

**PIRATES' RIGHT TO BAIL OR BOND IN KENYA'S LEGAL FRAMEWORK: A
CRITICAL APPRAISAL**

By

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DECLARATION

I, **TIMOTHY LETINA TANCHU**, hereby declare that this is my original work and it has not been presented for the award of a degree or any other award in any other university. Where works by other people have been used, references have been provided.

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Dedication

I dedicate this thesis to my family (Patricia, Morgan and Gabriel) for their inspiration and to my Late mother Grace Yiamoi Tanchu.

Abbreviations and Acronyms

UNCLOS United Nations Convention on the Law of the Sea

IMO International Maritime Organization

List of Constitutions and Constitutional Instruments

Constitution of Kenya, 2010.

Constitution of Kenya, 1969 (repealed).

List of Transnational Legal Instruments

Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Revisions up to Tuesday May 15, 2012) at the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters in Addis Ababa, Ethiopia, from May 14-15, 2012.

International Maritime Organization (2005) *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, October 14, 2005, LEG/CONF.15/21.

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

UN General Assembly (1948) *Universal Declaration of Human Rights*, December 10, 1948, 217A (III).

UN General Assembly (1966) *International Covenant on Civil and Political Rights*, December 16, 1966, United Nations, Treaty Series, vol. 999.

UN General Assembly (1979) *International Convention against the Taking of Hostages*, November 17, 1979, No 21931.

UN General Assembly (1982) *Convention on the Law of the Sea*, December 10, 1982, no 31363

UN General Assembly (1988) *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, March 10, 1988, No 29004.

UN Security Council Resolution 1846 (2008), Preamble; and Resolution 1950 (2010), §13.

List of Kenyan Statutes

Merchant Shipping Act, No 4 of 2009 (Cap 389).

Penal Code, Cap 63.

Criminal Procedure Code, Cap 75.

The Police Act, Cap 84.

List of Cases

Attorney General v. Mohamud Mohammed Hashi & 8 Ors Civil Appeal No. 113 of 2011

Republic v. Danson Mgunya & Kassim Sheebwana Mohammed, Criminal Case No 26 of 2008, High Court of Kenya at Mombasa (Coram: Mohammed K. Ibrahim, J.).

Republic v Aid Mohammed Ahmed, Criminal Case No 51 of 2009, Supreme Court of Seychelles, (Coram: D. Gaswaga, J.).

Republic v. Said Abdallah Hajj, Criminal Case No 2127 of 2009.

Republic v. Liban Ahmed Ali, Crim. No. 1374.

Republic v. Jama Abdikadir Farah, Crim No 1695.

Republic v. Ahmed Abdikadir Hersi & 11 Others, Crim. No. 1582 (CMC) 11 May 2009).

Republic v. Mohamud Abdi Kheyre, Crim no 791.

Republic v. Shafili Hirsi Ahmed, Crim No 2463.

Republic v. Mohamud Mohamed Hashi Misc App. 434 of 2009.

Republic v. Danson Mgunya & Kassim Sheebwana Mohammed, Criminal Case No 26 of 2008.

Republic v. Hassan Jamal Haleys (alias Hassan Jamal) &5 Others, Crim. Misc. Appl. 105 of 2010.

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CHAPTER ONE

1. INTRODUCTION

1.1. Background of the Study

Piracy has been a maritime problem for as long as ships have sailed through oceans and maritime trade has existed between countries. It has a history in the international maritime system as it is evident that piracy has existed as long as the oceans were plied for commerce.¹ Piracy is still alive in the modern world. Today, pirates are portrayed as “rebellious, cool and clever”² teams who operate outside the restricting bureaucracy of modern life.

The definition of piracy in Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS), covers “any illegal acts of violence or detention, or any act of depredation” committed on the high seas for private ends against another vessel or persons or property on board. This certainly covers the attacks on merchant shipping off the coast of Somalia. Part VII of UNCLOS makes provisions on matters of the High Seas. It includes provisions relating to piracy. These are generally considered to reflect customary international law on piracy³.

¹ Virginia Lunsford (2008) “What Makes Piracy Work?” Vol 134/12/1270 *Proceedings Magazine*, William Miller, Maryland. See also James A. Wombwell (2010) *The Long War against Piracy: Historical Trends*, Combat Studies Institute Press, Kansas, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0CFIQFjAF&url=http%3A%2F%2Fusacac.army.mil%2Fcac2%2Fcgsc%2Fcarl%2Fdownload%2Fcsipubs%2FOP32_Piracy.pdf&ei=Yu2dU7rPB-mu0QXS7IHODw&usg=AFQjCNE8iLUWTl7wiWXKhRm_4jTGmnS1Xg&sig2=OqJdUvaesFveFGB0hdxow&bv=bv.68911936,d.d2k (accessed 15/6/2014).

² The common image of pirates is now associated by the popular Captain Jack Sparrow portrayed by films such as Disney’s *Pirates of the Caribbean*. Gore Verbinski *et al.* (2003) *Pirates of the Caribbean* [Film], Walt Disney Studios Motion Pictures, USA. The film is based on a team of pirates who through carefully thought out plans evade the British Empire and the East India Company. The pirates are portrayed as representing freedom from the ruling power.

³ UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDwQFjAD&url=http%3A%2F%2Fwww.un.org%2Fdepts%2Flos%2Fconvention_agreements%2Ftexts%2Funclos%2Funclos_e.pdf&ei=A--dU9uqMa6b0AX_j4DwAg&usg=AFQjCNEIbPwVYkXZEoDCYvidOjPyhLyfNw&sig2=1mXI9RI-S9ncZygG2-hLIQ&bvm=bv.68911936,d.d2k (accessed on 15/6/2014).

The Gulf of Aden and off the coast of East Africa has been faced with the rise of pirates attack over the last decade leading to renewed international interest in the suppression of maritime piracy.⁴ While international efforts to curb piracy in the region have met with some success, a permanent solution requires that local governments take primary responsibility for its suppression.

Superficially, the situation in East Africa shares a number of characteristics with a spate of pirate attacks perpetrated roughly a decade ago on vessels traversing the Strait of Malacca.⁵ In this Strait, pirates and armed robbers took advantage of a narrow channel, heavily used in ocean-faring commerce.⁶ Although small-scale robberies remain a persistent problem in the South China Sea, attacks on ships traversing the Malacca Strait have diminished dramatically following the establishment of a coordination agreement between governments in the region. There are surely lessons to be learnt from the largely successful attempts to control piracy in Southeast Asia. The nature of the situation in East Africa however cautions against simply duplicating the Southeast Asian approach.

Although piracy on the high seas has been a persistent feature of seafaring commerce for centuries, the number of reported acts of piracy began to dwindle in the nineteenth and twentieth

⁴ Tom Vandem Brook (2017) "Pirates attacks rising off East Africa, Pentagon and shipping records show," in *USA Today* on April 23, 2017 at <https://www.usatoday.com/story/news/politics/2017/04/23/pirate-attacks-rising-off-east-africa-shipping-records-show/100812972/> (accessed 15/4/2019).

⁵ The Strait of Malacca is a narrow stretch of water that connects the Pacific Ocean with the Indian Ocean. The Strait of Malacca is found roughly to the south east of India, specifically between the Indonesian island of Sumatra and the Malay Peninsula.

⁶ Patrick Winn (2014) "Strait of Malacca is World's new piracy hotspot," in *NBC News*, on March 14, 2014 at <http://www.nbcnews.com/news/world/strait-malacca-worlds-new-piracy-hotspot-n63576> (accessed 13/7/2014); BBC News Reporter (2014) "Pirates raid oil tanker in Malacca Straits," in *BBC News Asia*, on April 23, 2014, at <http://www.bbc.com/news/world-asia-27114548> (accessed 13/7/2014)..

centuries.⁷ However, in the last few decades of the twentieth century, the rate of piratical attacks has sharply increased worldwide⁸. In 1984, the International Maritime Organization (IMO) began providing statistics on reported acts of piracy and armed robbery at sea in response to increased international interest in the suppression of piratical acts.

Nearly eighty percent of attacks worldwide in 2008 were conducted within twelve nautical miles of the shore, and in the vast majority of these the target vessel was stationary.⁹ In East Africa, we find the opposite. In 2008, forty-seven attacks were committed against steaming ships compared to a mere ten attacks while the target was at anchor¹⁰. Moreover, while many of the incidents in international waters near Somalia have in fact occurred fairly close to land, attacks have also been carried out far from the coastline.¹¹ Hijacking is very rare outside of East Africa.¹² The IMO reports that in 2008 forty-four vessels were hijacked in East African waters as compared with just seven in other regions. In the first four months of 2009, there were twenty-five hijackings in East Africa and only three elsewhere in the world.¹³

⁷ The Malacca Strait Coordinated Patrol is an agreement signed by the states of Singapore, Malaysia and Indonesia. This is an anti-piracy agreement that sought to secure the Strait of Malacca through the joint effort of the three States. The states sought to secure the Strait of Malacca through management and coordination of sea and air patrol, and the establishment of a regional reporting network to enable the states to share information on the region. At <http://www.eaglespeak.us/2006/04/singapore-malaysia-indonesia-sign.html> (accessed 15/6/2014).

⁸ Samuel Pyeatt Menefee (2008), "An Overview of Piracy in the First Decade of the 21st Century," in Myron H. Nordquist *et al.* (eds.) *Legal Challenges in Maritime Security*, Martinus Nijhoff, Leiden 441- 443.

⁹ The IMO reported 306 attacks in 2008 in International Maritime Organization (2009) *Reports on Acts of Piracy and Armed Robbery against Ships Annual Reports-2008*, IMO Publishing, London.

¹⁰ The IMO reported 306 attacks in 2008 in International Maritime Organization (2009) *Reports on Acts of Piracy and Armed Robbery against Ships Annual Reports-2008*, IMO Publishing, London.

¹¹ Jeffrey Gettleman & Mohammed Ibrahim (2009) "Somali Pirates Get Ransom and Leave Arms Freighter," in *The New York Times*, on February 5, 2009 at http://www.nytimes.com/2009/02/06/world/africa/06pirates.html?_r=0 (accessed 19/6/2014).

¹² Hijacking is defined here as a pirate attack that result in the seizure of the target vessel.

¹³ International Maritime Organization (2010) *Reports on Acts of Piracy and Armed Robbery against Ships Annual Reports-2009*, IMO Publishing, London.

Moreover, when a hijacking occurs outside of East Africa, the goal rarely seems to be ransom. Instead, attackers frequently kill or maroon the crew and seize the ship in order to create a “phantom vessel” useful for other criminal activities.¹⁴ Hostage-taking is also disproportionately common in East African pirate attacks. In 2008, 703 crewmen were taken hostage in the region while only seventy-one hostages were taken elsewhere in the world.¹⁵ Consequently, pirate attacks to secure ransom payments have systematized in East Africa to a degree unseen in the rest of the world.

Piracy in East Africa is distinguished by the size and nature of the ships targeted for attack. For example, in late 2008, pirates based in Somalia seized the *Sirius Star*, a Saudi oil tanker carrying \$100 million worth of crude.¹⁶ In January 2009, a \$3 million dollar ransom was paid for the ship’s release. In February 2009, a \$3.2 million ransom was paid for the *MV Faina*, a freighter captured in September 2008 while hauling thirty-three Soviet T-72 tanks and a cargo of weapons and ammunition.¹⁷

While piracy in other areas of the world also has a significant financial impact and threatens the safety of mariners, the factors outlined in the preceding paragraphs render piracy in East Africa a particularly grave danger.

¹⁴ Jeffrey Gettleman & Mohammed Ibrahim (2009) “Somali Pirates Get Ransom and Leave Arms Freighter,” in *The New York Times*, on February 5, 2009 at http://www.nytimes.com/2009/02/06/world/africa/06pirates.html?_r=0 (accessed 19/6/2014).

¹⁵ International Maritime Organization (2009) *Reports on Acts of Piracy and Armed Robbery against Ships Annual Reports-2008*, IMO Publishing, London.

¹⁶ Mohammed Ibrahim & Graham Bowley (2009) “Pirates Say They Freed Saudi Tanker for \$3 Million,” in *N.Y. Times*, on January 9, 2009 at http://www.nytimes.com/2009/01/10/world/africa/10somalia.html?_r=0 (accessed 22/6/2014).

¹⁷ Gettleman & Ibrahim, *supra* note 14.

Piracy is a crime that has been identified in international law and over which any state *may* exercise its national jurisdiction.¹⁸ Piracy is *jus cogens* in nature.¹⁹ No state may legislate to legalize piracy within its territory. This notwithstanding, this fact is not deleterious to the rights of pirates under prosecution.

The International Criminal Court has not, at least thus far, been given jurisdiction over piracy. The UN Security Council has, however, regularly called upon states to make piracy, as defined in international law, a criminal offence under their domestic law.²⁰ Under the United Nations Convention on the Law Of the Sea (UNCLOS)²¹ and the Convention on the High Seas,²² a seizing state *may* transfer a suspect for prosecution to its courts, or by means of a transfer agreement to the courts of another state.²³ At its 1973 Conference, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction

¹⁸ Article 105 of UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDwQFjAD&url=http%3A%2F%2Fwww.un.org%2Fdepts%2Flos%2Fconvention_agreements%2Ftexts%2Funclos%2Funclos_e.pdf&ei=A--dU9uqMa6b0AX_j4DwAg&usg=AFQjCNEIbPwVYkXZEoDCYvidOjPyhLyfNw&sig2=1mX19RI-S9ncZygG2-hLIQ&bvm=bv.68911936.d.d2k (accessed on 15/6/2014).

