Constitutionality of Criminal Procedure and Prison Laws in Africa

A comparative study of Burundi, Côte d'Ivoire, Kenya, Mozambique and Zambia

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Acronyms and abbreviations

AChHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
Burundian Act on the Penitentiary Regime	Burundian Act No. 1/026 of 22 September 2003 on the penitentiary regime (*Loi n° 1/026 du 22 septembre 2003 relative au Régime pénitentiaire*)
Burundian PA Decree	Ivorian Decree No. 69-189 of 14 May 1989 regulating the organisation of correctional facilities and laying down implementing rules for custodial penalties (*Décret n° 69-189 du 14 mai 1989 portant règlementation des Etablissements Pénitentiaires et fixant les modalités d'exécution des peines privatives de liberté*)
Burundian Police Decree-law	Burundian Decree-law No. 1/035 of 4 December 1989 on the general status of the judicial police (*Décret-loi n° 1/035 du 4 décembre 1989 portant statut général de la police judiciaire*)
Burundian Police Act	Burundian Act No. 1/023 of 31 December 2004 on the creation, composition and operation of the National Police of Burundi (*Loi n° 1/023 du 31 décembre 2004 portant création, composition et fonctionnement de la Police Nationale du Burundi*)
CC	Criminal Code
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CPC	Criminal Procedure Code
ICCPR	International Covenant on Civil and Political Rights
IPOA	Kenyan Independent Police Oversight Authority
K-DPP	Kenyan Director of Public Prosecutions
KNCHR	Kenya National Commission on Human Rights
NLAS	National Legal Aid Service
OPCAT	Optional Protocol to the Convention against Torture
UDHR	Universal Declaration of Human Rights

UNCAT	United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	United Nations Convention on the Rights of the Child

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The aim of CSPRI is to improve the human rights of people deprived of their liberty through research-based advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes.

CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity-building.

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Executive summary

The twentieth century saw the adoption of various international human rights treaties and conventions recognising the rights of arrested, accused and detained persons. At the end of the last century, and to a certain extent because of the ratification of these human rights treaties and conventions, numerous African countries adopted constitutions that provided for some of the rights of arrested, accused and detained persons. This study arose from the question of whether these new rights-driven constitutions incorporated rights recognised at an international level and whether subordinate legislation had been reviewed to ensure its compliance with these constitutions and international human rights law.

This study reviews 41 rights of arrested, accused and detained persons under Burundian, Ivorian, Kenyan, Mozambican and Zambian law. These countries were chosen because they represent Anglophone, Francophone and Lusophone Africa as well as countries that have a civil law and common law tradition. The study begins by reviewing 17 rights of those arrested and detained in police custody; it goes on to examine 18 rights of accused persons; and ends by considering six rights of those detained in prison on remand or as sentenced prisoners. Each right is examined from three angles: first, whether it is recognised under international human rights law; secondly, to what extent the right is enshrined in the domestic constitution of the jurisdiction under review; and thirdly, to what extent the right is upheld and developed in subordinate legislation.

This study finds that the only country that has made a genuine effort to uphold international human rights law in its constitution and to amend subordinate legislation to ensure its compliance with international human rights law and its new constitution is Kenya. The other jurisdictions have had their legislation amended in a piecemeal way. Furthermore, the subordinate legislation of these other jurisdictions is not only more prescriptive than their corresponding constitutions, but often contains a right which was not, or was not adequately, reflected in the constitution. Finally, there is a discrepancy between international treaties ratified by the countries and their constitutions. This is the case even though four of the five countries are monist states; only Burundi gives constitutional status to rights contained in international human rights instruments which it has ratified.

Finally, this study highlights that, particularly in countries with a civil law tradition, there is very little judicial activism that draws on existing international human rights instruments to uphold the rights of arrested, accused and detained persons.

