

A Comparative Study of Bail Legislation in Malawi, Mozambique and Burundi

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Acronyms and abbreviations

AChHPR	African Charter on Human and Peoples' Rights
CP	Código Penal
CPP	Código de Processo Penal
CPEC	Criminal Procedure & Evidence Code
ICCPR	International Covenant on Civil and Political Rights
PIC	Policia Investigacao Criminal
UNHRC	United Nations Human Rights Committee

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1. Introduction

The deprivation of liberty is a serious intervention in any person's life, and therefore the possibility of releasing an accused person from custody pending trial is a fundamental part of criminal justice systems across the world. Criminal justice systems have developed various ways to ensure, at least in law, that accused persons appear for trial without depriving them of their liberty. Such release may be conditional or unconditional. Unconditional release usually takes the form of a warning to appear in court at a later date, while conditional release can be secured through bail, bond, surety, and supervision. The United Nations International Covenant on Civil and Political Rights (ICCPR) guarantees any person arrested or detained on a criminal charge the right to be brought promptly before a judge or other officer authorised by law, along with the right to be tried within a reasonable time or to release.¹ The ICCPR also states it shall not be the general rule that persons awaiting trial are detained in custody, but release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement.²

Depriving an accused person of his or her liberty is effectively punishment exacted on a person presumed to be innocent, and the presumption of innocence is a fundamental feature of the right to a fair trial. However, there is great variation among African states in how conditional release is defined in law and practiced. This variation requires closer examination, with the aim of clarifying the concept of conditional release and determining if effective mechanisms exist that can be replicated or expanded in African states.

Considering the overcrowded situation in African prisons, bail may reduce congestion in our prisons. According to the International Centre for Prison Studies (ICPS), there are nearly 1.2 million prisoners in Africa.³ On average, pre-trial detainees constitute 42% of national total

¹ Article 9(3), UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

² Art. 9(3), UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

³ World Prison Briefs. Available at <http://www.prisonstudies.org/highest-to-lowest/prison-population-total>.

prison populations in Africa, but this ranges from 90% (Libya) to 6% (Algeria). Of the 46 countries and territories for which data are available, only seven do not have overcrowded prisons: Botswana, Sao Tome e Principe, Namibia, Reunion (France), Lesotho, Niger and Algeria. Occupancy levels range from 388% (Comoros) to 60% (Niger). In total, 73% of African prisoners are held in prisons that are occupied at higher than 100% capacity, and 32% are detained in prisons that are 150% and more occupied.⁴ In short, prison overcrowding is a near-universal phenomenon on the continent, affecting the overwhelming majority of prisoners.⁵

1.1 Key concepts

As noted above, conditional release mechanisms take various forms. These are set out below:

Bail: The temporary release of an accused person from custody (i.e. police detention, prison) pending trial, sometimes on condition that a sum of money be paid to the court to guarantee the accused person's appearance in court.

Bond: A written and signed promise to pay a certain sum of money on a certain date or on fulfilment of a specified condition. For the purposes of this paper, a bond can secure the accused person's temporary release from custody (i.e. police detention, prison) pending trial.

Supervision: The court order for release stipulates that the accused person reports on a regular basis to a particular official or institution, such as a police station, probation officer or correctional official. Other conditions may include not leaving a particular area, not engaging in certain activities and not associating with certain individuals or groups. The purpose is to ensure that the accused person remains accessible and does not abscond.

⁴ Muntingh, L and Petersen, K. (2016) 'Punished for being Poor: Arguments for the Decriminalisation and Declassification of Petty Offences,' page 49. Available at: <file:///C:/Users/Admin/Downloads/Punished%20for%20being%20poor%20Fin.pdf>

⁵ It should be noted that incomplete data are available for the following states and territories: Central African Republic, Congo (Brazzaville), Democratic Republic of the Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Guinea Bissau, Mayotte (France), Reunion (France), Somalia, and South Sudan. If they were available, this data would in all likelihood worsen the current poor picture of overcrowding in African prisons.

Surety: A surety is a person who agrees to forfeit a sum of money if another person (the accused) fails to pay bail or abide by his or her conditions of bail or fails to appear before a court as required. The surety can be required to deposit money with the court immediately, or provide an undertaking to pay if ordered to do so.

1.2 Scope of this paper

Conditional and unconditional release exists because the fundamental principle in criminal justice is that the defendant is presumed to be innocent until proven guilty by a court of law.⁶ The United Nations Human Rights Committee (UNHRC) has held that pre-trial detention should be the exception and that bail should be granted except where the accused would abscond, destroy or interfere with evidence, or influence witnesses, or where it is necessary to prevent the commission of further offences.⁷ Furthermore, the African Charter on Human and Peoples' Rights (AChHPR) reiterates the presumption of innocence of every person accused of a criminal offence until he or she is proven guilty or until he or she pleads so.⁸

Conditional release provisions in law provide an accused with the opportunity to be released subject to guarantees to appear for trial, until the completion of the trial. The lack of or limits to conditional release provisions in a criminal justice system not only infringes an individual's basic liberty, but has ramifications for the subsequent criminal processing of that individual, such as lack of access to legal and rehabilitation resources.⁹

In this regard, the continued detention of an accused person amounts to punishment without proof of guilt. Even if a person is to be tried within the formal justice system, the least restrictive legal

⁶ Art. 14(2), UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

⁷ UN Human Rights Committee, cases of *Hill v Spain* (CCPR 526/99) and *W.B.E. v The Netherlands* (CCPR 432/90) cited in Premachandra S 'Law of bail: An in-depth analysis', available at http://www.academia.edu/7826044/Law_of_Bail_An_in_depth_analysis_an_article_published_in_Law_College_Hostel-Veot_Inn_Magazine_2013 (accessed 29 November 2015).

⁸ Article 7(1)(b), Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁹ Brignell G 'Bail: An examination of contemporary issues' Judicial Commission of New South Wales, *Sentencing Trends & Issues* No. 24, November 2002. Available at <https://www.judcom.nsw.gov.au/sentencing-trends-24/> (accessed 12 September 2016).

alternatives to detention should be made available during adjudicative processes.¹⁰ However, provisional release provisions should also not be used in a reckless manner. It might be the situation that the continued detention of an accused pending trial is necessary to protect the community¹¹ and prevent further crime and interference with victims, witnesses and evidence.¹² It is clear that conditional and unconditional release mechanisms and the decisions based on them highlight the tension between the need to presume the accused's innocence and the need to protect the community.¹³

Moreover, the lack of substantial conditional release provisions also contributes to prison overcrowding, given the high number of awaiting trial detainees who may have been denied bail unfairly or who may have been granted bail but could not afford to pay the bail amount. The lack of pre-trial custody time limits, automatic review mechanisms for pre-trial detention and the inaccessibility of legal assistance exacerbate this problem.

This paper seeks to review the laws on conditional release in Burundi, Malawi and Mozambique. These three countries were selected on the basis that they represent not only different types of legal systems but Francophone, Anglophone and Lusophone legal traditions, respectively. In addition, CSPRI has previously conducted research in these three countries.

Legislation governing conditional release in Mozambique is the *Código Penal de 2015* (Penal Code of 2015) and the *Código de Processo Penal de 1932* (Criminal Procedure Code of 1932). In Malawi, the Criminal Procedure and Evidence Code Cap 8:01 and the Bail Guidelines Act of 2003 provide key provisions. In Burundi the *Code de Procédure Pénale de 2013* (Criminal Procedure Code of 2013) contains provisions dealing with conditional release. The legislation

¹⁰ Rule of Law Initiative, *Handbook of International Standards on Pretrial Detention Procedure*, American Bar Association (2010), p. 5. Available at https://www.ilsa.org/jessup/jessup16/Batch%201/handbook_of_international_standards_on_pretrial_detention_procedure_2010_eng.authcheckdam.pdf (accessed 12 September 2016).

¹¹ *Carmichele v Minister of Safety and Security*, 2001 (10) BCLR 995 (CC) (16 August 2001).

¹² Brignell G 'Bail: An examination of contemporary issues' Judicial Commission of New South Wales, *Sentencing Trends & Issues* No. 24, November 2002. Available at <https://www.judcom.nsw.gov.au/sentencing-trends-24/> (accessed 12 September 2016).