¹⁹ Alexandr Rahmonov (2011) "Piracy Off the Coast of Somalia: In Search of the Solution," Cornell Law School Inter-University Graduate Student Conference, at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1083&context=lps_clacp (accessed 7/10/2015) pg 8.

²⁰ UN Security Council (2008) *Security Council Resolution 1851 (2008) [on fight against piracy and armed robbery at sea off the coast of Somalia]*, December 16, 2008, S/RES/1851, at <https://www.treasury.gov/resource-center/sanctions/Documents/1851.pdf> (accessed 07/05/2016). The wording of Article 105 of UNCLOS permitted states to transfer alleged pirates to other states for prosecution. States avoided prosecuting pirates since jurisdiction of states is primarily premised on nationality or territoriality. The broader interpretations by which states now invoke jurisdiction were not relied upon. Hence states were unwilling to prosecute alleged pirates who did not commit the offence within their territory or against their national. Thus, in as much as piracy is a *jus cogens*, state did not have an obligation to prosecute alleged offenders they arrested.

²¹ Article 100 of UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDwQFjAD&url=http%3A%2F%2Fwww.un.org%2Fdepts%2Flos%2Fconvention_agreements%2Ftexts%2Funclos%2Funclos_e.pdf&ei=A--dU9uqMa6b0AX_j4DwAg&usg=AFQjCNEIbPwVYkXZEoDCYvidOjPyhLyfNw&sig2=1mX19RI-S9ncZygG2-hLIQ&bvm=bv.68911936.d.d2k (accessed on 15/6/2014).

²² Article 14 UN General Assembly (1982) *Convention on the Law of the Sea*, December 10, 1982, at http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf (accessed 15/6/2014).

²³ Supra Note 19.

rejected Malta's proposal to amend Article 100 of the UNCLOS Convention to read 'States have the obligation to prevent and punish piracy and to fully cooperate in its repression.'²⁴

The African Union is also playing a role in the fight against piracy. Currently, there is a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights that has now been adopted by the African Union but yet to come into force. The Protocol, under Article 28A brings the crime of piracy under the jurisdiction of the African Court of Justice and Human Rights. Further to this, the Protocol describes what acts constitute piracy, under Article 28F. Once the Protocol is in force, there would be a more coordinated multiparty approach towards fighting of piracy, on a national, regional and international level.²⁵

In Kenya, the legal framework governing the prosecution of pirates is mainly a derivative of International Law. The Kenyan Courts have jurisdiction over pirates who are not Kenyan nationals due to provisions of United Nations Convention on Law of the Sea (UNCLOS), specifically Article 105. The Kenyan courts are mandated under the Constitution and the Merchant Shipping Act to try alleged pirates captured by Kenya or brought to Kenya by other States. This is from the UNCLOS provisions and Resolution 1851 of the United Nations Security Council that led to bilateral and multilateral agreements entered into by Kenya. An example of such an agreement would be the bilateral agreement between Kenya and the United States of America (USA) which allow Kenyan courts to prosecute pirates captured in International

²⁴ UN Security Council Resolution 1846 (2008), Preamble; and Resolution 1950 (2010), pg 13.

²⁵ Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Revisions up to Tuesday May 15, 2012) at the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters in Addis Ababa, Ethiopia, from May 14-15, 2012, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fafriclaw.files.wordpress.com%2F2012%2F05%2Fau-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf&ei=xGPCU_SzClqc0QWDkYCQBQ&usg=AFQjCNFq6kJ-pe7upa9_ZiQCJBwYuRCUUQ&sig2=koln6vFxicS_50IMTa1UwQ&bvm=bv.70810081,d.d2k (accessed 13/7/2014).

waters.²⁶ The Court of Appeal in Kenya also determined that the courts in Kenya do have jurisdiction to try alleged pirates.²⁷

Initially, alleged pirates were charged for committing acts contrary to Section 69 of the Penal Code, Cap 63. Section 69 of the Cap 63 generally provided for the crime of piracy and the penalty of imprisonment for life to any person found so guilty. However, this section does not set out the particulars of the crime.

In order to concretize the jurisdiction of the court to try alleged pirates, parliament criminalized the conduct of piracy as outlined in UNCLOS by enacting the Merchant Shipping Act, No 4 of 2009 (Cap 389). The Merchant shipping Act creates the offence of piracy with specific interpretations as to what acts would amount to piracy under section 369. Cap 389 though, does not give provisions as to bail or bond to persons suspected of committing piracy.

It is important to note that the Merchant Shipping Act Cap 389 was enacted in 2009 before the promulgation of Kenya's Constitution of 2010. The promulgation of the Constitution of Kenya 2010 made for the provision of the right to bail and bond for every arrested person.²⁸ The right to bail or bond for an arrested person may be limited where there are compelling reasons as to why the bail or bond may be denied.

²⁶ David Morgan (2009) "Kenya agrees to prosecute U.S.-held pirates: Pentagon," in *Reuters*, on January 29, 2009, at <http://www.reuters.com/article/2009/01/29/us-usa-kenya-piracy-sb-idUSTRE50S4ZZ20090129> (accessed 13/7/2014).

²⁷ *Attorney General v. Mohamud Mohammed Hashi & 8 Ors* Civil Appeal No. 113 of 2011. Cf. BBC News Reporter (2012) "Kenya rules courts can try Somali pirates," in *BBC News Africa*, on October 18, 2012, at <http://www.bbc.com/news/world-africa-19992273> (accessed 13/7/2014).

²⁸ Article 49(1)(h) Constitution of Kenya 2010.

Whereas this study acknowledges that the right to bail is not absolute, it however finds it disturbing that while the courts have been willing to grant bail to persons charged with serious crimes such as capital offences,²⁹ they are most reluctant to provide bail to persons accused of piracy.³⁰ This is despite the presumption that an accused person remains innocent until proven guilty.

The Constitution is the Supreme Law of the Republic of Kenya; it binds all state organs at both levels of government i.e. the National and 47 County governments. This implies that the courts are equally bound by the provisions of the Constitution. The Constitution further creates an obligation on the State and State organs, under Article 21, to observe, protect, respect, promote and fulfill the rights and freedoms in the Bill of Rights.

The State is to fulfill its obligation towards the realization of the rights enshrined in the Constitution by enacting mechanisms or regulations. These regulations and laws are to respond to the challenges hindering the realization of these human rights. On the right to bail, there are no rules or procedures, which have been enacted that provide on how a bail application for capital offences is to be dealt with. Section 123 of the Criminal Procedure Code Cape 75 provides that bail and bond is not available for suspects of capital offences. This is in contravention of Article 49(1)(h) of the Constitution which provides for bail for all accused persons regardless of the offence they are suspected of. There is need to amend this section in line with the provisions of

²⁹ *Republic v. Danson Mgunya & Kassim Sheebwana Mohammed*, Criminal Case No 26 of 2008, High Court of Kenya at Mombasa at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CC4QFjAC&url=http%3A%2F%2Fkenyalaw.org%2FDownloads_FreeCases%2F78247.pdf&ei=tVijU_reIcqq0QW15YDQAw&usg=AFQjCNE9fh2q4i7XrAdfQUM0byYmQOI0Tw&sig2=vc7i_GpwJo4QFDtk1u0FEQ&bvm=bv.69411363,d.d2k (accessed 20/6/2014).

³⁰ Nation Media Reporter (2010) "Pirates deny charges, but they won't be freed on bail," in *Africa Review*, on October 1, 2010 at <http://www.africareview.com/News/No-bail-for-four-Somali-pirates/-/979180/1021996/-/2ou3vt/-/index.html> (accessed 19/6/2014).

the Constitution which is the supreme law of any State. The judiciary is in the process of streamlining the granting of bail in light of the recent adoption of the Bail and Bond Policy Guidelines. However, their impact on alleged pirates is yet to be determined.

Kenya's Parliament passed a new law that is consistent with this extremely broad jurisdiction over piracy, the Merchant Shipping Act (Cap 389). As of August 31, 2009, there were ten ongoing piracy prosecutions in Kenya involving at least seventy-six suspects, all before the Chief Magistrate's Court in Mombasa. Each of the accused persons was charged with committing the crime of piracy contrary to section 69(1) as read with section 69(3) of the Penal Code. The suspects were all denied bail and, with the exception of those in one case.

The exceptional case is the recently decided *Republic v. Aid Mohammed Ahmed*,³¹ which became the second completed piracy trial in Kenya's history. Aid Mohamed Ahmed had been charged with seven others with attacking and detaining the Yemeni-flagged *Waadi Omar 2* on the night of November 8–9, 2008, and for attempting to hijack the Danish MV *Powerful* on November 11, 2008. On March 10, 2010, the Chief Magistrate's Court in Mombasa sentenced each of the eight defendants to twenty years' imprisonment.³²

The remaining cases are *Republic v. Said Abdallah Haji*,³³ charged with eight others with attacking the Saint Vincent and the Grenadines–flagged MV *Maria K* on May 22, 2009;³⁴ *Republic v. Mohamed Hassan Ali* and *Republic v. Aid Mohamed Mohamud*, together charged

³¹ *Republic v Aid Mohammed Ahmed*, Criminal Case No 51 of 2009, Supreme Court of Seychelles, (Coram: D. Gaswaga, J.).

³² *ibid.*

³³ *Republic v. Said Abdallah Haji*, Criminal Case No 2127 of 2009.

³⁴ *Republic v. Said Abdallah Haji*, Crim. No. 2127 (Chief Magis. Ct. filed June 26, 2009). The accused were apprehended by the Italian naval warship *Maestrone*, and turned over to Kenyan officials on June 25, 2009.

with five others with committing piracy against the Maltese vessel *Anny Petrakis* on May 7, 2009;³⁵ *Republic v. Liban Ahmed Ali*, charged with ten others with attacking the Liberian flagged *Safmarine Asia* with rocket-propelled grenades and gunfire on April 15, 2009;³⁶ *Republic v. Jama Abdikadir Farah*, charged with six others with the attempted hijacking of the Panamanian *Nepheli* on May 6, 2009;³⁷ *Republic v. Ahmed Abdikadir Hersi*, charged with ten others with attempting to attack the French naval vessel *FNS Nivoise* on May 3, 2009;³⁸ *Republic v. Mohamud Abdi Kheyre*, charged with six others with attacking the Marshall Islands MV *Polaris* on February 11, 2009;³⁹ *Republic v. Shafili Hirsi Ahmed*, charged with six others with attempting to hijack the Greek-flagged MV *Antonis* on May 26, 2009;⁴⁰ and *Republic v. Mohamud Mohamed Hashi*, charged with eight others with attacking the German MV *Courier* on March 3, 2009.

The focus of this study is to determine whether the reasoning for limiting the right to bail for suspected pirates is in the interest of justice or an unjustified infringement of their rights by the state.

1.2. Objective of the Study

The objective of the study is;

- i. To establish the scope of the right to bail especially to pirates under Kenya's legal system and to examine the validity of the reasons given for the denial of this right to suspects.

³⁵ *Republic v. Mohamed Hassan Ali*, Crim. No. 1694 (Chief Magis. Ct. filed May 18, 2009), and *Republic v. Aidid Mohamed Mohamud*, Crim. No. 1784 (Chief Magis. Ct. filed May 27, 2009) (consolidated by the court's order of Sept. 2, 2009)

³⁶ *Republic v. Liban Ahmed Ali*, Crim. No. 1374 (Chief Magis. Ct. filed Apr. 23, 2009).

³⁷ *Republic v. Jama Abdikadir Farah*, Crim. No. 1695 (Chief Magis. Ct. filed May 18, 2009).

³⁸ *Republic v. Ahmed Abdikadir Hersi*, Crim. No. 1582 (Chief Magis. Ct. filed May 11, 2009).

³⁹ *Republic v. Mohamud Abdi Kheyre*, Crim. No. 791 (Chief Magis. Ct. filed Mar. 6, 2009).

⁴⁰ *Republic v. Shafili Hirsi Ahmed*, Crim. No. 2463 (Chief Magis. Ct., originally filed as Crim. No. 825, May 9, 2009, in Malindi, Kenya).

- ii. To study the effects of denial of bail or bond on the alleged pirates and the impact of the same on the pirates' human rights.
- iii. To study the process of granting bond or bail to alleged pirates in Kenya.