Introduction

In many African countries, criminal procedure legislation and prison laws were adopted in the middle of the twentieth century and have not been substantially updated since then. The second half of the century saw the adoption of several international and regional human rights treaties enshrining, among others, rights for arrested, accused and detained persons. Many African countries also underwent constitutional reform at the end of the century, with their new constitutions often granting extensive rights to detained and accused persons.

CSPRI therefore sought to understand (i) whether the new constitutional provisions complied with international standards, and (ii) whether subordinate laws (mostly focusing on criminal law, criminal procedure law and prisons legislation) were in line with constitutional provisions relating to procedural safeguards for arrested and detained persons. To investigate these questions, CSPRI identified five countries representing Anglophone, Francophone and Lusophone African jurisdictions that have common law and civil law traditions. They are Burundi, Côte d'Ivoire, Kenya, Mozambique and Zambia. Table 1 below outlines the dates at which these five jurisdictions most recently adopted revised domestic constitutions and subordinate legislation, including their latest amendments.

Table 1 Date of adoption of constitutions and subordinate legislation in jurisdictions under review

Country	**Adoption of Constitution**	**Adoption of criminal procedure legislation**	**Adoption of prison legislation**
Burundi	2005	2013	2003
Côte d'Ivoire	2000	1960, last amended in 2014	1969
Kenya	2010	1948, last amended in 2014	1977, last amended in 2009
Mozambique	2004	1932, last amended in 1993	1936 (policy adopted in 2002)
Zambia	2016 (Bill of Rights failed to be adopted by referendum)	1934, last amended in 2005	1966, last amended in 2004

This comparative report outlines which rights are granted to arrested, accused and detained persons at each stage of the criminal justice process and during detention, under international human rights law, in domestic constitutions and subordinate legislation. The first chapter of this study gives a brief overview of the relevant constitutional and legislative framework, law enforcement, judicial structures and the relationship with international law in each jurisdiction.

The second chapter reviews which rights should be granted during police arrest and police custody, and examines whether these are given constitutional and legislative support in the five jurisdictions. The prohibition of unlawful or arbitrary arrest and the use of reasonable force during arrest are two rights that are generally enshrined in domestic constitutions. However, the right to be informed of the reasons for arrest, the right to remain silent, the privilege against self-incrimination and the right to privacy are rights relevant at the time of arrest (and not only during trial) that are not systematically recognised in these jurisdictions' constitutions or subordinate legislation.

Similarly, the right not to be arbitrarily detained in police custody is generally adequately recognised in the constitutions under review, but a number of other rights are generally not recognised. These include: the right to be charged or informed of the reasons for police detention; the right to be promptly brought before a judge; the right to police bail or bond; the right to presumption of innocence; the right to remain silent; the privilege against self-incrimination; the right to safe police custody and to humane conditions of detention; the right to be separated (men from women, children from adults); the right to communicate with a legal representative and with one's family; and the right to be informed of one's rights. Beyond the fundamental right not to be arbitrarily detained, more specific rights find less frequent constitutional or legal basis.

The third chapter examines fair trial rights, which is the stage that typically receives the most constitutional recognition. The chapter discusses the principle of legality, the right to the presumption of innocence, the right to be informed of the charge, the right to a speedy trial, protection against double jeopardy and the right not to be detained while awaiting trial (or right to bail or bond).

Four other categories of rights are also reviewed. First, under communication rights, the chapter examines the right to legal representation, the right to an interpreter and the right to be informed of one's rights. Secondly, it is noted that several evidence-related rights should be granted to accused persons, including the right to have adequate time and facilities to prepare one's defence, the right to present and challenge evidence, the right to have evidence obtained under torture excluded from

trial, the right to remain silent and the privilege against self-incrimination. Thirdly, transparency rights are considered, including the right to be tried and sentenced in a public and open court, and the right not to be tried in absentia. Finally, regarding sentencing rights, the chapter considers the prohibition of the death penalty and of life imprisonment without the option of parole, the right not to be sentenced to unusual or degrading punishment, the right to appeal one's sentence and the impact of a conviction on other rights, especially after the sentenced person has served his or her sentence.

