors v The State of Cameroon*, Judgement No. HCB/19 CMR/921of 23 December 1992.
[727] CCPR/C/CMR/4 11 May 2009, para. 309.

habeas corpus ruling and transferred the victims to continued detention in Yaoundé, a Civil Law jurisdiction. However, authorities released them after several months after pressure from domestic and international stakeholders.

Similarly, authorities have also resorted to disregarding habeas corpus rulings. For example, in *Etengeneng J T v The Governor of South West Province*,[728] state security agents arrested the applicant on orders of the Governor of the South West Province. After failing to secure his release on several occasions, relying on section 16(d) of the JOO, the applicant seized the Fako High Court by way of habeas corpus to secure his release. The court issued an order compelling the Governor to produce the detainee in court. Instead, the Governor refused service of the court order, failed to appear in court at the designated date and continued to hold the applicant in custody.[729] Similarly, in *Namondo Makake v Bernard O Bilai*[730] the senior divisional officer for Fako ordered the applicant's arrest and detention on suspicion of 'either theft or misappropriation' under the Law on the Maintenance of Public Order. After more than 45 days in jail without being given reasons as to why her detention had exceeded 15 days, and without any ongoing investigations into the alleged offence, the applicant invoked section 16 (d) of the JOO and seized the Fako High Court by way of habeas corpus to challenge the legality of her detention. Although process servers properly served the respondent with a habeas corpus summons originating from the court, he failed to present himself in court on the appointed day to explain the reasons for the applicant's detention. The court held that the applicant's detention was arbitrary and consequently ordered and secured her release.[731]

Disregard for habeas corpus rulings was also normal in Francophone Cameroon, as administrative authorities often failed to release detainees even after a court order. This is largely because the JOO provided neither a procedure for habeas corpus nor a course of action to compel a jailer to present a detainee in court. In *The People v Ngoa Jean*

[728] *Etengeneng J T v The Governor of South West Province* (1998) 1 CCLR 9, para. 12.
[729] Enonchong L S 'Habeas Corpus Under the New Criminal Procedure Code of Cameroon: Progress or Status Quo?' (2014) (14) 1 *Oxford University Commonwealth Law Journal* 47-72, p. 52-3.
[730] *Namondo Makake v Bernard O Bilai*, Suit No: HCF/164/IR/04- 05 (29 September 2005).
[731] Enonchong L S (2014) 53.

Bienvenue and Tachoula Jean,[732] law enforcement personnel arrested the suspects with a faulty remand warrant issued on 30 January 2001 for alleged theft committed in Equatorial Guinea. The suspects seized the High Court by way of habeas corpus and challenged the legality of their detention. Relying on section 10(2) of the PC,[733] the court held that no case existed against them and ordered their immediate release. Once again, law enforcement officers failed to respect the habeas corpus ruling and the detainees continued to languish in jail. Although the detainees eventually regained their freedom, this case demonstrates total disregard for habeas corpus by law enforcement officers.[734]

Interestingly, Cameroon mentioned this case in its fourth periodic report to the HRC amongst others, as an example of its commitment to guarantee detainees the right to habeas corpus in line with Article 9(4) of the ICCPR and section 584 of the CPC.[735] Ironically, this case represents a typical violation of the rule of law and impunity, as the state neither condemned the disregard for the habeas corpus ruling nor responded appropriately to ensure that the suspects could vindicate their legal rights. This disregard and mockery of habeas corpus rulings by administrative authorities and law enforcement personnel, despite the efforts made by the courts to guarantee it, is ample evidence of the limited nature of the JOO in scope and practice, thus the urgent need for legislators to ameliorate and strengthen the law regulating habeas corpus in Cameroon.

4.5.7.2 Recent habeas corpus law in Cameroon: Jurisprudence under the CPC (2005) and JOO (2006)

Presently, habeas corpus guarantees in Cameroon are underlined in sections 584-588 of the CPC (2005) and 18(2) (b) of the JOO (2006). Section 584(1) of the CPC makes it

[732] *Ngoa Jean Bienvenue and Tachoula Jean v The People,* Judgment No. 19/CIV/LI/TGI of 19 July 2002.

[733] The section provides that 'no citizen or resident may be tried for a misdemeanour against a private party to which the law of the republic applies solely by virtue of this Section except at the instance of the authority controlling prosecution after private complaint or after official request to the government of the republic by the government of the place of commission'.

[734] CCPR/C/CMR/4 11 May 2009, para 309.

[735] Enonchong L S (2014) 54.

clear that persons arrested or detained in arbitrary circumstances, or their agents,[736] can seize the appropriate High Court to challenge the legality of their detention by way of habeas corpus. Unlike the JOO, the CPC makes provision for a habeas corpus procedure. An effective habeas corpus procedure is important as, first, it can prevent or limit the use of arbitrary detention as a weapon of political intimidation and repression. Secondly, it provides the necessary guidelines and motivation for law enforcement personnel and state security agents to adhere strictly to arrest and detention rules, and thirdly, ensures respect for the criminal justice system and the rule of law.

A habeas corpus process in Cameroon is commenced by the detainee or his or her agents. He or she submits a motion ex-parte to the High Court of competent jurisdiction supported by an affidavit stating the identity of the applicant and/or detainee,[737] place of arrest or detention,[738] precise summary of the facts and the arbitrary nature of the detention.[739] Upon receipt of the application, the president of the said court (judge) orders the detaining authority to present the detainee in court on a specified date and time, with the documents (warrants) authorising the arrest and detention.[740] A copy of the habeas corpus application is forwarded to the Legal Department of the court and a date is set for the hearing.[741] However, if the judge determines that the arrest or detention is arbitrary, he orders the immediate release of the detainee without necessarily waiting to do so at the hearing.[742] Although a habeas corpus ruling is subject to appeal, a detainee who secures his liberty by way of habeas corpus is entitled to release, irrespective of the appeal.[743] This is a welcome development in contrast to the general practice in Cameroon, where an appeal against a judgment automatically suspends its enforcement until the outcome of the appeal. A critical look at sections 584-588 of the CPC suggest that the new law regulating habeas corpus in Cameroon is limited as it contains no provision to compel or punish recalcitrant state agents who fail to present detainees in court and state reasons for their arrest or detention, or to release

[736] Section 584(3) of the CPC.
[737] Section 585(1) (a) of the CPC.
[738] Section 585(1) (b) of the CPC.
[739] Section 585(1) (c) of the CPC.
[740] Section 585(3) of the CPC.
[741] Section 585(3) of the CPC.
[742] Section 585(4) of the CPC.
[743] Section 586(2) of the CPC.

them subject to a court order to that effect.[744] No doubt, the same predicament that haunted the old law still hovers around section 584 of the CPC, that is to say, non-compliance and disregard for habeas corpus rulings by state agents.[745]

Excessive use of executive power by administrative officers and law enforcement personnel aside, sometimes court practices in Cameroon seem to work to the detriment of habeas corpus. It is important to note that the very essence of habeas corpus is to secure the prompt and unconditional release of a person deprived of liberty in arbitrary circumstances. Therefore, the process must be fast and expeditious. This is possible if, upon determining that the arrest or detention is arbitrary, the court immediately orders and secures the detainee's release even if it is not in session.[746] Unfortunately, sometimes the High Court determines arbitrariness in the manner of arrest and detention and order the detainees' release, yet the detaining JPO, state security agent or gendarmerie officer refuses to release the victim and fails to appear in court and state reasons for the initial arrest and continuing detention for many weeks, and sometimes for months.[747]

For example, in *Wirngo Vincent Jumbam & 4 others v The People of Cameroon*,[748] state security agents arrested the applicants on 7 and 13 May 2015 in Kumbo and Bamenda and brought them to trial pursuant to section 5(1) of Cameroon's counter-terrorism law.[749] The applicants were neither military men nor were in possession of weapons of war, recruiting militia or preparing for war.[750] On 25 May 2015, counsel for the applicants seized the High Court by way of habeas corpus, praying the court to determine the legality of their detention and secure their immediate release.[751] Regrettably, on 28 July 2015, more than 60 days after filing their habeas corpus application, the applicants continued to languish in jail, as authorities exhibited bad

[744] *Ngoa Jean Bienvenue and Tachoula Jean v The People,* Judgment No. 19/CIV/LI/TGI of 19 July 2002.
[745] Enonchong L S (2014) 55. See also *D. S. Oyebowale v Company Commander of Gendarmerie for Fako* (2009).
[746] Okpaluba C and Nwafor A 'The Common Law Remedy of Habeas Corpus Through the Prism of a Twelve-Point Construct' (2021) 2 *Erasmus Law Review*, (incomplete) 11.
[747] *D. S. Oyebowale v Company Commander of Gendarmerie for Fako* (2009) para. 14.
[748] *Wirngo Vincent Jumbam & 4 others v The People of Cameroon,* Suit No HCMB/7CRM/2015.
[749] Law No 2014/028 of 28th December 2014 on the Repression of Acts of Terrorism in Cameroon.
[750] *Wirngo Vincent Jumbam & 4 others v The People of Cameroon,* Suit No HCMB/7CRM/2015.
[751] *Wirngo Vincent Jumbam & 4 others v The People of Cameroon,* Suit No HCMB/7CRM/2015.

faith by charging the applicants with different offences ranging from terrorism, secession and revolution.[752] Regrettably, close to four years after the applicants filed their habeas corpus application, no ruling had been delivered to that effect. On 12 July 2019, the Yaoundé military tribunal sentenced the applicants to various jail terms and fines.[753]

The main cause for concern in this case are the victims' predicaments, and the total disregard for the habeas corpus ruling and the power of the Governor, an administrative officer, to successfully influence the arrest, investigation, prosecution and sentence of the applicants. This is a technical and procedural irregularity as in Cameroon, criminal investigations and proceedings can only be commenced on instructions from a magistrate acting in the capacity of either a State Counsel, examining magistrate or judge of the court, and not by an administrative officer. Thus, the case of *Wirngo Vincent Jumbam & 4 others v The People of Cameroon* is ample evidence that the new law regulating habeas corpus in Cameroon is limited, and has not in any way filled the gaps that plagued its predecessor. Sometimes, due to pressure from the regime, the High Court is unable to rely on habeas corpus to order and secure the release of persons arrested and detained in arbitrary circumstances until their eventual demise in prison.[754] Similarly, the HRC's verdict in *Cyrille Gervais Moutono Zogo (on behalf of Achille Benoit Zogo Andela) v Cameroon* has cast doubt on Cameroon's compliance with the provisions of Article 9(4) of the Covenant to guarantee habeas corpus to all persons under any form of detention, as the courts failed to rule on three petitions filed on the applicant's behalf on 5, 18 and 30 October 2012.[755] The HRC held that Cameroon violated Mr *Achille Benoit Zogo Andela*'s right to habeas corpus as authorities did not ensure constant periodic review of the lawfulness of his detention and no reasons or

[752] *Wirngo Vincent Jumbam & 4 others v The People of Cameroon,* Suit No HCMB/7CRM/2015.

[753] Numvi Walters and Che Clovis were individually sentenced to 15 years' imprisonment terms and fines of 300000frs and 200000frs CFA respectively, while Kongnso Stephen received a four-year imprisonment term with a fine of 100000 frs CFA. However, Tabukum Andrew, the first accused person was discharged and acquitted.

[754] Committee to Protect Journalists 'Jailed journalist dies in Cameroon prison' (2010) available at *https://cpj.org/2010/04/jailed-journalist-dies-in-cameroon-prison/* (accessed 3 April 2021).

[755] *Cyrille Gervais Moutono Zogo (on behalf of Achille Benoit Zogo Andela) v Cameroon* (2016) para. 6.7.

grounds were advanced for his continued detention. As a result, the HRC found a breach of Article 9(4) of the Covenant.[756]

That notwithstanding, in some cases, the courts have entertained habeas corpus petitions and effectively secured the release of persons arrested and detained in arbitrary fashion. For example, in *Moussa Yaya v the Public Prosecutor*, by virtue of a habeas corpus petition, the military tribunal ordered and secured the release of the victim on 15 February 2011 as his provisional detention period exceeded 18 months in violation of the provisions of Article 221 of the CPC.[757] Similarly, in *François Beka v the Public Prosecutor*, by way of a successful habeas corpus petition, the Ebolowa High Court ordered and secured the victim's release as his case had been struck off the court's list at first hearing many months earlier.[758] In a separate development, in *Sadou Sali v the Public Prosecutor*, the applicant's habeas corpus petition before the High Court of Mayo-kani succeeded as authorities held him in pre-trial detention for witchcraft practices despite that an order, dated 22 April 2014, had effectively waived his provisional detention.[759]

Although Cameroon guarantees the right to habeas corpus, determined circumstances in which arrest or detention is arbitrary, put in place procedural safeguards that protect against arbitrariness and a maximum period of pre-trial detention, regrettably, systemic and procedural barriers exist that render habeas corpus an ineffective and impractical option to challenge the legality of detention. For example, the law requires that a writ of habeas corpus must be accompanied by an order of release from the Procureur Général or State Counsel to effectively secure the detainee's release.[760] This process delays and defeats the intended expeditious and speedy nature of habeas corpus. Moreover, French speaking JPOs working in the English speaking parts of the country have adopted the civil law practice which permits JPOs not to present themselves in

[756] *Cyrille Gervais Moutono Zogo (on behalf of Achille Benoit Zogo Andela) v Cameroon* (2016) para. 8.
[757] *Moussa Yaya v the Public Prosecutor,* Order No. 06/habeas corpus of 15 February 2011. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 126.
[758] *François Beka v the Public Prosecutor*, Order No. 01/LI/HC/EB. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 126.
[759] *Sadou Sali v the Public Prosecutor,* Order No. 36/HC of 26 May 2014. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 126.
[760] Committee against Torture: CAT/C/CMR/CO/4, 19 May 2010, para.13.

court to answer habeas corpus petitions as their reports substitute for their physical presence. This is contrary to the Common Law practice, which requires that JPOs must present themselves personally in court to state reasons for the detainee's arrest and detention.

Furthermore, habeas corpus petitions are ineffective in cases of secret or unacknowledged detentions,[761] as the courts can only entertain and rule on the same, if the state security unit responsible for the arrest, detention and whereabouts of detainees is known. The case is complicated if detainees are transferred from one state jurisdiction to another,[762] as counsel must seize the competent court in the new jurisdiction by way of habeas corpus to secure their release. This is a difficult task and may explain why the courts find it difficult to provide meaningful explanations or rulings on habeas corpus petitions.[763] When confronted to this effect, courts often outrageously justify that the victim(s) is or are no longer in their jurisdiction and thus they cannot rule on the matter.[764]It is important to note that the law makes it clear that habeas corpus applications can be filed at the nearest High Court where the victim is arrested or detained.

4.5.8 Right to compensation for victims of arbitrary detention in Cameroon

International human rights treaty law requires that victims of human rights violations including arbitrary detention are entitled to prompt and adequate compensation.[765]

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[761] World Organisation against Torture 'Cameroon: Enforced disappearance and rumoured torture and killing of Mr. Samuel Ajiekah Abuwe' (2020) available at *https://www.omct.org/en/resources/urgent-interventions/enforced-disappearance-and-rumoured-torture-and-killing-of-mr-samuel-ajiekah-abuwe* (accessed 20 January 2021).

[762] *Nyo Wakai and 172 Ors v The State of Cameroon*, judgement No. HCB/19 CMR/921of 23 December 1992. World Organisation against Torture 'Cameroon: Enforced disappearance and rumoured torture and killing of Mr. Samuel Ajiekah Abuwe' (2020) available at *https://www.omct.org/en/resources/urgent-interventions/enforced-disappearance-and-rumoured-torture-and-killing-of-mr-samuel-ajiekah-abuwe* (accessed 20 January 2021).

[763] American Bar Association 'Cameroon: Preliminary Report on Proceedings Against Detained Journalist Samuel Ajekah Abuwe' (2020) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon-samuel-wazizi-prelim-report/* (accessed 5 April 2021).

[764] *Nyo Wakai and 172 Ors v The State of Cameroon*, judgement No. HCB/19 CMR/921of 23 December 1992. For more, see Reporters Without Borders 'Cameroon Findings of enquiry into journalist Samuel Wazizi's death in detention must be published' (2020) available at *https://rsf.org/en/news/cameroon-findings-enquiry-journalist-samuel-wazizis-death-detention-must-be-published* (accessed 5 April 2021).

[765] Articles 9 (5) of the ICCPR, 7 (1) (a) of the ACHPR and 5(5) of the ECHR.

Payment of compensatory damages to victims of human rights violations is important as it puts the victim in the position he or she would have been, had the violation not occurred. Although the Cameroon Constitution falls short in guaranteeing the right to compensation, nevertheless, it reiterates the country's commitment to the UDHR, ACHPR, ICCPR and other instruments that advocate for adequate compensation for victims of human rights violations including arbitrary detention.[766] Moreover, certain provisions in the CPC and PC have made up for this shortcoming. For example, section 236(1) of the CPC guarantees the enforceable right to compensation for arbitrary detention in the event where litigation proceedings end in a no-case ruling or final acquittal. However, victims have the onus 'to prove that they actually suffered injury of a serious nature as a result of such detention',[767] and the state is under every obligation to pay compensatory damages to victims of arbitrary detention and recover the same from the perpetrator as the case may be.[768] Therefore, victims of arbitrary detention can rely on section 544 of the CPC to state claims for compensation, as the section provides that 'the decision of acquittal may serve as the basis for an application for compensation before the competent commission provided for in section 237'. Section 237 of the CPC refers to a special commission that entertains applications for compensation with regard to arbitrary detention against members of the judiciary, State Counsels, Procureurs Généraux, JPOs and other persons or state agents working in an official capacity.

In some cases, Cameroon has complied with its domestic and international obligations under section 236(1) of the CPC and Article 9(5) of the ICCPR and awarded compensatory damages to victims of arbitrary detention. For example, in *The People v Baina Dedaidandi,* the High Court found the traditional ruler of Dore-Tongo village, guilty of arbitrary detention and ordered him to pay compensatory damages to the victim in the sum of FCFA 1,000,000.[769] Similarly, in *The People v Ouseini Hamadou,* the court of first instance found the defendant guilty of arbitrary detention and ordered him to pay the victim compensatory damages in the sum of FCFA 360000. Military

[766] Preamble to the Cameroon Constitution of 18 January 1996.
[767] Section 236(1) of the CPC.
[768] Section 236(3) of the CPC.
[769] *The People v Baina Dedaidandi,* (2006). For more, see CCPR/C/CMR/4 (2009) 34.

tribunals in Cameroon have also taken positive steps to ensure that victims of arbitrary detention are entitled to compensatory damages.[770] For example, in *The People v Warrant Officer Njiki Adolphe,* the military tribunal found the defendant guilty of arbitrary detention and ordered him to pay the victim compensatory damages of the sum of FCFA 900,000**.**[771] Furthermore, in *The People v Sergeant Nkam Onana*, the military tribunal found the defendant guilty of arbitrary detention, but the Tribunal did not specify an imprisonment term, amount of fine or compensatory damages.[772]

Despite the enforceable right to compensation guaranteed in section 236(1) of the CPC, the section is limited in different ways. First, it requires that the onus is on the victim to prove that he actually suffered damage because of the arbitrary detention. While it is possible to prove physical and material damage resulting from arbitrary detention, for example, scars of torture or loss of earnings while in detention, it is almost impossible to prove emotional or psychological damage. Secondly, section 236(1) of the CPC makes mention of 'injury of a serious nature as result of such detention', but does not explain in detail, describe or throw more light as to what might constitute 'serious nature'. Thirdly, the section does not provide a timeline (promptness requirement) for the payment of compensatory damages to victims of arbitrary detention. Rather, section 237(1) of the CPC is to the effect that compensatory damages guaranteed in section 236 (1) of the CPC are awarded at first instance by the decision of a commission,[773] a procedure that can be lengthy and thus in breach of the promptness requirement guarantee in Article 9(5) of the Covenant. Apart from section 236(1) limitations, other significant systemic challenges in Cameroon's domestic legal system such as state policy, nepotism, corruption, absence of an independent judiciary and the rule of law, and the culture of impunity, are other major obstacles for prompt award of compensatory damages to victims of arbitrary detention.

These inconsistencies and the significant failure on the part of the courts in Cameroon to compensate victims of arbitrary detention have motivated victims to seek remedy

[770] *The People v Ouseini Hamadou* (2006). For more, see CCPR/C/CMR/4 (2009) 34.
[771] *The People v Warrant Officer Njiki Adolphe* (2006). For more, see CCPR/C/CMR/4 (2009) 39.
[772] *The People v Sergeant Nkam Onana* (2006). For more, see CCPR/C/CMR/4 (2009) 39.
[773] Section 237(1) of the CPC.

from international bodies. It is for this reason that the HRC, in its Concluding Observations on Cameroon recommended that 'the state party should take steps to see to it that all victims of arbitrary arrest are accorded compensation by the commission set up to examine compensation claims submitted in relation to arbitrary arrest'.[774] To this effect, the HRC has entertained and delivered verdicts in a number of communications in favour of victims of arbitrary detention against Cameroon and ordered the state party to comply with its obligation under Article 9(5) of the Covenant and pay compensatory damages to the victims.[775] Except in one case,[776] Cameroon has failed to comply with its domestic and international commitments under section 236(1) of the CPC and Article 9(5) of the Covenant respectively.[777] It seems as if Cameroon took advantage of the HRC's laxity and failure to determine the amount of compensatory damages to victims of arbitrary detention to default in payments. For example in *Phillip Afuson Njaru v Cameroon*, the HRC found Cameroon guilty of arbitrary detention and ordered it to pay compensatory damages to the victim without stating the amount.[778] Cameroon opted to pay Mr Njaru compensatory damages in the sum of FCFA 20,000,000 instead of the FCFA 500, 000,000 demanded by the victim. Cameroon defended its position stating that the 'Committee's recommendation was devoid of any specific calculation of the quantity, thereby expressly leaving it to the discretion of the Government of the State party'.[779] Furthermore, Cameroon exhibited bad faith by stating that its desire to compensate Mr Njaru was not due to remorse for the arbitrary detention, but rather the desire to comply with its international commitments.[780]

[774]UN Committee against Torture (CAT), *Concluding Observations on the Fifth Periodic Report of Cameroon,*18 December 2017, CAT/C/CMR/CO/5, para. 34.

[775] *Womah Mukong v Cameroon* 1994, *Abdoulaye Mazou* v *Cameroon* 1995, *Fongum Gorji-Dinka v Cameroon* 2005, *Dorothy Kakem Titiahonjo v Cameroon* 2007, *Phillip Afuson Njaru v Cameroon* 2007, *Pierre Désiré Engo v Cameroon* 2005, *Ebenezar Akwanga v Cameroon* 2011 and *John Njie Monika v Cameroon* 2010.

[776] *Abdoulaye Mazou v Cameroon* 1995.

[777] Redress 'The Failure of Cameroon to Implement Views in Individual Communications: Shadow Report' (2017) 5 available *https://redress.org/wp-content/uploads/2018/10/HRC-Report-Sept-2017_Cameroon_FINAL.pdf* (accessed 7 May 2021).

[778] *Phillip Afuson Njaru v Cameroon* (2007) para. 8.

[779] Redress 'The Failure of Cameroon to Implement Views in Individual Communications: Shadow Report' (2017) 11 available *https://redress.org/wp-content/uploads/2018/10/HRC-Report-Sept-2017_Cameroon_FINAL.pdf* (accessed 7 May 2021).

[780] Redress 'The Failure of Cameroon to Implement Views in Individual Communications: Shadow Report' (2017) 11 available *https://redress.org/wp-content/uploads/2018/10/HRC-Report-Sept-2017_Cameroon_FINAL.pdf* (accessed 7 May 2021).

4.5.9 Conclusion

Chapter four has examined the effectiveness of the legal framework put in place to safeguard the right to freedom from arbitrary arrest and detention in Cameroon. It has shown that Cameroon has signed and ratified almost all international human rights treaties adopted to protect against human rights violations, including the right to freedom from arbitrary detention, and has incorporated their provisions and recommended standards in its domestic legal system. However, it has failed to ratify important treaties such the OPCAT which is pivotal in protecting against arbitrary detention.

The chapter has also demonstrated that Cameroon has criminalised arbitrary detention and prescribed appropriate penalties for perpetrators. Despite these positive measures put in place to protect against prohibited conduct and hold perpetrators accountable, the problem of arbitrary detention seems to be far from over in Cameroon. State security agents seem not to be familiar with interrogation and detention rules and procedures, or have deliberately undermined them, as suspects and accused persons held on criminal charges, whether in line with domestic law or not, fall short of international human rights standards. For example, state security agents, on the pretext of carrying out investigations, detain individuals without sufficient legal basis or probable cause to believe that they have committed or taken part in a crime. In most cases detainees are not presented promptly before a judge or other officer authorised by law to exercise judicial control over arrest and detention. They are often not tried within a reasonable time and are not granted bail, especially if the case is of a sensitive nature.

In a number of cases, the legal departments of the High Courts have not played their role as the arbiter between the state and accused persons in the criminal justice system in Cameroon as they have often failed to limit excessive use of pre-trial detention and prevent arbitrary detention, especially when state interests are at stake. Moreover, some examining magistrates have authorised remand in custody without a legal basis or contrary to domestic law procedures, thereby prolonging detention effected in an arbitrary fashion from the outset. Another serious concern is that of access to legal counsel and representation of detainees in the criminal justice system. This is evident, as the law does not guarantee lawyers the right to intervene on behalf of detainees at

police stations or at gendarmerie brigades during interrogation. As a result, lawyers are often intimidated, harassed and chased away by state security agents on the pretext that they, the lawyers, are disturbing interrogations. With no lawyers to intervene on their behalf, many suspects and detainees are held in prolonged detention, dependent on the mercy or goodwill of elements of the police or gendarmerie forces to complete investigations in good time. Moreover, most detainees cannot afford the services of a lawyer and, even when provided by the state, legal representation is often ineffective and insufficient, as either inexperienced, unqualified or underqualified lawyers render their services free of charge.

The chapter has also demonstrated that state security agents exhibit excessive powers over arrest and detention, especially during public emergency periods that render the writ of habeas corpus almost useless. The law that regulates habeas corpus in Cameroon is ineffective as it has little or no impact in protecting against prohibited conduct and excessive use of power by state agents to cause arrest and detention in arbitrary fashion. The next chapter examines the role played by criminal justice administration personnel in protecting against arbitrariness.