¹³ Brignell G 'Bail: An examination of contemporary issues' Judicial Commission of New South Wales, *Sentencing Trends & Issues* No. 24, November 2002. Available at <https://www.judcom.nsw.gov.au/sentencing-trends-24/> (accessed 12 September 2016).

governing conditional release pending trial in these three countries is reviewed with a focus on the following aspects:

- general provisions governing conditional release;
- the provision of pre-trial custody time limits;
- automatic review mechanism for pre-trial detention;
- the accessibility and affordability of legal assistance;
- conditions set for conditional and unconditional release;
- forms of bail and bonds commonly used;
- the provision for sureties in the conditional release system;
- the withdrawal of conditional release; and
- the appeal of conditional release decisions.

2. General provisions governing release in Mozambique, Malawi and Burundi

2.1 Mozambique

The 2004 Mozambican Constitution¹⁴ states that pre-trial detention shall be permitted only in cases provided for by law, which shall determine the duration of such detention.¹⁵ Subordinate legislation governing pre-trial detention, conditional and unconditional release in Mozambique is the *Código Penal* (Penal Code)¹⁶ and *Código de Processo Penal* (Criminal Procedure Code).¹⁷

The judge of the *instrução* (judge of the instructing phase/examining judge) and trial court can grant bail to an accused. The Criminal Procedure Code contains legal provisions governing the authorisation of pre-trial detention.¹⁸ The Code states that pre-trial detention may be ordered

¹⁴ *Constituição da República de Moçambique* (CRM), art. 64(1).

¹⁵ Throughout this report, the English translation of the analysed Constitution is used. It is provided by Mozlegal, Lda, Advising Investors and is available at www.mozlegal.com (accessed 1 July 2015).

¹⁶ *Código Penal de Moçambique* (CP), 2015.

¹⁷ *Código de Processo Penal de Moçambique* (CPP), 1932.

¹⁸ Art. 286 CPP.

- following the commission of a crime *in flagrante delicto*¹⁹ (i.e. caught in the act of committing the crime) that is punishable with a prison sentence;
- for intentional crimes punishable with a prison term exceeding one year; and
- where an accused fails to respect his or her conditions set by the court for conditional release (*liberdade provisória*).²⁰

Furthermore, the Criminal Procedure Code provides for conditions under which pre-trial detention *fora flagrante delicto* (i.e. not caught in the act of committing the crime) can be authorised. Article 291 requires that the following three conditions should all apply: (a) the commission of an intentional crime punishable with a prison term of more than one year; (b) great suspicion that the crime was committed by the person; and (c) inadmissibility of provisional release. When these conditions are not met, pre-trial detention cannot be ordered.

The Criminal Procedure Code states that provisional release can be ordered through *termo de identidade* (statement of identity) or *caução* (bail).²¹ Article 269 of the Criminal Procedure Code states that at the first judicial questioning the defendant shall

- prove his or her identity;
- declare his or her residential address;
- appear before the judge when it is ordered;
- not disrupt the proceedings of the case; and
- not commit further criminal offences.

Furthermore, article 269 of the Penal Code states that the defendant's identity is proved: (a) if known by the judge, prosecutor, attorney or other justice official; or (b) defendants show their identification card; or (c) a suitable person declares that they know the defendant(s).²² In respect

¹⁹ Art. 288 CPP provides the definition of *flagrante delicto*: *É flagrante delicto todo o facto punível que está cometendo ou que se acabou de cometer. Reputa-se também flagrante delicto o caso em que o infractor é, logo após a infracção, perseguido por qualquer pessoa, ou foi encontrado a seguir à pratica da infracção com objectos ou sinais que mostrem claramente que a cometeu ou nela participou.*

²⁰ Art. 286 CPP.

²¹ Art. 270 CPP. While in the provisional release through *termo de identidade* the defendant is subject to the obligations of article 269 CPP, the provisional release through *caução* shall respect the provision of article 271 CPP.

²² Art. 269(2) CPP.

of provisional release through *caução*, article 271 of the Criminal Procedure Code states that bail can be granted to an accused who has committed a crime punishable with a prison term of more than six months or a penalty correspondent to *processo correccional*²³ or *querela*,²⁴ not provided in subsections 2 and 3 of article 291 of the Penal Code.²⁵

The Criminal Procedure Code provides for the following conditions under which provisional release may not be granted:

- when there is proof that an accused is a flight risk;
- when there is proof that the judicial process may be disrupted should the accused be granted conditional release; and
- when considering the nature and circumstances of the crime and the personality of the accused, there is a proven risk that the accused will disrupt public order or will commit an offence.²⁶

While article 271 of the Criminal Procedure Code provides for the possibility of provisional release for *processo correccional* or *querela* only, article 560 states that a judge can also grant conditional release through *termo de identidade* or *caução* for *processo sumário crime*²⁷ for persons arrested *in flagrante delicto*. In cases where the accused is not immediately tried, the judge has the discretion to ask the accused to pay *caução* amounting to the maximum fine (in the event that a fine is applicable to such an offence and applied) or provisionally release the accused through *termo de identidade*.

2.2 Malawi

²³ Imprisonment of 3 days and up to 2 years can be applied and a fine may also be applicable. (Art. 62 CP)

²⁴ Greater penalties involving imprisonment exceeding 2 years and up to 24 years can be applied (Art. 61 CP)

²⁵ Unofficial translation of the consultant from the following article: *Artigo 271 CPP – Arguidos que ficam em liberdade provisória mediante caução: Ficam em liberdade provisória mediante caução os arguidos por crimes a que caiba pena de prisão por mais de seis meses ou pena que corresponda processo correccional ou de querela, se não estiverem compreendidos nos §§ 2 e 3 do artigo 291, bem como os vadios e equiparados a aqueles a quem forem aplicáveis medidas de segurança privativas de liberdade.*

²⁶ Art. 29(3) CPP.

²⁷ *Processo sumário crime* applies to accused persons charged with offenses punishable by a fine or imprisonment up to one year and a fine, caught in the act (in flagrante delicto) or not (fora flagrante delicto).

The key conditional release mechanisms in Malawi are the Constitution,²⁸ the Criminal Procedure and Evidence Code²⁹ and the Bail Guidelines Act.³⁰ Courts in Malawi are guided by the following principle provided in the Constitution and mirrored by the Bail Guidelines Act 2003: ‘any person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.’³¹

In Malawi, bail can be granted by the police and courts, although the police have more restricted powers in this regard. Section 1 of Schedule II of the Bail Guidelines Act states: ‘where a person has been arrested, whether with or without warrant, and the most Senior Police Officer at the police station where he or she is detained is not satisfied that there is sufficient evidence to charge him or her, then the most Senior Police Officer should release him or her either unconditionally or on bail.’³² Police cannot grant bail to any person arrested for an offence punishable with death (such as treason, murder, rape, armed robbery, and burglary)³³ and may not grant bail where the accused has been remanded by the court.³⁴

The police are guided by the following considerations in granting bail:

- the likelihood of the accused failing to appear for further inquiry or for his or her trial;
- the likelihood of the accused committing an offence while out on bail; and

²⁸ Constitution of the Republic of Malawi, 1966.

²⁹ Criminal Procedure and Evidence Code (CPEC).

³⁰ It should be noted that where the individual charged is a juvenile, the principal legislative instrument is the Child Care, Protection and Justice Act. The Child Care Act establishes the requirement for a preliminary inquiry – a social inquiry report – into the psycho-social background of the juvenile and establishes ‘the best interests of the child’ as the primary consideration.

³¹ Section 42, Constitution of Malawi; Section 1 of the Bail Guidelines Act 2003, Schedule Part II.

³² Section 1, Schedule Part II of the Bail Guidelines Act 2003. This section indicates that the ‘most Senior Police Officer’ at the police station where a person is detained has the discretion to release the accused either unconditionally or on bail depending on whether there is sufficient evidence to charge the accused with an offence.

³³ Bail in respect of these offences can only be decided by a court of competent jurisdiction.

³⁴ Section 4, Bail Guidelines Act 2003, Schedule Part II.

- the likelihood of the accused interfering with witnesses or tampering with evidence or otherwise obstructing the course of justice.³⁵

In considering whether the conditions above have been met, the police must take into account the following factors:

- the nature and the seriousness of the offence;
- the strength of the evidence against the accused;
- the sentence which the offence may carry upon conviction;
- the character, antecedents, associations and community ties of the accused;
- the safety and protection of the accused; and
- the state of health of the accused, as certified by a medical practitioner.³⁶

Where the accused is a juvenile (a person under the age of 18 years), the police shall, in addition, consider the following factors:

- the welfare of the juvenile;³⁷
- whether it is necessary in the interest of the juvenile to remove him or her from association with any undesirable person; and
- whether the release of the juvenile will defeat the ends of justice.³⁸

In practice, a detained person or relations of the detained person may request bail and the police may with their powers grant bail with or without conditions.