1.3. Statement of the Problem

The right to bail is a human right that is guaranteed by the Constitution of Kenya 2010. The Constitution provides that persons charged with murder and all other offences can now be freed on bond pending trial.⁴¹ Indeed, accused persons have benefited from Article 49(1) (h) which provides that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released. This right is not an absolute right and the state may limit the right to bail by law so long as the limitation is reasonable and justifiable in an open and democratic society.⁴²

From judicial practice, the right to bail and bond has been limited for persons alleged of committing piracy without taking into account all relevant factors. This is so even when persons alleged to have committed capital offences or terrorism enjoy the right. An example would be the case where magistrate Lilian Mutende denied four Somalis charged with piracy the right to bail⁴³ while in *Republic v. Dwight Sagaray & 4 Others*, Criminal case 61 of 2012 the offenders being charged for murder were granted bail. The courts consider various circumstances before granting of bail. The concern that has arisen is the fact that persons alleged of committing capital offences or terrorism are exposed to similar circumstances as pirates. These include the flight risk. Yet there have been instances where alleged capital offenders are granted bail while alleged pirates are not. In most instances piracy cases take a long time even years before they are

⁴¹ Constitution of Kenya Article 49(1)(h).

⁴² Constitution of Kenya, Article 24 (1).

⁴³Maureen Mundi (2012) "Court quashes plea by four suspected pirates," in *The Star*, on February 22, 2012, at <http://www.m.the-star.co.ke/news/article-29177/court-quashes-plea-four-suspected-pirates> (accessed 13/7/2014).

determined because of various factors including missing files or evidence, request for adjournment by the prosecution, and unavailability or failure of witnesses to come to court. Denial of bail in such cases therefore is detrimental to suspects who are detained.

This study aims at analyzing the rights of persons suspected of piracy under Kenya's legal system and examines the reasons why they are denied bail and whether the reasons given for their denial are compelling reasons as envisaged under the Constitution. It will also focus on the impact of this denial of bond on Kenya's judicial system and the impact of the same on the pirates.⁴⁴

Therefore this research intends to make a case to the effect that despite the nature of the offense of piracy and the fact that most suspected pirates are foreigners, they are also entitled to bond, just like any other accused person, as per the provisions of the Constitution. The study will also make recommendations as to how courts should proceed when granting pirates bond just like other accused persons who are charged before our courts, and make provision for reasonable terms..

1.4 Research Questions

The research questions of the study are;

- i. What is the scope of the right to bail?
- ii. Are Kenyan courts justified to deny bail to persons suspected of piracy?

⁴⁴ James Thuo Gathii (2010) "Kenya's Piracy prosecution," in *American Journal of International Law*, No 104, pp 416-436, 2010; Albany Law School Research Paper No 10-27, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698768 (accessed 22/6/2014).

- iii. What is the impact of this denial on Kenya's judicial system and on the persons suspected of piracy?

1.5 Hypothesis of the Study

- i. The pirates are denied bail because of the nature of offence and the fact that in most cases they are foreigners.
- ii. The denial of bail for suspected pirates burdens the judicial system
- iii. The denial of bail for suspected pirates negatively affects the rights of the accused person.

1.6. Literature Review

Under this topic the study shall review the existing literature that touch on the matter of prosecution of pirates. This research paper will focus on previous works done in relation to addressing this topic.

The 1963 independence Constitution and the 1969 Constitution of Kenya did not make express provisions for bail or bond. Bail and bond was rather implied under Section 72(5) of the then 1963 and 1969 Constitution. The Constitution of Kenya of 1969 allowed the admission of an accused person to unconditional bail so long as his attendance to court for the hearing was assured.⁴⁵ The High Court had the discretion to grant bail after considering the circumstances in each case brought before it.⁴⁶ It had the power to decide who was to be granted bail and who was to be denied bail. This however changed after the promulgation of the Constitution of Kenya 2010.

⁴⁵ Patrick Kiage (2008) *Essentials of Criminal Procedure in Kenya*, LawAfrica Publishers, Nairobi, Kenya..

⁴⁶ Statute law (miscellaneous Amendment) Act No 13 of 1978.

The Constitution of Kenya, 2010 guarantees the right to bail for accused persons in Article 49 (1) (h), where it states, “An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” It is evident that the Constitution provides for the framework in which accused persons may enjoy their right to bail. The Constitution though does not mention the specific manner in which bail applications may be dealt with.

Prosecuting suspected pirates detained in international waters has however proved difficult. According to Douglas Burnett, an expert in maritime law, pirates are treated with a “catch and release” philosophy that does very little to deter the recurrence of piracy.⁴⁷ The failure to address piracy in a holistic manner has resulted in a considerable increase in piracy in the Gulf of Aden and Indian Ocean. Somali pirates have taken hundreds of hostages, terrorized commercial and recreational shipping, and imposed a considerable economic burden on seafaring—the majority of pirates who capture hostages were paid off, and even when caught, they were not detained or prosecuted. Few pirates have been confronted and killed.⁴⁸ A permanent solution to piracy through institutional and infrastructural reform is due. These reforms may include legislation that focuses on detaining and prosecuting of the suspected pirates; though their fundamental human rights are to be respected during the process of prosecution. Burnett details on how pirates should be handled with respect to fighting piracy. He insists on respect of fundamental human rights inherent to every human being, whether the person is a pirate or not, but he does not examine the effect of denial of bail on the fundamental rights of alleged pirates when they are denied bail.

⁴⁷ Corey Flintoff (2010) “U.S. Navy Captures Pirates,” in *NPR News*, on April 1, 2010, at <http://www.npr.org/templates/story/story.php?storyId=125468411> (accessed 22/6/2014).

⁴⁸ Sarah Childress (2010) “U.S. Holds Suspects after Pirate Standoff,” in *The Wall Street Journal*, on Apr. 2, 2010, at <http://online.wsj.com/news/articles/SB10001424052702304539404575157663093991350> (accessed 22/6/2014).

The impact of denial of bail to the alleged pirate as a person and to his human rights human rights is among one of the objectives of this Study.

Mary Ann Glendon's book *Rights Talk*⁴⁹ spelled out the damage caused by excessively expanding the otherwise cardinal and valuable precept of rights. The key argument advanced here is not that pirates are without rights but that the interpretations of these rights have been expanded to the point that it undermines the rights of all other persons and corrodes the rights themselves. Additionally, the rights enjoyed by pirates must be balanced against concerns for the common good.⁵⁰ Mary Ann Glendon argues that the limitation on the right to bail for alleged pirates is justified where the right to bail may undermine the rights enjoyed by other persons in the society.

Caroline Davidson contends that the foremost objective of international criminal tribunals should be to promote respect for human rights and the rule of law.⁵¹ International criminal trials, mostly handled by international criminal tribunals ought to uphold international human rights laws in order to achieve the generally accepted objective of promoting respect for human rights.

This research intends to make recommendations as to how the judicial system may ensure alleged pirates do enjoy their right to bail without undermining the rights of members of the public.

⁴⁹ Mary Ann Glendon (1993) *Rights Talk: The Impoverishment of Political Discourse*, Free Press, Detroit.

⁵⁰ Nancy Hill-Holtzman (1991) "Santa Monica OKs Restroom Law," in *L.A. Times*, on Nov. 14, 1991, at http://articles.latimes.com/1991-11-14/local/me-2074_1_santa-monica-city-council (accessed 22/6/2014); Robert Reinhold (1991) "Santa Monica Journal; In Land of Liberals, Restroom Rights Are Rolled Back," in *N.Y. Times*, on Nov. 15, 1991, at <http://www.nytimes.com/1991/11/15/us/santa-monica-journal-in-land-of-liberals-restroom-rights-are-rolled-back.html> (accessed 22/6/2014).

⁵¹ Caroline Davidson (2010) "No shortcuts on human rights: bail and the international criminal trial," <file:///C:/Users/user/Downloads/SSRN-id1639664.pdf> (accessed 3/10/2014).

Prof James Thuo Gathii,⁵² details the history of prosecution of pirates in Kenya. He analyses the legal challenges that arise due to prosecuting pirates. Prof Gathii raises matters such as the legal guarantees inherent to pirates before, during and after trial. Rights such as the presumption of innocence, the right to a fair trial and an impartial tribunal and the right to have adequate time and facilities to prepare a defense are outlined by Prof Gathii. He indicates that these rights are played out on diplomatic realms but fail to materialize in reality. He further challenges the legality of the pre-trial detentions that suspected pirates are subjected to and questions their legality. In finality, Prof Gathii addresses the allegations of suspected pirates being subjected to torture, mistreatment and denial of bail; all of which are against their rights as arrested persons under Kenya's trial process. Prof Gathii looks at how the rights of persons suspected of committing piracy are infringed upon during the trial process due to exposure to torture and curtailing of their freedom. He however fails to indicate how courts may mitigate the circumstances facing pirates leading to their denial of bail. Prof Gathii notes that piracy cases in Kenya are receiving a lot of attention from the UNODC program as it tries to ensure their expeditious prosecution. This has led to the European Union, United States and other countries using their armed forces to interdict pirates from the high seas to Kenya for prosecution.

Joshua Nyariki Muchera in *Rights of an arrested Person to Bail/Bond: The Kenyan Legal Perspective*, details the rights of individuals to bail/bond and why bail is important.⁵³ He further discusses the legal reasoning for granting bail to alleged offenders citing various acts of

⁵² James Thuo Gathii (2010) "The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya," in Vol 59 No 5 *American University Law Review*, Washington College of Law, Washington, pp1322-1360.

⁵³ Joshua Muchera Nyariki (2011) *Rights of an Arrested Person to Bail/Bond: The Kenyan Legal Perspective*, at <http://dx.doi.org/10.2139/ssrn.2359922> (accessed 13/7/2014)..

parliament that address the right to bail for alleged offenders. Joshua outlines factors to be considered when determining whether or not to grant bail to an alleged offender stating that bail should be granted in the interest of justice.

I align my research with the findings of Joshua Nyariki though my objective would be to see how the right to bail can be specifically tailored for alleged pirates.

1.7. Justification of the study

Piracy trials have been conducted in very challenging circumstances that have proved detrimental of the pirates. The suspected pirates, who come into a country with no legal aid system, discover upon their arrest and arraignment in court that there is no system to facilitate their defence, that is, no legal representation, witness logistics and lawful evidence presentation.⁵⁴ There is also the obvious delay between being arrested and being charged in court; from the moment of capture. With the current constitutional dispensation,⁵⁵ it takes approximately twenty four hours or by the end of the next court day to be arraigned in court. There is a high probability that pirates do not receive any legal advice during this period and are not allowed any communication with their families.⁵⁶ In light of this process, the courts have been guilty of disregarding fundamental rights by expediting the trials once they are underway. Presumption of the pirates' guilt has been the norm, and this has meant that proving their innocence has been especially difficult for the accused, who are detained under such constrained circumstances. The approach courts take towards suspected pirates is discriminatory in that persons charged with capital offences, say for example, are granted bail, allowed communication

⁵⁴ There is no guaranteed access to free legal aid. Only capital offence suspects are entitled to such. *Republic v. Hassan Jamal Haleys (alias Hassan Jamal) & 5 Others*, Crim. Misc. Appl. 105 of 2010.

⁵⁵ Constitution of Kenya, Article 49 (f).

⁵⁶ The cases were *Republic v. Ahmed Abdikadir Hersi & 11 Others*, Crim. No. 1582 (CMC) (fi led 11 May 2009).

with their families and even receive legal advice during the trial process. All of these rights turn to privileges whenever the courts are dealing with suspected pirates.

This research is of significance and it seeks to show the importance of the Kenyan Legal System recognizing the rights of not only suspected pirates, but the society's and or the public's needs and interests of provision of better security. The right to bail and bond serves the purpose of minimizing infringement on the rights of all accused persons, to protect the accused person's rights to liberty regardless of the offence they are being accused off.

This study is also justified by the fact that there is no clarity with regards to the granting or denying of bail of persons suspected of piracy. This research argues that the reasons upon which pirates are denied bail are neither sufficient nor are they compelling enough to warrant such denial. This makes the study on denying pirates their right to bail or bond more pertinent as a way to mitigate the infringement of their rights as "vulnerable people."

It will further examine the limitation for the denial of bail. The research will further examine the impact of such denial on the pirates and the burden on the judicial system. By so doing, this research should enable the judiciary restructure the process of granting bail/bond especially to pirates.

1.8. Theoretical Framework

The theoretical framework of this study will be premised on Natural Law theory. Natural Law theorists, such as Thomas Hobbes detail that there is in existence universal good or the good of

self-preservation.⁵⁷ What human beings generally desire, due to similarities in physiological constitution, may be of central importance to them. “Thus we should strive to build correct percepts of rationality around them.”⁵⁸ This research shall regard personal freedom of movement as a universal good desired by human beings irrespective of their background. The freedom of movement should be limited only where all relevant factors have been considered, and it’s reasonable to limit the freedom to movement. Focus shall specifically be on the works of John Finnis.⁵⁹ John Finnis states that there are in existence certain basic goods such as health, life, freedom, aesthetic experience and religion.⁶⁰ Finnis further prescribes that one should never act against a basic good; regardless of the benefit one will come from taking that path.

This study perceives the right to bail as an equivalent to the freedom of a person. Freedom of an individual is a basic good. This study, however, departs from the theory advanced by John Finnis in that it considers that freedom should only be limited as a means of last resort and only where there are compelling reasons as to why the limitation is necessary.

1.9. Methodology

This research shall focus on the qualitative method of research. However, it will not incorporate quantitative methods, for instance, interviewing key players such as judges, magistrates, lawyers and even persons suspected of piracy. It will mainly entail document review, of which it will be highly relied on in this research on reviewing mainly secondary information.