CHAPTER FIVE

SAFEGUARDS AGAINST ARBITRARY DETENTION IN CAMEROON: THE ROLE OF THE JUDICIARY, AUXILIARIES OF JUSTICE, LEGAL PROFESSIONALS AND OVERSIGHT MECHANISMS

5.1 Introduction

Members of the judiciary, national prosecution authority, law enforcement department, legal professionals and other actors play varying important roles in the Cameroon criminal justice system. They are under every obligation to make use of their wide knowledge and experience to perform their duties judiciously, ensuring compliance with rules regulating arrest and detention, to prevent or greatly minimise the risk of arbitrariness. Therefore, the Cameroon criminal justice system requires a strong judiciary composed of independent and impartial magistrates and judges to rule on cases of arbitrary detention and deliver reasoned judgments without fear or favour from the executive, legislative and other state organs. Other actors in the criminal justice system such as JPOs (investigation), State Counsel and Procureur Général (investigation and prosecution) and counsel (advice and representation) play important roles in protecting the innocent against excessive and arbitrary state powers. It is important to note that apart from the above-mentioned actors, the Cameroon Human Rights Commission (CHRC), human rights defenders, journalists, Non-Governmental Organisations (NGOs) and diplomatic foreign missions also play leading roles in protecting against arbitrary detention in Cameroon.

This chapter provides an analysis of the role played by judges/magistrates, State Counsels/Procureurs Généraux, counsel, JPOs and the CHRC in protecting against arbitrary detention in Cameroon. It focuses on the specific rules and principles governing the work of these actors, and their role in applying national law and international human rights standards to protect against arbitrariness.

5.2 The role of JPOs

Law enforcement or the police department in Cameroon is an important arm of the government, and arguably the first visible and immediate response to the criminal justice systems' demands to protect lives, dictate and respond to deviant behaviour and maintain law and order. Law enforcement officials are expected to perform their duties diligently, and limit themselves within the confines of statutory powers granted to them to avoid human rights violations such as arbitrary arrest or detention, torture and other forms of ill-treatment, enforced disappearance and summary executions. To protect against arbitrariness and excessive police power, the CPC clearly identifies personnel competent to function as JPOs in Cameroon. JPO's include officers and non-commissioned officers of the gendarmerie force[781] and any gendarmerie officer acting in an official capacity.[782] The list extends to include superintendents of police[783] and their deputies,[784] and any gendarmerie officer or inspector of police who has passed the judicial police officer's examination and taken the oath.[785] Furthermore, public servants functioning as head of an external service of the national security[786] or assigned to perform some judicial police duties[787] also qualify as JPOs under Cameroon's domestic law.

5.2.1 Ensure respect for the laws or rules governing arrest or detention

Judicial Police Officers (JPOs) in Cameroon perform their duties under the supervision of the State Counsel[788] or Procureur Général [789] and are mandated to carry out criminal investigations,[790] arrest, detain and interrogate, and to grant bail to suspects in the absence of sufficient evidence to suggest that s/he has committed or participated in a crime. To prevent or greatly minimise the risk of arbitrariness, JPO's must perform their duties in accordance with the substantive and procedural provisions of the law,

[781] Section 79(a) of the CPC.
[782] Section 79(b) of the CPC.
[783] Section 79(c) of the CPC.
[784] Section 79(d) of the CPC.
[785] Section 79(e) of the CPC.
[786] Section 79(f) of the CPC.
[787] Section 80 of the CPC.
[788] Section 78(1) (2) of the CPC.
[789] Section 78(3) of the CPC.
[790] Sections 82(a), 83(1) and 84(4) of the CPC.

with respect for the rights of suspects and accused persons. Therefore, JPOs must establish a clear legal basis for arrest or detention. This is important, as arrest or detention is a significant restriction of a person's civil and political rights. As a result, authorities must be unequivocal and certain that the decision to detain a suspect is correct and is in line with the substantive and procedural safeguards put in place by the Constitution, PC, CPC and other pieces of legislation that protect against arbitrariness. For this purpose, JPOs must always rely on the CPC, as it clearly specifies the purposes or circumstances under which police detention may be effected, and the legal rules governing arrest or detention,[791] legal process and the timeline within which each stage must happen.[792]

It is important to note that release is possible at any stage of the criminal justice system, as suspects and accused persons may be granted bail subject to appear in court at a later stage or pending discontinuance, discharge or acquittal. Therefore JPOs must be versed with the law regulating arrest, detention, interrogation, remand in custody and the entire criminal justice process. The right to personal liberty and freedom from arbitrary detention depends largely on the JPO's understanding, mastery and compliance with the all-embracing principles of legality, necessity, accountability, proportionality and non-arbitrariness.

5.2.2 Obligation to effect arrest and detention by way of a valid warrant

Cameroon's domestic law makes it clear that JPOs can carry out an arrest with or without a warrant (flagrante delicto). Arrest is the process of apprehending a person suspected to have committed or been involved in a crime, to bring him or her to justice.[793] Evidence, probable cause or reasonable grounds are the legal prerequisites for JPOs to effect an arrest or detention.[794] Thus, JPOs must establish a clear, direct or indirect reasonable link between specific suspect(s) and the particular crime in question. If a warrant is required for arrest or detention, JPOs must first evaluate the evidence against the suspect or accused person and ensure that sufficient grounds exist to lay a

[791] Sections 30, 31, 86, 103 of the CPC.
[792] Sections 119 and 120 of the CPC.
[793] Section 30(1) of the CPC.
[794] Preamble to the Constitution and Sections 31 and 118 of the CPC.

charge against him or her.[795] Furthermore, JPOs must state reasons and grounds for the arrest or detention before a State Counsel, Procureur Général[796] or examining magistrate or judge can approve and sign the arrest or detention warrant.[797] To prevent or greatly minimise the risk of arbitrariness, 'the arrest or detention warrant must state the full names, date and place of birth, affiliation, occupation and address of the arrested person and it shall be dated, stamped and signed by the magistrate issuing it or by the president of the trial court'.[798] Moreover, an arrest or detention warrant should include a summary of the facts of the alleged offence and specific reference to the relevant sections of the Penal Code (PC) and Criminal Procedure Code (CPC) necessitating the arrest or detention.[799] This is important as the suspect can easily vindicate him or herself and avoid unnecessary arrest or detention by explaining certain facts to establish his or her innocence.

Judicial police officers (JPOs) are expected to execute arrest warrants in accordance with the terms thereof and ensure that if it is necessary to use force, it must be reasonable and proportionate to the circumstance.[800] It is for this reason that section 30(4) of the CPC makes it clear that while effecting arrest, JPOs must ensure that 'no bodily or psychological harm shall be caused to the person arrested'. Furthermore, JPOs are under obligation to inform arrested persons, at the time of arrest, of the reasons for their arrest and remand in police custody,[801] the right to remain silent, the right to counsel[802] and to record all information with regard to arrest such as reason, time, place and the identity of the officers involved. Moreover, JPOs have a duty to timely inform third parties such as relatives, friends, organisations and counsel of the detainees'

[795] Preamble to the Constitution and Section 31 of the CPC.
[796] Sections 118 (3) and 124(1) of the CPC.
[797] Mandeng P C N 'The Role and Function of Prosecution in Criminal Justice' 163, available at *https://www.unafei.or.jp/publications/pdf/RS_No53/No53_18PA_Mandeng.pdf* (accessed 31 March 2021).
[798] Section 26 of the CPC.
[799] Sections 119(a) and 122(a) of the CPC.
[800] Section 30(2) of the CPC.
[801] Section 119(1) (a) of the CPC.
[802] Section 116(3) of the CPC.

choice of the place of detention or imprisonment and, if the arrested person is a foreign national, his or her consular authority.[803]

The JPO commences investigation into the allegations against the suspect or accused person, and releases him or her in the absence of sufficient reasons to believe in the perpetration of a crime or the evidence that s/he committed or took part in the crime, or on bail. In the absence of bail, the JPO is duty bound to state reasons for the remand in custody, 'the length of time within which he was subjected to requesting, the interval of rest during questioning, the day and hours when he was either released or brought before the State Counsel'.[804] Furthermore, JPOs must respect the 48 hour timeline (legal period to remand suspects in police custody) and present suspects before a judge or any other officer authorised by law to review judicial detention.[805]

5.2.3 Obligation to comply with the prerequisites of arrest without warrant (flagrante delicto)

In case of flagrante delicto arrest(s)[806] JPOs are under obligation to act in accordance with the law, without bias and in a timely manner[807] to ensure respect of the suspect's rights.JPOs must adhere to the principle of the presumption of innocence which is to the effect that 'everyone suspected to have committed a crime has the right to be presumed innocent until his guilt has been legally established in the course of a trial where he shall be given all necessary guarantees for his defence'.[808] It is important to note that although JPOs do not necessarily need to prove guilt to justify an arrest or detention, reasonable grounds must exist to suggest that the suspect committed or took part in the offence. Therefore, 'reasonable grounds' must go beyond the JPO's 'mere feeling' to objective, verifiable facts and evidence that puts the suspect at the crime scene at the time the crime was committed and of his role in it.

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[803] Louise Edwards 'Pre-Trial Justice in Africa: An Overview of the Use of Arrest and Detention, and Conditions of Detention', APCOF Policy Paper No. 7 (2013) 4 available at *http://apcof.org/wp-content/uploads/2016/05/No-7-Pre-Trial-Justice-in-Africa-An-Overview-of-the-Use-of-Arrest-and-Detention-and-Conditions-of-Detention_-English-Louise-Edwards-.pdf* (accessed 14 March 2021).

[804] Section 124(1) of the CPC.

[805] Section 119(2) (a) of the CPC.

[806] Section 103(1) of the CPC.

[807] Sections 83 and 117(1) of the CPC.

[808] Preamble to the Constitution and Section 8(1) of the CPC.

JPOs are under obligation to ensure that arrested persons (flagrante delicto arrest or not) are entitled to bail in the absence of sufficient reasons to justify continued detention.[809] The reasoning is that JPOs must apply principles of equity, fairness and good conscience and not detain a person in arbitrary fashion. JPOs are under obligation to release flagrante delicto suspects if inquiry reveals insufficient evidence to proceed with a charge, or to present them before the nearest State Counsel within 24 hours; and, if s/he is not available, the nearest judicial officer within the jurisdiction. In addition, the JPO must inform the State Counsel, Procureur Général or other judicial officer of the alleged offence and the circumstances of the arrest.[810] Therefore, only the State Counsel, Procureur Général or other judicial officer can order the suspect's remand in custody if it is necessary and this is valid for 24 hours.[811] Conversely, if the State Counsel or judicial officer establishes that detention is not necessary, or that s/he will not initiate or continue investigations, the suspect must be released.

5.2.4 Ensure that criminal investigations are conducted in accordance with the law

JPOs in Cameroon are competent to conduct criminal investigations for the prosecution. This is by virtue of section 78(1) of the CPC to the effect that the State Counsel shall direct, supervise and monitor criminal investigations carried out by JPOs and all other civil servants or persons authorised by law to act in the capacity of JPOs. The purpose of supervising investigation is to ensure that JPOs comply with the substantive and procedural rules governing deprivation of personal liberty, including investigation and interrogation to prevent or greatly minimise the risk of arbitrariness. JPOs must ensure that investigation and interrogation are carried out in line with the principles of presumption of innocence, privilege against self-incrimination and the prohibition of torture and other forms of ill-treatment. The JPO is directly responsible to the Procureur Général or State Counsel as s/he reports all procedures involved in the conduct of the investigation. If the State Counsel determines arbitrariness, s/he can decide to withdraw the case file (investigations) from a JPO of the gendarmerie and transfer it to a JPO of

[809] Section 117(2) of the CPC.
[810] Section 89(1) of the CPC.
[811] Sections 15 and 218-221 of the CPC.

the National Security and vice versa.[812] Likewise, the State Counsel, in line with sections 135, 139 and 140 of the CPC, may return the case file to the JPO for further investigation or change JPOs within the same unit in case of arbitrariness.[813] Therefore, the Procureur Général or State Counsel is under the obligation to ensure that JPOs conduct criminal investigations with the view to upholding the principle of legality and non-arbitrariness.

It is argued that criminal investigation is one of the key components of the criminal justice system and, if carried out effectively, it can prevent or greatly minimise the risk of arbitrariness. Authorities must ensure that JPOs and other state officials authorised to carry out criminal investigations should be well educated and trained specifically for the purpose. They must also command a background knowledge or be versed in, but not limited to, related fields of criminal investigation such as law, forensic science, psychology, sociology and human rights.

5.2.5 Ensure proper detention conditions for suspects or accused persons

In line with its international commitments to promote and protect human rights, Cameroon is under obligation to ensure that suspects or accused persons are incarcerated only in state-recognised detention facilities. Therefore, JPOs must register all detainees in the custody registration notebook, paying particular attention to details such as detainees' names, exact date, time, and place, reasons for arrest or detention and nature of charges.[814] The identity of all JPOs that carry out or supervise the arrest or detention, including place of detention, must be recorded in the registration book as well. Prompt and accurate registration of suspects or accused persons is important and necessary as this protects against arbitrary detention or secret and incommunicado detention, enforced disappearance, torture and other forms of ill-treatment.[815] Registration of arrest or detention must be regulated by law and registers made available

[812] Ngatchou T C 'The Responsibility of the Judicial Police Officer under Cameroonian Law' (2019) 4 (1) *International Journal of Trend in Scientific Research and Development* 986–1000, p. 989.
[813] Section 83(5) of the CPC of Cameroon. For more, see Ngatchou T C (2019) 989.
[814] UN Committee against Torture (2017) para. 12(d). Section 34 of the CPC also requires that 'Judicial police officers shall forward daily a list of persons detained at their police stations to the competent State Counsel'.
[815] UN Committee against Torture (2017) para. 12(c).

at times to all concerned institutions and organisations, including the detainee, counsel, judicial or other competent authorities, a national human rights commission, and international bodies interested in the arrest or detention.[816] Furthermore, authorities must ensure that members of the international and local NGOs pay unrestricted and unannounced visits to detention centres for inspection and record-keeping purposes.[817] In the event of human rights violations due to failure to register or keep accurate custody records, sanctions should be imposed on culprits and other persons guilty of falsification of custody records. Moreover, JPOs must ensure that different categories of persons such as men and women, children and adults, detainees and convicted prisoners are held in separate cells to prevent physical and sexual abuse.

5.2.6 Oversight control mechanism (SPOD)

In line with its international commitments, Cameroon is under obligation to prevent arbitrary arrest or detention and to ensure that JPOs who engage in the practice are held accountable to prevent violations or future occurrences. Section 122(5) of the CPC makes it clear that 'any person who violates or fails to comply with rules regulating criminal investigations or prevents their compliance, shall be liable to prosecution without prejudice, where necessary, to disciplinary sanctions'. To this effect, Cameroon set up a Special Police Oversight Division (SPOD)[818] to curb excessive use of police power by JPOs upon arrest, detention and criminal investigations. The SPOD is competent to investigate human rights violations such as arbitrary arrest or detention, torture and other forms of ill-treatment as well as enforced disappearances orchestrated by recalcitrant JPOs (policing the Police).[819]

The SPOD is duty bound to ensure that investigations into allegations of arbitrary arrest or detention must be effective, thorough, independent and capable of explaining the manner and circumstances of the arrest or detention. For example, whether JPOs effected arrest or detention by way of a valid warrant or not, employed the use of force, and, if so, whether it was reasonably necessary. The investigation results must provide a definite conclusion as to whether the arrest or detention was arbitrary or not, and, if

[816] UN Committee against Torture (2017) para. 12(d) (e).
[817] UN Committee against Torture (2017) para. 12(e).
[818] Special Division for the Control of Services of the Police, Decree No. 2005-065 of 23 February 2005.
[819] Article 1(2) of Decree No. 2005-065 of 23 February 2005.

yes, it should identify the perpetrator(s), suggest punishment, and should be open to judicial review. Furthermore, JPOs investigating allegations of arbitrary arrest or detention must be free from hierarchical pressure, and from interference from other JPOs implicated in the investigation. Investigators must not limit themselves to, or rely solely on, information provided to them by those implicated in abuses, but look thoroughly at objective, and impartial facts surrounding the case.

The SPOD is also competent to constantly inspect police premises, including detention facilities. This is important, as persons arrested and detained in arbitrary fashion are easily identified, and should be recommended for release. The SPOD also reviews the patterns of JPO's conduct and misconduct, and identifies and assesses the functioning of the internal disciplinary process so as to pave the way for accountability and sanctions in case of arbitrariness. It is also competent to alert the relevant authorities to prosecute recalcitrant JPOs, and provide compensation or any other equitable relief to victims of arbitrary arrest or detention. For the SPOD to succeed in its mission, the public must be aware of its existence and modus operandi. So a legal regime must be put in place to entertain complaints, provide timelines for completing investigations, and establish methods and procedures for conducting disciplinary and criminal investigations, and sanctions for arbitrary arrest or detention, torture and other forms of ill-treatment. Furthermore, the SPOD must be competent to carry out daily checks at detention centres to ensure that arrest or detention is not arbitrary, confessions are not extracted by unorthodox means, and that detainees are not subjected to torture and other forms of ill-treatment. The success of the SPOD in achieving its task (the internal discipline of JPOs and protection against human rights violations including arbitrariness) depends on the positive will and collaboration of JPOs responsible for detention facilities, and on hierarchical policies.

Although the SPOD has played a leading role in protecting against arbitrariness,[820] regrettably, the service is not independent and lacks objectivity and transparency in its method of operation. As a result, only a handful of complaints against JPOs have been

[820] Human Rights Council, Cameroon: Report of the working group on the universal periodic review, eleventh session, agenda 6, A/HRC/11/21, 3 March 2009, para. 44.

investigated[821] leaving gaps for arbitrariness. For example, investigations into allegations of arrest or detention effected in arbitrary fashion by JPOs are conducted by other JPOs or higher-ranking JPOs. It is difficult to imagine how a JPO can testify or carry out rigorous and impartial investigations against his or her colleague which could compromise that colleague and lead to suspension from duties, loss of wages, prosecution, conviction or a possible sentence. For example, in the *Nine Missing Persons of Bepanda case*, elements of the 'gendarmerie operational command centre' in the Bepanda neighbourhood of Douala in arbitrary circumstances, arrested, detained and eventually caused the disappearance of nine youths, for stealing a gas bottle and cooker.

Lack of cooperation and failure on the part of JPOs to properly investigate the matter and present evidence of arbitrariness in court led to near impunity and lenient sentences.[822] This shows that human rights abuses such as arbitrary arrest or detention, including torture, other forms of ill-treatment and enforced disappearances committed by JPOs should not be investigated by other JPOs, but by an independent organ, commission or body free from executive or police influence.

International experience has demonstrated that an independent oversight division of the police is crucial and important for effective performance of JPOs in the criminal justice system.[823] For example, the South African Independent Police Investigative Directorate[824] has effectively conducted independent and impartial investigations into human rights violations, including arbitrary arrest and detention allegedly committed

[821] Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention: Concluding Observations on Cameroon forty-fourth session 26 April-14 May 2010, CAT/C/CMR/CO/4, para. 22.

[822] *Nine Missing Persons of Bepanda case,* Decision No. 139-02 of 6 July 2002. Two of the eight accused persons were convicted on some counts of the charge and sentenced to 15 months military detention suspended for three years, and 16 months imprisonment under military detention law respectively. For more, see CCPR/C/CMR/4, (2009)159.

[823] Amnesty International 'Police Oversight: Police and Human Rights Programme – Short paper series No. 2' (2015) 12, available at *https://policehumanrightsresources.org/content/uploads/2015/01/Short-paper-series-no.2-Police-oversight.pdf?x96812* (accessed 10 December 2020).

[824] The Independent Police Investigative Directorate (IPID) is the supervisory body of the South African Police Service (SAPS) and the Municipal Police Services (MPS). See National Government of South Africa 'Independent Police Investigative Directorate' (2020) available at *https://nationalgovernment.co.za/units/view/20/independent-police-investigative-directorate-ipid Program*(accessed 10 December 2020).

by members of the SAPS and the MPS, and has made appropriate recommendations[825] including criminal prosecutions, disciplinary sanctions, and compensation to the victim(s).[826] Therefore, Cameroon must learn from the South African experience and ensure that human rights abuses including arbitrary arrest or detention committed by JPOs are not investigated by other JPOs, but by an independent organ, commission or body, free from executive or police influence or control.

5.3 Role of the prosecution

The National Public Prosecution Authority is a very important arm of the Cameroon criminal justice system. It includes the office of the Prosecutor General headed by the Procureur Général at appeal level, and the legal department headed by the State Counsel at the trial level. The Procureur Général and State Counsel play varying important roles in the criminal justice system, such as representing the state and accused persons as well as advising the court system. The Procureur Général and State Counsel are the prosecuting authorities in Cameroon and they must ensure that JPOs, state security agents and other custody personnel respect the legal principles governing arrest or detention, criminal investigations and fundamental human rights of suspects and accused persons. They are duty bound to be fair,[827] consistent, expeditious and respectful, and to promote and protect human rights and dignity, ensure due process and the smooth functioning of the criminal justice system. They must be held accountable for all negative acts or omissions resulting from the discharge of their duties and functions.

[825] Amnesty International 'Police Oversight: Police and Human Rights Programme – Short paper series No. 2' (2015) 16 &17. Available at *https://policehumanrightsresources.org/content/uploads/2015/01/Short-paper-series-no.2-Police-oversight.pdf?x96812* (accessed 10 December 2020).

[826] Amnesty International 'Police Oversight: Police and Human Rights Programme – Short paper series No. 2' (2015)19, available at *https://policehumanrightsresources.org/content/uploads/2015/01/Short-paper-series-no.2-Police-oversight.pdf?x96812* (accessed 10 December 2020).

[827] The Procureur Général or State Counsel are under obligation to carry out their duties void of all political, social, religious, racial, cultural, sexual or any other kind of discrimination. Therefore, the decision to arrest, remand, prosecute, grant bail or release a suspect or accused person must not be motivated by any of these factors.

5.3.1 Effective control over arrest and detention

The Procureur Général [828] and State Counsel[829] are competent to exert total control over, and to supervise the activities of JPOs in the course of their duties working within their material and territorial competence. This is important as it ensures that JPOs respect the fundamental human rights of suspects and accused persons, comply with recommended policing rules and perform their duties in line with the principles of legality and non-arbitrariness. The Procureur Général and State Counsel have the right to scrutinise arrest or detention ordered by a judge, and initiate preliminary investigations to determine whether sufficient evidence exists to warrant arrest or detention and the manner in which the arrest or detention was effected. Therefore, any decision pertaining to arrest or detention must be well thought out, and certain that it will not amount to arbitrariness. For example, prior to applying for an arrest warrant, the Procureur Général or State Counsel must be certain that a suspect or accused person has committed a criminal offence and that reasonable grounds exist for his or her detention. The Procureur Général or State Counsel must also ensure that suspects or accused persons' pre-trial rights are respected and are presented before the courts within the stipulated time. On the contrary, in the absence of sufficient grounds to justify the suspect or accused person's arrest or detention, the Procureur Général or State Counsel can order their release or petition the courts to do so.

Furthermore, the Procureur Général or State Counsel shall not initiate or continue prosecution, or make efforts to stay proceedings against a suspect or accused person when an impartial investigation has revealed that the charge is unfounded.[830] That notwithstanding, it has been proved that sometimes prosecutors have hastily remanded suspects in custody at the early stages of investigations without disclosing sufficient reasons to connect them with the crime or show why detention is necessary.[831] Although the Procureur Général rarely pays unannounced visits to police stations, gendarmerie brigades and other detention centres, he delegates judicial officers (magistrates and the

[828] Section 134(2) (a) of the CPC.
[829] Section 137(1) of the CPC.
[830] Section 64(1) (2) of the CPC.
[831] *Hawa Abdouraman v The Public Prosecutor,* Order No. 01/HC/PTGI/LC of 17 September 2014. For more, see Committee against Torture: CAT/C/CMR/5, 3 November 2016, para. 126.

State Counsel) to perform this task within his or her jurisdiction.[832] S/he makes an appraisal of the detention register, as well as individual detainee files, to verify the lawfulness of their arrest and detention, and whether JPOs have respected the 48 hour rule stipulated by law. In the course of these visits, 'the persons whose release he orders of his own motion or by virtue of an order of habeas corpus, must immediately be set free, under pain of prosecution for unlawful detention against the judicial police officers in charge of the police post or gendarmerie brigade where the custody takes place'.[833] The Procureur Général or State Counsel where necessary can commence criminal proceedings or refer the matter to the competent authorities, for disciplinary action against the JPO at fault.

5.3.2 Attitude of the Procureur Général or State Counsel to bail

Suspects and accused persons charged with a criminal offence in Cameroon (except persons charged with felony)[834] have the right to be released on bail pending trial.[835] This is based on the presumption of innocence backed by the preamble to the Constitution which is to the effect that 'every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence'. The Procureur Général or State Counsel must bear in mind that any arrest or detention effected in arbitrary fashion, even for a brief period, can impact negatively on the suspect or accused person's mental, social and physical life, and that of his family. Therefore, the Procureur Général or State Counsel's discretion whether to consent to or oppose bail is fundamental to the proper functioning of the bail process in the criminal justice system, and must be arrived at with caution. That notwithstanding, the decision whether to grant bail or not is considered on a case by case basis and as a result, the Procureur Général or State Counsel must act with objectivity, independence and fairness to avoid arbitrariness.[836] Furthermore, the decision must be made timeously,

[832] Section 134(1) of the CPC of Cameroon.

[833] Section 137(2) of the CPC.

[834] A felony shall mean an offence punishable with death or loss of liberty for a maximum of more than 10 (ten) years and fine where the law so provides. See Section 21 (1) of the Penal Code (PC) of Cameroon.

[835] Sections 224 & 246(g) of the CPC.