The fourth chapter assesses detention rights whether one is remanded or sentenced. It examines the prohibition of unlawful or arbitrary detention, the right to be informed of the reasons for one's detention, the right to be informed of one's rights, the right to safe custody and to humane conditions of detention, the right to access legal representation in detention and the right to be separated (men from women, children from adults).

The fifth and final chapter of the study highlights some overarching issues: the rights of children in conflict with the law, domestic oversight and complaints mechanisms, and the right to redress following rights violations.

It is important to note is that rights span different stages of the criminal justice process, and thus neat demarcations from one to the next stage are not always possible. Rights are classified by the most relevant stage of the criminal justice process, but are sometimes applicable to another stage as well.

Methodology

CSPRI appointed consultants for the five countries and developed a template with them, identifying rights which should or may be granted to arrested, accused and detained persons, based on international human rights standards and the respective domestic constitutions. The consultants were then asked to fill out the template, identifying the constitutional provision that could support each right and verifying whether this right was reflected in subordinate legislation and/or confirmed by domestic jurisprudence.

The analysis in this study is based on the five completed templates as well as the authors' additional research into the relevant constitutions, legislation and secondary sources. The study's aim is to provide a comprehensive overview of the constitutional basis for the rights of arrested, accused and detained persons in the five jurisdictions under review, and the extent to which these rights are reflected in subordinate legislation. The study will be of value to those seeking to examine specific issues in further detail, and provides a starting point for individuals or organisations wishing to undertake constitutional litigation in the jurisdictions under review, particularly to ensure that the rights of arrested, accused and detained persons are upheld before domestic, regional and international courts.

When considering whether a right has a constitutional basis, several elements were taken into account. First, a right may be directly or indirectly enshrined in a domestic constitution. The right to human dignity, for example, may indirectly provide a constitutional basis for many other rights. However, the less detailed and specific a constitutional right is, the more interpretation it will require and the less substance it will provide to these particular rights, including instances when it is relied upon through constitutional litigation.

To give assistance in this regard, constitutions usually contain an interpretation clause or outline constitutional values, which may help in interpreting more general constitutional rights. Furthermore, constitutions typically contain a general limitations clause in order to balance rights when they are in conflict with each other. Some rights also contain internal qualifiers, in terms of which rights may or must be limited in certain circumstances. Finally, constitutions often provide that certain or all rights may be derogated from, in particular in circumstances such as a state of war or a state of emergency. This general constitutional framework formed the starting point of the analysis in the templates and in this study, and is outlined in the first chapter below.

The tables included under the sub-heading in Chapters 2, 3 and 4 examine whether the rights under review – those in relation to police arrest and police custody, trial and detention – are enshrined in international human rights law and the country's constitution (C) and reflected in subordinate legislation (SL). Although all effort was made to provide a comprehensive analysis, no systematic analysis is given of the legal framework of certain rights for which there was no constitutional basis (even in monist states). Annexure 1 replicates all the tables in one document.

Constitutional rights can receive direct or indirect recognition. Indirect recognition usually takes the form of a generic constitutional provision, applicable to different circumstances and not to a specific event in the criminal justice chain.

In some countries subordinate legislation can adopt rights-oriented language and guarantee a particular right upon the initiative of the arrestee or detainee or automatically. However, in other countries a right will be given procedural recognition and is often merely a possibility depending on the initiative of a public authority, usually a police officer, a prosecutor, a judge or a prison official. Some rights are only partially or conditionally reflected in subordinate legislation.