Applications for the release of an accused on bail are provided for by both the Magistrate's Court and High Court. High Courts only adjudicate bail applications for the first time in respect of those offences that the Magistrate courts have no jurisdiction over (such as murder and treason). There is a specific bail process that must be followed in the High Court. The accused must serve

³⁵ Section 5, Bail Guidelines Act 2003, Schedule Part I.

³⁶ Bail Guidelines Act 2003, Schedule Part I.

³⁷ In Malawi, a juvenile is a person under the age of 18 years. See s. 2 of the Children and Young Persons Act of 1969 (Cap. 26:03) Laws of Malawi.

³⁸ Bail Guidelines Act 2003, Schedule Part I

a summons on the respondent, which is either the police or the Director of Prosecutions, depending on the nature of the case, and file it with the court.

Summons for applications for bail in murder, treason and certain other cases must be served on the Directorate of Public Prosecutions.³⁹ The summons must be accompanied by a sworn affidavit by the accused (applicant in the matter) or his or her lawyer, if the accused is represented by a lawyer. The affidavit should contain facts and argue the case to show that the interest of justice requires that the accused (applicant) be released on bail pending trial. When the summons is filed with the court, a date is set by the court and the same is served on the respondents. On the date of the hearing, the applicant states his or her case before the court and the respondent responds to the application. In some cases courts have entertained oral bail applications, particularly so in the subordinate courts.

The Bail Guidelines Act also provides for principles to guide the court when deciding whether or not to grant bail.⁴⁰ These include:

- the likelihood of the accused availing him- or herself for trial;
- the likelihood of the accused interfering with witnesses if released on bail;
- the likelihood of the accused endangering the safety of the community; and
- exceptional circumstances exist for the release of the accused/applicant on bail.⁴¹

2.3 Burundi

The *Code de Procédure Pénale de 2013* (Criminal Procedure Code of 2013) contains provisions dealing with bail in Burundi. There is, however, a lack of clarity with regard to the procedure and criteria guiding courts when considering the release of an accused person. Pre-trial detention of

³⁹ A bail application before a subordinate court is brought under Section 118(1) of the CPEC. If the matter is before the High Court, the summonses are brought under Section 118(3) of the CPEC, which reads: 'The High Court may, either of its own motion or upon application, direct that any person be released on bail or that the amount of, or any condition attached to, any bail required by a subordinate court or police officer be reduced or varied.' This application is also brought under Section 42(2)(e) of the Malawi Constitution and/or under Bail Guidelines Act 2003, Schedule Part II.

⁴⁰ Section 4, Part II of the Schedule to the Bail Guidelines Act 2003.

⁴¹ Section 4, Part II of the Schedule to the Bail Guidelines Act 2003.

an accused must be ordered by a competent court. The court can order pre-trial detention in the following instances:

- when there is a sufficient likelihood of conviction of the accused; and
- if the accused is charged with a crime punishable by at least one year of imprisonment.⁴²

In addition to the aforementioned, pre-trial detention needs to be a means to meet at least one of the following goals:

- to preserve evidence;
- to prevent intimidation of witnesses or victims;
- to prevent collusion between accused persons, co-perpetrators or accomplices;
- to preserve public order;
- to prevent the commission of an offence or prevent its repetition; and
- to ensure that the accused stands trial for the crime he or she is accused of.⁴³

Moreover, the Criminal Procedure Code of 2013 does not expressly provide for bail to be granted by police officers or prosecutors, but section 120(2) of the Criminal Procedure Code implies that the powers vest in the prosecutor to grant provisional release, taking into account the same considerations a judge is allowed to when granting bail.⁴⁴ Such an interpretation of this section is strengthened further by article 118(4), which states that the refund of bail monies will be done by the court in case of release on bail determined by a judge. But, in practice, no case of provisional release on bail has happened outside the scope of judges.

The Burundi Criminal Procedure Code does not contain clear provisions to guide judges when considering conditional release. The onus is on the accused to present convincing reasons and arguments for conditional release. When considering conditional release, the judge must assess, among other factors, the seriousness of the offence and the individual circumstances of the

⁴² Art. 110, Criminal Procedure Code 2013.

⁴³ Art. 110, Criminal Procedure Code 2013.

⁴⁴ Prosecutorial provisional release is ordered by the prosecutor when instructing the case and as long as he or she has not yet brought the case in front of a judging court. Such a provisional release is done under the same conditions as provisional release decided by the court. Art. 120(2) Criminal Procedure Code (2013).

accused (e.g. whether there are previous convictions).⁴⁵ Section 116 of the Criminal Procedure Code states that ‘in all cases where detention is authorized or extended to meet the conditions of Article 110 (2), the Judge may, upon the request of the accused, order his or her release on bail, provided the accused deposits a sum of money with the Registrar as guarantee’.⁴⁶

Furthermore, the Burundian Criminal Procedure Code provides three instances in which bail will not be granted: (a) persons prosecuted for crimes punishable by more than 20 years’ imprisonment; (b) persons who have not returned the money or other property obtained through an offence or, failing that, their equivalent in value; and (c) persons accused of sexual abuse.⁴⁷

3. Can conditional release be granted at the first court appearance?

In Mozambique, a judge of the criminal court determines the conditional release of an accused at the first appearance after questioning.⁴⁸ Where the accused person has been provisionally released on *termo de identidade*, he or she may not leave his or her residential address for more than five consecutive days without communicating this absence to the court; the accused is also obliged to appear before the judge at any time he or she is ordered to.⁴⁹ In the case of provisional release granted through *caução*, the accused can be asked to comply with one or more of the following conditions:

- not to leave the country without authorisation;
- not to leave the place where she or he resides;
- to stay away from the place where the accused allegedly committed the offence;
- to avoid conducting certain activities related to the crime or that may be perceived as related to new criminal offences;

⁴⁵ Northern Ireland Courts and Tribunal Services, *A Guide to Bail Applications*, p. 4

⁴⁶ Judicial bail enshrined in article 116 of the Criminal Procedure Code is the bail system with which many justice seekers are acquainted. Any accused whose presumed offence is not a non-bailable crime according to article 117 has the right to apply to release on bail before conviction. If the court finds that it is in the interests of justice, it will grant such release.

⁴⁷ Art. 117 Criminal Procedure Code.

⁴⁸ Art. 275 CPP. This section determines the process.

⁴⁹ Art. 269 CPP.

- to avoid visiting certain places and/or seeing certain people;
- to be subjected to surveillance; and
- to exercise a profession, in a determined place, in the case where the accused does not have a regular job.⁵⁰

As mentioned above, in Malawi conditional release on bail can be granted by the police and courts (Magistrate and High Courts). Section 119 of the Criminal Procedure and Evidence Code provides for the following bail conditions to be set before a person may be conditionally released on bail or bond: (a) that the accused must report to a specific place at a specific time mentioned in his or her bail or bond document, and that the accused continue to report to such place until otherwise directed by a police officer or by the court;⁵¹ (b) the prohibition of, or control over, the movements of the accused;⁵² (c) the prohibition of, or control over, communication by the accused with witnesses for the prosecution;⁵³ (d) the supervision the accused must undergo while on bail;⁵⁴ (e) the prohibition against the commission of offences by the accused;⁵⁵ and (f) the prohibition against obstruction of the course of justice by the accused.⁵⁶

Although it was established in section 2.3 above that there are implicit provisions providing for prosecutorial release in Burundi's criminal justice system, in practice judges appear to be adjudicating bail decisions. Conditions imposed on accused persons for conditional release are the following: (a) to remain in the jurisdiction of the prosecutor's office; (b) not to move beyond a certain radius without permission of the investigating magistrate or his or her delegate; (c) the

⁵⁰ Unofficial translation of the following article: *Artigo 270 CPP – Deveres do arguido em liberdade provisória: Fora dos casos previstos no artigo 286, não pode ser ordenada a prisão preventiva, nem esta será mantida, ficando os arguidos em liberdade provisória. § 1 Em liberdade provisória mediante termo de identidade, o arguido fica sujeito às obrigações referidas no artigo anterior. § 2 Em liberdade provisória mediante caução, podem ainda ser impostas ao arguido, consoante as circunstâncias, alguma ou algumas das seguintes obrigações: 1. Não se ausentar do País...; 2. Não se ausentar de determinada distrito ou província, ou não se ausentar da sua residência a não ser para locais de trabalho, ou outros expressamente designados; 3. Residir fora onde cometeu o crime ou onde residem os ofendidos...; 4. Não exercer certas actividades que estejam relacionadas com o crime cometido e que façam recluir a interpretação de novas infracções; 5. Não frequentar certos meios ou locais, ou não conviver com determinadas pessoas; 6. Sujeitar-se à vigilância de determinadas autoridades ...; 7. Exercer uma profissão, em local determinado, quando não se ocupe em trabalho certo;...*

⁵¹ Art. 119(1) Criminal Procedure and Evidence Code.