[836] The Procureur Général or State Counsel may have sufficient reasons to believe that granting the suspect or accused person bail may adversely impact on the safety or security of the victim, witnesses, the public or the smooth functioning of the case and thus resort not to do so. However, the prosecution

and in line with appropriate legal principles without executive or other external pressures or considerations.[837] Moreover, the amount or surety for bail must be reasonable and not restrictive. More importantly, the Procureur Général or State Counsel is expected to notify the accused person of the outcome of his or her bail application, the conditions of bail if granted, assist with eventual release, and ensure that the court provides him or her with a copy of the bail release order.[838]

The Procureur Général or State Counsel's ability to protect against arbitrary detention can be guided by certain considerations as to whether or not to consent to bail. First, whether there is a reasonable prospect that the prosecution can secure a conviction and a custodial sentence if the accused person is eventually found guilty. Should this be to the contrary, the prosecution should withdraw the charges and release the accused person. The reasoning is that the mere filing of a criminal suit can have permanently devastating consequences on the suspect or accused person's life, including remand in custody, loss of employment, loss of dignity and reputation, financial waste (cost of the criminal defence suit), and emotional stress and anxiety. So detention should be the exception and release on bail the rule if the Procureur Général or State Counsel is certain that a custodial sentence is unlikely. Secondly, the Procureur Général or State Counsel is duty bound to assess all the surrounding circumstances of the case, and welcome new developments which may positively impact the accused person's case when deciding whether to consent to, or oppose bail. For example, new reliable evidence, facts or information made available to the Procureur Général or State Counsel by defence counsel or potential witnesses must be considered, regardless of who bears the onus to prove the same. Similarly, the Procureur Général or State Counsel must also disclose to the accused persons and their counsel facts and evidence, even those that may be necessary to help exonerate them from allegations that may pave the way for arbitrariness.

must refrain from improper methods calculated to refuse the accused person bail. For more, see *The People v Fon Doh Gah Gwanyi III & 11 Others* HCND/2C/2005/2006, unreported.

[837] Sections 224 & 246(g) of the CPC.

[838] Mandeng P C N 'The Role and Function of Prosecution in Criminal Justice' 164, available at *https://www.unafei.or.jp/publications/pdf/RS_No53/No53_18PA_Mandeng.pdf* (accessed 31 March 2021).

Although the Procureur Général and State Counsel are always cautious about whether or not to oppose bail, in some cases it has been proved that these legal professionals act in bad faith, especially with regard to cases relating to the territorial integrity of the state, or where the interest of the regime in power is at stake. For example, in the *People v Nya Henry,* members of the Southern Cameroons National Council (SCNC) were arrested on 1 October 2001 for commemorating the independence day of the British Southern Cameroons, otherwise known as Ambazonia Republic. Relying on section 224(2) of the CPC, the High Court granted bail to all the detainees, a decision undermined by the Procureur Général of the North West Region as he called and instructed the Legal Department not to comply with the bail order and hence their continued detention.[839] The learned trial judge stated as follows, 'the Procureur Général of the North West Province, the highest officer I know to be in charge of public prosecution, in this province' was prepared to undermine court orders.[840] Further charges instituted against the victims before the same trial judge who presided in the earlier bail ruling held that the Procureur Général's attitude, and that of the Legal Department, amounted to a violation of the right to be presumed innocent and to freedom from arbitrary detention. He maintained that the applicants were eligible for bail and re-ordered their release.[841]

Similarly, in *Dr Martin Luma & 18 Ors v The People,* the Procureur Général of the Court of Appeal, relying on section 224(2) of the CPC, petitioned the court to set aside a High Court order that had granted the applicants bail, on the grounds that bail is not the rule in the absence of charges, as the defendants may subsequently be charged with a felony, a non-bailable offence.[842] At retrial, the detainees were charged with simple offences, meaning that the Procureur Général had deprived them of their right to bail as simple offences are classified under offences entitled to bail. It is submitted that even if the applicants had not been charged with simple offences that warranted bail, *Dr Martin Luma & 18 Ors v The People* presents a clear case of arbitrariness as the delay

[839] *The People v Nya Henry Tichandum* (22 August 2002), Appeal No. BCA/MS/11C/2002. For more, see Enonchong N, 'Human Rights Violations by the Executive: Complicity of the Judiciary in Cameroon?' (2003) 47 (2) *Journal of African Law* 265-274, p. 265.
[840] Enonchong N 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?'(2002) 46 (2) *Journal of African Law* 197-215, p. 201.
[841] Enonchong N (2002) 265.
[842] *The People v Dr Martin Luma & 18 Ors* Suit No. BA/13m/01-02, Court of First Instance, Bamenda (2002).

in instituting charges timeously against the detainees amounted to a violation of their right to be informed of the nature of charges against them. Informing suspects and arrested persons of the nature of charges is important as it enables them to know whether they are eligible for bail or not, take the necessary steps to secure their release, and avoid unnecessary detention.

5.3.3 Dealing with evidence illegally or improperly obtained

The Procureur Général or State Counsel in Cameroon can adequately protect against arbitrary detention by ensuring that confessions[843] or evidence illegally or improperly obtained during custodial interrogation are not admissible in courts against a suspect or an accused person. This is in line with section 315(2) of the CPC which is to the effect that 'a confession shall not be admissible in evidence if it is obtained through duress, violence, or intimidation or in exchange of a promise for any benefit whatsoever or by any other means contrary to the free will of the maker of the confession'. In this regard, the Procureur Général or State Counsel is under the obligation to examine the proposed confession or evidence to ascertain if it was obtained in accordance with the law and standard rules of evidence.

If the Procureur Général or State Counsel reasonably concludes that a confession or evidence against a suspect or an accused person was obtained through unorthodox means, for example, by way of torture or other forms of ill-treatment, they must decline to use the same except against the perpetrator of ill-treatment.[844] Furthermore, they must proceed to inform the court and take all necessary steps to ensure that the culprits are brought to justice. It is important to point out that as the Procureur Général or State Counsel is responsible for conducting, directing or supervising criminal investigations, he himself must not use unlawful or unorthodox methods in obtaining confession, and should advise and instruct JPOs to act likewise. That notwithstanding, in some cases it has been proved that the prosecution failed to ensure that confessions and testimonies extracted from suspects, accused persons and witnesses by way of torture and other forms of ill-treatment are not admissible in evidence in the courts. For example, in

[843] Section 315(1) of the CPC presupposes that 'a confession is a statement made at any time by an accused in which he admits that he committed the offence with which he is charged'.
[844] Section 315(2) of the CPC.

Jonas Singa Kumié and *Franky Djome's case,* the Court of Appeal overturned the trial court's verdict, on grounds that the Procureur Général knowingly tendered, and the High Court admitted in evidence, confessions made by the defendants under duress while in police custody.[845] Moreover, the prosecution failed to present any witnesses who actually saw Jonas Singa Kumié and Franky Djome engaging in homosexual activities, 'relying instead on a police inspector who simply vouched for his colleague's report'. Even if the JPO actually saw them 'groping' one another, in legal sense it might be 'considered as attempted homosexuality', but not 'homosexuality'.[846]

The Procureur Général or State Counsel's ability to adequately protect against arbitrary detention is limited as they have no power to control administrative detention by virtue of the principle of separation of powers. For example, the Procureur Général or State Counsel cannot secure the release of persons[847] arrested or detained (even in arbitrary fashion) on orders of the Minister of Justice or a state administrator such as the Divisional Officer,[848] Senior Divisional Officer,[849] and Regional Governor.[850] However, the Procureur Général or State Counsel is competent to verify the authenticity of arrest warrants and the lawfulness of arrest or detention including those issued by competent administrative authorities.[851] In case of arbitrary arrest or detention, torture and other forms of ill-treatment or enforced disappearances, the Procureur Général or State Counsel may alert the competent courts of the abuses, and even partner with defence counsel to seize the competent courts by way of habeas corpus to vindicate the detainee's legal rights.[852]

[845] Human Rights Watch Cameroon: Letter to the Prosecutor General of the Central Appeals Court (2013) *https://www.hrw.org/news/2013/05/17/cameroon-letter-prosecutor-general-central-appeals-court* (accessed 10 July 2020).

[846] Human Rights Watch Cameroon: Letter to the Prosecutor General of the Central Appeals Court (2013) *https://www.hrw.org/news/2013/05/17/cameroon-letter-prosecutor-general-central-appeals-court* (accessed 10 July 2020).

[847] These categories of persons include but are not limited to critics and opponents of the regime, political party leaders and their militants, civil and human rights activists, human rights defenders and outspoken journalists.

[848] State administrator in charge of a Sub-division and representative of the head of state in Cameroon.

[849] State administrator in charge of a Division and representative of the head of state in Cameroon.

[850] The Regional Governor is the state administrator in charge of a region and representative of the head of state.

[851] Section 23(1) (new) of ordinance No. 72-4 of 26 August 1972.

[852]The author has personal experience, where the State Counsel for Ngoketunjia Division explained that he could not order the release of persons ordered by the Senior Divisional Officer for the division even if the arrest or detention was arbitrary. However, he advised the defence team to proceed with the matter

5.3.4 Protection against arbitrariness by way of nolle prosequi

The Procureur Général or State Counsel[853] has often relied on the principle of a 'nolle prosequi' to protect against arbitrariness in criminal proceedings in Cameroon. A nolle prosequi is an application made orally or in writing to the court of competent jurisdiction indicating that the prosecution does not intend to continue with the proceedings in court.[854] Section 64 (1) of the CPC makes it clear that 'the Procureur Général of a Court of Appeal may, by express authority of the Ministry in charge of Justice, enter a nolle prosequi, at any stage before judgment on the merits as delivered, if such proceedings could seriously imperil social interest or public order'. The prosecution can enter a nolle prosequi for the following reasons: first, the facts of the case do not disclose either an offence or the court is seized with wrong charges;[855] secondly, unavailability or lack of cooperation of vital witnesses;[856] thirdly, the evidence is too weak to satisfy the burden of proof requirement or charges against the suspect or accused person cannot be proved;[857] and fourthly, that the evidence against the suspect or accused person may be weak or invalid in light of the allegations and, as a result, doubts exist with regard to guilt.[858]

It is important to note that once the Procureur Général or State Counsel enters a nolle prosequi, the examining magistrate or the courts are under every obligation to discharge the suspect or accused person and s/he is immediately released if in police custody. If the suspect or accused person is at large, but on the strength of a valid warrant, the

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by way of a habeas corpus motion and that he would gladly cooperate and support the defence team in all it would take in court to vindicate the detainee's legal rights and secure his release.

[853] See section 73 of the Evidence Act. The State Counsel may discontinue the proceedings by way of a nolle prosequi and order the detainee's release in the absence of sufficient reasons to continue with the proceedings, or if charges against the suspect or accused person seems to be frivolous or unfounded. Similarly, by virtue of section 75 of the Criminal Procedure Ordinance, the State Counsel may, at any time before judgement, obtain leave of court to suspend prosecution to secure the suspect or accused person's release in case of arbitrariness.

[854] Mandeng P C N 'The Role and Function of Prosecution in Criminal Justice' 167 available at *https://www.unafei.or.jp/publications/pdf/RS_No53/No53_18PA_Mandeng.pdf* (accessed 31 March 2021).

[855] *The People v Jeremiah Anjayong & anor.,* Suit No. H.C.S.W./20c/80 (Unreported).

[856] *The People v Timothy Arrey & anor*. Suit No. H.C.S.W./7c/80 (Unreported).

[857] *The People v Jeremiah Anjayong & anor.,* Suit No. H.C.S.W./20c/80 (Unreported).

[858] *The People v Akie Tiku Zachariah* Suit No. H.C.S.W./19c/81 (Unreported).

warrant must be withdrawn irrespective of whether or not the release is on merits.[859] It is important to note that the nolle prosequi applies at all times irrespective of whether the accused person has pleaded guilty to the charges against him or her before conviction.[860] Therefore, the courts, examining magistrate, or JPOs are under every obligation to discharge the accused person once the Procureur Général or State Counsel enters a nolle prosequi, irrespective of reasons for the discharge or the whereabouts of the suspect or accused person.[861] The examining magistrate or the court shall proceed to record the discontinuation of the criminal proceedings, and order the cancellation of any pending warrant against the suspect or the accused person.[862]

In *The People v Tonfact Julienne and Kandem Robert,* the State Counsel, by way of a nolle prosequi, discontinued the proceedings before the High Court, as sufficient evidence existed that JPOs had extracted confessions from the accused persons by way of torture, coercion and intimidation. The court stated that such unorthodox and arbitrary actions are clear violations of the accused person's basic and fundamental human rights. The court proceeded to annul the proceedings and ordered the immediate release of the accused persons.[863] Similarly, in *The People v Mengue Junette and Djessa Jean Dennis,* the Procureur Général annulled the proceedings on grounds that in the course of the investigations, JPOs made use of torture and other unorthodox means to extract confessions from the accused persons.[864] Furthermore, relying on a presidential decree issued on 30 August 2017, the Procureur Général of the military tribunal, by way of a nolle prosequi, discontinued proceedings against Anglophone Consortium

[859] *The People v Etabi Elias* Suit No. H.C.S.W./13c/79 of 24/4/79 (Unreported).

[860] *The People v Tama Ndanga Victor & Anor*. Suit No. H.C.S.W./30c/79 (Unreported).

[861] Section 73(2) of the Criminal Procedure Ordinance of Cameroon.

[862] Section 64(2) of the CPC. For more, see section 73(2) of the Criminal Procedure Ordinance of Cameroon.

[863] *The People v Tonfact Julienne and Kandem Robert*, Judgement No. 69/00 of 21 September 2000. The 'evidence adduced in the course of the trial established that Djutio Richard subjected Kandem Robert to inhuman treatment because of his relationship with Mrs Tonfack Julienne. He was remanded in custody for twenty (20) days, which exceeds the legal time-limit, and beaten several times to force him to confess. He sustained injuries as a result of this treatment and finally confessed'. See Human Rights Committee, Consideration of Reports Submitted by State Parties under Article 40 of the International Covenant on Civil and Political Rights: Cameroon, Fourth Periodic Report, CCPR/C/CMR/4 11 May 2009, para. 292-294.

[864] *The People v Mengue Junette and Djessa J* Judgement No. 182/COR of 24 February 2005. For more, see Human Rights Committee, Consideration of Reports Submitted by State Parties under Article 40 of the International Covenant on Civil and Political Rights: Cameroon, Fourth Periodic Report, CCPR/C/CMR/4 11 May 2009, para. 295.

leaders[865] and over 50 other persons including four journalists[866] arrested and detained in arbitrary circumstances, demanding equal civil and political rights for the Anglophone marginalised minority in the Cameroons.[867]

5.4 Role of counsel

Counsel (lawyers)[868] play an important role in the Cameroon criminal justice system. They advise, assist, and represent suspects and accused persons at all stages of the criminal justice process, ensuring that judicial officers make the correct decisions with regard to arrest, detention, remand in custody and imprisonment of suspects or arrested persons. This is important as it protects against unnecessary arrest and detention to prevent or greatly minimise the risk of arbitrariness. Therefore counsel are the watchdogs of the criminal justice system as they monitor and alert the relevant authorities in case of violations, thereby ensuring its efficiency and effectiveness. The question arises, who can perform the role of counsel at the level of police investigations in the Cameroon criminal justice system? The law does not identify or attribute substance to the term 'counsel' presupposing that the term 'counsel' is not restricted exclusively to lawyers registered with the Cameroon Bar Association. Generally, paralegals[869] or any person conversant with the law, the criminal justice process and with first-hand knowledge of the case and all its surrounding circumstances, which the suspect is accused of, can perform the role of counsel. It is argued that intervention by counsel at the early stage of the criminal justice system on behalf of suspects or accused persons is an efficient measure to protect against arbitrary detention in Cameroon. It is important to note that, although related, this section should not be confused with the

[865] Dr Fontem Aforteka'a Neba, Barrister Agbor Balla Nkongho and Chief Justice Ayah Paul Abine.
[866] Hans Achumba, Mofor Ndong, Atia Azohnwi and Tim Finnian.
[867] African Freedom of Expression Exchange (AFEX) 'Cameroon Crises: President Orders Release of Journalists, Consortium Leaders and Others' (2017) available at *https://www.africafex.org/free-expression-and-the-law/cameroon-crises-president-orders-release-of-journalists-consortium-leaders-and-others* (accessed 10 August 2020).
[868] A lawyer is a qualified legal professional competent to practice law in a particular jurisdiction and who is duly registered with the relevant bar association or law society.
[869] A paralegal in the context of the Cameroon criminal justice system is a pupil lawyer with the necessary skills and training competent to carry out some of the functions of a lawyer, such as advising and assisting litigants, suspects, arrested and convicted persons under the supervision of an experienced lawyer and member of the Cameroon bar association.

right to be informed and access to counsel, legal representation and legal aid discussed in the previous chapter.

5.4.1 Effective legal assistance for suspects or accused persons at detention facilities

Early intervention of counsel to assist suspects or accused persons at all stages of the criminal justice system, especially in police custody and/or other detention facilities, is an efficient measure to protect against arbitrariness in Cameroon.[870] Counsel do not only prepare cases and litigate in court, they also provide an independent presence in detention facilities to examine the legality of arrest, detention, interrogation, remand in custody, determine arbitrariness and take the appropriate legal action to protect and vindicate the rights of their clients. Counsel's physical presence at detention facilities is important as it is at this stage that investigation and interrogation takes place and the fate of the suspect or accused person is determined. Decisions made at this stage will greatly impact on the subsequent course of events, for example whether or not to release the suspect or accused person, order remand in custody and commence legal proceedings against the suspect or accused person.

The reality is that, in many cases, suspects or accused persons are not aware of the reasons for their arrest or detention and charges against them, or their legal rights and the remedies available to them in case of violations. Furthermore, they lack the skills necessary to prepare their cases and the procedural prerequisites to challenge the legality of their arrest or detention to secure their release in case of arbitrariness. Therefore, when providing general legal advice to suspects or accused persons, and the type of information to reveal to JPOs during interrogation, counsel presents itself as a 'procedural guarantee of the privilege against self-incrimination'. Some state authorities manipulate suspects or accused persons to admit guilt for a lesser sentence or convince them to waive their privilege against self-incrimination to secure a conviction by using illicit means or coercion. The ability of counsel to assess the lawfulness of arrest, detention, and interrogation techniques used to extract confessions from suspects or accused persons and testimonies from witnesses may prevent or

[870] Section 116(3) of the CPC.

greatly minimise the authorities' chance(s) of making use of false fabrications, implication or to obtain information from suspects by coercion.

Moreover, counsel's physical presence at police stations, gendarmerie brigades or other detention centres can make a huge difference with regard to how a suspect or accused persons are treated. For example, counsel act as a deterrent effect ensuring that JPOs perform their duties in accordance with the procedures established by law, do not exceed the powers attributed to them by law and protect against torture, other forms of ill-treatment and enforced disappearances. As such counsel can easily identify and prevent arbitrary police actions as first, they can remind JPOs to desist from arbitrary actions and abuses, and secondly, inform the relevant authorities of the abuses and arbitrary actions by JPOs.

5.4.2 Identifying persons who are suitable and eligible for release or detained in arbitrary circumstances

Counsel in Cameron can also protect against arbitrariness by identifying suspects and accused persons who are eligible and suitable for release from police stations, gendarmerie brigades and prisons, and alert the relevant authorities and assist them accordingly. Relying on their knowledge of the law, and the surrounding circumstances of the case, counsel can easily detect factual or procedural irregularities and arrive at the conclusion that no case exists against the suspect or accused person that warrants arrest or detention. For example, after consultations with detainees, counsel can establish first that the arrest or detention was motivated by racial, political, religious or tribal discrimination. Secondly, it may be a case of mistaken identity, as it may turn out that the suspect or accused person did not commit or take part in the crime. In these circumstances, counsel can alert the relevant authority of the irregularities and arbitrariness, and take the necessary steps to secure the suspect or accused person's release, or make the necessary arrangements for them to be presented before the competent authority to review the lawfulness of the detention.

5.4.3 Carry out effective private criminal investigation (Fact-finding)

Counsel can effectively protect against arbitrary detention by carrying out investigations into alleged involvement of suspects or accused persons in a crime and the authenticity of the prosecution's case. Therefore, counsel must carefully evaluate the strength of the prosecution's case to ascertain its accuracy, including possible suspects and witnesses that may help in establishing the suspect or accused person's innocence. The investigation must be geared towards ascertaining whether sufficient factual legal bases exist for the prosecution to initiate criminal charges against suspects or accused persons. Counsel must proceed with investigations irrespective of the overwhelming force of the prosecution's evidence or case against the suspect or accused person, alleged confessions of guilt, expressed desire to plead guilty or documented statements supporting guilt.

At the level of the prosecution, the Procureur Général or State Counsel may not have the complete information (evidence of innocence or lack of responsibility) necessary to arrive at the conclusion whether or not to remand the suspect or accused person in custody. Should this be the case, counsel must do all it takes to complete the missing link, failing which the Procureur Général or State Counsel may be forced to confirm and rely on the accuracy of the information at hand. If counsel successfully investigates and presents evidence of innocence or lack of responsibility on the part of the suspect or accused person, the counsel contributes substantially to the investigative process and the outcome of the final results, thus protecting against arbitrariness. This is true as the suspect or accused person will not be subject to unnecessary remand in custody pending time that the prosecution completes its investigation. It is also important to mention that, without the assistance of counsel, suspects or accused persons in Cameroon find it difficult to confront either the Procureur Général or State Counsel to review the lawfulness of their arrest or detention and secure their release. It has been noticed that in the absence of counsel, some experienced and well-intentioned Procureurs Généraux or State Counsel have failed to properly review evidence against suspects or accused persons, due to bad faith, carelessness, recklessness or laxity, resulting in malicious prosecutions, unnecessary remand in custody and the imprisonment of innocent persons.[871]

[871] American Bar Association 'Cameroon: A Preliminary Report on Proceedings Against Detained Journalist Paul Chouta' (2020) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon--a-preliminary-report-on-proceedings-against-detained-j/* (accessed 14 April 2021).

5.5 Role of the judiciary

The judiciary in Cameroon is the court system competent to interpret the law, apply it to the facts of the particular case by judges and magistrates,[872] and review state legislations in the interest of litigants and state institutions.[873] As such judges and magistrates can play an important role in protecting against arbitrary arrest or detention, and other human rights violations common in deprivation of personal liberty such as, but not limited to torture, refoulement, enforced disappearances and summary executions. This section examines the role of judges and magistrates in protecting against arbitrary arrest or detention in Cameroon. It argues that effective and efficient handling of cases without fear, favour or bias can go a long way in protecting against arbitrariness, as magistrates and judges will examine all the circumstances of the case at hand such as lawfulness of arrest, detention, interrogation and remand in custody and establish the suspect or accused person's guilt or innocence. Furthermore, they ensure that the suspect or accused person's procedural rights are respected, and that they are entitled to prompt review of arrest or detention and to challenge the legality of the arrest or detention in case of arbitrariness.

5.5.1 Effective monitoring of arrest, remand in custody and criminal investigation

The judge or examining magistrate can adequately protect against arbitrariness by ensuring that criminal investigations are conducted in a timely manner and in accordance with the procedure established by law. The JPO submits the case file to the judge or examining magistrate who in turn arraigns the suspect. Arraignment is the formal notification or accusation of the nature of criminal charge(s) against the suspect. At this stage, the suspect is an accused person and is informed of the reasons for his arrest or detention, the offences he has allegedly committed, charges against him or her and the relevant sections of the criminal legislations s/he has violated.[874] The accused

[872] Section 2(1) of Law No. 2011/027 of 14 December 2011.
[873] Law No. 2006/015 of 29 December 2006 on Judicial Organisation, modified and completed by Law No. 2011/027 of 14th December 2011.
[874] Section 167(1) (a) (b) of the CPC.

person is given the opportunity to answer or state his or her case, may or not plead guilty to the charge(s) against him or her,[875] and may be assisted by counsel.[876] Furthermore, the judge or examining magistrate can permit the accused person to change an earlier guilty plea if s/he so desires, which may have been made at the level of JPO custody under duress, or by way of torture and other forms of ill-treatment. It is trite law in Cameroon that all confessions obtained through duress, intimidation, threats or by way of torture and other forms of ill-treatment are not admissible in evidence except against the perpetrator.[877]

The judge or examining magistrate is under obligation to call and question all witnesses whose testimony may influence the decision to release the accused person (whether on bail or not) or pose a legitimate challenge to the legality of arrest or detention such as non-existence of a reasonable suspicion or non-compliance with arrest or detention procedures. Furthermore, where the need arises, the judge or examining magistrate may pay visits to the crime scene (locus in quo). This is important as s/he may be furnished with first-hand information not included in the case file, or not disclosures by witnesses that can help to exonerate the accused person of the allegations against him or her and thus prevent or greatly minimise the risk of arbitrariness. If the judge or examining magistrate determines arbitrariness, s/he gives a no case ruling and orders the accused person's immediate release[878] by way of a committal order.[879]

The judge or examining magistrate must also ensure that the allegations against the accused person and the criminal charge(s) correspond to legal requirements, and the arrest or detention is void of arbitrariness. If the criminal charge does not correspond to the reasons JPOs, state security agents or other state officials advance for the accused person's initial arrest or detention, the judge or examining magistrate is under the obligation to ensure that the charge(s) are modified to that effect. This is important as it eliminates the possibility of trumped up and disproportionate charges against the

[875] Section 170(2) (a) of the CPC.
[876] Section 170(2) (b) of the CPC.
[877] Section 315(2) of the CPC. For more, see *The People v Tonfact J and Kandem R*, Judgement No. 69/00 of 21 September 2000, CCPR/C/CMR/4 11 May 2009, para. 292-294. *The People v Mengue J and Djessa J* Judgement No. 182/COR of 24 February 2005, CCPR/C/CMR/4 11 May 2009, para. 295.
[878] Section 257(6) of the CPC.
[879] Section 257 of the CPC.

accused person, thus protecting against unnecessarily lengthy imprisonment terms and arbitrariness.

The judge or examining magistrate may use his or her discretion to, or not to order remand in custody depending on the surrounding circumstances of the case such as nature of the alleged offence, charge(s), criminal record of the suspect or accused person, socio-political, cultural and sentimental atmosphere at the time the alleged offence was committed.[880] For example, remand in custody may not be an option in the likelihood of a non-custodial sentence if the suspect or accused person is eventually convicted. Moreover, the courts may release the accused person in the absence of sufficient evidence to institute proceedings, or where the Procureur Général or State Counsel decide to withdraw, discontinue, annul, or are absent, unable or unwilling to continue the proceedings.[881]

Furthermore, the judge or examining magistrate can make use of alternatives to detention, such as bail. This is by virtue of section 222(2) of the CPC which is to the effect that 'the examining magistrate may, at any time before the close of the preliminary inquiry, and of his own motion, withdraw the remand warrant and grant bail'. However, it is proper that the bail bond is determined taking into consideration the means of the accused person. That notwithstanding, if remand in custody is inevitable, the judge or examining magistrate must state in writing the concrete and specific reasons for the decision to remand, the duration of remand (not exceeding legal requirements) and ensure that it is used as a measure of last resort, for a limited period, and a matter of extreme necessity.