1. Overview of the five countries under review

1.1. Burundi

Burundi's Constitution, which came into being after years of civil war, was adopted by referendum in February 2005 and entered into force in March of the same year. Constitutional supremacy is enshrined in section 48 of the Constitution, and constitutional values include equality, dignity, peaceful coexistence, democracy, governance, unity and reconciliation.[1] The Constitution does not contain a further interpretative clause. It states that all human rights enshrined in it can be limited by a law of general application, but the latter must be proportionate and must be justified by the general interest or to protect another fundamental right.[2]

Section 19 provides that all rights and duties enshrined, 'among others', in the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (UNCRC), form part of the Burundian Constitution. The rights recognised in these conventions therefore have constitutional status.

However, although section 19 states that these international conventions do not constitute a closed list of international human rights forming part of the Constitution, there is no authoritative jurisprudence on whether this provision extends to other international treaties and conventions, such as the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[3] Burundi is a monist state. This means that it does not require implementing legislation to give effect to the rights contained in international treaties and conventions once they are ratified by Burundi.

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[1] Constitution of Burundi 2005, ss. 13-18.

[2] Constitution of Burundi 2005, s. 47.

[3] Report of the UNHCHR on the situation of human rights and the activities of her Office in Burundi, A/HRC/12/43, 31 August 2009, para. 10; Comité contre la Torture, Examen des Rapports Soumis pas les Etats Parties en Application de l'Article 19 de la Convention, Rapport Initial du Burundi, 11 janvier 2007, UN Doc No. CAT/C/SR.730 (in French only), para. 19; Report of the independent expert on the human rights situation in Burundi, 31 May 2011, A/HRC/17/50, para. 60.

Burundian criminal legislation is recent, with the Criminal Procedure Act having been adopted in 2013,[4] replacing the 1999 legislation, and the Criminal Code adopted in 2009.[5] Prison services are regulated by legislation dating from 2003.[6, 7]

Burundian law enforcement consists of the police, the defence force and security services.[8] There is equal ethnic representation of Hutus and Tutsis within the police and the army.[9] The Burundi National Police Force (*Police Nationale du Burundi*) is divided into four specialised bodies, one of them being the Judicial Police (*Police judiciaire*).[10] The Judicial Police is in charge of, among other things, preventing and investigating crime, conducting arrests, and interrogating suspects.[11] The prosecution services have extensive powers during the pre-trial stage, as will be highlighted below.

The Burundian judicial system is pyramidal, with resident courts (*Tribunaux de résidence*) at the bottom, located at the 'commune' level and hearing minor criminal offences; high courts (*Tribunaux de grande instance*), which hear most criminal cases, including international crimes, serving as an appeal court of the residence courts;[12] and four courts of appeal (*Cour d'Appel*) that serve as appeal courts of the high courts and hear criminal cases as court of first instance involving senior officials, including judges. The Supreme Court of Burundi consists of three chambers: a judicial chamber (for both civil and criminal matters); an administrative chamber; and a highest chamber of appeal (*chambre de cassation*), which ensures that lower courts correctly implement the law.[13]

In addition, Burundi has several specialised courts, including the Constitutional Court (*Cour Constitutionnelle)*, which is constitutionally mandated to verify the constitutionality of subordinate