⁵⁷ Brian Bix (2012) *Jurisprudence: Theory and Context*, Carolina Academic Press, North Carolina.

⁵⁸ Stanford Encyclopedia of Philosophy website, at <http://plato.stanford.edu/entries/natural-law-ethics/> (accessed 13/7/2014).

⁵⁹ Brian Bix (2012) *Jurisprudence: Theory and Context*, Carolina Academic Press, North Carolina.

⁶⁰ *ibid.*

The secondary data will be collected from electronic journals, book, periodic reviews and articles. Data collected in this procedure will include opinions, specific knowledge and background information relating to pirates rights to bail under the Constitution of Kenya, 2010. The data collection tools for the secondary data that will be used will be in-depth information gathering, and document analysis.

1.10. Limitations

This Study anticipates the following challenges:

- a. There is limited literature on the impact that the denial of bail has had on pirates incarcerated in Kenya. This limits the extent to which analysis of the impact of denial of bail has had on pirates, especially considering that a majority of them are foreigners.
- b. It is difficult to determine a cause and effect relationship between the denial of bail or bond to pirates and the nature of the offence. This is because there are other factors that determine the granting of bail. Thus, this study can only establish a correlation between the denial of bail to alleged pirates and the nature of the offence.

1.11. Chapter Breakdown

The study is presented in the following four chapters:

Chapter 1 is an introduction to the research topic, objective of the study, statement of the problem, objectives of the study, research questions, hypothesis of the study, literature review, justification of the study and methodology.

Chapter 2 analyses the rights to Bail under International Law. It will discuss the various international and regional treaties and conventions that provide for the right to bail.

Chapter 3 discusses the right to bail under Kenya's legal regime and its impact on pirates and the Judicial System.

Chapter 4 discusses and gives recommendations based on the Summary of Findings and Conclusions.

CHAPTER TWO

2. RIGHT TO BAIL UNDER INTERNATIONAL LAW

2.1. Introduction

International Law is law that generally governs relations between states among themselves or with other entities that have an international legal personality.⁶¹ Some view international criminal law as a subset/branch of public international law.⁶² In particular, international criminal law places responsibility on individual persons and not states or organisations and proscribes and punishes acts that are defined as crimes by international law.⁶³ Municipal law on the other hand is a reflection of state sovereignty and governs the relationship between individuals among themselves and individuals and state organs.⁶⁴

This chapter discusses the right to bail under international criminal law. It gives a general overview of the international conventions and their relevant sections on the right to liberty and freedom. It also analyses scholarly literature on the right to bail at international law. The illustrations given on international criminal tribunals and courts that have handled cases and set precedence on bail do not entail piracy or terrorism cases. This is because the crimes handled at the international level by International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court (ICC) and other tribunals comprise genocide, crimes against

⁶¹ See “Introduction to International Law” by Robert Beckman and Dagmar Butte at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CE4QFjAG&url=http%3A%2F%2Fwww.ilsa.org%2Fjessup%2Fintlawintro.pdf&ei=ZGOBVNmYDqqV7AbXyoGwDg&usg=AFQjCNHIO3Cwr5zsyeyPvAY48cE_U78HQA&bvm=bv.80642063,d.ZGU (accessed 1/12/2014).

⁶² See *Cassese's International Criminal Law*, 3rd ed (2008) Oxford University Press, at p 2. See also “International Criminal Law Practice and Training Materials,” (International Criminal Law Services) at http://wcjp.unicri.it/deliverables/docs/Module_2_What_is_international_criminal_law.pdf (accessed 20/3/2015)

⁶³ *ibid.*

⁶⁴ See Free Dictionary website (2015) at <http://legal-dictionary.thefreedictionary.com/municipal> (accessed 1/12/2014).

humanity, war crimes and the crime of aggression. Lessons on bail practice shall however be contextualized in light of right to bail for piracy suspects.

The main focus on this chapter shall be the analyses of the international conventions whose provisions, albeit not precise on the right to bail to piracy suspects, shall be useful in providing the general international legal framework. Brief conclusions and recommendations shall then be made accordingly.

2.2. Purposes of International Criminal Law

The general purpose of international criminal law is to prohibit certain categories of offences generally viewed as serious atrocities and to make perpetrators of such conduct criminally accountable for their perpetration.⁶⁵ These crimes generally include genocide, war crimes and crimes against humanity. However, the main purposes of the international criminal law are first, to provide avenue for giving voice to the international crimes.⁶⁶ Second, international criminal law is meant to spread human rights values.⁶⁷ The third purpose of international criminal law is to develop international criminal law.⁶⁸ Fourth, international criminal law is meant to promote peace and security.⁶⁹ Respect for human rights and the rule of law is however the most crucial purpose of international criminal law.

⁶⁵ Cassese, Antonia & Paola Gaeta (2008) *Cassese's International Criminal Law, op. cit.*

⁶⁶ See generally Kenneth Anderson "The Rise of International Criminal Law: Intended and Unintended Consequences," *The European Journal of International Law* Vol. 20 no. 2, at <http://www.ejil.org/pdfs/20/2/1802.pdf> (accessed 5/12/2014)/

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ *ibid.*

Many aspects of the international criminal law are neither uniform nor universal.⁷⁰ For instance, some aspects of the law of the International Criminal Tribunal for the former Yugoslavia are unique to that jurisdiction. These aspects do not also reflect customary international law and they also differ from the law of the International Criminal Court.

The right to bail under international criminal law is provided by various conventions and treaties including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Rome Statute of the International Criminal Court (ICC) and the African Charter on Human People's Rights (ACHPR). It is important to note that the UDHR does not expressly provide for the right to bail, it does however make provision for the right to life, liberty, and security of person.⁷¹ The right to bail falls under the right to liberty. Article 9 (3) of the ICCPR can be argued to provide for the right to bail as it stipulates that anyone arrested or detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within reasonable time or release. Prolonged detention without bail under this article is therefore a violation.

2.3. Right to bail and the presumption of innocence

The Right to bail in criminal law exists to safeguard a fundamental idea of the criminal justice system that accused persons or suspects are presumed innocent until proven guilty. A person should be treated just like any other person until he/she has been convicted.⁷² The presumption of

⁷⁰ Cassese, Antonia & Paola Gaeta (2008) *Cassese's International Criminal Law*, Oxford University Press, Oxford, 3rd ed.

⁷¹ Article 3 of the Universal Declaration of Human Rights 1948.

⁷² Lahiri, Rabi (2010) "Why Bail Matters," at <https://aclu-wa.org/blog/why-bail-matters> (accessed 6/2/2015).

innocence has two aspects:⁷³ First, concerning the outcome of the proceedings, judges are not allowed to do or say anything that would imply that the accused/suspect has already been convicted before the judgment has been delivered. Second, the presumption of innocence is meant to protect the reputation of the accused or suspect.

It is generally agreed among legal scholars, analysts and human rights activists that detention before conviction is a serious infringement on the rights of the accused/defendants.⁷⁴ The effects of detention before conviction include the violation of the right to be presumed innocent, the right to liberty and the right to a fair trial.⁷⁵ As Canadian Supreme Court Justice Iacobucci, J., notes, “when bail is denied to an individual who is merely accused of a criminal offence, the presumption of innocence is necessarily infringed.”⁷⁶

Yet at the same time, bail can be denied for a host of reasons. These reasons, however, differ in different jurisdictions. For instance, bail in some jurisdictions is denied when there is a risk that if granted bail, the accused will fail to appear, commit another crime, endanger other people’s safety/lives or obstruct the course of justice by interfering with witnesses.⁷⁷ The onus is always on the prosecution to establish that there is such an unacceptable risk if the defendant is granted bail as was held in *R v. Paterson*.⁷⁸

⁷³ Alexander Zahar & Goran Sluiter (2008) *International Criminal Law: A Critical Introduction*, Oxford University Press, at 303.

⁷⁴ Caroline Davidson (2010) “No shortcuts on human rights: bail and the international criminal trial,” *American University Law Review*, Vol. 60, No. 1, p 5 at <file:///C:/Users/user/Downloads/SSRN-id1639664.pdf> (accessed 3/10/2014).

⁷⁵ *ibid.*

⁷⁶ *R. v. Hall*, [2002] 3 S.C.R. 309, 2002 SCC 64, ¶ 48 (Can).

⁷⁷ Lucy Trevelyn (2014) “How do the courts decide whether or not to grant bail?” at <http://www.inbrief.co.uk/court-proceedings/bail.htm> (accessed 5/12/2014).

⁷⁸ *R v Paterson* (2006) VSC 268.

According to Stuart S. Nagel:⁷⁹

“The basic purpose of bail, from the society’s point of view, has always been and still is to ensure the accused’s reappearance for trial. But pretrial release serves other purpose as well, purposes recognized over the last decade as often dispositive of the fairness of the entire criminal proceedings. Pretrial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares the family the hardship and indignity of welfare and enforced separation. It permits the accused to take an active part in planning his defense with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble.”

Stuart attempts to give the benefits that pretrial release serves the defendant, as opposed to the conventional notion that pretrial release is only meant to guarantee the accused’ reappearance in court. In as much as the refusal to grant bail is seen to be a “benefit” of the court (whose interest is to see the accused back to court when needed), the grant of bail serves more benefits to the accused and his relatives. These two positions should be considered carefully and weighed against each other.

2.4. General Perspectives on the Right to Bail under International Law

To begin with, it has been observed that accused persons in international law are detained for very long periods of time.⁸⁰ Their trials also take long periods of time as compared to persons

⁷⁹ Stuart S. Nagel (1972) *The Rights of the Accused” in Law and Action*, SAGE Publications.

⁸⁰See Fair Trials International (“FTI”) Report (2011), at http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/fti_pre-trial_detention_report_en.pdf (accessed 8/2/2015).

accused under municipal laws of their countries.⁸¹ The reason for this lies in the intricate and complex structure and system of international criminal law. International criminal law is neither definite, nor uniform or standard.

Notably, there are no specific international criminal law standards, treaties or laws on the right to bail. Rather, there are human rights standards or laws on the right to bail. There are generic provisions on the right to liberty and due process of the law which are incorporated in conventions and in the constitutions of the various states. Scholarly works on international criminal law as well as decisions of international criminal tribunals also provide the general international standards on the right to bail.⁸²

The general international law position on bail applications is that they are usually granted, albeit with difficulty.⁸³ The positions taken regarding bail under the International Criminal Tribunal for the former Yugoslavia and other tribunals confirms this. Provisional release or bail at the ICTY may be ordered by a Trial Chamber “only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other

⁸¹ For instance, crimes prosecuted under the International Crimes Court (ICC), or those prosecuted by international criminal tribunals like ICTY and ICTR have taken a long time. Caroline Davidson notes in a footnote that “according to data provided by the United Nations Detention Unit (UNDU) in The Hague, as of October 31, 2008, the average time of detention before final conviction was five years, that several defendants had been detained considerably longer, and that eleven alleged war criminals have been acquitted by the ICTY after spending lengthy periods in detention.” This illustrates that the criminal trial process at the internal criminal justice system generally takes a very long period of time.

⁸² Relevant scholarly works include *International Criminal Law* (book) by Alexander Zahar and Goran Sluiter (2012). This book provides the general framework of international criminal law, with a special focus on how international criminal tribunals have handled crime cases. Caroline Davidson in her 2010 treatise entitled “No shortcuts on human rights: bail and the international criminal trial” also discusses the general principles of international criminal law that are relevant to the study of bail.

⁸³ See ICTY (RPE), Rule 65 cited in Alexander Zahar & Goran Sluiter (2008) *International Criminal Law*, at p 324.

person.”⁸⁴ Provisional release therefore remains difficult and burdensome at the ICTY. The same conditions under ICTY apply to ICTR and SCSL.⁸⁵ Notably, the ICTY has the greatest wealth of jurisprudence on provisional release.⁸⁶

In light of the above position, scholars have generally concluded that under international criminal law, the following factors determine release of accused persons or defendants before detention:⁸⁷

- “Gravity of the charges
- Complexity of the cases
- Absence of an international police force
- Absence of express penalties for failure to appear”⁸⁸

These factors according to Caroline Davidson distinguish international criminal tribunals from domestic courts.

There are also arguments that many accused persons under international criminal laws are not direct perpetrators of the crimes.⁸⁹ Proponents of these arguments explain that such defendants are not the direct perpetrators “because they are not the trigger-pullers but rather the higher-ups.”⁹⁰ For this reason therefore, many are unlikely to be dangerous if released. Piracy suspects are however an exception to this generality since in most cases, pirates are the actual perpetrators

⁸⁴ See Rule 65 (B) of the ICTY also cited in Alexander Zahar & Goran Sluiter (2008) *International Criminal Law*, at 340.

⁸⁵ Alexander & Goran Sluiter (2008) *International Criminal Law*, at 341.

⁸⁶ *ibid*

⁸⁷ Carolyne, *op.cit.*

⁸⁸ *ibid.*

⁸⁹ See Prevent Genocide International website (2003) “Genocide and international crimes in domestic courts,” at <http://www.preventgenocide.org/punish/domestic/> (accessed 3/12/2014).