5.5.2 Ensure the use of adversarial trial and equality of arms

Judges in Cameroon can adequately protect against arbitrariness by ensuring that criminal proceedings are conducted in line with the courts' rules supported by credible evidence. Rules of courts are a vital function of the criminal justice process as they ensure the smooth running of the proceedings, protect the accused person against arbitrariness and guarantee fair trial. Therefore, judges are independent and impartial

[880] Section 221(2) of the CPC.
[881] Section 64(1) of the CPC.

arbiters competent to ensure that the prosecution and the accused person and his or her counsel are afforded the same opportunity to present their case (principle of equality of arms). As the Procureur Général or the State Counsel represents the prosecution, counsel for the accused person has the right to represent and defend his client in court before the judge, or examining magistrate in chambers.[882]Therefore the judge or examining magistrate is under the obligation to ensure that the accused person and his counsel are afforded all the facilities and opportunity to effectively participate in the proceedings and challenge the lawfulness of the arrest or detention.

As such, bias, discrimination, bad faith and intimidation of the accused person or his counsel are unacceptable. For example, in *The Siseku Ayuk Tabe & 9 Ors case*, the court did not afford the prosecution and defence team (accused persons and their counsel) the same opportunity to present their case to vindicate their client's rights. While the prosecution collaborated and enjoyed support from the military court, the defence counsel and accused persons were intimidated and side-lined. They were also not allowed to cross-examine four prosecution witnesses.[883] This is unfortunate as examination of witnesses is important as it may help to exonerate the accused person and thus prevent or greatly minimise the risk of arbitrariness. Unfortunately, the practice in Francophone Cameroon suggests that the judge is all-powerful and has the sole discretion to or not allow examination of witnesses. Furthermore, the court proceeded to conduct the trial in the French language without adequate and qualified interpretation despite the fact that the accused persons made it clear that English is the only language that they understand.

Judges must also disclose all information with regard to the proceedings timeously to the prosecution and defence team. For example, judges are under obligation to always inform the accused person or his counsel of the courts' next sitting dates and time of appearance at least 48 hours before the said appearance if counsel resides within, and 72 hours outside the court's jurisdiction.[884] This is important as it guarantees effective representation and prevents or greatly minimises the risk of arbitrariness. Moreover, the case file of inquiry must also be made available to the accused person or his counsel.

[882] Section 172(1) of the CPC.

[883] Human Rights Watch Cameroon 'Separatist Leaders Appeal Conviction' (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 13 April 2021).

[884] Section 172(2) of the CPC.

This is by virtue of section 172(3) of the CPC to the effect that '[t]he case file of the inquiry shall be placed at the disposal of the counsel at the chambers of the inquiry twenty-four (24) hours before each interrogation or confrontation'. Regrettably, authorities have often deliberately violated section 172(3) of the CPC to the detriment of accused person(s) by invoking section 171(1) of the CPC, which states that the examining magistrate may not make available the case file of the inquiry in advance to counsel if they were present during the first appearance.[885]

Apart from the case file of inquiry, judges should ensure that the accused person and his counsel should also have access to all essential material (information, documents and exculpatory evidence) that may be relevant to challenge the legality of the accused person's arrest or detention. Although this is not a steadfast rule, the judge must distinguish between the type of material which must be made available to the accused person or his or her counsel. That notwithstanding, it has been illustrated that courts in Cameroon sometimes fail to respect this right. For example, in *The Siseku Ayuk Tabe & 9 Ors,* despite that the trial commenced on December 2018, neither the accused persons nor counsel had any prior knowledge of the evidence against the accused persons as it was only made available 'in court during a single 17-hour overnight hearing that started on August 19'.[886] Furthermore, counsel was not permitted to view, comment, or object to the alleged evidence, and threatened with arrest for raising objections.[887] This made it difficult for counsel to effectively examine the evidence, carry out meaningful discussion with the accused persons, prepare the case and mount a strong legal challenge against the prosecution's case in court.

Similarly, in *Engo v Cameroon*, the author alleged violations of articles 14(3) (a) (b) (c) of the Covenant as first, Cameroon did not make available forensic reports pertaining to his case, secondly, seized and confiscated documents intended to be used

[885] *Jean-Marie Atangana Mebara v Cameroon* (2015) para. 108. For more, see The Law Society of England and Wales 'Trial Observation Report- Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé' (2017) 25 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021).

[886] Human Rights Watch Cameroon 'Separatist Leaders Appeal Conviction' (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 13 April 2021).

[887] Human Rights Watch Cameroon 'Separatist Leaders Appeal Conviction' (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 13 April 2021).

in his defence,[888]and thirdly, deprived him of access to his case file for several months.[889] The HRC found a violation of the Covenant, as Cameroon failed to reply specifically to these accusations and 'merely states that the author had access to all the material in the case, without adducing any evidence'.[890]These tactics and schemes employed by the courts to frustrate the defence teams are in violation of the right to defence, legal representation and equality of arms and thus arbitrary.

5.5.3 Ensure regular or constant review of the lawfulness of arrest or detention

Review of the lawfulness of arrest or detention is an important measure to protect against arbitrariness. Judicial review of arrest or detention must be expeditious, constant or regular, and the detention immediately terminated if proved that its legal basis ceased to exist. Therefore, judges are under obligation to ensure that the motivation for the reasonable suspicion corresponds to its legitimate purpose. Review of arrest or detention is not accomplished by simply ascertaining that the arrest or detention is lawful and effected in accordance with the procedure established by law, and thus continued detention necessary and legitimate. Furthermore, unjustified and unnecessary procrastination of proceedings due to court laxity, such as setting the hearing date, time and venue, handling the motions, applications, and appeals[891] are inconsistent with the prerequisites of constant review of the lawfulness of arrest or detention and may amount to arbitrariness.

Regrettably, this is commonplace in Cameroon as certain categories of persons (opposition political party leaders, outspoken journalists critical of the regime, human rights defenders and suspected Anglophone separatist sympathisers) are deprived of the right to constant or regular periodic review of the lawfulness of the initial arrest or

[888] Pierre Désiré *Engo v Cameroon* (2005) paras. 3.2 and 3.3.
[889] Pierre Désiré *Engo v Cameroon* (2005) para 7.7
[890] Pierre Désiré *Engo v Cameroon* (2005) para 7.7
[891] A cause for concern is that the Court of Appeal in Cameroon rarely, or does not order the release of suspects or accused persons even if it determines arbitrariness as it refers the case to the trial courts for re-trial or maintaining the previous decision. In some cases, the Court of Appeal refuses to conduct judicial review of arrest or detention, maintaining that criminal investigations are on-going, the complex nature of the case and state of public emergency.

detention.[892] Furthermore, judges may not rely on obscure reasons not to review the lawfulness of initial arrest or detention on a regular basis, such as the complex nature of the case or gravity of the offence and charges against the accused person.

5.6 The role of the Cameroon Human Rights Commission (CHRC)

The CHRC is 'an independent institution for consultation, monitoring, evaluation, dialogue, concerted action, promotion, and protection of human rights'[893]in Cameroon. It was created by virtue of a presidential decree in 1990[894] (National Commission on Human Rights and Freedoms) and subsequently awarded greater powers by statute law in 2004.[895] In 2020, the Commission adopted a new name, (Cameroon Human Rights Commission (CHRC). The CHRC is empowered to entertain all complaints of violations of fundamental human rights and freedoms recognised by international legal instruments enforced in Cameroon, as well as domestic legislations. It also has the power to convoke alleged perpetrators of arbitrary arrest or detention by way of a subpoena and witnesses for a hearing of the matter in accordance with its rules of procedure. It also 'receives denunciations of human rights violations, conducts inquiries and inspects penitentiary establishments, popularises human rights instruments, liaises with NGOs and proposes measures to the authorities in the area of human rights'.[896]

5.6.1 Entertain complaints, carry out inquiries and investigations into allegations of arbitrary arrest or detention

[892] Human Rights Watch Cameroon 'Separatist Leaders Appeal Conviction' (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 13 April 2021).
[893] Common World Forum of National Human Rights Institutions 'National Commission on Human Rights and Freedoms' (2020) available at *https://cfnhri.org/members/africa/cameroon/* (accessed 3 November 2020).
[894] Decree No 90-1459 of 8 November 1990.
[895] Law No. 2004/016 of July 2004 on the National Commission on Human Rights and Freedoms, Cameroon.
[896] Common World Forum of National Human Rights Institutions 'National Commission on Human Rights and Freedoms' (2020) available at *https://cfnhri.org/members/africa/cameroon/* (accessed 3 November 2020).

The CHRC is an essential partner in the promotion and protection of human rights in Cameroon, competent to entertain all complaints of human rights violations[897] including arrest or detention effected in violation of the principles of legality and non-arbitrariness. It is also competent to conduct enquiries and investigations into such violations directed to it by individuals, groups of people, associations or NGOs on behalf of persons or groups of persons. It also has the power to subpoena or summon alleged human rights violators or perpetrators for a hearing in accordance with its rules of procedure.[898] Although it does not have the power of a regular court, it can refer arbitrary arrest or detention cases to competent courts for prosecution. For example in 2012, it referred a case to the military tribunal of Yaoundé against a gendarmerie officer for arbitrary arrest, detention, assault, torture and other forms of ill-treatment,[899] resulting in 8 years imprisonment with a fine of 200,000 CFA.[900]

That notwithstanding, the CHRC is not efficient at carrying out investigations into human rights violations, including arbitrary arrest or detention in Cameroon, as it does not have the power to issue search warrants and seizure. It also cannot subpoena anyone to testify in an investigation of human rights abuses, particularly arbitrary arrest or detention, torture, refoulement and forced disappearances.[901]Although it can request help from other state institutions during inquiries and investigations into allegations of human rights violations, including arbitrary detention, such assistance is not compulsory[902] and is not always rendered, especially in cases where the regime in power is the perpetrator.[903]

[897] Sections 36 – 39 of the 2019 proposed bill to establish a new National Commission on Human Rights and Freedoms in Cameroon.

[898] Nkumbe N 'The effectiveness of domestic complaints mechanisms in the protection of human rights in Cameroon' (2011) 5 (2) *Cameroon Journal on Democracy and Human Rights,* 24- 27.

[899] Judgment No. 42/CRIM of 13 March 2012*, (*the military tribunal, Yaoundé).

[900] Approximately 300 US Dollars.

[901] Progressive initiative group for Cameroon (PICAM) 'The National Commission on Human Rights and Freedom of Cameroon: An epitome of government's contempt for human rights (2009) available at *http://www.picam.org/press-releases/2009/08-20-humanrights commissiom.htn* (accessed 28 April 2020).

[902] Njungwe E N 'A brief comparison between the South African and the Cameroon national human rights commissions' (2007) 1 (1) *Cameroon Journal on Democracy and Human Rights* 27-27.

[903] Progressive initiative group for Cameroon (PICAM) 'The National Commission on Human Rights and Freedom of Cameroon: An epitome of government's contempt for human rights' (2009) available at *http://www.picam.org/press-releases/2009/08-20-humanrights commissiom.htn* (accessed 28 April 2020).

Regrettably, the CHRC is not independent, as it is required to present all its findings to the President of the Republic. This is by virtue of section 8 of its rules and procedures, which make it clear that 'the CHRC cannot release its annual report on the state of human rights and summary of its activities to the public, but must submit this only to the head of state'. This implies that the President of the Republic can censor the report and upon publication omit certain aspects that may reveal arbitrariness and other human rights violations.

5.6.2 Conduct human rights studies and education in collaboration with NGOs on human rights including arbitrary arrest or detention

The CHRC also plays a leading role in organising education and training programmes to educate law enforcement personnel and raise awareness for the need to prevent all forms of human rights violations including arbitrary arrest or detention. The education and training programmes are also geared to prevent other detention related human rights violations such as torture and other forms of ill-treatment, enforced disappearances and refoulement. It also carries out public awareness campaigns to educate persons deprived of their liberty on their pre- and fair-trial substantive and procedural rights and the available safeguards, rehabilitation opportunities and compensation available to them.[904] In some cases, it has publicly, by way of press releases and media coverage, frequently denounced human rights violations including arbitrary arrest, detention, torture and other forms of ill-treatment by JPOs and called on the state to comply with its international treaty obligations.[905] Furthermore, in partnership with the United Nations Center for Human Rights and Democracy in Central Africa and the High Commission for Refugees, the CHRC has trained more than a thousand JPOs in Yaoundé on sensitive topics including safeguards against arbitrary arrest, detention, torture and other forms of ill-treatment and non-refoulement.[906]

5.6.3 Carry out unannounced and unrestricted visits to detention facilities

[904] National Commission on Human Rights and Freedoms Cameroon: Permanent Secretariat: Contributions of the NCHRF to the challenge millennium account: Some indicators for improved performance (2011) 12, available at *www.cndhl.cm* (accessed 10 June 2020).
[905] National Commission on Human Rights and Freedoms 2017 reports.
[906] National Commission on Human Rights and Freedoms 2017 reports.

The CHRC is also competent to carry out unannounced and unrestricted visits to all detention centres[907] to examine and appraise detention conditions. It is important to note that these visits re-enforce the substantive and procedural measures contained in the CPC, PC and other pieces of legislation necessary to ensure effective protection against arbitrary arrest or detention.[908] Such visits also help to identify victims of arbitrary arrest, detention and torture and secure their release. Furthermore, arbitrary arrest or detention patterns are exposed as members of the CHRC can check custody registers and examine case files without pre-notification.

Regrettably, unannounced and unrestricted visits to detention centres are a daunting task as JPOs and other state authorities have often frustrated the endeavour. This predicament is obvious as in 2013, members of the CHRC were only allowed access to Gendarmerie Legion detention centres after peer pressure from human rights organisations and other stakeholders and authorisation from authorities instructing Legion Commanders to do so.[909] This predicament continued as in 2017 the CHRC was denied access to detention centres hosting Anglophone Cameroonians who had demonstrated for equal civil and political rights.[910] Furthermore, in February 2019, authorities refused the CHRC access to visit political opponents of the regime, especially members of the opposition political party and runners up of the 2018 presidential election, the Cameroon Renaissance Movement incarcerated at the Kondengui Maximum Security Prison.[911] This predicament is blamed on Article 2 of the 2004 law regulating the CHRC which makes it clear that 'such visits should be in

[907]Legal detention centres in Cameroon include penitentiary establishments, police stations and gendarmerie brigades. Detentions out of the context of any of these facilities amount to arbitrariness.

[908] For example, on 8 August 2017, a Buea-based human rights Non-Governmental Organisation 'Human Is Right', reported that 'during a visit to the Buea Central Prison in July, it came across a minor who had been in pre-trial detention since 2017. The minor was 14 at the time of his arrest and had been kept in detention without trial for approximately two years. As of October the Fako High Court had not yet reviewed the case'. Furthermore, in July 2019, it helped to identify a detainee subjected to prolonged arbitrary detention. For more, see U S Department of state 'Country Reports on Human Rights Practices: Cameroon' (2019) 7 and 9.

[909] Message No. 988/4-LE/GL/247 of 2 May 2013.

[910] Centre for Human Rights and Democracy in Africa 'Cameroon: Is Torture the New Routine to Address the Anglophone Crisis?' (2020) 14 available at *https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CMR/INT_CAT_ICS_CMR_42510_E.pdf* (accessed 23 October 2020).

[911] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 7 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

the presence of the competent State Council or his representative.[912] This provision is limited as first, it defeats the element of 'surprise' necessary for unannounced and unrestricted visits by members of the CHRC. Secondly, the provision can actually obstruct the fulfilment of the Commission's missions of inspecting police stations, gendarmerie brigades and other detention centres due to unavailability of the State Council or his representative or their refusal to collaborate with members of the CHRC.[913] This situation presented in 2017 as the State Counsel refused to accompany members of the CHRC on a mission to visit some detention centres under the Department for Territorial Surveillance (DTS) and other institutions 'in charge of public security or intelligence, for the reason that the activities of these services do not fall within his area of competence'.[914]

5.6.4 Limitations of the CHRC to protect against arbitrary detention and other human rights violations

That notwithstanding, the CHRC has proved to be inefficient and ineffective in protecting against human rights violations including arbitrary arrest, detention and other rights violations such as torture and other forms of ill-treatment common in detention facilities. As a result, on 26 June 2019, a proposed draft bill was introduced in Parliament to establish a new national commission on human rights and freedoms in Cameroon, as the current one did not conform to the 'Paris Principles'.[915] For example,

[912] National Commission on Human Rights and Freedoms Cameroon 'Report on the state of human right in Cameroon in 2017' 15 available at *http://www.cndhl.cm/sites/default/files/NCHRF_EDH_%202017_0.pdf* (accessed on 21 January 2021).
[913] National Commission on Human Rights and Freedoms Cameroon, 'Report on the state of human right in Cameroon in 2017' 15 available at *http://www.cndhl.cm/sites/default/files/NCHRF_EDH_%202017_0.pdf* (accessed on 21 January 2021). For more, see Centre for Human Rights and Democracy in Africa, 'Cameroon: Is Torture the New Routine to Address the Anglophone crisis?' (2020) 13 available at *https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CMR/INT_CAT_ICS_CMR_42510_E.pdf* (accessed 23 October 2020).
[914] Centre for Human Rights and Democracy in Africa 'Cameroon: Is Torture the New Routine to Address the Anglophone Crisis?' (2020) 14, available at *https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CMR/INT_CAT_ICS_CMR_42510_E.pdf* (accessed 23 October 2020).
[915] Universally accepted standards governing national human rights commissions worldwide.

its recommendations are non-binding and it lacks autonomy, as it cannot publish its annual reports without first submitting them to the president of the republic.

The disturbing question is whether the new proposed CHRC can be independent, efficient, effective and capable of addressing human rights violations including arbitrary arrest, detention, torture and other forms of ill-treatment common in places of detention? The answer seems to be in the negative. This is so because, first, sections 4, 5, 6 and 7 of the proposed new draft bill do not empower it to examine the existing legal framework of laws, such as those that protect against arbitrariness and bills directed to Parliament, to ensure that their provisions conform to international human rights standards and instruments ratified by the state. This is contrary to the Paris principles[916] which are categorical that domestic human rights institutions such as the CHRC shall be competent to,

> examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures.[917]

Secondly, the proposed new bill is neither persuasive nor authoritative as, even if inquiries, investigations or verifications are conclusive of rights violations such as arbitrary arrest, detention or torture and other forms of ill-treatment, it lacks the power or capacity to order a remedy or reparation to the victim of the violation or order binding corrective measures against the perpetrator. This is so as section 7 of the draft new bill provides that the CHRC may alert and refer cases of human rights abuses to the Minister

[916] The Paris Principles are the legal framework put in place to regulate the functioning of domestic institutions for the protection and promotion of human rights. It is a set of internationally recognised and acceptable standards to evaluate the credibility, independence and effectiveness of national human rights institutions (NHRIs). For NHRIs to perform their duties effectively, they must be competent to deal with all human rights related violations such as arbitrary arrest, detention, torture and other forms of ill-treatment without bias. Furthermore, their leadership selection or appointment criteria must be inclusive and transparent. NHRIs must also be independent both in law and in practice, possess or have access to sufficient funds, staff and co-operate effectively with national and international stakeholders. See United Nations General Assembly resolution 48/134 of 20 December 1993.

[917] Article 3(a) (i) of the Paris Principles.

of Justice or the relevant authorities.[918] Although the draft bill provides for a penal sanction for failure to appear before the commission after a person is duly served with a summons,[919] it does not sanction persons who, first, fail to produce or conceal documents or other material requested by the Commission. Secondly, it does not provide any sanction against persons who threaten or intimidate witnesses during inquiries, investigations or procedure before the CHRC, or thirdly, persons who in any other manner, obstruct or interfere with the work of the CHRC, paving the way for arbitrariness. These characteristics are clearly not in line with the government's express intention and promise to translate the CHRC to the ranks of acceptable NHRIs in accordance with the Paris Principles, but, rather, a desire to deflect criticism of the government's poor record in the promotion and protection of human rights and fundamental freedoms.

5.6.5 Conclusion

This chapter has examined the role of the various actors in the criminal justice system (JPOs, judges, magistrates, counsel and prosecutors including the SPOD and CHRC) in protecting against arbitrary detention in Cameroon. It has demonstrated that the new CPC adopted in 2005 has facilitated the work of these actors by spelling out their duties and ensuring that they act in accordance with the law and in respect of material, territorial and hierarchical competence. The chapter has also demonstrated that the Procureur Général or State Counsel is the immediate boss of JPOs, and as a result they exercise control over them to ensure that they carry out their duties judiciously and in line with substantive and procedural rules governing arrest or detention.

The Procureur Général or State Counsel represents a check and balance in the criminal justice system ensuring that examining magistrates and judges comply with substantive and procedural pre- and fair-trial rights, rule of law and deliver reasoned judgment on habeas corpus cases. Furthermore, they have the power to carry out unannounced visits to detention centres, carry out investigations and terminate criminal proceedings by way

[918] Section 26 of the draft new bill on the CHRC.
[919] Section 62 of the draft new bill on the CHRC.

of a nolle prosequi in case of arbitrariness with regard to arrest, interrogation, remand or trial procedures.

The chapter has also demonstrated that the CPC has granted defence counsels more powers to represent, advise, assist and carry out investigations to uncover reliable evidence that can help to exonerate suspects or accused persons at all stages of the criminal justice system and secure their release. Relying on their wide knowledge of the law, they easily detect arrest or detention effected in arbitrary circumstances, and alert the relevant authorities. Moreover, their physical presence at detention centres cautions JPOs and other law enforcement personnel to perform their duties judiciously; it can also prevent other forms of human rights violations such as torture and other forms of ill-treatment, enforced disappearances and even extra-judicial executions.

CHAPTER SIX

CHALLENGES TO EFFECTIVE ENFORCEMENT OF THE RIGHT TO FREEDOM FROM ARBITRARY DETENTION IN CAMEROON

6.1 Introduction

The right to freedom from arbitrary detention is adequately guaranteed in the Cameroon criminal justice system. The state has put in place legislation, rules and regulations for the smooth functioning of the criminal justice process. It has also put in place a regulatory framework binding on JPOs, State Counsel, Procureur Général, judges and custody personnel to ensure that all arrests or detentions are lawful and non-arbitrary. Despites the measures put in place to this effect, arbitrariness continues to occur with disturbing frequency, on a regular basis, unabated, and with impunity. Politically motivated arrests, detentions, lengthy pre-trial detentions, coupled with torture and other forms of ill-treatment to obtain confessions in violation of the right to remain silent and the presumption of innocence, have undermined the rule of law and ruined positive human rights culture in Cameroon.

Other predicaments such as insufficient judicial power, inefficiency in the criminal justice system, lack of full engagement between judges, suspects and accused persons, lack of transparency, accountability, political will, administrative interferences and inadequate police training have also contributed to the violation of the right to freedom from arbitrary detention. Other factors contributing to arbitrary detention are corruption, trumped-up and disproportionate charges, and discrimination. Although considerable literature exists on the promotion and protection of human rights and the right to personal liberty in Cameroon, data on the causes of arbitrary arrest, detention and challenges to effective enforcement of the right to freedom from arbitrary detention are scanty. The purpose of this chapter is to fill this gap.

6.2 Disregard for the rule of law

Disregard for the rule of law is an unfortunate practice that has effectively challenged the enforcement of the right to freedom from arbitrary detention and seems to be rooted

in Cameroon's historical, socio-political, highly centralised and rigid presidential system of governance. This problem is attributed to vices plaguing the Cameroon criminal justice system such as disregard for substantive and procedural safeguards put in place to protect against arbitrariness, tarnished concept of the right to be presumed innocent, perverse understanding of the purpose of detention and remand and insufficient judicial power. Disregard for procedural safeguards is not discussed in this section as it is adequately addressed in chapters 4 and 5.

6.2.1 Tarnished concept of the right to be presumed innocent

The presumption of innocence is an important virtue that protects against arbitrary detention, and is adequately guaranteed under international law.[920] This is true as it requires that persons not yet convicted of the crime(s) of which they are accused have the right to be treated as non-convicted persons[921] and thus must be presumed innocent.[922] Pre-trial detention is incompatible with the presumption of innocence as incarceration compromises 'the ability to prepare for defence, consult with counsel, review the prosecution's case and prepare for trial'.[923] Furthermore, persons in pre-trial detention are vulnerable as JPOs and prosecutors can intimidate, force or pressure them to confess or accept plea deals, even when they did not commit or participate in a crime, paving the way for unjustified or wrongful convictions.[924]

This section argues that the tarnished concept of the right to be presumed innocent has contributed enormously to arbitrariness, and poses a serious challenge to effective enforcement of the right to freedom from arbitrary detention in Cameroon. The presumption of innocence is adequately guaranteed in the preamble to the Constitution to the effect that 'every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence'.[925] A critical look at this provision seems to suggest that the right to be presumed innocent is applicable

[920] Articles 11 of the UDHR, 14(2) of the ICCPR, 7(1) (b) of the ACHPR and 6(2) of the ECHR.
[921] Article 10(2) (a) of the ICCPR.
[922] Article 14(2) of the ICCPR.
[923] Heard C & Helen Fair H, 'Pre-trial detention and its over-use: evidence from ten countries' (2019) 7, available at *https://eprints.bbk.ac.uk/policies.html* (accessed 6 March 2021).
[924] Heard C & Fair H (2019) 7.
[925] For more, see section 8(1) of the CPC to the effect that 'any person suspected of having committed an offence shall be presumed innocent until his guilt has been legally established in the course of a trial where he shall be given all necessary guarantees for his defence'.

only to accused persons.[926] However, this gap is filled by the second paragraph of section 8 of the CPC, which makes it clear that the presumption of innocence shall apply to every suspect,[927] defendant[928] and accused. Therefore, the presumption of innocence rule can adequately protect against arbitrary detention, as it can compel and motivate JPOs, State Counsel, Procureur Général, examining magistrates and judges to respect the laws and regulations put in place to protect against arbitrariness.