[4] *Loi n°1/ /10 du 3 avril 2013 portant révision du code de procédure pénale*.
[5] *Loi N°1 /05 du 22 avril 2009 portant révision du Code pénal.*
[6] *Loi n°1/026 du 22 septembre 2003 relative au Régime pénitentiaire.*
[7] Other relevant legislation includes: *Loi n° 1/08 du 17 mars 2005 portant Code de l'organisation et de la compétence judiciaires ; Loi n° 1/37 du 28 décembre 2006 portant Création, organisation et fonctionnement de la Brigade Spéciale anti-Corruption ; Loi n° 1/07 du 25 février 2005 régissant la Cour Suprême ; Loi n° 1/007 du 30 juin 2003 portant Organisation et fonctionnement du Conseil Supérieur de la Magistrature ; Ordonnance ministérielle n° 560/189 du 6 septembre 1983 pour Fixation des ressorts et des sièges des tribunaux de province et de résidence ; Loi n° 1/006 du 16 juin 2000 portant Statut des agents de l'ordre judiciaire ; Loi n° 014 du 29 novembre 2002 portant Réforme du statut de la profession d'avocat ; Ordonnance n° 550/782 du 30 juin 2004 portant Règlement d'ordre intérieur des établissements pénitentiaires ; Loi n°1/004 du 8 mai 2003 portant répression du crime de génocide, du crime contre l'humanité et du crime de guerre ; Loi n° 1/12 du 18 avril 2006 portant mesures de prévention et de répression de la corruption et des infractions connexes*, etc.
[8] Constitution of Burundi, s. 245.
[9] Constitution of Burundi, art. 257.
[10] The organisation and functions of the judicial police are regulated by the Act No. 1/023 of 31 December 2004 on the creation, composition and operation of the National Police of Burundi (*Loi n° 1/023 du 31 décembre 2004 portant création, composition et fonctionnement de la Police Nationale du Burundi*) ('Police Act').
[11] Human Rights Watch, *Mob Justice in Burundi: Official Complicity and Impunity* (March 2010), p. 13.
[12] Burundi has 17 provinces, divided into 129 *communes*, which are divided into 2 908 *collines*.
[13] Constitution of Burundi, s. 221.

legislation and interprets the Constitution.[14] All new legislation is subject to a review of its constitutionality by the Constitutional Court before being promulgated.[15]

The Burundian Constitution enshrines the independence of the judiciary and mandates it to be the custodian of human rights.[16] However, the Constitution also tasks the President to protect such independence, together with the High Council of the Judiciary (*Conseil Supérieur de la Magistrature*).[17] Judges are appointed by the President, following a recommendation from the Minister of Justice and an opinion of the High Council of the Judiciary.

1.2. Côte d'Ivoire

The Constitution of Côte d'Ivoire was adopted by referendum in 2000.[18] The supremacy of the Constitution is not expressly enshrined, nor does it have an interpretative clause. However, its Preamble contains a series of core values guiding Ivorian constitutionality, including the protection of fundamental rights (in particular, human dignity and cultural and spiritual diversity), the separation of powers and transparency. Reference is also made in the Preamble to the UDHR and the African Charter on Human and Peoples' Rights (AChHPR). The Constitution is silent on the possibility of limiting or derogating from fundamental rights, including during a state of emergency. Finally, the Constitution provides civil and criminal immunity to all those who participated in the coup d'état of 1999.[19]

Côte d'Ivoire has adopted a monist system in relation to international law, and the Constitution states that ratification elevates international treaties and conventions to quasi-constitutional status, since they supersede all other legislation. However, before ratification all international treaties and conventions have to be submitted to the Constitutional Council, which will verify their constitutional compliance. If any provision of an international treaty or convention is unconstitutional, the Constitution has to be amended before ratification can take place.[20] These provisions indirectly confirm the supremacy of the Constitution.

Ivorian criminal legislation includes the Criminal Code (1981) and the Criminal Procedure Code (1960).

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[14] Constitution of Burundi, s. 225.
[15] Constitution of Burundi, s. 228(2).
[16] Constitution of Burundi, ss. 60 and 209(1).
[17] Constitution of Burundi, ss. 209 to 220.
[18] Law n° 2000.515 of 1st August 2000 establishing the Constitution of the Republic of Côte d'Ivoire (*Loi n° 200-513 du 1er août 2000 portant Constitution de la Côte d'Ivoire*).
[19] Constitution of Côte d'Ivoire, s. 132.
[20] Constitution of Côte d'Ivoire, ss. 85 to 87 and 95.

Prisons are regulated by a Presidential Decree of 1989.[21] All have been amended piecemeal since then. Ivorian authorities have commenced a process of drafting a new Criminal Code and Criminal Procedure Code, but these drafts have not yet been made public. Adoption is expected in 2017. Ivorian law defines three categories of crime, with different sentence brackets for each. These are minor offences (*contraventions*), misdemeanours (*délit*s) or crimes (*crimes*).