⁹⁰ David Aronofsky (2006) “International War Crimes & Other Criminal Courts: Ten Recommendations for Where We Go From Here and How to Get There—Looking to a Permanent International Criminal Tribunal, 34 *DENV. J. . J. INT’L L. & POL’Y* 17, 26, cited in Caroline Davidson (2010) “No shortcuts on human rights: bail and the international criminal trial,” at <file:///C:/Users/user/Downloads/SSRN-id1639664.pdf>. (accessed 3/12/2014).

of the offence. Further, there are arguments and puzzles by legal analysts on how international defendants who can afford bail and have nowhere to flee are nonetheless not allowed bail while on trial.⁹¹

Undoubtedly, denial or refusal of the right to bail assumes the position that our criminal justice systems are perfect. It also assumes that individuals detained for allegedly committing serious offences will be charged and tried in accordance with the precepts of the due process of the law.

However empirical evidence proves the contrary. There are cases in certain jurisdictions of torture at detention camps and the inability of the state to bring detained persons for trial within reasonable time.⁹²

2.5. Transnational Instruments That Touch on the Right to Bail

This section shall discuss the various conventions and treaties that have a bearing or nexus to the right to bail. Most of these treaties encompass the right to liberty or freedom of liberty. The right to bail in international criminal law falls under the general rubric of the right of personal liberty and international instruments such as the Universal Declaration of Human Rights,⁹³ the African Charter on Human and People's Rights⁹⁴ and the International Covenant of Civil and Political

⁹¹ *ibid.*

⁹² Amoo, Samuel Kwesi (2012) "The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia," *Forum on Public Policy*, at <http://www.questia.com/library/journal/1G1-218606472/the-bail-jurisprudence-of-ghana-namibia-south-africa> (accessed 2/10/2014).

⁹³ See articles 9, 10 and 11.

⁹⁴ See Article 6.

Rights (ICCPR),⁹⁵ have provisions protecting the rights of the personal liberty of the individual both during pre-trial and trial proceedings.

There is no formal obligation on states to ratify a particular international covenant or a protocol. Under international law, the international standards and norms contained in international treaties and conventions become binding on states upon accession of the said instruments and acceptance of the jurisdiction of the particular international organization.

In Kenya, the import of Article 2 (6) of the Constitution of Kenya 2010 is that ratified treaties become part of Kenyan law immediately after ratification.⁹⁶ This means that the effect of ratification of treaties and conventions is to make them law in Kenya. However, dissenting views about this position hold that the Kenyan Constitution recognizes parliament as the only body capable of making law except in situations where a person or body making such law is authorized by the Constitution or in legislation.⁹⁷

The relevant declarations and treaties on the right to bail under international law are:

2.5.1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on December 10, 1948 in Paris. This was enacted after the experience of the Second World War to provide for the expression of human rights which every human being is entitled to. The UDHR does not have specific articles directly mentioning the right to bail.

⁹⁵ See Article 6.

⁹⁶ Article 2 (6) states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution

⁹⁷ Article 94(5) provides that “no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this constitution or by legislation.

However, such provisions can be presumed from the provisions of article 9, 10 and 11 on liberty rights generally.

Article 9 of the UDHR states that no one shall be subjected to arbitrary arrest, detention or exile. In practice, however, the right to freedom from arbitrary arrest and detention, like much of human rights law, is imprecise and vague.⁹⁸ This is because it is difficult to codify human aspirations into juridical texts. As a result, some scholars have attempted to demonstrate the extent to which international law protects individuals from arbitrary arrest and detention.⁹⁹

Further, Article 10 of the UDHR states that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The right not to be subjected to arbitrary arrest, detention or trial implies that in the event one is arrested, he or she is entitled to be released on bail terms.

Article 11 (1) of the UDHR states that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. The right to be presumed innocent explains the reason why one should not be held in custody before his/her case is fully heard and determined, hence the right to be released on bail.

⁹⁸Laurent Marcoux Jr (1982) “Protection from Arbitrary Arrest and Detention under International Law,” at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1565&context=iclr> (accessed 9/3/2015).

⁹⁹ The scope of the scholarly work on the operationalization of this provision is in-depth and is beyond the scope of this study.

The presumption of innocence under many international criminal tribunals is given prominence and emphasis.¹⁰⁰ The implications of this, according to Antonio Cassese and Paula Gaeta, are that first, the person charged with a crime must be treated as being innocent until proved guilty.¹⁰¹ To buttress this implication, the court in the case of *Prosecutor v. Perisic* stated that “the gravity of the charges cannot by itself serve to justify long periods of detention on remand.”¹⁰²

The second implication according to Cassese and Gaeta is that the burden of proof that the accused is guilty of the crimes with which he is charged, is on the prosecution.¹⁰³ To this effect, the defendant may limit himself to rebutting the evidence produced by the prosecutor, but does not have to prove his innocence. Cassese and Gaeta’s third implication is that in order to find the accused guilty of the crimes charged, the court must be convinced of his guilt according to a certain standard of proof, which in civil law countries is normally the judge’s innermost conviction whereas in common law countries like Kenya, it is “finding the accused guilty beyond a reasonable doubt.”¹⁰⁴

2.5.2. The African Charter on Human and People’s Rights

This is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. Member states to this charter are the African Union (AU) members (except South Sudan as at now and Morocco). Just like the Universal

¹⁰⁰ These include the ICTY, ICTR and the ICC statutes. Article 6 (2) of the European Convention on Human Rights for instance states that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

¹⁰¹ A. Cassese & P. Gaeta (2008) *Cease’s International Criminal Law*, OUP, at 38.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ Antonio Cassese (2011) “International Criminal Law 390,” cited in Caroline Davidson (2010), *ibid.*

Declaration of Human Rights, the African Charter does not have specific/direct provisions on the right to bail. Rather, there are general provisions which imply the right to bail.

Article 6 of the Charter states: “every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.” Here, the right to liberty is the key pointer to the right to be released on bail, though not expressly stated.

Article 7 (1) (b) states that every person accused of a criminal offence is innocent until proved guilty or until he/she so pleads. The presumption of innocence, as stated earlier, gives the justification for the release of accused or suspected persons including pirates on bail.

These provisions generally reiterate the rights enshrined in the UDHR.

2.5.3. The International Covenant on Civil and Political Rights (ICCPR)

This is a multilateral treaty that was adopted by the United Nations General Assembly on December 16, 1966. It came into force from March 23, 1976. The ICCPR commits its parties to respect the civil and political rights of individuals. These include the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and right to a fair trial. As of April 2014, the Covenant had 74 signatories and 116 parties.¹⁰⁵ Kenya is a state party to this convention.¹⁰⁶

¹⁰⁵ See American Civil Liberties Union (ACLU) website at <https://www.aclu.org/human-rights/faq-covenant-civil-political-rights-iccpr> (accessed 7/10/2014).

¹⁰⁶ The accession date is 23/03/1976.

Generally, the covenant has provisions that point to the freedom of liberty and hence the right to bail for international defendants.

Article 9(1) of the Covenant states that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The right to liberty, as stated earlier, encompasses the right not to be held in custody when the law still presumes one to be innocent. It therefore supports the argument for the right to bail.

Article 9(3) states that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” The entitlement to a speedy trial or “release” as stated above points indirectly to the right to be released on bail. There are two options to the above statement, the right to be tried within a reasonable time and the right to be released on bail. A direct interpretation of this is that there is a right to be released on bond.

Article 9(4) states that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” This section relates more to the right not to be detained unlawfully than it relates to the right to be released on bail. However, it indirectly supports and emphasizes the right to liberty and the right to be presumed innocent, discussed earlier.

2.5.4. The European Convention on Human Rights

Article 5 (1) of the convention states that everyone has the right to liberty and security of person.

The ECHR however gives a detailed list of the circumstances under which a person can be denied the right to liberty. These include situations where a person is lawfully detained after conviction, among others.¹⁰⁷

Article 6 (2) of the Convention states that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

Like the provisions of the other conventions and declarations discussed above, this provision in essence disallows premature declarations of guilt by the court or court officials and relevant judges. The European Court in the case of *Samoilă and Cionca v. Romania*¹⁰⁸ held that it amounts to the pronouncement of guilt of the accused in circumstances where the applicant is shown to the public in prison garments during bail proceedings.¹⁰⁹

Article 2 of Protocol No 4 of this Convention also provides that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

¹⁰⁷ See Aisha Gani (2014) “What is the European Convention on Human rights?” in *The Guardian*, on Friday October 3, 2014, at <http://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr> (accessed 4/12/2014).

¹⁰⁸ ECHR (2008)

¹⁰⁹ Dovydas Vitkauskas and Grigoriy Dikov (2012) “Protecting the right to a fair trial under the European Convention on Human Rights,” *Council of Europe human rights handbooks*, at http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb12_fairtrial_en.pdf (accessed 3/10/2014).

2.5.5. United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS)¹¹⁰ defines the rights and responsibilities of nations with respect to their use of the world's oceans and seas. It establishes guidelines for businesses, the environment, and the management of marine natural resources. The Convention criminalizes piracy and gives every state the rights to seize pirate ships or aircrafts and to arrest pirates/persons in control.¹¹¹

Article 105 of the Convention provides for the seizure of a pirate ship or aircraft. It states:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”

This convention does not however provide for the rights of the persons arrested to bail or bond. The issue of bail/bond for such individuals has been left to be determined by the jurisdiction of the seizing state. The consequence of this is that individual states handling piracy cases have had to partially apply their municipal law in proceedings and largely disregard specific rules and guidelines on bail or temporary release. Interestingly, UNCLOS has even sought to clarify and give a guarantee to the relevant states whose ships are seized without grounds i.e. that the seizing

¹¹⁰ The United Nations Convention on the Law of the Sea (UNCLOS) concluded in 1982.

¹¹¹ See Article 105 and 106.

state shall be held liable.¹¹² Yet it has not provided for protection of the individuals persons when they are arrested without grounds.

2.6. Conclusion

Most of the basic international norms, contained in these conventions, on the right to liberty have been incorporated and internalized in the municipal laws of states. These conventions are binding on state parties upon ratification. Whether or not the provisions of the treaty are to be applied in the municipal courts depends on whether a state is dualist or monist.

Significantly, international bills of rights have impacted on municipal jurisdiction to the extent that most states including Kenya have incorporated the international bill of rights and treaty norms in their constitutions and domestic legal systems.

The right to bail is an important component of the international criminal law. This chapter has found that international legal instruments on criminal law do not directly provide for this right. To leave the discretion to grant bail to the jurisdiction or laws of the state prosecuting pirates creates a risk to a fundamental right to liberty. Generally, the municipal laws of various states provide for the rights to bail with regard to criminal suspects under their jurisdiction.

¹¹² Article 106 provides: “Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.”

CHAPTER 3

3. RIGHT TO BAIL UNDER KENYA'S MUNICIPAL LAW, ITS IMPACT ON ALLEGED PIRATES AND THE JUDICIAL SYSTEM

3.1. Introduction

This Chapter examines the right to bail or bond under Kenya's municipal law. It analyses the effects of denial of bail or bond on the rights of the alleged pirates and on the judicial system in Kenya. This Chapter answers the following research questions: First, are Kenyan courts justified to deny bail or bond to alleged pirates? Second, what is the impact of the denial of bail or bond to alleged pirates on Kenya's judicial system and on the accused persons?

This chapter proceeds by investigating the process involved in granting bond or bail to alleged pirates in Kenya in order to determine whether the courts are justified in denying bail or bond to the alleged pirates. This Chapter then examines the impact this decision by the courts has on the fundamental human rights of the alleged pirates and Kenya's judicial system.

The Chapter builds on the foundation established in chapter 2 where the right to bail for alleged offenders is promoted and protected under various international legal instruments. The previous chapter established that although the right to bail or bond has been provided for expressly in international law it is implied and covered under the right to liberty. It recommended the review of international criminal law to ensure that the right is protected from the arbitrariness of municipal courts.

3.2. Process of Granting Bail or Bond in Kenya

The bail or bond can be granted at various stages of trial for alleged offenders. First there is pre-trial bail. This is bail given at the police station before a suspect is charged. A person may be released on bail or bond while still in police custody before being charged in court under the Penal Code.¹¹³ Section 23 of the National Police Service Act¹¹⁴ empowers a police officer investigating an alleged crime to require any person to execute a bond in such sum and in such form as may be required, on the understanding that the suspect will attend court on a particular date and time as may be required.

Second there is bail pending trial. This is bail given after the suspect has been charged in court as they await completion of their trial. Third, there is bail pending appeal where the courts that have sentenced an accused person suspend the execution of the sentence pending appeal of the sentence in a higher court.¹¹⁵

Bail or bond for alleged offenders or pirates as the case may be, is granted upon furnishing of sufficient security to the courts or to the police officers arresting the offender unless the court grants free bond. Security for bail or bond in Kenya is normally given in terms of cash, land title deeds, share certificates and/or motor vehicle logbooks.¹¹⁶

¹¹³ Section 123 (1) of the Criminal Procedure Code, Cap 75.

¹¹⁴ National Police Service Act, Cap 84.

¹¹⁵ Kenya Law Resource Centre website, at <http://www.kenyalawresourcecenter.org/2011/07/bail-pending-appeal.html> (accessed 21/6/2015).

¹¹⁶ National Council on the Administration of Justice (2015) *Bail and Bond Policy Guidelines*, Government Press, Nairobi.