⁵² Art. 119(2)(a) Criminal Procedure and Evidence Code.

⁵³ Art. 119(2)(b) Criminal Procedure and Evidence Code.

⁵⁴ Art. 119(2)(c) Criminal Procedure and Evidence Code.

⁵⁵ Art. 119(2)(d) Criminal Procedure and Evidence Code.

⁵⁶ Art. 119(2)(e) Criminal Procedure and Evidence Code.

accused is prohibited from areas such as airports, ports and bus stations, or may not be at such localities at specific hours; (d) to appear periodically before the investigating magistrate or his or her delegate; (e) to appear before the investigating magistrate or the judge whenever he or she is required to; and (f) to avoid contact with victims or other persons as specified.⁵⁷

It appears that bail conditions set in all three jurisdictions are similar in nature, addressing a number of aims, namely to ensure the attendance of the accused at court, protect the community, prevent further offences, and prevent the accused from interfering with witnesses, victims and evidence.

4. What are the non-monetary conditions of bail or bond which are commonly used?

In Mozambique, if an accused cannot afford bail or has difficulty paying it, the judge can of his or her own volition or under advice of the Public Ministry, and at the request of the accused, replace it with an order to appear before the court or a designated authority by a certain date as specified by the judge.⁵⁸ This amounts in effect to a release on warning.

In Malawi, the most frequently used non-monetary conditions include the requirement for sureties (see definitions in section 1(b) above), the imposition of a supervision schedule upon the accused and a limitation on travel. The frequency of reporting may vary depending on the distance between the accused's place of residence and the nearest police station or unit. However, the accused is generally required to report once a week or once a fortnight to the police or designated authority. Moreover, accused persons with travel documents will be required to

⁵⁷ Art. 119(2) Criminal Procedure Code 2013.

⁵⁸ Unofficial translation of the consultant from the following article: *Artigo 272 CPP - Substituição da caução por outra medida: Se o arguido estiver impossibilitado de prestar caução ou tiver grandes dificuldades ou inconvenientes em prestá-la, deverá o juiz, oficiosamente ou sob promoção do Ministério Público, ou a requerimento do próprio interessado, substituí-la pela obrigação de o mesmo se apresentar ao tribunal ou à autoridade por ele designada, em dias e horas pré-estabelecidos ou quando o juiz o entenda necessário, obrigação esta que acrescerá as que lhe tiveram sido impostas. A substituição prevista neste artigo não poderá fazer-se nos casos em que, sendo autorizada a prisão preventiva, o juiz considere indispensável a caução ou a prisão nos termos do §3 do artigo 291.*

surrender their documents to the police and would therefore need to seek permission from the court or the police to travel outside their district or other specified region.

In Burundi, the court, when granting conditional release on bail, may impose further conditions with which the accused has to comply. These are the same conditions the court imposes on the accused in the case of conditional release.

5. What are the requirements and conditions in relation to sureties?

In Mozambique, articles 277 to 281 of the Criminal Procedure Code provide for different provisions of bail through, for example, deposit, pledge, mortgage, bank guarantee and surety. Article 278 of the Criminal Procedure Code states that the accused, after first questioning, must indicate the method by which he or she will pay bail if it is granted. The accused can always replace the selected method with another one permitted by law. When an accused chooses pledge or securities, precious stones and metals are accepted. In cases where the bail will be paid through mortgage, article 280 of the Criminal Procedure Code provides for its conditions, while article 281 provides for requirements and conditions related to sureties. In the case of sureties, the name of the guarantor must be recorded in the case file.

In principle, the Burundi criminal justice system does not accept surety. Sureties may be issued only in the case of children in conflict with the law.

In Malawi, the courts usually require the applicant to produce sureties with monetary or non-monetary bonds, and are charged with the duty to ensure that the accused adheres to the conditions of the release. Section 97(1) of the Criminal Procedure and Evidence Code states that in relation to offences other than genocide, murder, treason or rape, when an individual provides 'sufficient sureties for his attendance' an officer with a warrant of arrest may take such sureties and release the accused. However, the statute does not define 'sufficient sureties'. Much of the practice and clarification of this area derives from the common law. It is accepted practice that a surety must

- be advised of what being a surety means;
- be informed of what obligation he or she is undertaking;
- confirm that he or she is still willing to take on the said obligations and ensure that he or she can raise the amount involved; and
- be warned of the consequences if the defendant fails to appear.⁵⁹

Currently in Malawi the accepted practice is for the identified sureties to present themselves for an ‘examination of sureties’ application before a Registrar of the High Court or the Magistrate within their nearest court jurisdiction. The surety is taken through the aforementioned steps and it is generally also ascertained where he or she resides.

6. Under what conditions can bail be withdrawn?

It is accepted in all three countries that bail can be withdrawn if the accused has not met his or her bail conditions.

In Burundi, conditional release on bail can be withdrawn if the accused fails to comply with any of his or her bail conditions or if new circumstances motivate his or her imprisonment.⁶⁰ New circumstances can be connected either to the alleged offence(s) the accused committed or to the accused. For example, it can be a case of discovering new compelling evidence or the commission of a new crime by the accused to whom conditional release was granted.

In the Mozambican bail system, bail may also be revoked or the bail conditions amended where the accused has not complied with his or her bail conditions.

In Malawi, it is accepted practice that a breach of bail conditions may result in the revocation of bail, although this is generally reserved for failure to attend court or on attempt to flee the

⁵⁹ Archbold JF *Criminal Pleading, Evidence and Practice* (2008) UK: Thomson, Sweet & Maxwell.

⁶⁰ Art. 119(4) Criminal Procedure Code 2013.

jurisdiction.⁶¹ In *Antony Penama v the State*,⁶² a decision by the lower court revoking bail due to delays occasioned by the accused and his attorney was upheld by the High Court. Judge Kamanga noted it was in the interests of justice for the matter to be concluded and that in view of the fact that the delays were caused by the accused, who had already been found with a case to answer, it was not inappropriate to revoke bail. This ruling illustrates that bail can be withdrawn where the interests of justice mandate that it be revoked.

7. Can bail decisions be appealed and on what grounds?

In all three jurisdictions, conditional release decisions can be appealed. In Mozambique, decisions approving or denying conditional release can be appealed, and no other conditions are set in this regard.⁶³ In Burundi, bail decisions can be appealed once a decision has been made by the court to refuse bail. The prosecutor or the accused must lodge an appeal within two working days before a superior court.⁶⁴ In Burundi the following appeal timelines are applicable to the prosecutor and accused: (a) the prosecutor must lodge an appeal on the day the decision on bail was given; and (b) the accused must lodge an appeal on the day he or she was notified of the bail decision.⁶⁵ The court is under an obligation to undertake a hearing within seven days of the date when the decision against which the appeal is lodged was pronounced.⁶⁶

In Malawi an accused may apply for bail throughout the course of his or her trial. There is no restriction on how many times an accused may apply for bail, as long as it can be justified during the bail application that the circumstances of the accused have changed sufficiently to justify the granting of bail.⁶⁷ In effect, it means there must be new evidence that may affect the initial bail

⁶¹ Section 124 Criminal Procedure and Evidence Code.

⁶² Misc. Criminal Application No. 47 of 2005.

⁶³ Article 284 CPP. Unofficial translation of the consultant from the following article: *Artigo 284 CPP - Recurso do despacho sobre caução. Cancelamento da caução: Do despacho que negar ou conceder a liberdade provisória mediante caução e arbitrar o valor desta, e bem assim do que a julgar quebrada, compete recurso, restrito ao conhecimento do que nesses despachos se decidiu.*

⁶⁴ Arts. 124-126 Criminal Procedure Code 2013.