Law enforcement is not framed under the Constitution. The Criminal Procedure Code determines that law enforcement includes the Judicial Police (*police judiciaire*), which is responsible for preventing and investigating crime, gathering evidence and identifying perpetrators; the Office of the Prosecutor, which is in charge of leading criminal prosecutions; and the Investigating Judge (*Juge d'instruction*), who is responsible for criminal investigations. The investigating judge systematically intervenes in cases of *crimes* and, on an optional basis, in cases of *délits*.[22]

The Ivorian judicial system is pyramidal, with 44 first instance courts (*Tribunaux de première instance* and *sections de tribunal*) at the first level, followed by three appellate courts (*Cours d'Appel*) and the Supreme Court at the top. In addition, the Jury Court (*Cour d'Assises*) has jurisdiction over *crimes*.[23] There is no possibility to appeal the Jury Court's judgments, with the exception of a cassation appeal in case of acquittal or in the interest of the law.[24] The Supreme Court is divided into four branches, namely the Court of Cassation, the Supreme Administrative Court (*Conseil d'Etat*), the Court of Audit (*Cour des Comptes*) and the Constitutional Council (*Conseil Constitutionnel*). The Court of Cassation reviews non-appealable judgments on questions of legal and factual interpretation. However, in practice, the Constitutional Council is the only operating institution, and the Supreme Court, as one entity, performs the judicial functions of its three other branches.

The Constitutional Council may examine the constitutionality of draft legislation (it is an obligation for 'organic laws', which are laws that regulate institutions and structures created by the Constitution)[25] and rules on the constitutionality of legislation when this is raised before a lower court.[26] It appears that virtually no criminal procedure or prison legislation has been challenged before the Constitutional Council. The Constitutional Council also plays an important role in the

[21] Decree No. 69-189 of 14 May 1969 regulating the organisation of correctional facilities and laying down implementing rules for custodial penalties (*Décret n° 69-189 du 14 mai 1969 portant règlementation des Etablissements Pénitentiaires et fixant les modalités d'exécution des peines privatives de liberté*) (PA Decree).
[22] Ivorian CPC, s. 77.
[23] Ivorian CPC, s. 124.
[24] Ivorian CPC, ss. 566 and 567.
[25] Constitution of Côte d'Ivoire, s. 71(2)(ii).
[26] Constitution of Côte d'Ivoire, ss. 52, 70, 71, 75, 77, 95 to 97.

election process, including by vetting presidential and parliamentary candidates, overseeing the holding of elections and announcing presidential election results.[27]

The independence of the judiciary is upheld in the Constitution, which is also guaranteed by the President. The judiciary is regulated by the High Council of the Judiciary (*Conseil Supérieur de la Magistrature*), which is presided over by the President of the Republic.[28] Judges cannot be removed.

1.3. Kenya

Kenya's constitutional review started in the early 1990s. An inclusive constitution-making process led to the development of a draft Constitution, but it was rejected by referendum in 2005. The draft Constitution remained in limbo and the 2007 general elections took place, which were followed by unprecedented post-election violence in which 1 300 people died and more than 100 000 were displaced. Part of the post-electoral violence saw a power-sharing agreement, which entailed reviving the constitutional process and which was, to the surprise of many, successful. A revised draft Constitution was developed with international expert input and adopted by referendum in 2010, with a 70 per cent approval rate.[29]

The supremacy of Kenya's Constitution is directly enshrined in section 2 of its Constitution. Furthermore, section 10 lists the constitutional values that must be referred to when interpreting the Constitution, legislation and policies. These include 'national unity, [...] the rule of law, […] human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, […] good governance, integrity, transparency and accountability'. Fundamental rights may be limited only by a law of general application, and the limitation must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', taking into consideration all relevant factors including the nature of the right and of the limitation, the importance of the purpose of the limitation, as well as whether any less restrictive means are available to achieve the purpose of the limitation.[30]