Despite these legislative guarantees, Cameroon's current policing and criminal justice practices seem to present a reverse scenario as sometimes upon arrest, suspects are presumed guilty instead of innocent.[929] The presumption of guilt prevails in the French speaking regions of Cameroon as the Civil Law procedural system practically requires that suspects are guilty at all times, and the onus is on them to prove their innocence.[930] For example, in a case concerning suspected Boko Haram fighters, Amnesty International noted that

> Those who have been brought to court have faced deeply unfair trials in military courts in which the burden of proof is often effectively reversed and people are convicted on the basis of limited and unverifiable evidence – often statements from single, anonymous informants who cannot be challenged in court, or other circumstantial evidence such as the loss of an identity card.[931]

[926] Section 9(3) of the CPC is to the effect that 'an accused shall be a person who must appear before the trial court to answer to the charge brought against him, whether in respect of a simple offence, a misdemeanour or a felony'.
[927] Section 9(1) of the CPC is to the effect that 'a suspect shall be a person against whom there exists any information or clue which tends to establish that he may have committed an offence or participated in its commission'.
[928] Section 9(2) of the CPC is to the effect that 'the defendant shall be any suspect whom an examining magistrate notifies that he is presumed henceforth either as the offender or co-offender, or as an accomplice'.
[929] Oke C 'Guilty Without Trial: Assessing the due Process Rights of Suspects under the Cameroonian Criminal Law and Procedure' (2021) 2, available at *https://www.ijsr.net/archive/v10i1/SR201228173251.pdf* (accessed 10 March 2021).
[930] Atoh W M. T 'Critique on Sections of the Cameroon Criminal Procedure Code' (2016) 274, available at *http://www.ijsrp.org/research-paper-0916/ijsrp-p5737.pdf* (accessed 10 March 2021). For more, see Sections 307 and 309 of the CPC.
[931] Amnesty international 'Right Cause, Wrong Means: Human Rights Violated and Justice Denied in Cameroon's Fight against Boko Haram' (2016) 7 available at *https://www.amnesty.org/en/documents/afr17/4260/2016/en/* (accessed 25 February 2021).

Regrettably, Civil Law norms including presumption of guilt are regularly used in the Anglophone regions of the country.[932] This is unfortunate as pre-trial and due process rights[933] are compromised, and prolonged pretrial detentions seems to be normal[934] as non-convicted persons are treated as convicted persons.[935] The HRC has stated in General Comment No. 32 at paragraph 30 that

> [t]he presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.[936]

Sometimes, state practice in Cameroon reveals the opposite of paragraph 30 of the General Comment. For example, state security agents arrested a journalist, Mr Samuel Ajiekah Abuwe (Wazizi) and the military's spokesperson unequivocally pronounced him guilty of terrorism related activities.[937] This may explain why he was neither charged with a criminal offence nor presented before a judge within the forty-eight hour

[932] U.K. Home Office, 'Country Policy and Information Note, Cameroon: Anglophones' (2020) para. 7.4.3 available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873402/Cameroon_-_Anglophones_-_CPIN_-_v1.0__March_2020_.pdf* (accessed 13 March 2021). For more, see *Mgwanga Gunme v Cameroon* (2003) para. 12

[933] Amnesty International 'Cameroon: Wide Human Rights Violations' (2018) 5 and 6, available at *https://www.amnesty.org/download/Documents/AFR1777032017ENGLISH.pdf* (accessed 10 March 2021).

[934] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 10 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

[935] U. K. Home Office (2020) para. 2.3.8.

[936] HRC: General Comment No. 35 (2014) para. 30.

[937] World Organisation against Torture 'Cameroon: Enforced disappearance and rumoured torture and killing of Mr. Samuel Ajiekah Abuwe' (2020) available at *https://www.omct.org/en/resources/urgent-interventions/enforced-disappearance-and-rumoured-torture-and-killing-of-mr-samuel-ajiekah-abuwe* (accessed 20 January 2021).

period recommended by law to review the legality of initial arrest or detention and assess the necessity for bail[938] or pre-trial detention.[939] Mr Wazizi's case is a clear example of a violation of the right to be presumed innocent, as the HRC has made it clear that authorities must not imagine, predict or pre-judge the result of a trial before its logical conclusion by way of pronouncement(s).[940] Although the state is not directly responsible for such pronouncements, nevertheless, judges are under obligation to intervene on behalf of victims whenever authorities make such pronouncements.[941]Unfortunately, after immense pressure from national and international stakeholders and three unsuccessful habeas corpus applications on his behalf, the state announced the victim's demise 11 months after his arrest, detention and disappearance.[942]

At the international level, the African Commission found a violation of the right to be presumed innocent. For example, in *Jean-Marie Atangana Mebara v Cameroon,* the Minister of Justice unequivocally pronounced Mr Mebara and other persons arrested and detained as part of 'Operation Sparrow Hawk' guilty of embezzling state funds. He stated that 'I challenge anyone to prove that those who have been arrested are innocent …. Those who say they are innocent have cleverly hidden what they have stolen'.[943] Furthermore, the Minister of Communication also stated on Cameroon National Radio and Television (CRTV) that 'those people embezzled these funds in

[938] Mr Wazizi's bail application was unsuccessful on grounds that his arrest and detention were motivated by terrorism related activities (felony) which did not warrant bail. The irony is that he was never charged with any criminal offence, and thus could not be refused bail on grounds of terrorism -related offences in the first place. Moreover, it is trite law in Cameroon that in the absence of sufficient reasons for detention or criminal charge(s) suspects are entitled to release. For more, see World Organisation against Torture 'Cameroon: Enforced disappearance and rumoured torture and killing of Mr. Samuel Ajiekah Abuwe' (2020) available at *https://www.omct.org/en/resources/urgent-interventions/enforced-disappearance-and-rumoured-torture-and-killing-of-mr-samuel-ajiekah-abuwe* (accessed 20 January 2021).

[939] World Organisation against Torture 'Cameroon: Enforced disappearance and rumoured torture and killing of Mr. Samuel Ajiekah Abuwe' (2020) available at *https://www.omct.org/en/resources/urgent-interventions/enforced-disappearance-and-rumoured-torture-and-killing-of-mr-samuel-ajiekah-abuwe* (accessed 20 January 2021).

[940] HRC: General Comment No. 35 (2014) para. 30.

[941] HRC: General Comment No. 35 (2014) para. 30.

[942] Al Jazeera News 'Cameroonian journalist Samuel Wazizi dies in government detention' (2020) available at *https://www.aljazeera.com/news/2020/6/5/cameroonian-journalist-samuel-wazizi-dies-in-govt-detention* (accessed 22 April 2021).

[943] *Jean-Marie Atangana Mebara v Cameroon* (2015) para. 82.

order to prepare for the next presidential election'.[944] It is argued that the term 'embezzled' and statements 'are not innocent' and 'what they have stolen' used by the state officials clearly indicate a presumption of guilt.[945] Furthermore, the CRTV broadcast pronouncing Mr Mebara a thief is contrary to the HRC's position that 'the media should avoid media news coverage undermining the presumption of innocence'[946] as the courts had not delivered a final judgment.

Similar to Mr Mebara's case, in *Urbain Olanguena Awono v Cameroon,* the Deputy Prime Minister and Ministers of Justice and Communication accused the author of embezzling public funds and publicly pronounced him guilty over CRTV.[947] The HRC took a more cautious approach and reiterated that state agents should refrain from making public statements pre-judging or predicting the outcome of a trial. However, it held that the accused failed to establish that Cameroon had violated his right to be presumed innocent,[948] as the facts submitted by the accused and Cameroon revealed that the statements concerned did not directly refer to the accused, and that he had not sufficiently proved his case.[949]

6.2.2 Perverse understanding of the purpose of pre-trial detention

Pre-trial detention is generally used to prevent flight of suspects or accused persons, recurrence of crime, to protect victims of crime and witnesses and ensure the smooth functioning of the criminal justice process. However, pre-trial detention is only acceptable if it is lawful, reasonable and necessary in all the circumstances and used only as a measure of last resort and for the shortest possible period.[950] Detaining a person in connection with a crime before trial and conviction contravenes the right to personal liberty, which includes the right to freedom from arbitrary detention.[951] This is true, as pre-trial detention (sometimes prolonged for months and even years), may deprive suspects or accused persons of the possibility of finding the evidence necessary

[944] *Jean-Marie Atangana Mebara v Cameroon* (2015) para. 83.
[945] *Jean-Marie Atangana Mebara v Cameroon* (2015) para. 103.
[946] HRC: General Comment No. 32 (2007) para. 30.
[947] *Urbain Olanguena Awono v Cameroon* (2015) 3.4.
[948] *Urbain Olanguena Awono v Cameroon* (2015) 9.7
[949] *Urbain Olanguena Awono v Cameroon* (2015) 9.7
[950] *Womah Mukong v Cameroon* (1994) paras. 9.7 and 9.8.
[951] Heard C & Fair H 'Pre-trial detention and its over-use: evidence from ten countries' (2019) available at *https://eprints.bbk.ac.uk/policies.html* (accessed 6 March 2021).

to secure their release.[952] This section argues that this perverse interpretation of the purpose of pre-trial detention is a serious challenge to effective enforcement of the right to freedom from arbitrary detention in Cameroon.

Sometimes authorities seem to not understand, or deliberately refuse to understand, the purpose of pre-trial detention, as sometimes it is used in disregard for its intended purpose(s).[953] For example, Amnesty International,[954] Human Rights Watch[955] and the US State Department[956] have documented that sometimes authorities resort to prolonged pre-trial detention for purposes of punishment and dehumanisation. This is true as all categories of persons, including outspoken journalists critical of governments' policies, opposition party leaders expressing their political views, human rights defenders concerned about rights violations, and peaceful demonstrators demanding civil and political rights are often subjected to lengthy arbitrary pretrial detentions.[957] This can impact negatively on the right to bail (the right of suspects or accused persons to be released from custody pending investigations) and/or trial as authorities sometimes refuse to grant bail even where applicants are eligible.

Some State Counsel, Procureurs Généraux and examining magistrates or judges have different reasons for pre-trial detention, in blatant disregard for the rights of accused persons. For example, authorities deliberately effect prolonged pre-trial detention in the belief that it will enable them to obtain confessions from accused persons,[958] and

[952] Heard C & Fair H (2019).

[953] Pre-trial detention is generally used as a mechanism to prevent flight of the suspect(s) or accused person(s), recurrence of the crime, or to protect persons and evidence against harm and to ensure a smooth trial.

[954] Amnesty International 'Right Cause, Wrong Means: Human Rights Violated and Justice Denied in Cameroon's Fight against Boko Haram' (2016) 6 available at *https://www.amnesty.org/en/documents/afr17/4260/2016/en/* (accessed 25 February 2021).

[955] Human Rights Watch, 'Cameroon events of 2020' available at *https://www.hrw.org/world-report/2021/country-chapters/cameroon* (accessed 25 February 2021).

[956] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 4, 5 and 6 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

[957] Enonchong L S 'Applying International Standards in Enforcing the Right to Personal Liberty in Cameroon: Challenges and Prospects' (2016) 60 (3) *Journal of African Law* 389-417, p.7.

[958] Amnesty International 'Cameroon's Secret Torture Chambers: Human Rights Violations and War Crimes in the Fight against Boko Haram' (2017) available at *https://reliefweb.int/sites/reliefweb.int/files/resources/AFR1767632017ENGLISH.PDF* (accessed 25 February 2021). For more, see Human Rights Watch 'Cameroon: Routine Torture, Incommunicado Detention (2019) available at *https://www.hrw.org/news/2019/05/06/cameroon-routine-torture-incommunicado-detention* (accessed 26 February 2021).

provide more time for criminal investigations[959] or to determine the appropriate charges against a suspect or accused person.[960]

Pre-trial detention aside, it is also important to note that JPOs and state security agents have continuously arrested and detained relatives of alleged suspects. For example, Amnesty International documented that in July 2015, state security agents arrested more than 250 persons because they were wives, husbands, children, relatives or friends of suspected Boko Haram terrorists.[961] Similarly, in 2019 and 2020 respectively, Human Rights Watch[962] and Advocates for Human Rights[963] also documented that arbitrary arrest and detention of family members of suspects is normal in Cameroon. For example, in two separate operations, sometime in 2018 and on 2 August 2019, state security agents arrested and detained the mothers and sister of two outspoken front-line separatist leaders.[964] Although the two elderly women eventually regained their liberty on 20 November 2019,[965] the sister continued to languish in jail.[966] However, she was released on 8 January 2021 after the military court found no incriminating evidence against her. This unfortunate use of procedures other than for their intended purposes

[959] Mooya N 'Cameroon: Ongoing Due Process Violations in Cases of Journalists Reporting on the Anglophone Crisis' (2021) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon--ongoing-due-process-violations-in-cases-of-journalists/* (accessed 25 February 2021).

[960] Advocates for Human Rights 'Cameroon's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para. 3, available at *https://www.theadvocatesforhumanrights.org/uploads/ahr_loi_cameroon_report_on_anglophone_crisis_final.pdf* (accessed 26 February 2021).

[961] Amnesty international 'Right Cause, Wrong Means: Human Rights Violated and Justice Denied in Cameroon's Fight against Boko Haram' (2016) 23 available at *https://www.amnesty.org/en/documents/afr17/4260/2016/en/* (accessed 25 February 2021).

[962] Human Rights Watch 'Cameroon: New Attacks on Civilians By Troops, Separatists' (2019), available at *https://www.hrw.org/news/2019/03/28/cameroon-new-attacks-civilians-troops-separatists* (accessed 10 March 2021).

[963] The Advocates for Human Rights 'Cameroon's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) paras. 21 and 30 available at *https://www.theadvocatesforhumanrights.org/uploads/ahr_loi_cameroon_report_on_anglophone_crisis_final.pdf* (accessed 26 February 2021).

[964] News Day Cameroon 'Mother and sister of Ambazonia leader Chris Anu to appear in court Tuesday' (2019) available at *https://newsdaycameroon.wordpress.com/2019/09/09/mother-and-sister-of-ambazonia-leader-chris-anu-to-appear-in-court-tuesday/* (accessed 20 March 2021).

[965] News Day Cameroon 'Mother and sister of Ambazonia leader Chris Anu to appear in court Tuesday' (2019) available at *https://newsdaycameroon.wordpress.com/2019/09/09/mother-and-sister-of-ambazonia-leader-chris-anu-to-appear-in-court-tuesday/* (accessed 20 March 2021).

[966] News Day Cameroon 'Mother and sister of Ambazonia leader Chris Anu to appear in court Tuesday' (2019) available at *https://newsdaycameroon.wordpress.com/2019/09/09/mother-and-sister-of-ambazonia-leader-chris-anu-to-appear-in-court-tuesday/* (accessed 20 March 2021).

in part explains the widespread and indiscriminate use of detention,[967] pre-trial detention[968] and the high rate of remand detainees,[969] despite the substantive and procedural safeguards contained in domestic law and international standards to protect against arbitrariness.

6.2.3 Insufficient judicial power

Judicial power is one of the most important features of a democratic society. It is the ability or power of a magistrate or judge to make binding court orders and decisions and the successful execution of same. Therefore the judiciary must be sufficiently independent to enable magistrates and judges to deliver rulings based on the merits of a case and in accordance with the law, without interference from the executive or other stakeholders. Regrettably, this is not the case in Cameroon as the judiciary is not independent, and magistrates and judges are subject to executive control and influence.[970] The reality is that although Article 37(2) of the Constitution affirms the independence of the judiciary, the Article is limited and subject to strict executive control. For example, Article 37(3) makes it clear that 'the President of the Republic shall guarantee the independence of judicial power … he shall appoint members of the bench and for the legal department'. This implies that the President of the republic, 'who is head of the executive, has been conferred with practically unilateral powers to control judicial tenure through appointments'.[971] This has paved the way for representatives of the President at the regional level (governors), divisional level (senior divisional officers) and sub-divisional level (divisional officers) to exhibit significant influence and control over members of the judiciary and their decisions in their respective scope of competence, particularly in cases where state interest is at stake.[972]

[967] Amnesty International 'Right Cause, Wrong Means: Human Rights Violated and Justice Denied in Cameroon's Fight against Boko Haram' (2016) 23. For more, see Amnesty International, Cameroon's Secret Torture Chambers: Human Rights Violations and War Crimes in the Fight against Boko Haram (2017) 6.

[968] Concluding Observations on Cameroon, CAT/C/CMR/5 (2017) para. 8. For more, see Human Rights Watch 'Cameroon Should Protect Prison Population from COVID-19' (2020) available at *https://www.hrw.org/news/2020/03/27/cameroon-should-protect-prison-population-covid-19* (accessed 22 March 2021).

[969] U.K Home Office (2020) para. 4.3.5.

[970] Atoh W M. T 'Critique on Sections of the Cameroon Criminal Procedure Code' (2016) 275, available at *http://www.ijsrp.org/research-paper-0916/ijsrp-p5737.pdf* (accessed 10 March 2021).

[971] Enonchong L S (2016) 9.

[972] Enonchong L S (2012) 327-328.

Sometimes judicial decisions and court orders such as the release of persons from arbitrary custody on the strength of bail or habeas corpus are not respected. The reason is that court orders and decisions are not self-executing, as the judiciary does not have its own institution to enforce its judgments, and so depends on the state's legal department for this.

Sometimes the legal department (National Public Prosecuting Authority), in bad faith and in conspiracy with the executive, executes only court orders and decisions that it is comfortable with and undermines those in conflict with executive interest. For example, in *Nyo Wakai & 172 Ors v The People*, the High Court of Bamenda (Common Law jurisdiction) held that the arrest and detention of post-presidential election demonstrators was arbitrary[973] as authorities had detained some of them without the use of valid warrants, while detention warrants for others had expired. The court held that 'the action of the administration was a gross violation of the fundamental right of the person and could be likened to an administrative assault'.[974] As a result, the court granted the applicants bail and ordered their release. Conspicuously, the Legal Department (National Public Prosecuting Authority) on instructions from the Governor disregarded the court order and the victims were transferred to Yaoundé, a Civil Law jurisdiction.[975] The presiding judge in the matter was relieved of his duties as president of the court and transferred to the legal department (National Public Prosecuting Authority), while his two colleagues were demoted to remote areas. Similarly, in *Mbonga Mauger's case*, the State Counsel of Ocean Division did not only condone the arbitrary arrest and detention of the suspects (for over five months) but disrespected judicial power and authority 'by vehemently refusing to execute a release order obtained by way of habeas corpus'.[976] Although the victims were eventually released, these are clear cases of insufficient judicial power, as the court orders could not secure the release of persons arrested and detained in an arbitrary fashion in a timely manner.

An important question is whether the Legal Department (National Public Prosecuting Authority) has the discretion whether or not to execute a bail order or habeas corpus

[973] *Nyoh Wakai and 172 Ors v The State of Cameroon* (1992).
[974] *Nyo Wakai and 172 Ors v The State of Cameroon* (1992). For more, see CCPR/C/CMR/4 11 May 2009, para. 309.
[975] Enonchong L S (2012) 327-328.
[976] *Mbonga Mauger's case,* Ordinance No. 1/HC/PTGI/Kribi of 13 February 2009.

ruling. In answering this question, reference is made to *Lorencea & 1 Or. v The People of Cameroon,* where the Inquiry Control Chamber of the Appeal Court of the South West Region stated:

> The Legal Department cannot refuse to execute a court order merely because they are aggrieved by it and have filed an appeal. To hold otherwise would mean that the legal department can review decisions of the court thereby usurping the prerogatives of the court of appeal. Even if the law makes them a party, the legal department is only a party in a criminal action and nothing more …'.[977]

Furthermore, section 545(2) of the CPC compels the Legal Department (National Public Prosecuting Authority) to execute all bench or remand warrants or court decisions granting bail to suspects, accused persons or detainees whether it agrees with them or not and to forward them directly to the authorities responsible for their execution. Thus, the Legal Department (National Public Prosecuting Authority) must execute and not question any decision emanating from the courts to release a suspect or accused person, as even if the detention is not arbitrary it may be unnecessary.

Insufficient judicial power and blatant disrespect for judicial personnel in Cameroon is not limited to court judgments and decisions of magistrates and judges. Although the law permits them to visit police stations, gendarmerie brigades and other detention centres, sometimes they are not allowed access. Flimsy excuses for this outrageous and unorthodox behaviour include absence of the head of the unit, or that they were not informed in advance of the magistrate or judge's arrival.[978] Even when JPOs do grant magistrates or judges access to detention centres, sometimes they refuse to obey instructions to release suspects or accused persons detained in arbitrary fashion on the grounds that they have not received instructions from their superiors.[979]

Sometimes JPOs chase away magistrates on control missions to detention centres, demanding the physical presence of the Procureur Général or State Counsel.[980]

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[977] *Lorencea & 1 Or. v The People of Cameroon* (2016) 34-36.
[978] Ngatchou T C 'The Responsibility of the Judicial Police Officer under Cameroonian Law' (2019) 4 (1) *International Journal of Trend in Scientific Research and Development* 986–1000, p. 991.
[979] Ngatchou T C (2019) 991.
[980] Ngatchou T C (2019) 991.

Conflicts are frequent, and sometimes can get physical and ugly, and thus put to question the role and hierarchical competence of the various actors in the criminal justice system. For example, in The *LAGASSO Case*,[981] JPOs of the first district police station beat up a magistrate on a mission to inspect the detention facility, and in arbitrary fashion detained him for several hours.[982] The High Court sentenced the culprits to ten years in prison.[983] However, on appeal, the sentence was reduced to two years' imprisonment.[984] This nonchalant and outrageous behaviour by JPOs is not surprising, as sometimes they are forced to yield to pressures from their immediate bosses, influential state personnel, top politicians and local community leaders to commit human rights violations, including arbitrary detention.[985]

Insufficient judicial power poses a serious challenge to effective enforcement of the right to freedom from arbitrary detention, as judges are deprived of their ability to exercise good judgment and are rendered powerless to secure the release of persons arrested and detained in an arbitrary fashion. The problem of insufficient judicial power will continue to perpetuate arbitrariness if left unchecked, as has been observed in many disastrous bail motions and habeas corpus petitions. Conversely, sufficient judicial power will help to guarantee respect for the rule of law and a sound human rights culture.[986]

6.3 Other challenges

6.3.1 Inefficiency and ineffectiveness in the criminal justice system

An efficient and effective criminal justice system is important as it upholds the rule of law, guarantees the promotion and protection of human rights and fundamental freedoms including from arbitrary arrest and detention. The Cameroon criminal justice system is inefficient and ineffective,[987] thus posing a serious challenge to the effective

[981] *The LAGASSO Case,* Judgement No. 122/crim of 1 March 1996. For more, see Ngatchou Toto Carles (2019).
[982] Ngatchou T C (2019) 992.
[983] *The LAGASSO Case* (1996). For more, see Ngatchou T C (2019) 992.
[984] *The LAGASSO Case* (1996). For more, see Ngatchou T C (2019) 992.
[985] U S Department of State '2016 Country Reports on Human Rights Practices: Cameroon' (2016) 1 and 2 available at *https://www.state.gov/reports/2016-country-reports-on-human rights-practices/cameroon/* (accessed 7 May 2021).
[986] Enonchong L S (2016) 9.
[987] Enonchong L S (2016) 9.

enforcement of these rights. This is so because there are unnecessary delays in completing police investigations, lengthy criminal proceedings, court backlogs, ineffective hearings, frequent and unnecessary adjournments, failed prosecutions and prolonged pretrial detentions paving the way for arbitrariness. This section does not discuss unnecessary delays in completing police investigations as this is adequately discussed in the previous chapters.

Frequent and unnecessary adjournments pave the way for lengthy criminal proceedings and prolonged pretrial detentions. For example in *Wawa Jackson Nfor's case*, the High Court adjourned the initial hearing, scheduled for 21 June 2018, more than 20 times due to lack of interpreters, the prosecution's alleged inability to finalise its list of witnesses and its need to conduct further investigations. The hearing commenced on 11 December 2020, three years behind schedule date as Mr Wawa Jackson Nfor languished in pre-trial detention;[988] he was released on 19 February 2021. In *Paul Chouta's case,* he suffered the same fate, as the initial hearing of his case, scheduled for 11 June 2019, was adjourned repeatedly as the court and prosecution were not ready to proceed. However, on 19 May 2021, the High Court sentenced him to 23 months in prison, with a fine of 160,000 CFA francs and a further 2 million CFA francs in damages (approximately 3,200 euros),[989] after being subjected to arbitrary pre-trial detention for close on two years.[990] This attitude is common in Cameroon as authorities often use flimsy and unfounded excuses to delay court proceedings, paving the way for lengthy and unnecessary detentions and arbitrariness.

The ineffectiveness and insufficiency of the criminal justice system is also evident when accused persons languish in jail for many years, far beyond the legally acceptable limits, following multiple court appearances waiting for their judgments. For example,

[988] Mooya N 'Cameroon: Ongoing Due Process Violations in Cases of Journalists Reporting on the Anglophone Crisis' (2021) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon--ongoing-due-process-violations-in-cases-of-journalists/* (accessed 25 February 2021).

[989] Reporters Without Borders 'Cameroonian journalist Paul Chouta sentenced and fined in defamation case' (2021) available at *https://rsf.org/en/news/cameroonian-journalist-paul-chouta-sentenced-and-fined-defamation-case* (accessed 24 May 2021).

[990] American Bar Association 'Cameroon: A Preliminary Report on Proceedings Against Detained Journalist Paul Chouta' (2020) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon--a-preliminary-report-on-proceedings-against-detained-j/* (accessed 28 February 2021).

an accused person remained in custody for fourteen years awaiting judgment.[991] In some cases, detainees continue to languish in jail for many months and even years although acquitted by a court.[992] For example, Elvis Fonuy Luma remained in jail for more than four years after the High Court acquitted him.[993] On 8 June 2007, the Court of First Instance discharged and acquitted Boniface Trésor Dinozor of all the allegations against him; remarkably, he remained in custody until 1 July 2008.[994] Similarly, Charles Ngassam remained in custody for five years after the Court of Appeal overturned the trial court's verdict. The Court of First Instance refused to execute the committal order stating that it was not competent, but however, maintained that it was still waiting for the case to be returned to it.[995]

The reasoning is that although the law clearly spells out the different stages and actors in the criminal justice system, it does not clearly indicate the competent authority to order release of suspects and accused persons at each stage of the criminal justice system. Furthermore, certain sections of the CPC are not precise and give room for misunderstanding. For example, although section 119(2)(a)(b) of the CPC makes it clear that remand in custody shall not exceed forty-eight (48) hours renewable once or twice with the written approval of the State Counsel or Procureur Général, the law does not compel JPOs to release suspects in the absence of sufficient evidence for remand in custody. This lacuna in knowledge or understanding is not surprising, as the power to release suspects is implied and not documented in the CPC.

[991] African Criminal Justice Reform 'Cameroon - slowest justice system in the world?' (2019) available at *https://acjr.org.za/news/cameroon-slowest-justice-system-in-the-world* (accessed 4 January 2021).

[992] African Criminal Justice Reform 'Cameroon - slowest justice system in the world?' (2019) available at *https://acjr.org.za/news/cameroon-slowest-justice-system-in-the-world* (accessed 4 January 2021).