⁶⁵ Art. 126 Criminal Procedure Code 2013.

⁶⁶ Art. 128 Criminal Procedure Code 2013.

⁶⁷ Section 10 of the Bail Guidelines Act provides that where there has been a change in circumstances since the initial application, the application can be brought before the same or another judge in the same court. However, when no such change has occurred, an applicant may appeal, in the normal manner, the prior decision to the higher court by outlining the areas in which the lower court is alleged to have erred. When an appeal is referred to a higher

decision. Where bail is denied by the Magistrate's Court, an accused can appeal to the High Court.⁶⁸ Bail applications can be made at any point during the proceedings but before judgement is delivered. The accused may also appeal a bail ruling to change the conditions imposed by a lower court. It is, however, necessary to provide a reason that shows some actual change in circumstance.⁶⁹

8. What is the time limit for the first appearance in court?

In Malawi, an accused must either be charged or brought before a court and informed of the reason for his further detention, within 48 hours of his or her arrest.⁷⁰ In the event that it is not done, the individual must be released. This requirement affords an opportunity for the detained person to be charged promptly or at least informed of the reasons for his or her arrest. It also allows for the State to assess the evidence against a suspect early to determine the need for continued detention. In *Republic v Brigadier Mtende and Others*⁷¹ the suspects were detained on allegations of treason and conspiracy to commit murder. The State duly brought the accused persons to court within the 48-hour period and applied for their further detention. The court declined to order further detention, on the basis that the available evidence presented by the State provided no justification for further detention.

court the general rules regarding an appeal to the said court apply. With regard to a subsequent application lodged within the initial court, there is no limit on the number of possible applications for bail that may be made, or at what stage in the proceedings they may occur.

⁶⁸ The High Court hears the appeal by way of re-hearing of the bail application. Bail applications are made before a single judge or magistrate in the High Court and Magistrate's Court, respectively, except if the matter proceeds to the Supreme Court where a minimum of three judges sit on appeal.

⁶⁹ In *The Republic v Mike Msungama and Victor Sithole* Criminal Case No. 931 of 2013 (SRM Court at Lilongwe), it was not sufficient to establish change of circumstances for the second defendant to state that he would not attempt to obtain a new passport.

⁷⁰ Section 42(2)(b). Section 35(1) imposes a duty on a police officer in charge of the police station to release any individual in custody where it is not near practicable to bring such person before a competent Court within 48 hours and the offence does not appear to be serious. The individual may be released upon executing a bond, with or without sureties.

⁷¹ Miscellaneous Application Number 62 of 2008, Lilongwe District Registry, unreported.

In Mozambique, accused persons must be brought to the court within 48 hours after arrest.⁷² The prosecutor can extend this period up to five days where the judicial authority did not order the arrest. This provision applies to the cases of *flagrante delicto*, when the arrest can be made by anyone who witnessed the commission of a crime.

There is no fixed time limit for an accused to appear in court for the first time. The Constitution of the Republic of Burundi states that any person has the right, either in a judicial or administrative procedure, to have his or her case heard fairly and judged within a reasonable time.⁷³ This provision introduces the notion of a reasonable time frame during which either judicial or administrative decisions are to be taken, but it is not clear what is considered to be reasonable. Reasonableness is a subjective matter that can be understood differently depending on the interests at stake. Furthermore, the Criminal Procedure Code provides no guidance on what constitutes a reasonable time.

A study conducted in 2011 showed that the average duration of a criminal matter in Burundi is 24 months and an accused is likely to be called for his or her first appearance to court after 16 months.⁷⁴ This has serious implications for the well-being of the accused and his or her family, especially where the accused is the breadwinner. The psychological impact is also felt by the children who depend on the accused person's financial and emotional support.

9. Is bail affordable? What are the amounts commonly involved?

The most commonly used monetary bail sums in Malawi range between K10,000 (US\$ 14) and K20,000 (US\$ 28). While the figure may appear to be relatively low, considering that the

⁷² Art. 311 CPP.

⁷³ Art. 38 Constitution of the Republic of Burundi (2005).

⁷⁴ Moriceau J *Etude sur le fonctionnement de la chaîne pénale au Burundi* (2011) Bujumbura, Burundi: RCN Justice et Démocratie, p. 21.

minimum wage is currently set at approximately K15,000 (US\$ 21),⁷⁵ this is a punitive sum for the average Malawian.

In Mozambique, articles 274 and 276 of the Criminal Procedure Code state how a judge shall determine the bail amount. More often than not the bail amount exceeds the economic capacities of the accused, who is consequently obliged to wait in custody. A study on the socio-economic impact of pre-trial detention in Maputo, Mozambique, shows the unaffordability of bail set by courts.⁷⁶ The study found that 20 per cent of male detainees interviewed had an amount for security recorded, which presumably they were unable to afford, and thus they remained incarcerated. The amounts ranged from MT 10,000 (US\$ 319) to MT 260,000 (US\$ 8,240), with a median of MT 120,000 (US\$ 3,800). The most common amount was MT 150,000 (US\$ 4,785); 38 per cent of male detainees mentioned this amount.⁷⁷ Moreover, the study found that all of the amounts listed for security for male detainees applied to those facing theft or robbery charges.⁷⁸

The monthly minimum wage in Mozambique, the lowest of which is found in the agricultural sector, is MT 3,010 (US\$ 95), which is also in line with median incomes earned by detainees.⁷⁹ Only 14 per cent of female detainees had an amount for security recorded. The amounts were MT 40,000 (US\$ 1 600), MT 70,000 (US\$ 2,210) (two of these amounts), and MT 150,000 (US\$ 6,000). Three of the amounts applied to fraud charges, and the largest, to theft charges. All of these amounts are far in excess of median earnings.

In Burundi, bail is fixed by taking into consideration the offence of which the suspect is accused. The courts also tend to order bail amounts proportionate to the monetary value implicated in the offence.⁸⁰ A case of interest is where the accused requested to be released on bail and accepted to

⁷⁵ Available at <http://www.wageindicator.org/main/salary/minimum-wage/malawi> (accessed 12 September 2016). This amounts to slightly above a dollar a day.

⁷⁶ Muntingh L & Redpath J *The Socio-Economic Impact of Pre-trial Detention in Maputo, Mozambique* (2016).

⁷⁷ Muntingh L & Redpath J *The Socio-Economic Impact of Pre-trial Detention in Maputo, Mozambique* (2016).

⁷⁸ Muntingh L & Redpath J *The Socio-Economic Impact of Pre-trial Detention in Maputo, Mozambique* (2016).

⁷⁹ Muntingh L & Redpath J *The Socio-Economic Impact of Pre-trial Detention in Maputo, Mozambique* (2016).

⁸⁰ For example, *Prosecutor v J. Nday*, RAO 428, RMP 150008. In a case judged by the Court of Appeal of Bujumbura, the accused was prosecuted for misappropriation of an amount equivalent to \$54,000. With a guilty plea, she recognised misappropriation of only \$37,718 and at the date of bail hearing she had returned \$12,200. The court decided release on bail on the condition that the accused deposit with the registrar an amount of \$25,518, which was

make a deposit of BIF 50,000 (US\$ 32) supporting that he was indigent, but the court, while agreeing to release him on bail, ordered a bail deposit with the registrar of BIF 1 million (US\$ 640).⁸¹ When considering the amount fixed and the economic conditions of the majority of pre-trial detainees, it is clear that bail is accessible only to a privileged minority.

10. Must a trial commence within a certain time period?

The provision of pre-trial custody time limits in criminal justice systems are important, as it places some pressure on the State to limit the duration of detention pending trial. Under the ICCPR and AChHPR, an individual detained pending trial is entitled to a trial within a reasonable time or release pending trial.⁸² Therefore, in considering whether to release an individual, a judicial authority must determine both if continued detention remains necessary and is legally justifiable, and if the length of detention is such that the detainee has been denied his or her right to be tried within a reasonable time.⁸³ In considering what is reasonable, the authority must ‘examine all the circumstances arguing for or against the existence of a genuine public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for individual liberty’.⁸⁴

In *Bakmutskiy v Russia*,⁸⁵ the European Court of Human Rights observed that ‘after a certain lapse of time the persistence of a reasonable suspicion, in itself, no longer sufficed’.⁸⁶ In this case

the balance of the recognised amount. See also *Prosecutor v P. Nk*, RMP 150541. In this case the High Court of the Town of Bujumbura fixed the amount of bail based on the sum of money misappropriated by the defendant. The accused was charged of having misappropriated BIF 745,300; he also made a guilty plea and, while granting release on bail, the court awarded provisional release on condition the accused deposit BIF 745,000 with the registrar. In *Prosecutor v Nes*, RMP 10809, the same court awarded release on bail on condition the accused deposited BIF 13,000,000, an amount fixed ‘after an appreciation which considered the sum of money requested by the plaintiff’.