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[27] Constitution of Côte d'Ivoire, ss. 35, 37, 38, 40, 60 and 94.
[28] Constitution of Côte d'Ivoire, ss. 101 and 104.
[29] C. Murray, 'Kenya's 2010 Constitution', available at http://www.iapo.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf (accessed 08 March 2016).
[30] Constitution of Kenya, s. 24. Section 24(1) to (4) reads as follows:
(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right or fundamental freedom;

Of particular note is the Prevention of Terrorism Act, which prescribes that some rights (including the right to privacy, to be brought before a court within 24 hours, to freedom of expression and to freedom of security) may be limited in conformity with the general constitutional limitations clause for the purposes of preventing, detecting and investigating criminalised terrorist acts.[31] However, the right to be free from torture and other ill-treatment, the right to be free from slavery and servitude, the right to a fair trial and the right to an order of habeas corpus are non-derogable.[32] In a derogation from the general limitations clause, members of the Kenyan defence forces may at the moment of arrest have their rights to privacy, freedom of association, assembly and demonstration as well as their socio-economic rights limited by a law of general application.[33]

Prior to the adoption of the 2010 Constitution, Kenyan courts had adopted a dualist approach to international law, as the previous constitution was silent on the matter. Section 2(6) of the 2010 Constitution reads that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution', which would suggest that Kenya has now adopted a monist approach, in that domesticating legislation is no longer required to give effect to rights recognised under international treaties ratified by Kenya. This has also been recognised in some case law.[34] However, it is unclear whether international law has constitutional, quasi-constitutional or legal status in the Kenyan legal framework.[35]

(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied.
(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

[31] Kenya Prevention of Terrorism Act, s. 35.

[32] Constitution of Kenya, s. 25.

[33] Constitution of Kenya, s. 24(5).

[34] See N. Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13(2) *AHRLJ*, pp. 415 to 440.

[35] See N. Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13(2) *AHRLJ*, pp. 415 to 440.

Kenya is the only country under review that has made a dedicated effort to amend its pre-existing criminal law and criminal procedure legislation to bring it in line with its new Constitution. Legislation regulating the criminal justice system includes the Criminal Procedure Code, Cap. 75 (last amended in 2014); the Penal Code, Cap. 63 (last amended in 2014); the Evidence Act, Cap. 80 (last amended in 2014); the Prisons Act, Cap. 90 (last amended in 2009); the National Police Service Act, Cap. 84 (last amended in 2015); the Prevention of Terrorism Act, No. 30 of 2012, the Security Law (Amendment) Law, 2014 and the Persons Deprived of Liberty Act, No. 23 of 2014. Kenya's Criminal Procedure Code and Penal Code are very similar to the corresponding Zambian texts, at least before the post-2009 amendments, which can be explained by the fact that the two countries had been ruled by the same colonial power.

Kenyan law enforcement includes the National Police Service (acting under the supervision of the Inspector General), the National Intelligence Service, the Director of Public Prosecutions (K-DPP), and the Kenya Prison Services. The Ministry of Interior and Coordination of National Government is responsible for managing prison services and for providing policy guidelines for the police. The police are mandated to prevent, detect and investigate crime, while prosecution powers are vested in the K-DPP. The K-DPP need not give reasons for withdrawing charges.

The Constitution guarantees the institutional, fiscal and personal independence of the Kenyan judiciary.[36] The first level of the Kenyan courts with criminal jurisdiction are the magistrates' courts. Their decisions can be appealed to the High Court. The High Court is the first instance where the question 'whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened' is determined.[37] Decisions of the High Court can be appealed to the Court of Appeal and ultimately to the Supreme Court. Automatic access to the Supreme Court is possible only for matters of interpretation or application of the Constitution.[38] Decisions of the Supreme Court are binding on all other courts.[39] The Chief Justice is the head of the judiciary and the Supreme Court.[40]

1.4. Mozambique

The Mozambican civil war ended in 1992 and saw the adoption of three constitutions, the last one having been adopted in 2004. Section 2 of the Constitution states that the Constitution of the Republic of Mozambique (*Constituição da República de Moçambique*) is supreme.