[993] African Criminal Justice Reform 'Cameroon - slowest justice system in the world?' (2019) available at *https://acjr.org.za/news/cameroon-slowest-justice-system-in-the-world* (accessed 4 January 2021).

[994] International Federation of Action by Christians for the Abolition of Torture 'Concerns of FIACAT and ACAT Cameroon regarding Torture and Ill-treatment in Cameroonian Prisons' (2008) 2, available *at https://www.upr-info.org/sites/default/files/document/cameroon/session_4_-_february_2009/* (accessed 9 March 2021).

[995] International Federation of Action by Christians for the Abolition of Torture 'Concerns of FIACAT and ACAT Cameroon regarding Torture and Ill-treatment in Cameroonian Prisons' (2008) 2, available *at https://www.upr-info.org/sites/default/files/document/cameroon/session_4_-_february_2009/* (accessed 9 March 2021).

Insufficiency and ineffectiveness in the criminal justice system paving the way for arbitrariness is also blamed on lack of resources. JPOs, judges and other judicial personnel are expected to perform their duties with the highest degree of professionalism and integrity. They must also be provided with sufficient human, material and financial resources in the conduct of their duties. Regrettably, Cameroon seems to lack the necessary human, material and financial resources[996] to implement an efficient and effective criminal justice system that can adequately protect against human rights violations including arbitrariness. This is true as an insufficient number of judges, court staff, counsel, and an inadequate case-tracking system have negatively impacted on the expeditious nature of judicial proceedings paving the way for unnecessary prolonged detention and arbitrariness.[997]

6.3.2 Lack of full engagement between judges, suspects, accused persons and witnesses

There is need for judges to engage in meaningful dialogue with suspects and accused persons to gather valuable information pertaining to their arrest, detention, alleged offence, including potential witnesses that may help to exonerate them and secure their release. This is important as sometimes rulings may be delivered without consideration of individual circumstances, paving the way for prolonged pre-trial detention, malicious prosecutions, convictions and sentencing. Moreover, sometimes judges' decisions to remand suspects or accused persons are not subject to adequate review, thereby making detention the only alternative. Therefore, pre-trial remand seems to be the rule rather than the exception. The reasoning is that the judge's discretion is wide and sometimes they fail to rely on laws or policies designed to eliminate or limit the use of excessive pre-trial remand. This is commonplace in the inquisitorial French speaking regions of Cameroon where criminal proceedings may be conducted without an oral hearing, and the decision to remand a suspect may be considered on the basis of the case file submitted by the JPO or the Procureur Général. This is problematic as judges may make irrational and inappropriate decisions with regard to pre-trial detention that does not concur with international human rights norms and thus open the way to arbitrariness.

[996] U. K. Home Office (2020) para. 2.3.4.

[997] African Criminal Justice Reform 'Cameroon - slowest justice system in the world?' (2019) available at *https://acjr.org.za/news/cameroon-slowest-justice-system-in-the-world* (accessed 4 January 2021).

It is important to note that criminal proceedings in the French-speaking regions in Cameroon are inquisitorial in nature and sometimes judicial and prosecutorial functions are concentrated in the hands of the judge. S/he controls the entire proceedings, initiates investigation, gathers evidence, and has control over the admissibility and evaluation of the evidence. Moreover, the inquisitorial Civil Law system attaches considerable importance to police power, punishment and presumption of guilt as opposed to innocence. Furthermore, a suspect or accused person has the onus to prove his or her innocence beyond a reasonable doubt to secure his or her release.

A judge's discretion to not allow cross-examination of witnesses can pose a serious challenge to effective enforcement of the right to freedom from arbitrary detention. In *Mr Wawa*[998] and *Barrister Tamfu Richard,* and *Maitre Armel Tcuemengne's cases*, the three accused persons were detained on misdemeanour related charges on 15 May 2018 and 10 November 2020 respectively. On arraignment, the defendants pleaded not guilty. Relying on section 336(a) of the CPC,[999] the judges elected to not allow cross-examination of witnesses adequately guaranteed in section 373 of the CPC. This is contrary to Article 14(3) (e) of the ICCPR to the effect that, in the determination of any criminal charge against anyone, s/he shall be entitled as a minimum, 'to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. Therefore, cross-examination of witnesses could have presented the perfect opportunity for the accused persons' lawyers to expose deficiencies, discrepancies and inconsistencies in the prosecution's case, test the accuracy and authenticity of the evidence, cast doubt on its testimony[1000] and thus pave the way for the accused persons' release**.**

[998] Mooya N 'Cameroon: Ongoing Due Process Violations in Cases of Journalists Reporting on the Anglophone Crisis' (2021) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon--ongoing-due-process-violations-in-cases-of-journalists/* (accessed 25 February 2021).

[999] Section 336(a) of the CPC provides that 'notwithstanding the provisions of section 335, any statement made in the course of a judicial proceeding by a person who cannot be heard at subsequent proceedings either because he is deceased or because of insufficient time to get him to appear before the court, the excessive expenditure involved, or the impossibility of finding him', shall be admissible in evidence.

[1000] Section 332(3 c and d) of the CPC.

Lack of full engagement of judges, suspects, accused persons and witnesses is attributed to a lack of courthouses in some parts of the country, particularly in remote and enclaved areas. Courthouses are mostly situated in the semi-urban and urban areas while police posts and gendarmerie brigades (detention centres) are situated in almost all the remote parts of the country, with very poor or no road networks. Moreover, the ongoing armed conflict in the English speaking regions has resulted into closure of many courts in the semi-urban areas in these regions[1001] as state security agents and separatist fighters constantly battle for control. This has paved the way for the military and state security agents to continually effect random and indiscriminate arrest and detention of persons in disregard of the 48-hour rule, and substantive as well as other procedural safeguards put in place to protect against arbitrariness.

6.3.3 Repressive pieces of legislation

The advent of multi-party politics in the early 1990s in Cameroon brought with it new repressive and emergency pieces of legislation designed specifically to restrict rights, contain public demonstrations, maintain law and order and combat terrorism**.** These pieces of legislation have paved the way for human rights violations and pose serious challenges to effective enforcement of the right to freedom from arbitrary detention, as administrators are granted broad powers to order detention without charge or trial for a lengthy period. For example, section 11 of the law relating to counter-terrorism[1002] and 2(4) of the law relating to the maintenance of public order[1003] empower administrative authorities at all times. depending on the circumstances, to order a person's arrest and detention without charge or trial for a renewable period of 15 days to combat terrorism and banditry respectively.

Similarly, the law relating to the state of emergency[1004] empowers the Minister of Territorial Administration, Provincial Governors and Senior Divisional Officers to order the arrest and detention of 'persons deemed dangerous to public security' for up to four months, 15 and seven days respectively, without charge or trial. Amnesty

[1001] UK Home Office (2020) para 2.3.10.
[1002] Law no. 2014/028 of 23 December 2014 on the Suppression of Acts of Terrorism.
[1003] Law No. 90/54 of 19 December 1990, relating to the Maintenance of Law and Order.
[1004] Law No. 90/47 of 19 December 1990 relating to the State of Emergency.

International reported that between January 2014 and September 2015, relying on the anti-terrorism law, state security agents arrested and detained more than 1,000 people on suspicion of supporting the terrorist group Boko Haram, based on little or no evidence and without arrest warrants.[1005] Furthermore, Human Rights Watch reported that in August 2019, state security agents randomly and indiscriminately arrested 506 persons in various cities in the French speaking regions including the nation's capital, Yaoundé, and economic capital, Douala, demonstrating peacefully for civil and political rights. While about 100 of them were released in September, more than 250 were charged with terrorism-related offences and continue to languish in jail.[1006]

These pieces of legislation challenge the effective enforcement of procedural safeguards put in place to protect against arbitrariness, as none of them indicate the number of lawful extensions of detention, nor clarify the circumstances and conditions that may warrant an extension or extensions.[1007] This implies that a person can be held in custody for an indefinite period without information on reasons for arrest, detention or nature of charges against him or her. Secondly, the three laws are contrary to section 119(2)(a) and (b) of the CPC which makes it clear that JPOs may legally cause the arrest and detention of suspects for up to 48 hours renewable once, or twice with written approval of the State Counsel, provided good reasons are submitted to that effect.[1008] Moreover, the three pieces of legislation do not make provision for preliminary inquiry, prompt presentation of suspects before a judge or provide detainees with the opportunity to challenge the legality of their detention. Thirdly, the three pieces of legislation lack procedures to review detention of persons held under emergency powers. They also do not include explicit provision for lawyers, family members and

[1005]Amnesty international 'Right Cause, Wrong Means: Human Rights Violated and Justice Denied in Cameroon's Fight against Boko Haram' (2016) 18 available at *https://www.amnesty.org/en/documents/afr17/4260/2016/en/* (accessed 25 February 2021).

[1006]Human Rights Watch 'World Report 2021 Events of 2020', available at *https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf* (accessed 11 March 2021) 138 and 139.

[1007] Enonchong L S (2016) 4-5.

[1008] Section 119(2) (c) of the CPC. For more, see The Law Society of England and Wales 'Trial Observation Report- Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé' (2017) para. 32 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021).

other third parties to pay unrestricted visits to detainees. This is unfortunate as detainees are deprived of their right to counsel and adequate time to prepare their case.

Fourthly, the substantive provisions of the three laws are vague and very broad[1009] and may provide state security agents the perfect opportunity to treat anyone as a suspect, and to cause random and indiscriminate arrest and detention of innocent persons. It is important to note that the substance and meaning of the law relating to counter-terrorism is also attributed to the law relating to state of emergency and maintenance of law and order as the three legislations seek to protect the same interest, viz, 'maintain public order'. Section 2(1) of the law relating to counter-terrorism reads as follows:

> Whoever, acting alone as an accomplice or accessory, commits or threatens to commit an act likely to cause death, endanger physical integrity, cause bodily injury or material damage, destroy natural resources, the environment and cultural heritage with intent to: (a) intimidate the public, provoke a situation of terror or face the victim, the government and/or national and international organization to carry out or restrain from carrying out an act or renounce a particular position; (b) disrupt the national functioning of public services, the delivery of essential services to the public to create a crisis situation among the public; (c) create widespread insurrection in the country; (d) shall be punished with a death penalty.

A critical observation of section 2(1) reveals that the section creates grounds for arbitrariness as first, it paves the way for the indiscriminate and random arrest and detention of persons, for an indefinite or lengthy period. found on the streets during public manifestations (whether they are involved or not) or involved in terrorism-related activities or not.[1010] Secondly, the section criminalises not only acts that constitutes terrorism, but also peaceful gatherings, protests and other forms of opposition that are clearly not terrorism-related.[1011] Thirdly, the section does not make provision for JPOs and state security agents to present suspects before an examining magistrate or judge for judicial review.[1012]

[1009] Ngangum P T 'The "Trumping Effect" of Anti-Terrorism Legislations: The Case of Cameroon' (2020) 105, available at *https://idus.us.es/bitstream/handle/11441/94308/978-84-18167-14-0-96-122.pdf* (accessed 11 March 2021).
[1010] Berrih C & Toko N 'Sentenced to Oblivion Fact-Finding Mission on Death Row Cameroon' (2019) 48 available at *https://www.researchgate.net/publication/344441821* (accessed 11 March 2021).
[1011] Berrih C & Toko N (2019) 48.
[1012] U.K. Home Office (March 2020) 50. It is important to note that in 2020, the U.K. The Home Office published two reports on Cameroon (March and December).

Laws must not be vague or broad, but be transparent, accessible[1013] and sufficiently precise for clear understanding (so that the possibility of commission of an offence is foreseeable) and for authorities to apply them judiciously to prevent abuse and arbitrariness.[1014] For example, the substantive provision of the law relating to counter-terrorism does not conform to this specificity as it is to the effect that 'any public manifestation is tantamount to terrorism'. It is important to note that the Special Rapporteur on the Promotion of Human Rights and Freedoms while Countering Terrorism, stated that 'vagueness of concept could lead to its use against members of religious minorities, civil society, human rights defenders, peaceful separatists, indigenous groups and members of opposition political parties'.[1015]

It is argued that the vague, broad and imprecise character of the law relating to counter-terrorism renders it unconstitutional and paves the way for arbitrariness.[1016] This is so because it infringes many basic rights and freedoms (press freedom, freedom of expression, right to peaceful assembly, freedom of association, and restrictions on political opinion or participation) guaranteed in the Constitution and international human rights treaties.[1017] It also paves the way for the suppression of these rights by way of crackdown, random and indiscriminate arbitrary arrests and detentions[1018] and the death penalty.[1019] For example, the Procureur Général relied on the law relating to

[1013] Ngangum P T 'The "Trumping Effect" of Anti-Terrorism Legislations: The Case of Cameroon' (2020) 102-3, available at *https://idus.us.es/bitstream/handle/11441/94308/978-84-18167-14-0-96-122.pdf* (accessed 11 March 2021).

[1014] The Law Society of England and Wales 'Trial Observation Report- Cameroon: Case of Nkongho Felix Agbor Balla, Fontem Neba and others, hearing of 27 April 2017, Military Tribunal Yaoundé' (2017) para. 43 available at *https://communities.lawsociety.org.uk/download?ac=28396* (accessed 7 May 2021).

[1015] Ngangum P T 'The "Trumping Effect" of Anti-Terrorism Legislations: The Case of Cameroon' (2020) 107 available at *https://idus.us.es/bitstream/handle/11441/94308/978-84-18167-14-0-96-122.pdf* (accessed 11 March 2021).

[1016] Ngangum P T (2020) 107.

[1017] Ngangum P T (2020) 107.

[1018] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) 2 available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).

[1019] Berrih C & Toko N (2019) 49.

counter-terrorism to order the arbitrary arrest, detention and requested the death penalty for Ahmed Abba, a journalist working for Radio France International for not condemning terrorism, and covering and reporting on Boko Haram activities.[1020] The Court of First Instance sentenced him to 10 years' imprisonment. However, the Court of Appeal reduced the sentence to 24 months, 'retaining the crime of not condemning terrorism'.[1021] Similarly, on the strength of the law relating to counter-terrorism, state security machinery subjected another journalist, Mr Wawa, to arbitrary detention without trial for more than three years for reporting events in the troubled Anglophone regions.[1022]

It seems as if the meaning of 'public order' in the Cameroon context has shifted from protection of persons and property, peace and tranquility to maintenance of the political status quo and protection of the regime in power. For this reason, all public manifestations, whether peaceful or not,[1023] including peaceful protest marches,[1024] are construed to mean rebellion against properly constituted state authority. The state usually suppresses these so-called rebellions (whether legitimate or not) by way of crackdown, random and indiscriminate arrest, detention and summary executions.[1025] There is urgent need for the various actors in the criminal justice system to distinguish between persons whose statements, speeches, declarations or actions are intended to facilitate terrorism, insurrection or to destabilise the territorial integrity of the state, and

[1020] Berrih C & Toko N (2019) 49.

[1021] Berrih C & Toko N (2019) 49.

[1022] Mooya N 'Cameroon: Ongoing Due Process Violations in Cases of Journalists Reporting on the Anglophone Crisis' (2021) available at *https://www.americanbar.org/groups/human_rights/reports/cameroon--ongoing-due-process-violations-in-cases-of-journalists/* (accessed 25 February 2021).

[1023] Committee to Protect Journalists (CPJ) 'Mancho Bibixy: imprisoned in Cameroon' (2020) available at *https://cpj.org/data/people/mancho-bibixy/* (accessed 4 November 2020).

[1024] Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).

[1025] Amnesty International 'Cameroon: Inmates packed like sardines' in overcrowded prisons following deadly Anglophone protests' (2017) available at *https://www.amnesty.org/en/press-releases/2017/10/cameroon-inmates-packed-like-sardines-in-overcrowded-prisons-following-Anglophone-protests* (accessed 7 April 2020).

those who demonstrate peacefully to exercise their civil and political rights.[1026] For example, the Working Group on Arbitrary Detention[1027] and Lawyers' Rights Watch Canada[1028] noted the arbitrary arrest, detention and sentence of three civil rights activists in 2018 to between ten and 15 years imprisonment for complaining about the poor state of roads.[1029] So it is obvious that these three repressive and emergency laws pose serious challenges to effective enforcement of the right to freedom from arbitrary detention in Cameroon.

6.3.4 Lack of transparency and accountability

Transparency and accountability are important virtues for the proper functioning of the criminal justice system as they motivate state officials to act rationally, predictably, perform their duties in line with the law and take responsibility for their actions. The Cameroon criminal justice system is lacking in transparency and accountability as sometimes JPOs fail to state reasons for arrest or detention. Similarly, there are cases where judges, examining magistrates, State Counsel and Procureurs Généraux have failed to provide explanations for remand in custody and the decision to not grant bail to certain category of persons.[1030] This is evident as suspects and accused persons often languish in jail unaware of the nature of criminal charges pending against them.[1031] For example, the US State Department reported that state security agents detained separatist

[1026] Contra Nocendi 'Rejection of habeas corpus claim maintains arbitrary detention of the Deputy Attorney General of the Supreme Court of Cameroon' (2017) available at *http://contranocendi.org/index.php/en/news-press/102-rejection-of-habeas-corpus-claim-maintains-arbitrary-detention-of-the-deputy-attorney-general-of-the-supreme-court-of-cameroon* (accessed 23 April 2020).

[1027] Committee to Protect Journalists (CPJ) 'Mancho Bibixy: imprisoned in Cameroon' (2020) available at *https://cpj.org/data/people/mancho-bibixy/* (accessed 4 November 2020).

[1028] Lawyers Rights Watch Canada 'In the Matter of Mancho Bibixy Tse: Lawyers' Rights Watch Canada (LRWC) Reply to The Republic of Cameroon (2019) paras. 16, 17 and 46 available at *https://www.lrwc.org/ws/wp-content/uploads/2019/02/WGAD.Mancho-Bibixy-Tse.LRWC-Reply-to-Cameroon.13.02.19.pdf* (accessed 1 April 2021).

[1029] Committee to Protect Journalists (CPJ) 'Mancho Bibixy: imprisoned in Cameroon' (2020) available at *https://cpj.org/data/people/mancho-bibixy/* (accessed 4 November 2020).

[1030] These include but are not limited to outspoken journalists critical of the regime in power, political opponents and their militants, suspected terrorists, and, most recently, Anglophones and alleged sympathisers of the secessionist movement.

[1031] U.K. Home Office (2020) para. 2.3.8.

leaders and 46 others incommunicado without informing them of the nature of charges for close to six months.[1032]

This lack of transparency and accountability poses a serious challenge to the effective enforcement of the right to freedom from arbitrary detention in Cameroon, as JPOs have routinely falsified and failed to maintain a comprehensive and detailed arrest and detention record for suspects and accused persons in the criminal justice system.[1033] At times, police interrogations are neither documented nor recorded, leading JPOs to rely on memories of previous conversations with the suspect or accused persons. Furthermore, most detention facilities are largely out of reach to members of the public or counsel, and subject to limited inspection by members of the CHRC and representatives of national and international Non-Governmental Organisations (NGOs).[1034] The lack of transparency and accountability is also evident as in some cases, JPOs and other custody personnel have failed to communicate the whereabouts of detainees moved to unknown locations to third parties such as counsel, family members, friends, political or social organisations to which they belong, and other persons or groups interested in the arrest or detention.[1035] For example, Amnesty International reported that on 27 December 2014, state security agents invaded Magdeme and Doublé villages and arrested more than 200 boys and men.[1036] As of year-end 2020, the whereabouts of 130 of them is a mystery.[1037] Similarly, Human Rights Watch reported that in January 2019, state security agents arrested opposition leader Maurice Kamto and hundreds of his supporters nation-wide, including journalists and human rights defenders, and their whereabouts were hidden for many

[1032] U S Department of State '2019 Country Reports on Human Rights Practices: Cameroon' (2019) available at *https://www.state.gov/reports/2019-country-reports-on-human rights-practices/cameroon/* (accessed 12 March 2021).
[1033] U.K. Home Office (2020) para. 4.3.2.
[1034] U S Department of State '2016 Country Reports on Human Rights Practices: Cameroon' (2016) 17-18 available at *https://www.state.gov/reports/2016-country-reports-on-human rights-practices/cameroon/* (accessed 7 May 2021).
[1035] U.K. Home Office (2020) para. 4.3.3.
[1036] Amnesty International 'Cameroon: Authorities fail to shed light on fate of 130 people missing for one year' (2015) available at *https://www.amnesty.org/en/latest/news/2015/12/cameroon-authorities-fail-to-shed-light-on-fate-of-130-people-missing-for-one-year/* (accessed 14 March 2021).
[1037] Amnesty International 'Cameroon: Five years of agony for families of 130 disappeared' (2020) available at *https://www.amnesty.org/en/latest/news/2020/03/new-amnesty-campaign-cameroun/* (accessed 14 March 2021).

months.[1038] In 2020, hundreds of persons demonstrated in a protest march in the nation's capital Yaounde, demanding to know the whereabouts of relatives arrested and detained in arbitrary circumstances.[1039]

A serious concern is whether JPOs or a commission delegated by the hierarchical superior command of the unit in question can effectively carry out transparent and impartial investigations into allegations of human rights violations, including arbitrary detention, committed by other JPOs. The present author argues that, while investigations may be transparent in cases of severe human rights violations such as arbitrary arrest or detention, coupled with torture and other forms of ill-treatment leading to the demise of the victim(s), it may not be the same if these violation have been committed on the instructions, and with the knowledge, approval or backing of the regime in power.[1040] A situation where JPOs, who are colleagues and possibly friends, investigate each other, leaves much to be desired in terms of transparency and accountability. Therefore, to ensure transparency and accountability, investigations into human rights violations including arbitrary arrest or detention committed by JPOs should not be investigated by other JPOs or SOPD, but by other independent institutions such as the NCHFR, National Public Prosecution Authority or the courts.

Because of this lack of transparency and accountability, the state has remanded certain categories of persons including outspoken journalists critical of the regime in power, opposition party leaders and civil and human rights activists, without justification.[1041] Gaining information or some track record of these cases is challenging, as custody officials often deny the arrest and detention of persons arrested and detained in arbitrary fashion. Even where the courts are seized to this effect, the presiding officers often rely on section 302(2) of the CPC and conduct proceedings in camera, and rulings are

[1038] Human Rights Watch 'Cameroon: Opposition Leaders Arrested' (2019) available at *https://www.hrw.org/news/2019/01/30/cameroon-opposition-leaders-arrested* (accessed 1 April 2021).
[1039] U.K. Home Office (2020) para 4.3.3.
[1040] World Organisation against Torture 'Cameroon: Enforced disappearance and rumoured torture and killing of Mr. Samuel Ajiekah Abuwe' (2020) available at *https://www.omct.org/en/resources/urgent-interventions/enforced-disappearance-and-rumoured-torture-and-killing-of-mr-samuel-ajiekah-abuwe* (accessed 20 January 2021).
[1041] Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).

neither reported nor published.[1042] The problem is compounded by the lack of a computerised database of court decisions. Moreover, since the outcomes of decided cases are rarely reported, it is difficult to detect, prevent and punish arbitrariness. It seems as if the reluctance of some courts to publish their judgments or decisions dealing with human rights violations, including arbitrary detention, is motivated by concerns not to expose the high level of rights violation in the country.

Lack of transparency and accountability frustrates the ability of victims or their representatives to commence proceedings before the competent courts to vindicate their legal rights and seek compensation. Usually, culprits are not held accountable for their actions, paving the way for recurrence of rights violations. This circumstance can create conditions for arbitrary arrest or detention, prolonged pre-trial detention, and unnecessary and unjustified lengthy court proceedings.

6.3.5 Lack of political will and administrative interference

The lack of political will and administrative interference are other problems that challenge the effective enforcement of the right to freedom from arbitrary arrest and detention in Cameroon. Genuine political will can help to overhaul the entire criminal justice system by invalidating bad laws and ensuring the dismissal of incompetent or corrupt members of the criminal justice system. It can also help to accelerate enforcement of legislation put in place to protect against arbitrariness, and motivate members of the judiciary and other actors in the criminal justice system to perform their duties in accordance with the law and deter state administrators from acting ultra-vires.

Regrettably, administrative authorities including Governors, SDOs, DOs, and other top government officials and military personnel have often ordered or caused the arrest and detention of persons for administrative reasons (preventive detention), rather than for criminal investigation purposes, crime prevention or to present them before the trial

[1042] Fombad C M 'Update: Researching Cameroonian Law' (2015) available at *https://www.nyulawglobal.org/globalex/Cameroon1.html* (accessed 23 October 2020).

courts.[1043] Despite pieces of legislation guaranteeing freedom of political opinions,[1044] peaceful assembly,[1045] expression, press, communication and association,[1046] a lack of political will and interference by administrators in the criminal justice system have paved the way for the indiscriminate and arbitrary arrest and detention of outspoken journalists,[1047] political party leaders and their militants[1048] and peaceful demonstrators calling for more representation and regime change. This is contrary to Article 21 of the ICCPR which guarantees right to freedom of peaceful assembly, and paragraph 82 of the Human Rights Committee's General Comment to the effect that

> preventative detention of targeted individuals, to keep them from participating in assemblies, may constitute arbitrary deprivation of liberty, which is incompatible with the right of peaceful assembly … practices of indiscriminate mass arrest prior to, during or following an assembly, are arbitrary and thus unlawful.[1049]

Between October and December 2016, militarised JPOs and state security agents, in violation of the right to peaceful assembly, arrested and detained hundreds of Anglophones including students, teachers and lawyers demanding reforms in the educational and justice system, and equal civil and political rights.[1050]

The government's policy of zero tolerance on any form of opposition is not limited to Anglophones. For example, the Minister of Territorial Administration ordered the arbitrary detention of Prof. Maurice Kamto, chairperson of the opposition party, Cameroon Renaissance Movement (CRM) commencing from January to October 2019. However, by virtue of a presidential decree, in October 2019 authorities released him

[1043] Louise Edwards 'Pre-Trial Justice in Africa: An Overview of the Use of Arrest and Detention, and Conditions of Detention', APCOF Policy Paper no. 7 (2013) 8, available at *http://apcof.org/wp-content/uploads/2016/05/No-7-Pre-Trial-Justice-in-Africa-An-Overview-of-the-Use-of-Arrest-and-Detention-and-Conditions-of-Detention_-English-Louise-Edwards-.pdf* (accessed 14 March 2021).
[1044] Preamble to the Cameroon Constitution of 18 January 1996.
[1045] Articles 3, 4, 6 and 7 of Law No. 90/55 of 1990.
[1046] Preamble to the Cameroon Constitution of 18 January 1996.
[1047] CMR 002 / 0620 / OBS 061, 4 June 2020.
[1048] Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).
[1049] UN Human Rights Committee (HRC), General Comment No. 37, Article 21 (Right of peaceful assembly), 17 September 2020, CCPR/C/GC/37, para. 82.
[1050] International Crisis Group 'Cameroon's Anglophone Crisis at the Crossroads' (2017) 10, Report No. 250 available at *https://d2071andvip0wj.cloudfront.net/250-cameroons-anglophone-crisis-at-the-crossroads_0.pdf* (accessed 13 March 2021).

after immense pressure from local and international stakeholders.[1051] On 22 September 2020, state security agents took him hostage at his home in the nation's capital Yaoundé, and subjected him and his entire family to arbitrary house arrest. Two mandamus applications filed in the High Court on 5 and 11 October for the immediate withdrawal of state security agents from his home were turned down for 'for lack of urgency'.[1052] However, on 6 December 2020, after pressure from local and international stakeholders, Prof. Maurice Kamto regained his liberty and freedom. Similarly, on 22 September 2020, on instructions from the Minister of Territorial Administration, state security agents, in an arbitrary fashion, arrested more than 500 militants of the opposition party, Cameroon Renaissance Movement (CRM) demanding political reforms and regime change in Cameroon.[1053] State security agents also targeted and in arbitrary fashion detained top ranking members of the party.[1054]

Even if Cameroon relies on articles 12(3) and 21 of the ICCPR and maintains that the arrest and detention of the CRM leaders and their militants was lawful and necessary, in the interest of national security, maintenance of public order and the protection of the rights of members of the society, it will still amount to arbitrariness. The reasoning is that, first, of the more than 500 CMR militants arrested on the 22 September 2020, 107 of them were presented before a military court on terrorism-related charges and insurrection, although none of them was in possession of weapons or plotting to engage in terrorism-related activities at the time of their arrest. Secondly, as at the time of writing, 63 others, including three CRM leaders, continue to languish in jail without

[1051] Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).