⁸¹ *Prosecutor v J.D. T*, RAO 460, RMP 150 495.

⁸² Art. 9(3) ICCPR and art. 7(5) AChHPR.

⁸³ Rule of Law Initiative, *Handbook of International Standards on Pretrial Detention Procedure* (2010) American Bar Association, p. 5. Available at https://www.ilsa.org/jessup/jessup16/Batch%201/handbook_of_international_standards_on_pretrial_detention_procedure_2010_eng.authcheckdam.pdf (accessed 12 September 2016).

⁸⁴ Reid K A *Practitioner’s Guide to the European Convention of Human Rights* (1998) Sweet and Maxwell, p. 308.

⁸⁵ *Bakmutskiy v Russia*, ECHR Application No. 36932/02, Strasbourg, 25 June 2009.

⁸⁶ *Bakmutskiy v Russia*, ECHR Application No. 36932/02, Strasbourg, 25 June 2009, para 137.

the domestic authorities were under an obligation to analyse the applicant's personal situation in greater detail and give specific reasons for holding him in custody.⁸⁷

In Burundi, an accused may not be held in pre-trial detention for longer than one year if the alleged crime is punishable by less than five years of imprisonment,⁸⁸ and pre-trial detention cannot exceed three years where the sanction of the alleged crime exceeds five years of imprisonment.⁸⁹

In Mozambique, the *Código de Processo Penal* provides for specific periods of pre-trial detention to be adhered to. These are divided into two different stages.⁹⁰ The first stage is from the person's arrest to the notice of his or her criminal charge: (a) 20 days for crimes punishable with a prison term of more than a year; (b) 40 days for crimes punishable with a longer prison term (*prisão maior*);⁹¹ and (c) 90 days for crimes, which is the exclusive competence of the *Policia de Investigação Criminal* (PIC).⁹² The second stage is from the criminal charge or from the prosecutor's request of the investigation phase (*instrução contraditória*) to the final decision of the Court (*despacho de Pronuncia de 1ª Instancia*).⁹³ This period cannot exceed three months if related to a crime of *processo correccional*⁹⁴ and four months for *querela* cases.^{95, 96} The trial related to *processo correccional* and *querela* should be finalised, respectively, within three and four months.

⁸⁷ *Bakhtmutskiy v Russia*, ECHR Application No. 36932/02, Strasbourg, 25 June 2009, para 137.

⁸⁸ Art. 115(2) Criminal Procedure Code 2013.

⁸⁹ Art. 115(3) Criminal Procedure Code 2013

⁹⁰ Art. 308 CPP.

⁹¹ Article 61 CP states the following: (*Penas maiores*) *As penas maiores são: a) a pena de prisão maior de vinte a vinte e quatro anos; b) a pena de prisão maior de dezasseis a vinte anos; c) a pena de prisão maior de doze a dezasseis anos; d) a pena de prisão maior de oito a doze anos; e) a pena de prisão maior de dois a oito anos.*

⁹² The PIC refers to the Criminal Investigative Police. Article 19 of Law 16/2013 states that 'it is responsibility of the PIC to conduct the instruction phase of crimes such as falsification of documents; kidnapping; people trafficking; corruption; production, growing, manufacturing, trade and illicit traffic of plants, substances ... applicable to trafficking and consumption of drugs'.

⁹³ The Court of the *1ª Instancia* is the court where the case has been opened. It does not refer to a decision of a Court of Appeal.

⁹⁴ *Policia Correccional* crimes are punishable with a prison term of more than a year (art. 11 CPP).

⁹⁵ Cases in the CPP (see art. 11 CPP) are divided into: 1) *processo de querela*; 2) *policia correccional*; 3) *transgressões*; and 4) *processo sumário*.

⁹⁶ Cases involving a crime punishable with a prison term of more than one year as provided for in article 61 of the CP.

In Malawi, there are several established time periods for which an accused may be held lawfully in custody before commencement of trial. Where these statutory periods expire and trial has not commenced, the accused must be released. Part IV of the Criminal Procedure and Evidence Code (CPEC) deals extensively with the applicable pre-trial limits, rights and obligations. The custodial time limits are as follows:

- Section 161 D states that the maximum period that a person accused of an offence triable in a subordinate court may be held in lawful custody pending commencement of his or her trial for that offence shall be 30 days.
- Section 161 E states that the maximum period that a person accused of an offence triable in the High Court may be held in lawful custody pending his or her trial shall be 30 days.
- Section 161 F states that where a person accused of an offence triable in the High Court is committed to the High Court for trial, the maximum period that he may be held in lawful custody pending commencement of his trial in relation to that offence shall be 60 days.
- Section 161 G states that the maximum period that a person accused of treason, genocide, murder, rape, defilement and robbery may be held in lawful custody pending commencement of his or her trial for that offence shall be 90 days.

In terms of section 161 H of the CPEC, the State has the discretion to apply for an extension of these periods, as long as the application is lodged seven days before the expiration of any of the aforementioned periods. The court can only extend pre-trial custody by a maximum of 30 days. Section 161 I of the CPEC provides that on the expiry of the pre-trial custody time limit the court may on its own motion or on application grant bail to an accused person. Section 161J of the CPEC also confers on every individual eligible for bail the discretion to apply for bail even where the individual is being held in lawful custody.

Once an accused has been conditionally released there is no prescribed period within which trial must commence. The exception appears in a general provision in section 261 of the CPEC, where for offences tried by subordinate courts and punishable by not more than three years of imprisonment, trial must commence within 12 months from the date the complaint arose and must be completed within 12 months from the date the trial commenced. The same applies for

similar offences being tried by the High Court, as provided by section 302A of the CPEC. Where both provisions are not complied with, the accused must be discharged of the offence.

11. Is there an automatic review mechanism for pre-trial detention?

In Burundi, where mandatory periods of pre-trial detention for certain offences have been established (see section 10 above), there is an obligation on the prosecutor to bring the accused to court within 15 days in order for the case to undergo the process of periodic review.⁹⁷ During this process, the court may order conditional release or pre-trial detention. If pre-trial detention is ordered, the prosecutor is obliged to bring the accused before the court every 30 days for a review of continued detention.⁹⁸

There is no automatic review mechanism for pre-trial detention in Mozambique. However, there are two articles that offer some protection against lengthy pre-trial detention. First, article 273 of the Criminal Procedure Code⁹⁹ states that pre-trial detention *sem culpa formada* (without charge)¹⁰⁰ can be revoked, releasing the person, when the conditions of pre-trial detention are not met.¹⁰¹ Secondly, the release of the defendant is mandatory, with conditional release through *caução*, when the legal terms of pre-trial detention have expired¹⁰² (section 10 above addresses the legal terms of pre-trial detention). Only in instances where provisional release cannot be

⁹⁷ Art. 111 §3 Criminal Procedure Code (2013).

⁹⁸ Art. 115 §1 Criminal Procedure Code (2013).

⁹⁹ Unofficial translation of the consultant from the following article: Artigo 273 CPP - *Revogação da Prisão Preventiva ou sua Prorrogação: A prisão preventiva sem culpa formada poderá ser revogada, ordenando-se a soltura do arguido, sempre que se verifique não subsistirem os requisitos que a justificaram, e poderá ser de novo ordenada, sem prejuízo da unidade dos prazos que a lei estabelece, se sobrevierem motivos que a justifiquem legalmente. Nos mesmos termos poderá ser revogada ou decretada a liberdade provisória antes da culpa formada. Após a culpa formada, a prisão preventiva só pode ser revogada em recurso interposto do despacho de pronúncia, do despacho que a tiver ordenado posteriormente ou da decisão final, quando do teor da decisão deva resultar nova apreciação da legalidade da prisão, nos termos do artigo 291 e seus parágrafos. A liberdade provisória após a culpa formada pode ser revogada, ou alterado o seu condicionamento, por inobservância das obrigações impostas, nos termos estabelecidos para a liberdade provisória antes da culpa formada.*

¹⁰⁰ Art. 308 CPP.