Unfortunately, before the introduction of the Bail and Bond Policy Guidelines in 2015, there was no predetermined process for application of bail or bond in Kenya.¹¹⁷ This uncertainty opened up the process of granting bail or bond to arbitrariness by the police officers as well as the officers of the court granting bail or bond. The result was constant infringement of the rights of the accused persons who are exposed to this arbitrariness. In the case of alleged pirates, they were exposed to this violation of rights in peculiar, very unique and exceptional circumstances that they found and still find themselves in.¹¹⁸ Judge Ibrahim argues that alleged pirates are “vulnerable people” deserving extra protection from the courts since they are majorly foreigners.¹¹⁹ This makes the study on denying pirates their right to bail or bond more pertinent as a way to mitigate the infringement of their rights as “vulnerable people.”

There are various municipal legal instruments that regulate the granting of bail or bond and provide for the prosecution of pirates. An analysis of these legal instruments is important to determine how best to protect the rights of the alleged pirates seeking bail or bond. These municipal legal instruments include:

¹¹⁷ The practice of granting bail in Kenya normally involves asking the police or court for bail or bond. In court, the practice is that an accused person who seeks to be released on bail pending trial raises their hand and requests the magistrate or the judge for bail. The prosecution is allowed to cross examine sureties and the details of the documents presented as security before the accused person is released on bail. For instance where the title documents to land or the log book to a car are provided as security by the accused. See Kenya Law Resource Centre, at <http://www.kenyalawresourcecenter.org/2011/07/pre-trial-bail.html> (accessed 14/7/2015). See also National Council on the Administration of Justice (2015) *Bail and Bond Policy Guidelines*, Government Press, Nairobi, pg 15.

¹¹⁸ *R v. Mohamud Mohamed Hashi and Eight Others*, High Court of Kenya Miscellaneous Application Number 434 of 2009, at Mombasa, (Coram: Ibrahim M. K., J.)

¹¹⁹ *ibid.*

3.2.1. Constitution of Kenya, 2010

The Constitution of Kenya is the supreme law of the land.¹²⁰ It binds all state organs and persons.

The Constitution strictly binds the courts which are established under its Chapter Ten (10). The courts are mandated to comply with the provisions of the Constitution when discharging their mandate, for instance when issuing bail or bond.

By dint of Article 2 (5) of the Constitution the general rules of international law shall form part of the laws of Kenya. International human rights prohibit torture, cruel and inhuman treatment, for instance, the Universal Declaration of Human Rights¹²¹ and the International Covenant on Civil and Political Rights.¹²² These international legal instruments apply to all persons by the virtue of being human. Further to this, several human rights instruments as discussed in Chapter 2¹²³ have various articles addressing the right to bail for alleged offenders. These international instruments obligate Kenya to promote and protect the international human rights. Fortunately, there are provisions in the Constitution of Kenya which provide for mechanisms to ensure that the international human rights are respected and promoted. For instance, Chapter Four on the Bill of Rights.

On the right to bail or bond, the Constitution, 2010, lays the grounds for the actualization of this right through various provisions. Under Article 20, the Constitution sets out the Bill of rights which applies to every person and shall bind all state organs and all persons including foreigners.

¹²⁰ Constitution of Kenya, 2010, Article 2.

¹²¹UN General Assembly (1948) *Universal Declaration of Human Rights*, December 10, 1948, 217A (III), at <http://www.un.org/en/documents/udhr/#atop> (accessed 9/10/2014).

¹²²UN General Assembly (1966) *International Covenant on Civil and Political Rights*, December 16, 1966, United Nations, Treaty Series, vol. 999, p. 171, at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 9/10/2014).

¹²³ The Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966, the Rome Statute of the International Criminal Court and the African Charter on Human and People's Rights.

The Constitution also creates a specific obligation on the State under Article 21 (4) to take up an active role in the fulfillment of its international obligations in respect of human rights and fundamental freedoms.

Article 49(1)(h) expressly provides that an accused person or suspect is to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. The Constitution does not mention or give any exceptions to the right to bail. This means that all offences are bailable and that denying bail therefore amounts to the infringement of a person's basic rights. However, it is important to note that the Constitution gives discretion on how or when bail can be denied to an accused person.

The right to bail for alleged pirates correlates with the right to a fair trial. The Constitution provides that the right to a fair trial shall not be limited under any circumstances.¹²⁴ This also applies to the freedom from torture and cruel, inhuman or degrading treatment or punishment. The arbitrariness exhibited by the courts and the police when granting bail to the alleged pirates amounts to limiting their rights as provided for under Article 25 of the Constitution of Kenya, 2010. This is mainly attributed to the conditions the alleged pirates are subjected to while under custody and their inability to secure resources and legal aid in preparation of their defence. As highlighted earlier in the chapter, pirates face peculiar, unique and exceptional circumstances since they are mostly foreigners who are being tried away from their home jurisdiction. Their situation then exposes them to the harsh realities of the Kenyan legal system.¹²⁵

¹²⁴ Constitution of Kenya, Article 25.

¹²⁵ *R v. Mohamud Mohamed Hashi and Eight Others*, High Court of Kenya Miscellaneous Application Number 434 of 2009, at Mombasa, (Coram: Ibrahim M. K., J.)

3.2.2. Criminal Procedure Code, Cap 75

The Criminal Procedure Code, Cap 75, was enacted to regulate the procedure in criminal cases.

Cap 75 has specific provisions as to bail. These provisions include instances when bail may be denied;¹²⁶ reasonable bail terms and conditions; discharge of sureties; and power to direct levy of amount due on certain recognizances.

Unfortunately, the Criminal Procedure Code does not have specific provisions that apply to alleged pirates. Instead, the provisions on bail within Cap 75 apply across all alleged offenders seeking bail. Capital offences in Kenya were non-bailable before the promulgation of the Constitution of Kenya 2010.¹²⁷ No accused person in respect of murder, treason or robbery with violence could be granted or released on bail. The law however changed with the promulgation of the Constitution of Kenya on August 27, 2010. Under the provisions of Article 49, it is now possible for a person charged with any offence including murder or any other capital offence, to apply for and be released on bail or bond. Article 49 1 (h) of the constitution provides that “an arrested person has the right (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

This therefore overrides the provisions of section 123 of the Criminal Procedure Code and any other legal instrument that is inconsistent with this Article of the Constitution.

¹²⁶ Criminal Procedure Code, Cap 75, section 123 (1).

¹²⁷ This was pursuant to the provisions of Section 123 of the Criminal Procedure Code. The Criminal Procedure Code did not allow for alleged capital offenders to be released on bail. This position changed on the promulgation of the Constitution in 2010. The provisions of the Constitution on bail rendered section 123 of the Criminal Procedure Code unconstitutional.

3.2.3. Merchant Shipping Act, Cap 389

The Merchant Shipping Act, Cap 389, was enacted to make provision and regulations for the orderly development of merchant shipping services. Currently, pirates are prosecuted in Kenya as per the provisions of the Merchant Shipping Act, Cap 389, under Part XVI which provides for maritime security.

Part XVI defines the term piracy as,

any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft and directed against another ship or aircraft, or against persons or property on board such ship or aircraft; or against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.

Section 371 of the Merchant Shipping Act, states that the penalty for the offence of piracy shall be imprisonment for life. The Merchant Shipping Act does not provide for the procedure in which bail may be provided to the alleged pirates being prosecuted in Kenya. This is because penal statutes generally do not provide for bail which is a procedural issue left to the Criminal Procedure Code.

3.3. Evaluation of Bail Application in Kenya

In Kenya, only recently were guidelines for the application and granting of bail passed.¹²⁸ Prior to their introduction, however, there were no specifically outlined rules or procedures on how bail applications for criminal offences have to be made. The bail applications are determined on an individual case basis. The process of granting bail for capital offences is more uncertain. This is partly because these offences were not bailable until the promulgation of the Constitution of Kenya, 2010.

The police are still unwilling to grant bail to alleged capital offenders primarily due to complexity of the capital offences.¹²⁹ In court, the practice for granting of bail or bond in Kenya has been that the alleged offenders raise their hand when in court requesting the magistrate for bail. There are times when the magistrate may grant bail without the alleged offender requesting resulting in the granting of unaffordable terms of bail.¹³⁰

Upon promulgation of the Constitution in 2010, the principles and consideration of granting bail or bond in capital offences was systematized to other criminal bail applications. This was stated in the case of *Republic v. Danson Mgunya & Another* (2010) eKLR where the court stated that:

“once an accused person applies for bail in a murder case, then the same principles and consideration in bail applications in respect of any other criminal offences shall be applicable.”

¹²⁸ Republic of Kenya (2015) *Bail and Bond Policy Guidelines*, Government Press, Nairobi.

¹²⁹ Stephen Makabila (2014) “DPP: Courts must be sensitive to our national security threats,” in *Standard Digital*, on Sunday, April 20, 2014, at <http://www.standardmedia.co.ke/article/2000109790/dpp-courts-must-be-sensitive-to-our-national-security-threats> (accessed 15/7/2015).

¹³⁰ National Council on the Administration of Justice (2015) *Bail and Bond Policy Guidelines*, *op cit.*

For non-capital offences that were bailable before 2010, there has been established a general criterion for determining whether to grant bail or not. The key factor for consideration here is whether the accused will turn out for trial. This was stated by Porter J in the case of *Watoro v. Republic* (1991) KLR 220 at P 283:

“... I think I have made it clear over a number of rulings in bail application that I take the view on authority that the paramount consideration in bail application is whether the accused will turn up for his trial...”

Whether the accused will turn up for trial is the main concern when evaluating bail application in Kenya. There are, however, inflexible requirements that are subsequently set out by the courts in a bid to balance the right to bail for alleged offenders. This is notable from the *ratio decidendi* of the court in the case of *Republic v Joktan Mayende & 4 Others*, the High Court of Kenya ruled that the high standard for denying bail or bond under article 49(1) (h) of the Constitution is more in accord with the stringent constitutional requirements in Article 24 of the Constitution on limitation of rights and fundamental freedoms. The court further stated that denial to grant bail requires the prosecution to prove that it is proportionate and justified in the circumstances of the case to deny bail.¹³¹

In the words of Judge F. Gikonyo, “the court must be convinced by the prosecution that it is proportionate and justified in the circumstances of the case to deny the accused bail.”¹³² Justice Gikonyo further outlined examples of compelling reasons to include interference of witnesses,

¹³¹ Cf *R v. Paterson*.

¹³² *R v. Joktan Mayende, John Wekesa, Gibson Kiboi & Amos Simiyu Mulati* High Court of Kenya Criminal Case No 55 of 2009, at Bungoma, (Coram: F. Gikonyo, J.).

interference with investigations, real possibility of absconding court and danger to the accused person. According to the Black's Law Dictionary 7th Edition, the phrase “compelling reasons” denotes reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. The courts therefore should not deny bail on flimsy grounds but on real and cogent grounds that meet the high standard set in the Constitution.¹³³

The court however has the discretion to determine the conditions of bond or bail. A key factor to determine the denial or grant of bail entails an assessment of the reasons adduced by the prosecution. If they are compelling reasons to deny the accused bond or bail in the sense of Article 49(1) (h) of the Constitution of Kenya 2010, then bail/bond can be denied. The main issues for determination before the Court in the case of *Republic v Joktan Mayende & 4 Others* were: first, whether the right to be released on bond or bail under Article 49(1) (h) of the Constitution was absolute; second, whether interfering with witnesses amounted to a “compelling reason” thus denying the accused bail and therefore reasonable and justifiable limitation of the right to liberty in an open democratic society. Judge F. Gikonyo, in the matter above, found in favour of the prosecution and denied the accused bail. The evaluation of bail application above should also be extended extensively to alleged pirates who are tried in Kenyan courts.

The high standard under Article 49(1) (h) of the Constitution is more in accord with the stringent constitutional requirements in Article 24 of the Constitution on limitation of rights and fundamental freedoms. This provision requires the prosecution to prove that it is proportionate and justified in the circumstances of the case to deny the accused bail.

¹³³ *Republic v Joktan Mayende & 4 Others*.

Unlike Kenya, some countries or jurisdictions have statutory procedures for the evaluation of bail applications and the criteria to be used.¹³⁴ Borrowing from Nigeria, the Nigerian Supreme Court established some key criteria to give a guideline for determining whether or not to grant bail.¹³⁵ The court was however emphatic that this list was not conclusive/exhaustive. These key considerations are: nature of the charges; strength of the evidence which supports the charge; gravity of the punishment in the event of conviction; the previous criminal record of the accused if any; the probability that the accused may not surrender himself for trial; the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him; the likelihood of further charges being brought against the accused; the probability of guilt; detention for the protection of the accused; and the necessity to procure medical or social report pending final disposal of the case.¹³⁶

The Kenyan High Court adopted and applied this criterion in determining the application for bail in the case of *Republic v Danson Mgunya & Another*.¹³⁷

Elsewhere, section 42 (2) (e) of the Constitution of Malawi almost bears similarity with Article 49 (1) (h) of the Kenyan Constitution but there is a difference in the provision. It provides that: “Every person arrested for or accused of the alleged Commission of an offence shall, in addition to the rights which he or she has as detained person, have the right to be released from detention, with or without bail unless the interest of justice requires otherwise.”