[1052]Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).

[1053] Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).

[1054] Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).

charge, while the fate or whereabouts of many others is uncertain and unknown.[1055] Thirdly, neither state security agents nor the courts have communicated reasons for, or the nature of charges against, some of the detainees. It is for this reason that the HRC in its General Comment No. 37 at paragraph 82 made it clear that preventative detention of targeted individuals, to keep them from participating in assemblies, and practices of indiscriminate mass arrest prior to, during or following an assembly, are arbitrary and thus unlawful.[1056]

6.3.6 Inadequate police training on human rights and the criminal justice system

Adequate and appropriate training of JPOs is an efficient and effective way to ensure maximum performance of their duties, raise their level of confidence, improve their operational skills, update their knowledge of new legislation, reduce confrontations with members of the community and protect against arbitrariness. As a result, inadequate police training on human rights and the criminal justice system can challenge the effective enforcement of the right to freedom from arbitrary detention in Cameroon. The recruitment of JPOs in Cameroon is carried out by the Director General for National Security (DGNS),[1057] while training is the responsibility of the National Advanced Police School and the Police Training Centres.[1058] JPOs in Cameroon receive in-service training sessions in the form of seminars to provide them with the necessary tools and techniques to carry out their duties in line with the law.[1059]

Despite the efforts made to build the capacity of JPOs, it seems as if some JPOs are not versed in, or do not understand the key concepts pertaining to arrest and detention, and the legal framework put in place to protect against arbitrariness. This can be said because some JPOs and state security agents continue to arrest and detain persons in

[1055] Human Rights Watch 'Cameroon: Opposition Leaders, Supporters Detained: Release Those Held Arbitrarily; End Crackdown on Dissent (2020) available at *https://www.hrw.org/news/2020/10/19/cameroon-opposition-leaders-supporters-detained* (accessed 28 October 2020).

[1056] H R C: General Comment No. 37 (2020) para. 82.

[1057] Decree No. 2002/003 of 04 January 2002 on the Organization of the General Delegation for the National Security.

[1058] Decree No. 2003/079 of 16 April 2003 on the Organisation and Functioning of the National Advanced Police School and the Police Training Schools.

[1059] Ministry of Justice 'Report by the Ministry of Justice on the State of Human Rights in Cameroon' (2005) para. 112.

disregard of the procedural safeguards put in place to protect against arbitrariness.[1060] This may be an indication that police training and capacity building in Cameroon is insufficient, and does not adequately equip JPOs with the tools necessary for effective and efficient performance of their duties.[1061] Although human rights law is included in the syllabuses of the police school,[1062] and the agenda of seminars, workshops and symposiums,[1063] most people recruited into the police force, especially at the lower levels, are poorly educated or school dropouts,[1064] and thus may not be able to accurately interpret and enforce the provisions of international human rights treaties that protect against arbitrariness.

With the passage of time and the recent state of the country, Cameroon has changed police training methods to meet the new challenges, namely the recent political insurgencies, terrorist threats from Boko Haram, and secession demands from the war-torn North West and South West regions of the country.[1065] Police training is more militaristic, placing stress on the laws of conventional warfare, handling of sophisticated ammunition, counter-insurgency operations, guerrilla warfare techniques and commando operations,[1066] to the detriment of rule of law, promotion and protection of human rights and procedural safeguards put in place to protect against arbitrariness.[1067] One can be tempted to conclude that the recent changes in police training in Cameroon has tremendously increased police power, and represent the

[1060] U.K. Home Office (2020) para. 2.3.6.
[1061] U.K. Home Office (2020) para. 2.3.4.

[1062] Ministry of Justice 'Report by the Ministry of Justice on the state of Human Rights in Cameroon 2005' para. 77.
[1063] Ministry of Justice 'Report by the Ministry of Justice on the state of Human Rights in Cameroon 2005' para. 76(2).
[1064] African Policing Civilian Oversight Forum (APCOF) 'Policing the Urban Periphery in Africa: Developing safety for the marginal' (2019) 79, available at *http://apcof.org/wp-content/uploads/apcofpolicingtheurbaneng.pdf* (accessed 17 March 2021).
[1065] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) 'Police structures in Cameroon are strengthened' (2019) available at *https://www.giz.de/en/worldwide/41991.html* (accessed 12 March 2021).
[1066]Global Security. Org. 'Cameroon: Gendarmerie Nationale' available at *https://www.globalsecurity.org/military/world/africa/cm-gendarmerie.htm* (accessed 12 March 2021).
[1067] Louise Edwards 'Pre-Trial Justice in Africa: An Overview of the Use of Arrest and Detention, and Conditions of Detention', APCOF Policy Paper no. 7 (2013) 5 available at *http://apcof.org/wp-content/uploads/2016/05/No-7-Pre-Trial-Justice-in-Africa-An-Overview-of-the-Use-of-Arrest-and-Detention-and-Conditions-of-Detention_-English-Louise-Edwards-.pdf* (accessed 14 March 2021).

strong arm of the state, almost uncontrollable by members of the judiciary and prosecutors.

6.4 Unorthodox cultures and practices

The cultural, economic and socio-political histories of countries are distinct. As a result, JPOs and judicial personnel are subject to different demands, pressures, requirements, and obligations that facilitate certain unorthodox cultures and practices that lead to arbitrariness. Cameroon is no exception, as trumped-up and disproportionate charges, corruption and discrimination are common features of the criminal justice system. These vices have contributed to challenging the effective enforcement of the right to freedom from arbitrary detention in Cameroon.

6.4.1 Disproportionate and trumped-up charges

A criminal charge is a formal accusation made by the state prosecutor against a person suspected to have committed a crime. A suspect can be accused of one or more crimes committed during the same or separate criminal activities thereby leading to one or multiple convictions. State prosecutors must thus charge suspects appropriately or correctly, as charges are a determining factor of a suspect or accused person's ability to apply for bail, and the length of time to which an accused person is sentenced if found guilty of the allegations or charges against him or her. Therefore, disproportionate and trumped-up charges can present serious challenges to effective enforcement of the right to freedom from arbitrary detention in Cameroon.

Sometimes JPOs in Cameroon employ unorthodox means such as torture and other forms of ill-treatment, intimidation, harassment and detention threats to force suspects to confess and plead guilty, in the absence of sufficient evidence that they have committed or participated in a crime, to formulate a charge.[1068] Furthermore, sufficient evidence exists to suggest that JPOs have often lured and/or enticed suspects to plead guilty to lesser charges to avoid lengthy jail terms, even though they did not commit or

[1068]Human Rights Watch 'Cameroon: Routine Torture, Incommunicado Detention' (2019) available at *https://www.hrw.org/news/2019/05/06/cameroon-routine-torture-incommunicado-detention* (accessed 8 January 2021).

participate in the offence in question.[1069] Furthermore, sometimes suspects are charged with offences more serious than what is revealed by the evidence or the facts of the case. For example, in 2013, prosecutors charged one Mbede 'with a crime, which is three times the limit permitted by Cameroonian law'.[1070] Similarly, in *Tanyi Schwartz, Egbe Samuel, Eyong Fidelis v The People,*[1071] the accused persons were indicted, tried and convicted under section 320(1)(c) of the Penal Code as they used false keys to gain access to a Principal's office and stole examination question papers.[1072] The Court of Appeal held that

> prosecuting an individual for the offence of the misappropriation of public funds as stipulated in Section 184(1) of the Penal Code requires that the Prosecution should determine the value of the property misappropriated (as a material element of the offence) and also because the value will be used in determining the appropriate sentence given the fact that the stipulated terms of imprisonment vary depending on the value of the misappropriated property in question. This, as would be observed, was not done by the Legal Department, as they brought the charge under the wrong Section of the Penal Code (Section 320: aggravated theft).[1073]

Prosecuting the accused persons under section 320 was arbitrary as a person convicted of an offence under that section is liable to be sentenced to death if found guilty of the offence(s) in question, while section 184(1) attracts punishments ranging from five years to life imprisonment and a fine.[1074]

[1069] Human Rights Watch 'Cameroon: Routine Torture, Incommunicado Detention' (2019) available at *https://www.hrw.org/news/2019/05/06/cameroon-routine-torture-incommunicado-detention* (accessed 8 January 2021).

[1070] Nordberg E 'Ignoring Human Rights for Homosexuals: Gross Violations of International Obligations in Cameroon' (2013) 462, available at *https://www.corteidh.or.cr/tablas/r29850.pdf* (accessed 9 March 2021).

[1071] *Tanyi Schwartz, Egbe Samuel and Eyong Fidelis v The People* (Court of Appeal, North West Province, Bamenda, Suit No BCA/3C/94).

[1072] Agbor, A A 'Prosecuting the Offence of Misappropriation of Public Funds: An Insight into Cameroon's Special Criminal Court' (2017) 6 &7, available at *http://dx.doi.org/10.17159/1727-3781/2017/v20n0a770* (accessed 13 March 2021).

[1073] *Tanyi Schwartz, Egbe Samuel and Eyong Fidelis v The People*. For more, see Agbor, A A 'Prosecuting the Offence of Misappropriation of Public Funds: An Insight into Cameroon's Special Criminal Court' (2017) 8, available at *http://dx.doi.org/10.17159/1727- 3781/2017/v20n0a770* (accessed 13 March 2021).

[1074] From 100,000 FCFA (182 US Dollars) to 500,000 FCFA (910 US Dollars).

Most recently, on 25 May 2018, the military tribunal sentenced Mancho Bibixy,[1075] Tsi Conrad,[1076] and Penn Terence[1077]to varying jail terms for 'terrorism, secession, hostility to the fatherland, spreading false information, revolution, insurrection, rebellion, and contempt for civil servants'.[1078] Even if the three men had contravened Cameroon's domestic law, it would have been articles 3 and 4 of the law governing public assembly,[1079] certainly not any of the above-mentioned offences. Moreover, section 231(1) of the Cameroon Penal Code makes it clear that violation of the law governing public assembly is punishable with an imprisonment term of between fifteen days and six months and a fine.[1080]

Disproportionate charges apart, trumped up charges are a common characteristic of the Cameroon criminal justice system. A trumped-up charge is a product of bad faith, fake, false or fabricated information to unjustly convict and sentence a person to arbitrary custody. Sometimes the State Counsel and Procureur Général in Cameroon have preferred trumped-up charges to secure convictions. For example, on 26 July 2016, state security agents arrested and detained Mr Amadou Vamoulké, former Cameroon Radio and Television director (CRTV) at Kondengui Central Prison in Yaoundé on trumped-up charges for embezzlement and misuse of public funds amounting to about six million Euros.[1081] At the close of 2020, after more than four and a half years (1600 days) in pre-trial detention, prosecutors have not presented any evidence against him in

[1075] Sentenced to fifteen years imprisonment term and a monetary fine of 268 million Francs.

[1076]Sentenced to fifteen years imprisonment term and ordered to pay an extortionate fine.

[1077] Sentenced to twelve years imprisonment term and a monetary fine of five million Francs.

[1078] Committee to Protect Journalists (CPJ) 'Mancho Bibixy: imprisoned in Cameroon' (2020) available at *https://cpj.org/data/people/mancho-bibixy/* (accessed 4 November 2020).

[1079] Law No. 90/55 of 1990. Articles 3 and 4 of the Law Organising Public Assemblies makes it clear that organisers of public meetings, manifestations or assembly must apply three days in advance for authorisation from the relevant administrative authority of the jurisdiction where the assembly is planned. The application must 'state the names and residence of organisers, the purpose of the meeting, venue, date, and time, and the notification must be signed'. Furthermore, the organisers must maintain at least three persons to maintain peace and order, respect for the law, and prohibit speeches that may jeopardise the smooth functioning of the state.

[1080] Of from 5,000 FCFA (9.09 US Dollars) to 100,000 FCFA (182 US Dollars).Général

[1081] Reporters Without Borders (RSF) 'Cameroon's leading journalist held on trumped up charges since 2016' (2018) available at *https://ifex.org/cameroons-leading-journalist-held-on-trumped-up-charges-since-2016/* (accessed 3 January 2021).

support of the two trumped–up charges at any of his 50 appearances before the special criminal court.[1082] Reporters Without Borders (RSF) head desk for Africa lamented that

> [a]fter 1,600 days in prison and what is about to be a total of 50 hearings, all that has been demonstrated in this case is the viciousness of the charges against him, the crude attempts to conceal evidence attesting to his innocence, and the vile plot to crush this prominent journalist despite his age and poor health. Everything seems to have been done to ensure that he dies slowly in prison without ever having been tried.[1083]

If Mr Vamoulké embezzled and misused state funds, it should not take the prosecution 4 and a half years to submit proof of his culpability. Even if the allegations against him were true, 1600 days or 4 and a half years of pre-trial detention is 3 times in excess of the sentence that would have been imposed on him had he been convicted of the charges against him.[1084]

6.4.2 Corruption

Corruption is an outrageous form of human dishonesty that has paved the way for arbitrary pre-trial detention of millions of persons worldwide.[1085] Despite the fact that corruption is condemned and prohibited by international[1086] and regional treaties,[1087] criminal justice systems are often plagued by bribery and other forms of corruption.[1088] Corruption is usually orchestrated by wealthy and influential persons in society, top government officials, auxiliaries of justice such as JPOs, prosecutors and members of the judiciary (magistrates and judges) who acquire illicit benefits for their personal

[1082] Reporters without Borders '1,600th day in prison, 50th court appearance for top Cameroonian journalist' (2020) available at *https://rsf.org/en/news/1600th-day-prison-50th-court-appearance-top-cameroonian-journalist* (accessed 3 January 2021).

[1083] Reporters without Borders '1,600th day in prison, 50th court appearance for top Cameroonian journalist' (2020) available at *https://rsf.org/en/news/1600th-day-prison-50th-court-appearance-top-cameroonian-journalist* (accessed 3 January 2021).

[1084] See section 221(1) of the CPC and Article 10 of the Special Criminal Court's Regulations.

[1085] Open Society Justice Initiative 'The Global Campaign for Pre-trial Justice: Pre-trial Detention and Corruption' available at *https://www.justiceinitiative.org/uploads/* (accessed 28 February 2021).

[1086] UN Convention against Corruption.

[1087] African Union Convention on Preventing and Combating Corruption; Council of Europe: Criminal Law Convention on Corruption (ETS No. 173); and Civil Law Convention on Corruption (ETS No. 174) and Inter-American Convention against Corruption.

[1088]Open Society Justice Initiative 'The Global Campaign for Pre-trial Justice: Pre-trial Detention and Corruption' available at *https://www.justiceinitiative.org/uploads/* (accessed 28 February 2021).

interest at the detriment of poor people in the society.[1089] Corruption influences these personalities to depart from the correct position for a wrong one, such as causing the unlawful arrest and detention of persons for monetary consideration or bribery. It is argued that corruption is prevalent at the pre-trial stage, as it is subject to less scrutiny than the other stages of the justice process.[1090]

Cameroon has committed to eradicating and outlawing corruption.[1091] It has put in place institutions[1092] to combat the prohibited conduct, yet the practice is prevalent in all sectors of the society including the criminal justice system.[1093] The Centre for Democracy and Human Rights noted that:

> Corruption has eaten so deep into the fabric of the Cameroonian society such that it dictates almost every aspect of life. Bribery has become the order of the day and virtually directs daily activities for civil servants and law enforcement officials who continue to engage in corrupt practices with impunity. Today, it is extremely difficult for anyone of a morally upright character to live and effectively function in the Cameroonian society.[1094]

The Cameroonian police force is perceived to be the most corrupt public institution in the country.[1095] Corrupt JPOs often demand payments in the form of bribery or

[1089] Open Society Justice Initiative 'The Global Campaign for Pre-trial Justice: Pre-trial Detention and Corruption' available at *https://www.justiceinitiative.org/uploads/* (accessed 28 February 2021).
[1090] Open Society Justice Initiative 'The Global Campaign for Pre-trial Justice: Pre-trial Detention and Corruption' available at *https://www.justiceinitiative.org/uploads/* (accessed 28 February 2021).
[1091] Cameroon signed and ratified the UN Convention against Corruption on 10 October 2003 and 6 February 2006 respectively. Cameroon has also signed the African Union Convention on Preventing and Combatting Corruption on 30 June 2008, but has not implemented it.
[1092] National Anti-Corruption Commission (CONAC), Special Criminal Court, National Agency for Financial Investigation and Supreme State Audit Office. It is important to note that 'CONAC has a central structure with branches in almost all ministries. It plays a coordinating and regulatory role in relation to the anti-corruption policy framework in Cameroon. It has investigating capacities and the mandate to analyse allegations and gather information about corrupt practices. Its findings can lead to disciplinary and legal proceedings'. See Cameroon Tribune, 'Institutionalising a Vision for Better Results' available at *https://www.cameroon-tribune.cm/article.html/19781/fr.html/institutionalisingGénéral-vision-for-better-results* (accessed 3 March 2021).
[1093] Refugee Documentation Centre (Ireland) 'Information on police corruption in Cameroon?'(2013) 1, available at *https://www.refworld.org/docid/51a724274.html* (accessed 3 March 2021). For more, see Bertelsmann Stiftung 'BTI 2020 Country Report — Cameroon' (2020) 13 & 30, available at *https://www.bti-project.org/content/en/downloads/reports/country_report_2020_CMR.pdf* (accessed 3 March 2021).
[1094] Refugee Documentation Centre (Ireland) 'Information on police corruption in Cameroon?'(2013) 1, available at *https://www.refworld.org/docid/51a724274.html* (accessed 3 March 2021).
[1095] Refugee Documentation Centre (Ireland) 'Information on police corruption in Cameroon?'(2013) 1, available at *https://www.refworld.org/docid/51a724274.html* (accessed 3 March 2021).

monetary considerations from persons arrested and detained in arbitrary circumstances to secure their release, and also from rich and influential persons to arrest and detain persons in arbitrary fashion.[1096] Sometimes JPOs effect arrest and detention in arbitrary fashion, and release victims based on their ability to pay their way out by way of bribes. For example, sufficient evidence reveals that JPOs effect arrest on 'weekend days' or the so called 'Friday arrests' rather than on reasonable suspicion that the suspect committed a crime, or to present him or her before a judge or other judicial officer or conduct prompt and impartial investigation.[1097] Courts do not convene at weekends, so persons arrested on Fridays remain in detention until at least Monday. According to reports, sometimes, JPOs effect such 'Friday arrests' on fake charges after accepting bribes from persons who have private grievances.[1098] In most cases, JPOs do not notify the state counsel of such arrests and detentions and demand bribes of up to 35 000 FCFA (approximately 60 US Dollars) from detainees or their families.[1099] Therefore, corruption can seriously damage the real purpose and meaning of the criminal justice system, as sometimes the system cannot protect innocent persons against police arbitrariness because they cannot pay bribes to secure their release.

The question arises why is corruption prevalent, rampant and almost a normal practice at the pre-trial stage of the Cameroon criminal justice system? Excessive discretionary powers, low wages,[1100] too little scrutiny and reluctance on the part of the state to hold corrupt JPOs and state security agents accountable for arbitrary practices (arbitrary arrest, detention, torture and other forms of ill-treatment and enforced disappearances) are to blame.[1101] Furthermore, the institutions put in place to combat corruption are

[1096] Cameroon Corruption Report (2020) available *at https://www.ganintegrity.com/portal/country-profiles/cameroon/* (accessed 3 March 2021).
[1097] U S Department of State '2016 Country Reports on Human Rights Practices: Cameroon' (2016) 7 available at *https://www.state.gov/reports/2016-country-reports-on-human rights-practices/cameroon/* (accessed 7 May 2021).
[1098] Refugee Documentation Centre (Ireland) 'Information on police corruption in Cameroon?' (2013) 2 available at *https://www.refworld.org/docid/51a724274.html* (accessed 3 March 2021).
[1099] Amnesty International 'Cameroon: Inmates 'packed like sardines' in overcrowded prisons following deadly Anglophone protests' (2017) available at *https://www.amnesty.org/en/latest/news/2017/10/cameroon-inmates-packed-like-sardines-in-overcrowded-prisons-following-anglophone-protests/* (accessed 4 December 2020).
[1100] African Policing Civilian Oversight Forum (APCOF) 'Policing the Urban Periphery in Africa: Developing safety for the marginal' (2019) 79, available at *http://apcof.org/wp-content/uploads/apcofpolicingtheurbaneng.pdf* (accessed 17 March 2021).
[1101] Refugee Documentation Centre (Ireland) 'Information on police corruption in Cameroon?'(2013) 1, available at *https://www.refworld.org/docid/51a724274.html* (accessed 3 March 2021).

ineffective, their findings are perceived as highly politicised[1102] and pieces of legislation that punish corruption are not effectively implemented.[1103]

6.4.3 Discrimination

Discrimination is an outrageous and harmful practice that breeds hate and perpetuates inequality as it unjustifiably separates human beings. Therefore, it drastically reduces or eliminates the possibility of persons or groups from enjoying their fundamental human and legal rights on the same basis as other members of society as a result of 'unjustified distinction in policy, practice, differential treatment and legislations.[1104] Discrimination is condemned and prohibited by many international human rights instruments[1105] including articles 2, 3 and 26 of the ICCPR. Therefore, targeted arrests and detentions on discriminatory grounds are arbitrary, and contrary to the aspirations of the Covenant.[1106]

The present author argues that discrimination is an unfortunate practice that has played a leading role in challenging the effective enforcement of the right to freedom from arbitrary detention in Cameroon. Although the preamble to the Constitution guarantees right of equality and non-discrimination to everyone throughout the entire criminal justice process,[1107] regrettably, this right is not protected, as discrimination seems to be normal in Cameroon.[1108]

[1102] Bertelsmann Stiftung 'BTI (2020) 32. Bertelsmann Stiftung, 'BTI 2020 Country Report — Cameroon' (2020) 32 available at *https://www.bti-project.org/content/en/downloads/reports/country_report_2020_CMR.pdf* (accessed 3 March 2021).

[1103] U.K. Home Office (2020) para. 2.3.4.

[1104] Amnesty International 'Discrimination' (2019) available at *https://www.amnesty.org/en/what-we-do/discrimination/* (accessed 29 November 2020).

[1105] Articles 2 and 7 of the ICCPR, Article 2(2) of the ICESCR and Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

[1106] HRC: General Comment No. 35 (2014) para. 17.

[1107] For example, the preamble to the Constitution provides that 'the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights'.

[1108] Advocates for Human Rights 'Cameroon's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para. 4 available at

The perpetual socio-political, ethnic and ideological differences, and the ongoing armed conflict[1109] in Cameroon, have paved the way for discriminatory policing cultures and practices that have undermined the Constitution, rule of law and legislation put in place to protect against arbitrariness.[1110] Frustrated at failing to resolve the Anglophone problem, in 2017 the President declared war on Anglophone Cameroonians as he stated that 'it is now clear that Cameroon is at war'[1111] and resorted to use all available means to crush the Anglophone uprising[1112] such as arbitrary arrest, detention crack-downs and summary executions. The President's declaration of war motivated JPOs, state security agents, militarised police and the military to openly pronounce that all Anglophones males are suspects and thus targets for arbitrary arrests and detentions at any time.[1113] This is evident as the Immigration and Refugee Board of Canada,[1114] Lawyers' Rights Watch Canada,[1115] and Advocates for Human Rights[1116] reported that militarised JPOs and state security agents targeted and indiscriminately arrested and detained thousands of Anglophone Cameroonians because of their identity rather than on reasonable grounds or probable cause that they committed or participated in an offence. Similarly, the state (National Prosecuting Authority) has also routinely ordered

https://www.theadvocatesforhumanrights.org/uploads/ahr_loi_cameroon_report_on_anglophone_crisis_final.pdf (accessed 26 February 2021).

[1109] Advocates for Human Rights 'Cameroon's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para. 40, available at *https://www.theadvocatesforhumanrights.org/uploads/ahr_loi_cameroon_report_on_anglophone_crisis_final.pdf* (accessed 26 February 2021).

[1110] Willis R 'Human Rights Abuses in the Cameroon Anglophone Crisis' (2019) available at *http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2019/11/Cameroon-Anglophone-Crisis-Report-online.pdf* (accessed on 9 August 2020).

[1111] Advocates for Human Rights 'Cameroon's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para. 40 available at *https://www.theadvocatesforhumanrights.org/uploads/ahr_loi_cameroon_report_on_anglophone_crisis_final.pdf* (accessed 26 February 2021).

[1112] Njie M J 'Is the Conflict in Anglophone Cameroon an Ethnonational Conflict?'(2019) available at *https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/* (accessed 9 March 2021).

[1113] Centre for Human Rights and Democracy in Africa 'Cameroon Prisoners' Rights in Flames' (2018) *https://www.chrda.org/cameroon-prisoners-rights-in-flames/* (accessed 8 March 2021).