¹⁰¹ The *formação da culpa* occur with the *despacho de pronúncia* of the judge (in querela processes); or equivalent document that sets the date for the trial (in sumário processes and in the other processes).

¹⁰² Art. 309 CPP.

ordered, shall the judge pronounce the decision to extend pre-trial detention up to another 60 days.

In Malawi, there is an automatic review mechanism established in law. The review of detention is possible when the accused approaches the court for a bail application, which can be brought at any stage. In terms of the pre-trial custody time limits, the Criminal Procedure and Evidence Code sets the following provisions: once the statutory period for pre-trial detention has lapsed (see the provisions of section 161 of the CPEC in section 10 above) and the State has not asked for an extension, the court is required on its own motion to order the release of the accused. It must also be emphasised that an accused continues to have the right to apply for bail.

12. If a conviction/sentence is appealed, can the accused apply for and be released on bail/bond?

In Mozambique, it is possible for a convicted person to apply for and be released on bail or bond pending an appeal against his or her conviction and/or sentence. In this instance, an appeal suspends the conviction or sentence.¹⁰³ In Malawi, however, the High Court has the discretion to release any accused on bail when leave to appeal has been granted.¹⁰⁴ In Burundi, there are no clear provisions that allow or refuse this possibility. However, article 100 of the Law Organizing the Supreme Court provides that a detained person who is appealing a decision may request conditional release on bail.

13. Who can gain access to legal aid and how accessible is it in practice?

¹⁰³ Art. 659 CPP

¹⁰⁴ Section 355(1) CPEC.

Most international and regional human rights instruments grant accused persons the right to consult with and be represented by legal counsel.¹⁰⁵ This right applies during all stages of the criminal process.¹⁰⁶ The right to legal representation encompasses three guarantees: (a) the right to defend oneself; (b) the right to be informed of the right to counsel; and (c) the right to choose one's counsel or, where the interests of justice or the indigent status of the accused so require, to elect to have legal counsel appointed and paid for by the State.¹⁰⁷

In Malawi, section 18 of the Legal Aid Act 2010 identifies the following two main criteria for eligibility to legal aid services: (a) that the individual has insufficient means to obtain private legal counsel; and (b) it would be in the interests of justice to have legal aid represent the accused.¹⁰⁸ Currently, the Legal Aid Board attempts to assess the means of individuals,¹⁰⁹ but its system relies mainly on the honesty of the applicant to disclose their means, which is not always reliable. Legal aid may also be granted to someone who can afford to retain private attorneys as long as payment is made to the Legal Aid Board to obtain their legal services.¹¹⁰ It is an established practice in Malawi that a suspect charged with a capital offence will always be represented by a lawyer and that, where he or she cannot afford one, the State is ordered to provide one through legal aid. The Legal Aid Board attempts to assist all those individuals who seek their aid in criminal or civil litigation. However, they face significant financial and capacity restraints, which restrict the accessibility of legal aid to indigent persons.

¹⁰⁵ Article 7(1)(c) African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); article 14(3)(d) UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171.

¹⁰⁶ United Nations Basic Principles on the Role of Lawyers, Right to Counsel, para. 1. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. N (2)(c). Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V, Due Process of Law.

¹⁰⁷ ICCPR article 14(3)(d), see Lawyers Committee for Human Rights, 'What is a Fair Trial?' (1995), p. 3, and Nowak M *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) Kehl; Arlington: N.P. Engel, p. 258. Both article 14(3)(d) ICCPR and article 6(3)(c) ECHR require legal assistance free of charge where the 'interests of justice' so require.

¹⁰⁸ Factors to be taken into consideration when determining whether the interests of justice exist are the following: (a) the sentence is likely to result in the loss of liberty or damage to the accused's reputation; (b) the issues in dispute are complex legal matters and legal representation would make a difference to the accused receiving a fair trial; (c) the accused is unable to understand the proceedings due to a language barrier, mental illness or other reason; (d) the defence will require tracing of witnesses and/or expert cross-examination skills; (e) it is in the interests of another third party that the accused be represented; and (f) if convicted, the accused may have a fine imposed that can remain unpaid for a month.

¹⁰⁹ Section 21, Legal Aid Act 2010.

¹¹⁰ Section 22, Legal Aid Act 2010.

No formal legal aid system exists in Burundi. Accused persons have to source their own legal representation and some may be provided with legal assistance by a few non-governmental organisations engaged in human rights work. Such organisations have their own criteria for granting legal assistance.

In Mozambique, legal assistance is provided to indigent accused persons. The *Instituto do Patrocínio e Assistência Jurídica* (IPAJ) or the Institute for Legal Aid¹¹¹ guarantee legal assistance to all people submitting a certificate of poverty (*Atestado de Pobreza*), which is issued by the municipal authority where the accused resides. The certificate of poverty costs approximately 50-100 Mt. (US\$ 1.5 – US\$ 3.00).¹¹² The lack of a clear definition of poverty has been the subject of criticism, as has the means test. In the case of the latter, anecdotal evidence suggests that a certificate of poverty is issued to any person who applies for it.

14. Are bail and surety decisions affected by corruption?

Due to a lack of conclusive evidence, the issue of whether bail and surety decisions are affected by corruption could not be determined in the three countries. Further research is needed to evaluate this. However, the available literature on corruption in the criminal justice system in Mozambique indicates that bail and surety decisions are indeed affected by corruption.¹¹³ There is a perception that cases involving large amounts of money are more liable than others to involve corruption.

15. Concluding analysis on bail & bond legislation in Burundi, Malawi and Mozambique

¹¹¹ The IPAJ was established by Law 6/94, replacing the National Institute for Legal Assistance (INAJ) which, through Law 8/86, had been created previously under the Ministry of Justice. In 2013 the IPAJ legal framework underwent important changes.

¹¹² Lorizzo T 'The African Commission's guidelines on pre-trial detention: Implications for Angola and Mozambique' (2014) CSPRI-PPJA 1 Occasional Paper. Available at <http://cspri.org.za/publications/research-reports/PPJA%20Occ%20Paper%201%20Lorizzo.pdf> (accessed 20 July 2015).

¹¹³ Mosse M A *Corrupção no Sector da Justiça em Moçambique* (2006) Centro de Integridade Pública de Moçambique.

The differences in the respective bail regimes representing Anglophone, Francophone and Lusophone legal traditions are evident; the similarities are few. The process and onus for granting provisional release on bail and surety are clearer in respect of the criminal justice systems of Malawi and Mozambique than in Burundi. For instance, in Burundi the Criminal Procedure Code does not contain clear provisions to guide judges when considering conditional release and the onus always rests on the accused to present convincing reasons and arguments for conditional release.

The respective countries contain similar conditions for release on bail or bond. Some of the conditions set include: prohibiting the accused from leaving a certain jurisdiction or radius (without the permission of the designated authority); limited communication and contact or interference with witnesses or crime scenes; not committing any crime during release; and regular reporting to a designated authority.

There is a range of non-monetary conditions of conditional release. In Malawi, for instance, the most frequently used non-monetary conditions include the requirement for sureties, the imposition of a reporting and supervision schedule upon the accused, and the accused being asked to surrender his or her travel documents to the police, thus limiting his or her travel outside of the country. In Mozambique, other non-monetary conditions of bail include the release of the accused on warning. If an accused cannot afford bail or has difficulty in paying it, the judge can release him or her on warning and request that the accused appears before the court or other authority on specific dates.¹¹⁴

Police bail provisions for minor offences, which do not pose a risk to the public, facilitate criminal justice processes and limit the interference in the socio-economic aspects of an accused person's life (i.e. financial and emotional support to family). In Malawi, bail may be provided to accused persons at police stations for certain offences and under certain circumstances,¹¹⁵ whereas in Mozambique only a judge may do so. In Burundi, although there are some provisions in the Criminal Procedure Code providing for prosecutorial release on bail, this is not being used and the legal provisions are vague.

¹¹⁴ Art. 272 CPP.

¹¹⁵ The police are guided by factors such as the nature and the seriousness of the offence; the evidence against the accused; the potential sentence, the character, health and safety and protection of the accused.