¹³⁴ For instance the United Kingdom.

¹³⁵ Cited in the Kenyan case of *R v. Danson Mgunya & Kassim Sheebwana Mohammed* High Court of Kenya Criminal Case No 26 of 2008, at Mombasa, (Coram: Ibrahim, J.).

¹³⁶ *ibid.*

¹³⁷ *R v. Danson Mgunya & Kassim Sheebwana Mohammed* High Court of Kenya Criminal Case No 26 of 2008, at Mombasa, (Coram: Ibrahim, J.).

Effectively, while discretion is given to the court under the Constitution of Malawi, the court is to consider a criterion of what the interest of justice would demand.¹³⁸ Further, regarding section 42 (2) (e) of the Constitution of Malawi, the Supreme Court of Malawi has stated that it does not create an absolute right to bail. It has stated:-

“There are two points which must be made about the effect of Section 42 (2) e of the Constitution. In our view the right to bail which section 42 (2) (e) now enshrined does not create an absolute right to bail. The Section still reserves the discretion to the courts and it makes the position absolutely clear that courts can refuse bail if they are satisfied that the interest of justice so requires. The second point we would like to make is that section 42 (2) (e) does not create a new right. The right to bail has always been known to our law and all that section 42 (2) (e) does is to give it Constitutional force. We would like to emphasize that section 42 (2) (e) does not give an absolute right to bail. The courts will continue to exercise their discretion depending on the circumstances obtaining in each particular case.....”¹³⁹

The exercise of the court’s discretion in Kenya has been to the detriment of the alleged pirates. The courts should stand by their decision of granting alleged pirates bail from the criteria established by the case of *Republic v Danson Mgunya & another*. This would reduce the arbitrariness exhibited by the court in subsequent piracy cases as well as ensuring that the interests of justice are served on both the accused party and the public.

¹³⁸ Judgment in the Kenyan case of *R v. Danson Mgunya & Kassim Sheebwana Mohammed* High Court of Kenya Criminal Case No 26 of 2008, at Mombasa, (Coram: Ibrahim, J.).

¹³⁹ *ibid.*

It is noteworthy that the right to bail under the Constitution of Kenya 2010 is not an absolute right. It is a conditional right, which falls under the category of rights which can be limited under article 24 of the Constitution.¹⁴⁰ The manner in which the limitation is imposed has to be constitutional. The limitation has to consider the nature of the right, the importance of the limitation and the nature of limitation. The Constitution then sets out the rights of accused persons under Article 49. The particular focus of this research is on Article 49 (h) where the right to be released on bond or bail is categorically set out.

This study argues that in order to shelter the alleged pirates from the arbitrariness of the courts may only limit the right to bail or bond to suspected pirates where the courts have satisfied themselves that the conditions set out under Article 24 on limitation of rights and fundamental freedoms have sufficiently been addressed. The assessment of the application for bail or bond may then follow the criteria set out by the Supreme Court of Nigeria. These criteria will then curtail the arbitrariness exercised by the courts when determining bail or bond application.

The arbitrary exercise of power to grant bail by the court has been witnessed in the case of *Republic v. Danson Mgunya & Kassim Sheebwana Mohammed*¹⁴¹ where the courts willingly granted bail to the accused, an alleged capital offender yet sought to limit the same right in the case of *Republic v. Ahmed Abdikadir Hersi & 11 Others*, in which the accused persons were

¹⁴⁰ Article 24 provides for limitation of rights and fundamental freedoms in the Bill of Rights.

¹⁴¹ *Republic v. Danson Mgunya & Kassim Sheebwana Mohammed*, Criminal Case No 26 of 2008, High Court of Kenya at Mombasa at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CC4QFjAC&url=http%3A%2F%2Fkenyalaw.org%2FDownloads_FreeCases%2F78247.pdf&ei=tVijU_reIcqq0QW15YDQAw&usg=AFQjCNE9fh2q4i7XrAdfQUM0byYmQOI0Tw&sig2=vc7i_GpwJo4QFDtk1u0FEQ&bvm=bv.69411363,d.d2k (accessed 20/6/2014).

alleged pirates. In both instances, the circumstances facing the accused persons were similar. For instance, the accused persons were charged with the offence of piracy, both of the accused were foreigners who were being tried in Kenya therefore had a high probability of leaving Kenya due to the grave nature of the offence. In another instance, the courts held that a person is entitled to bail where he is facing an offence not punishable by death¹⁴² yet the courts still assert that alleged pirates are not entitled to bail where piracy is punishable by imprisonment for life.

According to Mombasa court records, of senior principal magistrate Lillian Mutende, "accused can revisit the issue of bail at a later stage, at this stage they are denied bail," she said.¹⁴³ In her ruling, the magistrate said she could not release the accused since it was unclear whether they had identification documents and tracing them would be difficult.

The right to bail is not absolute, like all other rights, the same is subject to limitation in the interest of justice.

The Courts are not allowed to limit the right to bail where the limitation would amount to a breach of the freedom from cruel, inhuman and degrading treatment and the right to a fair trial.¹⁴⁴ Even where the courts argue that the right to bail is not absolute, in order to promote the right to a fair trial, the right to bail should only be limited upon strict interpretation of the Constitution to ensure the greatest enjoyment of the rights and fundamental freedoms of the alleged pirates. The Constitution does however provide that the right to bail can only be limited where there are

¹⁴² *Lilian Kalunde Musyoki v Republic*, High Court of Kenya Criminal Application No 646 of 2004, at Nairobi (Coram: Fred A. Ochieng, J.).

¹⁴³ *Supra*, Note 43.

¹⁴⁴ This arises from Article 25 of the Constitution which prohibits the limitation of the right to a fair trial and the freedom from cruel, inhuman and degrading treatment. The courts may only limit the right to bail if the limitation will not result in the limitation of the right to a fair trial.

compelling reasons. It however does not go into any detail as to what these compelling reasons are. Hence, the courts are left to their own instruments to determine what amounts to a compelling reason.

Unfortunately, the courts have found most reasons compelling enough to warrant limiting of the right to bail for alleged pirates yet the reason provided would not be compelling enough to limit the right to bail for other alleged capital offenders.¹⁴⁵ It is evident that the courts lack justification to deny alleged pirates the right to bail.

The real problem is on the process of application of bail as well as the reasons for the denial of bail to alleged pirates. The absence of a detailed procedure for actualizing the rights of the alleged pirates is a grave infringement of their fundamental rights and freedoms.¹⁴⁶ The absence of such a provision is unconstitutional in that the State has failed in its obligation set out under Article 21 of the Constitution of Kenya to ensure the promotion of the international human rights and freedoms.

With the recent enactment of the Bail and Bond Policy Guidelines, 2015, the arbitrariness exhibited by the courts in granting bail/bond to alleged pirates is likely to reduce or be done away in entirety. This, however, is yet to be witnessed. The administration of bail and bond still continues to pose a challenge because of the difficulties experienced in balancing the interests of

¹⁴⁵ See *Republic v. Ahmed Abdikadir Hersi & 11 Others* Crim. No. 1582 (CMC) 11 May 2009.

¹⁴⁶ The alleged pirates are considered “vulnerable groups” as stated by the court in *Re Mohamud Mohamed Hashi & 8 others*. Then, the state is under a constitutional obligation to ensure that the rights of vulnerable groups are promoted and protected.

the suspects, accused, victims and the public interest in decision making and disparities in decision making.¹⁴⁷

3.4. Impact of Denial of Bail on Alleged Pirates

In order to fully understand the impact and effects of bail on alleged pirates and the judicial system, there is need to look at the importance of the right to bail to the alleged pirate.

The need to provide bail is necessitated by the fact that detention of persons tends to infringe on their right to movement and further rights that are set out in the Constitution such as the presumption of innocence.¹⁴⁸ In order to ensure that justice is not denied to the alleged criminal, they are assumed innocent until proven otherwise.

The presumption of innocence calls for the need to ensure that their absolute right to a fair trial is respected, promoted and guaranteed.¹⁴⁹ It may be deduced that the objective of bail pending trial aids in the fulfillment of the right to a fair trial since it allows for the suspect to secure time, legal aid and resources that would help them prepare for their defence when in court.¹⁵⁰ This ensures the protection of the right of an accused person to have adequate time and facilities to prepare a defence, as enshrined under Article 50(2) (c) of the Constitution of Kenya, 2010.

The failure by the courts to promote, respect and grant alleged pirates their right to bail has resulted in the subjection of pirates to cruel, torture and inhumane treatment while under

¹⁴⁷ Judiciary Website (2018) “Bail and Bond team in retreat,” at <https://www.judiciary.go.ke/news/bail-and-bond-team-develop-bill/> (accessed 17/4/2019).

¹⁴⁸ Constitution of Kenya, Article 39.

¹⁴⁹ The right to a fair trial is extrinsically linked to the presumption of innocence.

¹⁵⁰ Joshua Muchera Nyariki (2011) *Rights of an Arrested Person to Bail/Bond: The Kenyan Legal Perspective*, at <http://dx.doi.org/10.2139/ssrn.2359922> (accessed 13/7/2014), pp 6.

custody.¹⁵¹ There are reported instances where persons under custody have been subjected to beatings, electric shocks, prolonged isolation and denial of medical care.¹⁵² The persons in custody are also kept in overcrowded and congested cells.¹⁵³ These are the same conditions and torture methods that alleged pirates and other alleged offenders are subjected to while in custody. For alleged pirates, the conditions are deemed far worse since they face peculiar and different conditions mostly in foreign jurisdictions. The issue as to whether foreigners deserve equal or better protection than the citizens of a state is a public international law matter that is subject to debate.¹⁵⁴ However, the Standard Minimum Rules for the Treatment of Prisoners¹⁵⁵ adopted by the United Nations provides guidelines for foreign citizens held in prisons or custody. These guidelines provide a basic minimum which Kenya is to comply with when holding alleged pirates in custody.

Further to this, alleged pirates and other alleged offenders in custody are exposed to sexual based violence which includes but is not limited to rape and sexual harassment.¹⁵⁶ The Sexual Offences Act, 2006 has criminalized sexual intercourse between police and persons in custody yet instances of such acts have been happening.¹⁵⁷ There have also been recorded incidents of persons in custody being subjected to sexual based violence by other persons who are in custody

¹⁵¹Kenya Human Rights Commission website, at <http://www.khrc.or.ke/media-centre/news/232-un-international-day-in-support-of-victims-of-torture.html> (accessed 3/11/2014).

¹⁵² *ibid.*

¹⁵³ Government of Kenya (1995) *Kenya National Assembly Official Record (Hansard)*, October 3, 1995, Government Printers, Nairobi, pp 1874.

¹⁵⁴ David Cole (2003) "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens," 25 *Jefferson Law Review* 367-388.

¹⁵⁵ United Nations (1955) *Standard Minimum Rules for the Treatment of Prisoners*, August 30, 1955, at <http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf> (accessed 15/7/2015).

¹⁵⁶ Andrew Commins (2010) *Gender-based violence in Kenya: Victims, Values and State Responses*, St John's Chambers, Bristol, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CCwQFjAC&url=http%3A%2F%2Fwww.stjohnschambers.co.uk%2Fwp-content%2Fuploads%2FGender-based-violence-in-Kenya.pdf&ei=Sd5XVJ7yHczgatGsgPgJ&usg=AFQjCNEpY8MNTCXjYy9rJ1pfu9eVskeG9A&sig2=2JV54uVgLAH0_zYE8JvUtQ (accessed 3/11/2014), pp 8.

¹⁵⁷ *ibid.* See also Sexual Offences Act, No 3 of 2006, section 24 (1).

as well.¹⁵⁸ This attack on their sexuality tends to have a negative effect on the psychology of the victims even after the custody period ends.

The prison department in Kenya launched a remote parenting and prison open day policy where prisoners are given the opportunity to have unrestricted quality time with their children and members of their family.¹⁵⁹ This ensures that support and strengthening of family relations when the accused persons are incarcerated. Unfortunately for pirates, most of who are foreigners, the costs associated with visits from family members is astronomically high. This leads to the breaking down of family relations among the pirates' families due to lack of contact upon incarceration. The children of the convicted pirates grow without psychological and emotional support for moral and social upbringing due to the absence of their parent. This is a unique factor that faces pirates when held in custody while in Kenya.¹⁶⁰

Language barrier between prison officials and accused pirates held in custody puts in jeopardy the social welfare of the pirates when held in custody. The accused pirates are unable to communicate with the prison officials or receive instructions from them.¹⁶¹ This exposes the pirates to lack of proper health care when suffering from illnesses like diabetes and hypertension since they are unable to communicate to the prison officials what they are suffering from.¹⁶²

¹⁵⁸ *ibid.*

¹⁵⁹ See, <http://unpan1.un.org/intradoc/groups/public/documents/aapam/unpan032702.pdf> (accessed 16/7/2015).

¹⁶⁰ *ibid.*

¹⁶¹ MJ (2011) "Pirates' Health Deteriorating in Kenyan Prison," in *Piracy Report*, at http://www.somaliareport.com/index.php/post/1143/Pirates_Health_Deteriorating_in_Kenyan_Prison (accessed 16/7/2015).