[1114] Immigration and Refugee Board of Canada 'Cameroon: Situation of Anglophones, including returnees, in Bamenda, Yaoundé and Douala; treatment by society and by the authorities' (2016-August 2018) [CMR106141.E] available at *https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=457577&pls=1* (accessed 9August 2020).

[1115] Written statement submitted by Lawyers' Rights Watch Canada, Human Rights Council Forty-second session 9–27 September 2019.

[1116] The Advocates for Human Rights 'Cameroon's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para. 2 available at *https://www.theadvocatesforhumanrights.org/uploads/ahr_loi_cameroon_report_on_anglophone_crisis_final.pdf* (accessed 26 February 2021).

the detention of Anglophones[1117] (suspected to sympathise with the separatists) in blatant disregard of procedural safeguards put in place to protect against arbitrariness and lengthy arbitrary detention.[1118] The nature of charges against the victims are often vague, false and overbroad.[1119] Other rights violations include denial of access to counsel, unfair trials[1120] and trials and sentencing of civilians in military tribunals 'lacking the required independence, impartiality and competence' prerequisites for fair trials.[1121]

It is important to note that targeted arrest and detention of Anglophones motivated by discrimination is not a recent practice in Cameroon. Although the government has not denied the indiscriminate and random arrest of Anglophones, instead it tried to defend or justify its position. For example, in the African Commission case of *Mgwanga Gunme v Cameroon*, it stated that

> concerning citizens who had been arrested for committing various ordinary law offences since the return to multi party democratic processes, most of them are SCNC and SCAPO activists who, in their logic of contestation, defied republican institutions especially the forces of law and order, either during demonstration of

[1117] Lawyers Rights Watch Canada 'In the Matter of Mancho Bibixy Tse: Lawyers' Rights Watch Canada (LRWC) Reply to The Republic of Cameroon (2019) 23 available at *https://www.lrwc.org/ws/wp-content/uploads/2019/02/WGAD.Mancho-Bibixy-Tse.LRWC-Reply-to-Cameroon.13.02.19.pdf* (accessed 1 April 2021).

[1118] Advocates for Human Rights 'Cameroon's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para. 29 available at *https://www.theadvocatesforhumanrights.org/uploads/ahr_loi_cameroon_report_on_anglophone_crisis_final.pdf* (accessed 26 February 2021).

[1119] Lawyers Rights Watch Canada 'In the Matter of Mancho Bibixy Tse: Lawyers' Rights Watch Canada (LRWC) Reply to The Republic of Cameroon (2019) 39 available at *https://www.lrwc.org/ws/wp-content/uploads/2019/02/WGAD.Mancho-Bibixy-Tse.LRWC-Reply-to-Cameroon.13.02.19.pdf* (accessed 1 April 2021).

[1120] Lawyers Rights Watch Canada 'In the Matter of Mancho Bibixy Tse: Lawyers' Rights Watch Canada (LRWC) Reply to The Republic of Cameroon (2019) 27 available at *https://www.lrwc.org/ws/wp-content/uploads/2019/02/WGAD.Mancho-Bibixy-Tse.LRWC-Reply-to-Cameroon.13.02.19.pdf* (accessed 1 April 2021).

[1121] Lawyers Rights Watch Canada 'In the Matter of Mancho Bibixy Tse: Lawyers' Rights Watch Canada (LRWC) Reply to The Republic of Cameroon (2019) 39 available at *https://www.lrwc.org/ws/wp-content/uploads/2019/02/WGAD.Mancho-Bibixy-Tse.LRWC-Reply-to-Cameroon.13.02.19.pdf* (accessed 1 April 2021). For more, see United Nations General Assembly, A/HRC/42/NGO/1 (2019) 3; Human Rights Watch 'Cameroon: Separatist Leaders Appeal Conviction (2019) available at *https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction* (accessed 10 August 2020).

> the anniversary of "Southern Cameroon" every 1 October of the year, or at the approach, during and after important elections.[1122]

It stated, furthermore, that

> whatever the circumstances, the more it is true that every individual shall have the right to liberty and the security of his person, the more it is accepted that an individual may be deprived of his freedom for reason and conditions previously laid down by the law. (Article 6 of the Charter) The cases of arrest registered since the return to multiparty politics in this part of the territory has always obeyed the principle of legality ....[1123]

The African Commission disagreed with this position as it stated that, first, Cameroon could not invoke the limitation clause under Article 6 of the Charter to justify the indiscriminate arrest and detention of persons 'in this part of the country' (Anglophone Cameroon) as it put it. Secondly, Cameroon failed to convince the African Commission that 'the measures or conditions it had put in place were in compliance with Article 6 of the Charter'.[1124]

The Kanuri ethnic group of the Far North Region of Cameroon has also suffered discrimination and been targeted for indiscriminate and random arbitrary arrests and detentions. The terrorist group Boko Haram took advantage of the vast Far North Region of Cameroon, home of the Kanuri people, and exploited 'their vulnerability, tradition of rigorist Islam, poverty and low school enrolment rates, and of their links with north-eastern Nigeria through their proximity to the border, Quranic education ties and trade' to settle and recruit militia.[1125] This has impacted negatively on the Kanuri people as the government has often associated them with the terrorist group Boko Haram, and has resorted to random indiscriminate arbitrary arrests, detentions and summary executions of their members.[1126]

[1122] *Mgwanga Gunme v Cameroon* (2009) para. 116.
[1123] *Mgwanga Gunme v Cameroon* (2009) para. 117.
[1124] *Mgwanga Gunme v Cameroon* (2009) para. 118.
[1125] International Crisis Group 'Cameroon: Confronting Boko Haram (2016) available at *https://www.crisisgroup.org/africa/central-africa/cameroon/cameroon-confronting-boko-haram* (accessed 13 March 2021).
[1126] International Crisis Group 'Cameroon: Confronting Boko Haram (2016) available at *https://www.crisisgroup.org/africa/central-africa/cameroon/cameroon-confronting-boko-haram* (accessed 13 March 2021).

Amnesty International also noted that, between 2014 and 2016, elements of the Rapid Intervention Battalion (BIR) arrested members of the Kanuri ethnic group because of their ethnicity.[1127] Similarly, the United Nations Human Rights Council reported that in December 2014, state security agents arrested and detained 84 male Kanuri children aged between 7 and 15 alleged to be Boko Haram trainees, with no evidence of their involvement with the jihadist group. Six months later state security agents released 30 of them to their families. Unfortunately, the fate or whereabouts of the remaining children is unknown.[1128] Other arbitrary and discriminatory arrests of male members of the Kanuri ethnic group also reportedly took place in December 2017.[1129]

Regrettably, victims are often subjected to detention incommunicado, torture and other forms of ill-treatment in disregard for procedural rights against arbitrariness. Despite Cameroon's commitment to investigate these human rights violations, the state is yet to commence investigations of this prohibited conduct.[1130] However, the United Nations Human Rights Council has called on Cameroon to desist from discriminating against, and unjustly associating the entire Kanuri ethnic group with the terrorist group Boko Haram.[1131]

Homosexuality is criminalised in Cameroon[1132] and, persons alleged to engage in same-sex activities are often subject to discrimination and targeted for arrest and detention

[1127] Amnesty International 'Cameroon's Secret Torture Chambers: Human Rights Violations and War Crimes in the Fight against Boko Haram' (2017) 18, available at *https://www.amnesty.org/download/Documents/AFR1765362017ENGLISH.PDF* (accessed 13 March 2021).

[1128] The United Nations Human Rights Council 'Boko Haram' (2020) available at *https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=16176&LangID=R* (accessed 15 March 2021).

[1129] Amnesty International 'Cameroon's Secret Torture Chambers: Human Rights Violations and War Crimes in the Fight against Boko Haram' (2017) 18 available at *http://www.amnesty.org* (accessed 18 May 2018).

[1130] Adotei A 'Cameroon: Another Year of Deteriorating Human Rights Testimony from Amnesty International USA' (2018) 3, available at *https://www.congress.gov/115/meeting/house/108492/witnesses/HHRG-115-FA16-Wstate-AkweiA-20180627.pdf* (accessed 14 March 2021).

[1131] International Crisis Group 'Cameroon: Confronting Boko Haram (2016) available at *https://www.crisisgroup.org/africa/central-africa/cameroon/cameroon-confronting-boko-haram* (accessed 13 March 2021).

[1132] Section 347-1 of the Penal Code and Article 83 of Law No. 2010/012 of 21 December 2010 Relating to Cyber-security and Cyber-criminality in Cameroon.

because of their sexual orientation.[1133] ACODEVO, an NGO, and 12 others that promote the sexual and reproductive health care of same-sex oriented persons, reported that arbitrary arrest and detention of persons with same-sex orientation is widespread in Cameroon.[1134] Similarly, while Amnesty International,[1135] Human Rights Watch,[1136] and The Observatory[1137] reported and strongly condemned the judicial harassment and arbitrary detention of persons alleged to engage in same-sex activities, Alternatives Cameroon and The Advocates for Human Rights decry discrimination and persecution of this category of persons.[1138] Human Rights Watch also noted and reported that Cameroon is one of the most aggressive of the 76 nations that prosecute and punish same-sex activities[1139] as it arrests more persons alleged to engage in the practice than any other country in the world.[1140]

The African Commission has also noted with concern harassment, discrimination and human rights violations including arbitrary detention of persons based on their sexual orientation and has called on Cameroon to 'take appropriate measures to ensure the

[1133] Human Rights Watch 'Guilty by Association: Human Rights Violations in the Enforcement of Cameroon's-Anti Homosexuality Law (2013) available at *https://www.hrw.org/report/2013/03/21/guilty-association/human rights-violations-enforcement-cameroons-anti* (accessed 8 August 2020). For more, see Amnesty International, 'Submission for the UN Universal Periodic Review of Cameroon' (2018) 1.

[1134] Association des Communautés Démunies et Vulnérables de l'Océan (ACODEVO) & 12 Others 'The Violations of the Rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in Cameroon' (2017) 5 available *https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CMR/INT_CCPR_CSS_CMR_29079_E.pdf* (20 March 2021).

[1135] Amnesty International 'The State of the World's Human Rights – Cameroon' (2013) available at *https://www.ecoi.net/en/document/1264147.html* (accessed 8 March 2021).

[1136] Human Rights Watch 'Guilty by Association: Human Rights Violations in the Enforcement of Cameroon's-Anti Homosexuality Law' (2013) available at *https://www.hrw.org/report/2013/03/21/guilty-association/human rights-violations-enforcement-cameroons-anti* (accessed 8 August 2020).

[1137] The Observatory for the Protection of Human Rights Defenders 'Urgent appeal: New information on judicial harassment in Cameroon' (2017) available at *https://www.omct.org/files/2017/05/24335/056.3_cmr_001_0716_obs_056.3.pdf* (accessed 7 May 2021).

[1138] Alternatives Cameroon & The Advocates for Human Rights 'Republic of Cameroon's Compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para. 1, available at *www.TheAdvocatesForHumanRights.org* (accessed 21 March 2021).

[1139] Ghoshal N, Human Rights Watch 'Guilty by Association: Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law (21 March 2013), available at *https://www.hrw.org/report/2013/03/21/guiltyassociation/human rights-violations-enforcement-cameroons-anti* (Accessed on 7 November 2018).

[1140] Human Dignity Trust 'Cameroon: Types of Criminalisation' (2021) available at *https://www.humandignitytrust.org/country-profile/cameroon/* (accessed 8 March 2021).

safety and physical integrity of all persons irrespective of their sexual orientation and maintain an atmosphere of tolerance towards sexual minorities in the country'.[1141] Similarly, in its 2017 Concluding Observations on Cameroon, the Committee against Torture recommended that Cameroon should take all necessary steps to protect same-sex oriented persons against arbitrary arrest and detention.[1142]

6.4.4 Conclusion

This chapter has examined the challenges to effective enforcement of the right to freedom from arbitrary detention in Cameroon. It has shown that, despite a clear legal framework put in place to protect against arbitrariness, enormous challenges exist to this effect. Inconsistency and arbitrary procedures have rendered the legal framework non-functional, as arbitrary detention seems to be normal, and an institutionalised practice. Pre-trial detainees are held for unjustified prolonged periods with disregard for substantive and procedural safeguards put in place to protect against arbitrariness. Various causes of arbitrary arrests, detentions and lengthy pretrial detentions, including disregard for the rule of law and procedural safeguards put in place to protect against arbitrariness, have been identified. Arbitrary detention is also blamed on the lack of full engagement between judges, suspects and accused persons, lack of transparency, accountability, political will and administrative interference. Inadequate police training, and unorthodox cultures and practices, have also challenged the effective enforcement of the right to freedom from arbitrary detention in Cameroon.

[1141] African Commission 'Consideration of Reports submitted by State Parties under Article 62 of the ACHPR, Concluding Observations on Cameroon' (2014) paras. 84 and 85.
[1142] Committee against Torture 'Concluding Observations on the Fifth Periodic Report of Cameroon', UN Doc. CAT/C/CMR/CO/5 (2017) para. 44 (b).

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7. 1 CONCLUSION

This study was conducted to examine the effectiveness of the legal framework put in place to safeguard the right to freedom from arbitrary detention in Cameroon. To achieve this objective, the introductory section of the study put forth a discussion on the standards contained in international human rights treaties or instruments that protect against arbitrary detention, and uses these standards to assess Cameroon's commitment to protect against the prohibited conduct. The rationale was also used to accentuate the importance of international human rights instruments that guarantee the right to personal liberty and freedom from arbitrary detention and Cameroon's commitment to implement, respect and enforce the provisions of ratified international treaties that protects against arbitrariness. It was also highlighted that Cameroon had adopted the dualist approach, and authoritatively concluded that the state is bound to comply with, and respect the provisions of ratified international treaties that protect against arbitrary detention and other human rights violations.

In the study, it was demonstrated that attempts by historic documents adopted by mediaeval England (Magna Carta, Habeas Corpus Acts, Petition of Right) and revolutionary France (Declaration of the Rights of Man and of the Citizen) to address arbitrary detention were unsuccessful. However, these documents set the pace for the guarantee of personal liberty and fundamental freedom as they outlawed arbitrary detention and maintained that the rule of law and due process are inextricably linked and inevitable to protect against arbitrariness. Failure on the part of the four historic documents to this effect motivated the international community to adopt binding and non-binding uniform standards in international and regional human rights treaties or instruments to protect against arbitrariness. The standards contained in these instruments ensure that arbitrary detention is prohibited, outlawed and that all allegations of the prohibited conduct are investigated, culprits prosecuted and punished

accordingly, and that victims receive adequate compensation as evident in rulings delivered by the HRC, African Commission, African Court, IACrtHR and ECtHR. Thus, the protection against arbitrary detention is a fundamental concern that constitutes a near-universal state practice as evidenced in near-customary international law.

In line with the main objective set out in the introduction section of the thesis, namely, to examine the effectiveness of the legal framework put in place to protect against arbitrary detention, it has been demonstrated that Cameroon joined forces with the international community to protect against this prohibited conduct. The study thus concludes that although Cameroon has ratified and acceded to a number of international human rights instruments which contain measures to protect against arbitrariness, the problem of implementation into its domestic legal system, and the non-practical enforcement of the standards contained in these instruments is a serious cause for concern. Furthermore, although domestic legislation appreciates and guarantees protection against arbitrariness, a handful of laws are incompatible with international standards. This motivated the harmonisation of the Criminal Procedure Code (2005), and the adoption of a new Judicial Organisation Ordinance (2006). These reforms were necessary and important to repair a defective criminal justice system that could not adequately protect against arbitrariness and other human rights violations such as torture, other forms of ill-treatment and enforced disappearances, and also plagued by political upheavals, terrorist and secessionist threats . Regrettably, despite the reforms, arbitrary arrests, prolonged pretrial detentions and delays in criminal trials persist, unabated and with impunity.

The study has also demonstrated that members of the judiciary (judges, examining magistrates), prosecution (State Counsel, Procureur Général), counsel, JPOs and members of the CHRC are the front-line actors that play leading roles in protecting against arbitrary detention in Cameroon. They rely on their knowledge and expertise of the law and human rights matters to ensure that the rule of law prevails, and ensure respect for the substantive and procedural safeguards contained in the Constitution, CPC, PC, JOO and other pieces of legislation to protect against arbitrariness. They also have the responsibility to ensure that principles of international criminal and human rights laws are effectively enforced in Cameroon. While their knowledge and mastery

of the country's domestic law is not a cause for concern, understanding and interpreting the varying complex international treaties binding on Cameroon that protect against arbitrariness have posed a serious challenge to effective performance of their duties. Furthermore, systemic barriers exist that have retarded their ability to perform their duties in accordance with the law, to ensure that arrest and detention is lawful, non-arbitrary and respects the substantive and procedural rights of suspects and accused persons. There is no doubt that the rights of suspects and accused persons are continuously violated, as sometimes JPOs, judges or magistrates, State Counsel, Procureur Général and counsel perform their duties in contrast to domestic law provisions and the recommended international human rights standards binding on Cameroon.

The study has further demonstrated that arbitrariness and other human rights violations in the criminal justice system of Cameroon are attributed to a number of factors. These include lack of political will, disregard for the rule of law, absence of a human rights culture, repressive legislation, unorthodox cultures and practices, inadequate training of JPOs and custody personnel, weak investigation machinery, a culture of impunity, insufficient coordination amongst the key institutions of the criminal justice system, and weak oversight mechanisms. These deficiencies have paved the way for indiscriminate, mass and random arrests, prolonged arbitrary detentions and unequal access to justice, as the majority of persons subjected to prolonged detention, whether lawful or not, are the poor and underprivileged[1143] and persons considered dangerous to the smooth functioning of the state.[1144] Moreover, in most cases suspects and accused persons are not aware or lack general knowledge of the substantive and procedural rights that protect against arbitrariness and institutions (the Legal Aid Commission and CHRC) that provide free legal services to protect their interest. Thus the study concludes authoritatively that Cameroon has failed in its domestic and international obligations to protect against arbitrary detention, as the rights of suspects and accused persons at the pre-trial stage of the criminal justice system in Cameroon are violated with impunity. This is so because arbitrariness, and other human rights violations such

[1143] These categories of persons lack the financial means and/or influence to protect themselves against arbitrary detention and to secure bail for their release should the need arise.
[1144] These categories of persons include opposition political party leaders and journalists critical of the regime in power.

as torture and other forms of ill-treatment and enforced disappearances, are politically motivated, institutionalised and effected with state approval and support.

7.2 Recommendations

The weaknesses in law and practice, and the reasons for arbitrariness in Cameroon, have been identified. Reforms are necessary to ensure that Cameroon fulfills its domestic and international obligations to protect against prohibited conduct. To attain this, the domestic legal framework put in place to protect against arbitrary detention must comply with international standards to ensure non-arbitrariness. Perpetrators of arbitrary detention must be held accountable and punished accordingly to avoid impunity; victims must receive adequate compensatory damages. Furthermore, there is a need to guarantee and strengthen judicial power, incorporate and overhaul the criminal justice system and strengthen national oversight mechanisms,[1145] reduce police and gendarmerie power and demilitarise the streets of the war torn North West, South West and the terrorist-infested Far North regions of the country. However, success of these reforms will depend largely on the actors in the criminal justice system playing their various roles effectively and efficiently to protect against prohibited conduct. It is important to note that, although this study focuses on safeguards against arbitrary detention at the pre-trial stage of the criminal justice system, the broad structural, systemic and socio-political challenges have also been considered. Many reforms have been proposed in the previous chapters. However, a handful considered crucial are discussed in greater detail.

7.2.1 Ensure respect for the substantive and procedural safeguards put in place to protect against arbitrariness

As indicated above, it is imperative that Cameroon reform its criminal justice system and overhaul the formal domestic legal framework put in place to protect against arbitrariness and other forms of rights violation, including torture and enforced disappearances associated with detention and remand in custody. Therefore, the domestic legal framework must be in line with binding international and regional human rights instruments that protect against this prohibited conduct. Furthermore,

[1145] Enonchong L (2015) 17.

Cameroon must improve on its methods and strategies to implement and enforce laws that protect against prohibited conduct, eliminate flaws that pave the way for arbitrariness, and secure the rights of suspects and accused persons both in theory and practice. For example, arrests and detentions must be lawful, non-arbitrary and effected in compliance with domestic law and international human rights law and standards, based on sufficient and recognisable reasonable grounds, probable cause, or evidence that the suspect or accused person is blame-worthy, and if this is not so, the victim must be released. Therefore members of the judiciary, national prosecution authority, JPOs and other custody personnel must have a clear understanding of the purposes and procedure of arrest, detention and remand in custody.

Furthermore, suspects and accused persons must be entitled to all substantive and procedural rights against arbitrariness guaranteed in the Constitution and other pieces of legislation, including the provision of information on reasons for arrest or detention, access to counsel, the right to challenge the legality of detention, and prompt judicial review. Bail should be the rule and detention the exception, and the State Counsel or Procureur Général must not refuse to execute an order to release a suspect or accused person on a bail order emanating from the courts. The period of pre-trial detention must be respected, to ensure that accused persons are not held in custody for more than 18 months as stipulated by law, and the power of the writ of habeas corpus must be strengthened to ensure that it secures the unconditional and prompt release of all persons arrested and detained in arbitrary fashion. Furthermore, the state must also ensure that victims, including their family members or next of kin, receive reparations, including compensation, restitution, rehabilitation, and guarantees of non-repetition.

7.2.2 Guarantee complete independence of the judiciary and strengthen judicial power

The judiciary in Cameroon lacks independence, as it is accountable to the executive at the institutional level, hierarchically subordinated to the Ministry of Justice[1146] and relies on the executive for funds. This is true as remuneration and allowances of magistrates and judges are determined by the executive through decrees that are liable

[1146] The reasoning is that the judiciary in Cameroon is considered as a department under the Ministry of Justice. See Article 8 of Decree No. 2005/122 of 15 April 2005 Organising the Ministry of Justice.

to change without notice.[1147] For this reason, the executive often interferes with the internal administration of the courts, case management and judicial processes, sometimes paving the way for injustice and arbitrariness. It is recommended that the judiciary should be completely independent, and strengthened to ensure that magistrates and judges perform their duties without interference, influence, fear or favour, so that, for example, they can order the release of persons from arbitrary custody on the strength of bail or habeas corpus.

Courts must guarantee the presumption of innocence and equality of arms rule, to ensure that accused persons are entitled to the same treatment as the prosecution, and that rulings are delivered timeously to avoid unnecessary prolonged detentions pending final judgment. Furthermore, authorities should ensure that the State Counsel and Procureur Général must execute, and not question, any decision emanating from the courts to release a suspect or an accused person. Moreover, the examining magistrate should engage more in criminal investigations as well as judicial review of arrest and detention. This is important as they can easily identify and secure the release of persons arrested and detained in arbitrary fashion.

7.2.3 Investigate all allegations of arbitrary detention and release all persons arrested and detained in arbitrary fashion

The study has revealed that, despite Cameroon's commitment to protect against arbitrary detention, arbitrariness continues in the country unabated and with impunity. Authorities must ensure that prompt, effective and impartial investigations are conducted into all allegations of arbitrary detention, and the culprits, accomplices and state officials engaged in the practice prosecuted, (irrespective of their rank and status) before competent courts in line with international fair-trial standards, and, if found guilty, punished accordingly to avoid impunity. To achieve this objective, the Special Police Oversight Division (SPOD) must be declared incompetent to carry out investigations into allegations of arbitrary detention caused by JPOs, and a separate institution should be created for this purpose. Upon completion of investigations, all persons arrested and detained in arbitrary fashion must be released unconditionally.

[1147] Articles 67, 68 and 69 of Decree No. 2005/122 of 15 April 2005 Organizing the Ministry of Justice.

Furthermore, certain categories of persons, including members of opposition political parties, outspoken journalists critical of the regime, human rights activists and defenders, and peaceful demonstrators exercising their rights to freedom of expression, association and assembly, often detained without charge or trial should either, first, be charged and tried promptly before a competent court, or secondly be released.

7.2.4 Strengthen the CHRC

Access to Cameroon's detention facilities by members of the public, including domestic and international stakeholders, has always been problematic. Therefore, authorities must ensure that all detention facilities are subject to unhindered, regular independent inspection by members of the CHRC as well as domestic and international human rights bodies. The state should make it compulsory for all state officials, JPOs and all personnel working in detention facilities to cooperate with members of the CHRC to ensure that they carry out their duties effectively and without hindrance during visits to detention centres. It is important to insist that the State Counsel must not be a compulsory component during visits to detention centres, as they sometimes refuse to accompany members of the CHRC to frustrate such visits. The CHRC should be empowered to subpoena anyone to testify in an investigation of human rights violations, particularly arbitrary arrest or detention, torture, refoulement and forced disappearances, and, if investigations conclusively prove rights violations, to order remedy or reparation to the victim, and punishment against the perpetrator.

Furthermore, the financial and political independence of the CHRC should be total and not partial. Therefore, its budget should be voted on by Parliament, and its yearly report published without presentation for inspection, review and approval by the head of state before publication. The CHRC should be empowered to examine the existing pieces of legislation that protect against arbitrariness, and bills directed to Parliament with the effect of ensuring that their provisions conform to international human rights standards, and instruments ratified by the state.

7.2. 5 Authorities should revise repressive pieces of legislation

The law relating to counter-terrorism in Cameroon has paved the way for JPOs and state security agents to arrest and detain people arbitrarily. This is so as some of its provisions do not reflect international human rights standards and need urgent attention. For example, articles 2 and 3 of the law relating to counter-terrorism viz, 'any public manifestation is tantamount to terrorism' is vague and very broad, and provides state security agents the perfect opportunity to consider anyone as a suspect, paving the way for random and indiscriminate arrest and detention of innocent persons. It is recommended that sections 2 and 3 should be amended to provide a narrower meaning of terrorism and specify the activities that amount to terrorism. Authorities should also ensure the practical reality of the provision of the law relating to counter-terrorism, which provides that persons arrested on the strength of this law must be presented before a judge or other officer immediately, as in the case of flagrante delicto offences. However, as authorities rarely respect this provision, sections 11 of the law relating to counter terrorism and 2(4) of the law relating to the maintenance of public order, that permit detention without charge or trial for a renewable period of 15 days, should be amended to ensure that all arrested persons are presented promptly before a judge or other officer authorised by law to exercise judicial power, and charged within 48 hours or released. Furthermore, the State Counsel and Procureur Général should be empowered to order and secure the release of persons arrested and detained in arbitrary fashion on the strength of the law relating to counter-terrorism and the law relating to the maintenance of public order.

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