Burundi is the only country that strictly prohibits bail for certain categories of offences or persons. These include crimes punishable by more than 20 years' imprisonment,¹¹⁶ persons who have not yet returned the money or property obtained through an offence, and persons accused of sexual offences.¹¹⁷ This provision violates the constitutional principle of presumption of innocence and the general principle of 'freedom is the rule, detention the exception' provided for under the Burundi Constitution.¹¹⁸

In all three bail systems, bail may be withdrawn if an accused fails to comply with his or her bail conditions. Burundi provides furthermore that bail may be withdrawn if new circumstances motivate an accused's imprisonment.¹¹⁹ In all of the systems the objective of the conditions set for bail are to ensure the attendance of the accused at court, to protect public order and to prevent the accused from interfering with witnesses, victims and evidence.

Surety provisions are provided for within the respective bail regimes, with differences. In Burundi, surety is used only in the case of children in conflict with the law. In Mozambique, the Criminal Procedure Code has provisions for bail in the form of sureties, which can take the form of a pledge or securities, mortgage, bank guarantee and surety.¹²⁰ If pledges or securities are selected to secure release, precious stones and metals are accepted, and in cases where mortgage and surety are chosen, the Criminal Procedure Code provides for conditions and requirements.¹²¹ In Malawi, surety is allowed, imposing a duty on the 'surer' to ensure that the accused or applicant adheres to the conditions of release and after undergoing an 'examination of sureties'. In terms of the Criminal Procedure and Evidence Code, this is not allowed in relation to offences such as genocide, murder, treason or rape.¹²²

Bail decisions may be appealed in all three jurisdictions. Mozambique sets no conditions or grounds for an appeal, whereas Burundi requires strict time limits within which an appeal may be

¹¹⁶ Art. 117 Criminal Procedure Code.

¹¹⁷ Art. 117 Criminal Procedure Code.

¹¹⁸ See *inter alia* Law N 1/10 of April/03/2013.

¹¹⁹ Art. 119(4) Criminal Procedure Code 2013. The 'new circumstances' can be connected to the alleged offences the accused committed or to the accused.

¹²⁰ Ss. 277-281.

¹²¹ Section 280 of the Criminal Procedure Code provides for mortgage conditions, while section 281 provides for requirements and conditions related to sureties.

¹²² Section 97(1) CPEC.

lodged. In Malawi, bail can be appealed during an accused's detention if the circumstances of the accused have changed sufficiently to justify the granting of bail.¹²³

If a conviction or a sentence of an accused is appealed, persons are allowed to apply for bail in the Mozambican and Malawian justice system while awaiting the decision of the appeals court. Once again, Burundi's bail system provides no clear provisions in this regard.

In Burundi there is no fixed time limit for first court appearances of an accused, although the Constitution of Burundi is clear that any person has the right, either in a judicial or administrative procedure, to have his or her case heard within a reasonable time.¹²⁴ This provision does not provide for the adequate protection of accused persons against abuse of power during the arrest and detention stages, and effectively denies accused persons the right to a speedy trial. Accused persons in Malawi must either be charged or brought before a court and informed of the reason for further detention within 48 hours of arrest,¹²⁵ with the same applying in Mozambique. There is, however, a qualification to Mozambique's strict 48-hour rule: in cases of *flagrante delicto*, where the judicial authority did not order the arrest, the prosecutor has the authority to extend this period up to five days. This delays accused persons arrested under these circumstances from appearing before a court within a 48-hour period.

The only strict time limit within which trial must commence can be found in the Criminal Procedure and Evidence Code of Malawi, where for offences tried by subordinate courts and punishable by not more than three years of imprisonment trial must commence within 12 months from the date the complaint arose and must be completed within 12 months from the date the trial commenced.¹²⁶ The same applies for similar offences tried by the High Court.¹²⁷ The accused must be discharged of the offence where both provisions are not complied with. There are also extensive pre-trial custody time limit provisions in Malawi in respect of when trial should commence. In Burundi, no statutory limits for the commencement of trial exist. However, pre-trial custody time limits have been set depending on the length of the prison sentence for the

¹²³ Section 10, Bail Guidelines Act.

¹²⁴ Art. 38, Constitution of the Republic of Burundi (2005).

¹²⁵ Section 42(2)(b).

¹²⁶ Section 261 CPEC.

¹²⁷ Section 302A CPEC.

offence with which the accused has been charged.¹²⁸ The Mozambican bail system also provides for pre-trial custody time limits in respect of certain categories of offence.

Mozambique has no automatic pre-trial detention review mechanism. Burundi and Malawi have mechanisms in place to monitor pre-trial detention and mandatory periods for pre-trial detention for certain offences, but there are flaws in both systems. In Malawi, when the statutory period for pre-trial detention has lapsed, the State has an opportunity to ask for an extension and only in the case where an extension is not requested may the court release the accused on its own motion. In Burundi, it can be argued that in practice the review enabled by article 115(1) of the Criminal Procedure Code is not truly automatic as it requires the action of the prosecutor (or the accused, if the prosecutor fails to comply with his obligation) to bring the accused before a judge for detention review.¹²⁹

It is unfortunate that bail amount decisions, in all three jurisdictions, exceed the economic capabilities of accused persons. This results in accused persons being detained in pre-trial facilities for long periods of time because they are unable to afford bail. In Burundi, there is a tendency to fix bail amounts by taking into account the offence for which the defendant is accused. This is unfair, as it impacts on the accused person's right to be presumed innocent until proven guilty.

It is also unfortunate that the government of Burundi does not provide for a formal legal aid system. Indigent accused persons in Burundi have to secure their own legal representation or represent themselves if they are unable to secure the legal assistance from the few non-governmental organisations in the human rights field available in the country. The situation exposes indigent accused persons to an unjust system that does not prioritise the right of the accused to a speedy trial and may result in prolonged detention. This is contrary to the fair trial rights provisions in the AChHPR and ICCPR. Funded legal aid institutions provided free of

¹²⁸ In Burundi, an accused may not be held in pre-trial detention for longer than one year if the alleged crime is punishable by less than five years of imprisonment, and pre-trial detention cannot exceed three years where the sanction of the alleged crime exceeds five years of imprisonment.

¹²⁹ There is an obligation on the prosecutor to have the accused undergo periodic review within 15 days, whereafter the court may order conditional release or pre-trial detention. Should pre-trial be ordered by the court, the prosecutor has the duty to bring the accused before the court every subsequent 30 days to review his or her detention.

charge by governments for indigent persons are important as they offer the poor and most vulnerable persons an opportunity to obtain legal representation.

Mozambique and Malawi provide for funded legal aid institutions, a major difference between the two countries being that Malawi allows legal assistance to accused persons who can afford to retain private counsel subject to payment of a fee. Research conducted in Mozambique indicated that just more than half of detainees (54%) said they received legal assistance.¹³⁰ About 41% (76% of those receiving assistance) said this was with *Instituto do Patrocínio e Assistência*. It has been established that, despite the fact that formal legal aid services are available, access to legal aid in both jurisdictions may be restricted by financial and capacity constraints, potentially preventing clients, mostly poor, from receiving adequate services.

16. Conclusion

Legislation governing provisional release on bail and surety is important as it gives effect to the notion of presumption of innocence embedded in international human rights law. Inadequate legislation or the lack thereof prevents accused persons from realising this fundamental right and provides inadequate guidance to judicial officials who might use their unfettered discretion to make decisions incorrectly or with bias.

The pre-trial custody time limits set in the respective countries as a precursor to prolonged detention are commendable. More efforts, however, need to be made in Mozambique to ensure that there is a court review system to enforce custody time limits, and in Burundi to ensure a fixed time limit for first court appearances of accused persons. The 48-hour first court appearance rule established in Mozambique and Malawi is evidently not without qualification, with Mozambique qualifying this rule in cases of *flagrante delicto* and Malawi providing for an accused person to be either charged or brought before a court of law within 48 hours. The vagueness and uncertainty in legislation pertaining to the possibility of prosecutorial release in Burundi denies an accused person access to an expedited conditional release system. Moreover,

¹³⁰ Muntingh L & Redpath J *The Socio-Economic Impact of Pre-trial Detention in Maputo, Mozambique* (2016).

clear legislative provisions need to be established to guide courts when considering a process for conditional release of an accused.

More efforts need to be made to ensure that indigent accused persons in Burundi have adequate access to legal aid funded by the State. In all three countries, courts should ensure that bail amounts are affordable and do not exceed the economic capacities of accused persons. The tendency of courts in Burundi to base bail amounts on the monetary value implicated in the offence and the application of non-bailable offence provisions set in legislation, undermine the international human rights principle of the presumption of innocence of accused persons.

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