¹⁶² Phillip Mwakio (2014) "Somalia wants its pirates in Kenya jails sent home," in *Standard Digital*, on Monday, October 20, 2014, at <https://www.standardmedia.co.ke/article/2000138881/somalia-wants-its-pirates-in-kenya-jails-sent-home> (accessed 16/7/2015).

These are just some of the impacts the denial to the right of bail has on the alleged pirates. The State needs to look at measures to mitigate the effects of denial of bail to alleged pirates. This study shall also look at the impact that the denial of bail has on Kenya's Court System as it currently stands.

3.5. Impact of Denial of Bail on Kenya's Judicial System

The courts of Kenya are the third arm of the government.¹⁶³ They have the mandate of protecting the citizens of Kenya from the excesses of the executive and the legislature.¹⁶⁴ An inspection of Chapter 10 of the Constitution reveals that the courts are among guardians of the rights of the citizens. For instance, Article 165 (3) (b) provides the High Court of Kenya with the jurisdiction to determine the question of whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. As such, there is a legitimate expectation that the courts are the vanguard in championing human rights.

With this in mind, a critical look at the provision of bail for alleged pirates sheds light at how courts are failing in their core mandate, which is the protection of the rights of individuals. This is illustrated from the prevailing discussion on the impact of denial of bail upon alleged pirates and the exercise of the court's discretion in granting bail or bond.

In their current position, the courts are perpetuating the violation of the alleged pirates' civil and political rights. This is by unfairly denying alleged pirates their rights to bail. It is worthy of note

¹⁶³ The government is comprised of three independent working arms. They include; the executive, the legislature and the judiciary. The doctrine of separation of powers advocates for the non-interference by one arm of the government into the affairs and workings of the other arms of the government.

¹⁶⁴ John Gichuhi (2014) *Constitutionalisation of Administrative Justice in Kenya, 2014*, at https://www.academia.edu/7052956/John_Gichuhi_Constitutionalisation_of_Administrative_Justice_in_Kenya_2014 (accessed 4/11/2014).

that this violation of the alleged pirates' civil and political rights inadvertently violates various other rights found in the Bill of Rights. For instance, the right to association & the right to movement for the alleged pirates are limited in the process by the very courts meant to protect these rights.

The judicial system in Kenya has been burdened with the overwhelming task of prosecuting pirates in Kenya. Unfortunately, Kenya is ill-equipped in following through with bail or bond application for the alleged pirates. A deficiency in the training of legal officials on the subject of piracy constrains the efficiency of the courts in delivering justice.¹⁶⁵ The impact is that the institution mandated to administer justice renders itself a perpetrator of injustice. This damages the public confidence in Kenya's court system.

The major impact of denial of bail is that it leads to the congestion of detention centers.¹⁶⁶ It is important to note it is the duty of the State to ensure that the conditions at the detention centers are habitable. Congestion in the detention centers leads to overcrowding, poor diet, degrading clothing and bedding, lack of clean water, poor sanitation and infectious diseases.¹⁶⁷ In the year 2017, it was reported that over 1714 detainees had died while in detention with the largest death number being 623 reported in 2013.¹⁶⁸

¹⁶⁵ Lisa Otto (2012) "Kenya and the pest of piracy: A prospective partner for peace," in *Institute for Security Studies Situation Report*, at <https://www.issafrica.org/uploads/22Feb12Kenya.pdf> (accessed 16/7/2015) pg 4.

¹⁶⁶ Susan Muhindi (2018) "Judiciary seeks to review bond terms to ease congestion in jails," *The Star Newspaper*, at <https://www.the-star.co.ke/news/2018-01-23-judiciary-seeks-to-review-bond-terms-to-ease-congestion-in-jails/> (accessed 18/4/2019).

¹⁶⁷ Kenya Human Rights Commission website at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/600-statement-by-the-kenya-human-rights-commission-on-prisons-conditions-of-detention-and-policing-in-kenya-at-the-60th-ordinary-session-of-the-african-commission-on-human-and-people-s-rights-in-niamey-niger.html> (accessed 18/4/2019).

¹⁶⁸ *ibid.*

3.6. Conclusion

The effects that the denial of bail has greatly outweigh any benefits that may accrue due the denial of bail to the alleged pirates. It is my argument that the judicial system may mitigate these effects by promoting and respecting the right to bail for the alleged pirates. This may be achieved by ensuring the courts have access to information on the accused person so as to fairly determine the question of bail for the alleged pirates. Access to such information may be by way of background checks and official records available on the suspected pirates. Additionally, the wide discretion enjoyed by the courts on matters pertaining to granting of bail to alleged pirates needs to be curtailed. The courts may only exercise the discretion within a predetermined statutory framework that looks to strike a balance between the rights of the offender and the interests of justice.¹⁶⁹

¹⁶⁹ Elisha Zebedee Ongoya (2014) *Legal and Policy Dilemma in the Fight against Terrorism: The B Question in Terrorism cases in Kenya*, at <http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-in-the-fight-against-terrorism-the-bail-question-in-terrorism-cases-in-kenya/> (accessed 9/11/2014).

CHAPTER 4

4. SUMMARY OF THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

4.1. Introduction

This Chapter shall first summarize the study as per the chapters; second it will provide a conclusion and lastly make appropriate recommendations on how to solve the challenge of denial of bail or bond to alleged pirates. The study has given a case for the right to bail or bond for alleged pirates in Kenya. In this regard, this study has shown that the alleged pirates are denied bail due to the absence of a clear established procedure for granting bail or bond; and lack of clear criteria in the evaluation of bail or bond for alleged pirates. This results in the infringement of their constitutional right to bail.

As such, the hypothesis that pirates are denied bail because of the nature of the offence and the fact that in most cases they are foreigners, has been nulled. The second and third hypotheses have been proven. The denial of bail or bond to the alleged pirates threatens and infringes upon the fundamental human rights of the pirates. The practice in existence for bail evaluation and application is uncertain. This has led to arbitrariness by the courts or the police officers when granting bail or bond to the alleged pirates. Therefore there exists a gap in the law that has to be addressed if the arbitrary denial of bail for pirates is to be solved.

4.2. Summary of Findings

The study has established that there is a hiatus in the law regulating the process and evaluation of bail application in Kenya for alleged pirates. There is also an existing gap in the law on how to treat foreigners being tried in Kenya's municipal courts.

This study reviewed the international criminal law providing for bail to accused persons and particularly for alleged pirates being tried in foreign states. Scholarly literature on the right to bail at international law was also examined. One of the purposes of international law is to ensure that international crimes do not go unpunished. This had been difficult to arrive at since there was no universally accepted definition of what amounts to a crime prior to adoption of the treaties and conventions that make up international criminal law. Subsequently, sovereign states have collectively agreed to criminalize certain acts thereby giving the crimes an international criminal law perspective.

In as much as the aim of the international law is to ensure that certain criminal offences do not go unpunished, the law also provides for the presumption of innocence and the accompanying right to bail. It was noteworthy that Kenya has incorporated the international bill of rights and the treaty norms to a great extent. The right to bail has been provided for in the international bill of rights, however, there are no provisions as to the right to bail for the alleged pirates. International law has left the facilitation of this right to the municipal law of the sovereign states.

Transnational instruments that touch on bail were examined to determine the nexus between the right to liberty and the right to bail as provided for under these transnational legal instruments. Their aim is to promote and protect human rights. Thus, they advocate strongly for the promoting, respecting and upholding of the right to bail as linked to the freedom of movement and liberty.

This study also analyzed the right to bail or bond under Kenya's municipal law. It examined the provisions of the Constitution of Kenya, 2010, the Criminal Procedure Code, Cap 75, and the

Merchant Shipping Act, Cap 389. These legal instruments provide for the prosecution and for the rights of the alleged pirates. Their examination was to establish how they regulate the granting of bail or bond. This study found that these legal instruments contain the substantive law on prosecution of pirates. They enshrine the rights of accused persons to bail with the indication that the right to bail should only be limited where the limitation is justifiable in an open and democratic society. Instances where the limitation is justifiable are; where the granting bail to the alleged pirate will threaten national security; where the accused or suspect is a flight risk; likelihood of witness tampering by the accused; failure of an accused to observe bail and bond terms on previous occasion; and in some instances protection of the accused person.

The procedure for granting bail or bond for alleged pirates in Kenya is not codified. The practice has been unfair and unjust whenever the alleged pirates are involved unlike where the citizens of Kenya are involved.

The research further looked at the impact the denial of bail or bond to alleged pirates has on their human rights and the impact the same has on the judicial system. The study arrived at the findings that there are gross violations of the pirates' human rights arising from the arbitrariness of the court and the police officials when granting bail to alleged pirates as compared to other capital offenders who are generally citizens of Kenya. These violations are specific to the pirates and not for Kenyan citizens who are denied bail generally. The courts and the police officials are involved in perpetrating the violation of the pirates' human rights.

The government agencies tasked with the role of promoting and protecting human rights turn to be the perpetrators in their violation. Lastly, the study established that the courts lack skill and

capacity to handle the applications for bail or bond by the alleged pirates. This is largely attributable to the fact that the judicial officers involved in the prosecution of the alleged pirates are not trained to handle bail applications from alleged pirates.

4.3. Conclusion

The right to bail is inherent to every accused person. For alleged pirates, the right is more pertinent due to the peculiar and unique circumstances that they face by virtue of being foreigners being tried in a foreign court. This renders them as vulnerable groups in need of protection from the state. The challenges that the alleged pirates face when in custody are unique to the alleged pirates. Majorly because the alleged pirates speak a foreign language hence they are unable to effectively communicate with the custodial officials and that the conditions they are exposed to are unique and different from what they are used to. Subsequently, their detention leads to the breakdown of family relations since they are not guaranteed the same rights as Kenyan citizens held in detention.

The objectives of the study were: to establish the scope of the right to bail especially to pirates under Kenya's legal system and to examine the validity of the reasons given for the denial of this right to pirates; to study the effects of denial of bail or bond on the alleged pirates and the impact of the same on the pirates' human rights; and to study the process of granting bail or bond to alleged pirates in Kenya.

The arguments in this study were that: the pirates are denied bail because of the nature of the offence and the fact that in most cases they are foreigners; the denial of bail or bond for suspected pirates burdens the judicial system by leading to congestion in remand facilities and;

that the denial of bail or bond for suspected pirates negatively affects the rights of the alleged pirates. The study has nulled the first assumption and proven the other two. It has subsequently made recommendations to that effect.

The recommendations are to the effect that the right to bail is limited only as provided for in the Constitution of Kenya, 2010. The study looked at the criteria used to determine the bail application in foreign jurisdictions and concludes by stating that Kenya should promote and protect the rights of the alleged pirates by providing for a substantive law laying out the procedure and manner for bail or bond application at the police station and in court.

4.4. Recommendation

This study recommends the following in view of the findings and the conclusion above:

4.4.1. Reforms to the International Criminal Law

The provision of the right to bail for alleged pirates by the international criminal law should not be left to the discretion of the municipal courts. Since this exposes the alleged pirates to arbitrariness of the government organs or agencies mandated with processing and evaluating bail or bond applications.

There should be adopted an international standard as to how the right to bail for the alleged pirates should be handled by the sovereign states that prosecute alleged pirates. This will ensure the objective of the international law of ensuring that the international crimes do not go unpunished, goes hand in hand with the corresponding obligation of protecting human rights and the presumption of innocence.

4.4.2. Reforms to Kenya's legal framework

Kenya's legal framework including the Criminal Procedure Code should be reviewed to provide for the criteria to be relied upon when evaluating bail or bond applications in accordance with the provisions of the Constitution. Since the Constitution, 2010, enshrines the right to bail or bond for alleged pirates, there needs to be specific statutes to operationalize the rights set out in the Constitution. These reforms should actualize the right to bail and the corresponding inalienable right to fair trial. However, the reforms should be in tandem with Article 21 on limitation of the rights.

The reforms should also codify the procedure for granting bail or bond to alleged offenders including alleged pirates. The launching of the Bail and Bond Policy Guidelines, 2015, is a step in the right direction, however, proper and strict implementation of the policy Guidelines is vital in order to achieve their intended objectives.

The practice of granting bail should also include the manner in which the sureties and security provided by the alleged pirates are to be examined to ensure legitimacy.

4.4.3. Adoption of a Policy on the Prosecution of Foreigners

There is a lacuna in the law on how to deal with the detention and prosecution of foreigners in Kenya. This has exposed the foreigners being tried in Kenya to unfair and unjust treatment due to the arbitrariness of the courts and government agencies on their treatment.

Thus, Kenya should adopt a policy document that is in compliance with international standards on the treatment of foreigners when prosecuting them in municipal courts. The policy document should cover the detainment, the prosecution and the sentencing of the foreigners in Kenya. This will promote and protect the welfare of the foreigners in Kenya.

4.4.4. Improvement of the Welfare of the Alleged Pirates when in Custody

The peculiar conditions facing alleged pirates in Kenya calls for special attention in order to ensure their human rights are protected and promoted. For instance, an interpreter should be availed to serve as the communication link between the foreigners and the prison officials. This will ensure that any concerns that the foreigners held in custody have are adequately addressed.

Their right to health and social interactions with their family should be promoted at least to the same level as Kenyan citizens held in custody.

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