[36] Constitution of Kenya, s. 160(1).
[37] Constitution of Kenya, s. 165(3)(b).
[38] Constitution of Kenya, s. 163 (3) and (4).
[39] Constitution of Kenya, s. 163(7).
[40] Constitution of Kenya, s. 161(2) and 163(1).

The Constitution, in its Title outlining fundamental rights, starts by listing a series of 'general principles' that could be seen as guiding the interpretation of all other fundamental rights. These include the right to non-discrimination and the right to life. It is unclear, however, whether these rights, and the other general principles introducing the Mozambican Bill of Rights, should be regarded as general constitutional values or an interpretation clause. Furthermore, the rights recognised to arrested and detained persons are relatively generic and can be applied throughout the different stages of the criminal justice process. The consequence is that such constitutional rights cannot easily serve as a sole basis for constitutional litigation.

Fundamental rights may be limited to safeguard the rights and interests protected in the Constitution.[41] More specifically, section 72 of the Constitution reads that 'individual freedoms and guarantees may be temporarily suspended or restricted only in the event of a declaration of a state of war, of a state of siege, or of a state of emergency'.[42] In addition, section 286 states that the rights to life, to personal integrity, to civil capacity and to citizenship, the non-retroactivity of criminal law, the right of arrested persons to a defence and freedom of religion cannot be suspended due to states of siege or emergency.

However, section 287 also expressly states that certain rights can be limited in a state of siege or emergency, including detention in a place not intended for such purpose and the possibility to interfere with private correspondence and conduct searches without judicial control. In times of siege or state of emergency, a detainee's relative must be informed immediately of the detention, but the detention need only be made public within five days and the detainee need only be brought before a judge within ten days. The Constitution is silent on the non-derogability of rights in times of war or generally in times of peace.

Mozambique has adopted a monist approach to international law, and the Constitution states that after ratification, rights and norms recognised in international treaties and conventions become law with 'infra-constitutional' status.[43] Therefore, international human rights would have a higher status than subordinate legislation but a lower status than the provisions of the Constitution.

The criminal justice system in Mozambique is regulated by the 1932 Criminal Procedure Code (*Código de Processo Penal*) and the 2014 Criminal Code (*Código Penal*), which entered into force in 2015.

[41] Constitution of Mozambique, s. 56(2).
[42] English translation available at http://confinder.richmond.edu/admin/docs/Constitution_(in_force_21_01_05)(English)-Mozlegal.pdf (accessed 22 June 2016).
[43] Constitution of Mozambique, s. 18.

There is a discussion amongst practitioners and academics as to whether the new Criminal Code can be implemented before a new Criminal Procedure Code has been adopted.[44] Prisons are regulated by the Prison Policy (*Política Prisional*) of 2002 and the Law Decree 26643/1936 on Prison Organization (*Organização Prisional*) of 1936.[45] One key ruling is the Constitutional Council judgment 4/CC/2013. It found that several provisions of the Criminal Procedure Code were unconstitutional, in particular finding that relevant legislation had to be read to limit the duration of pre-trial detention and ordered by a judicial authority.[46]

Law enforcement in Mozambique includes the Police of the Republic of Mozambique (*Policia da República de Moçambique*) and the Mozambican National Penitentiary Services (*Serviços Nacional Penitenciario*, SERNAP). The police fall under the responsibility of the Ministry of Interior and are divided into four branches, the one relevant for this study being the Criminal Investigation Police (*Policia de Investigação Criminal*). It is regulated by the Constitution and by Law 19/92, which was amended in 2013.[47] In addition, the government in recent years has adopted several strategies and policies to modernise the police.[48] The police are mandated, among other things, to regulate public order, guarantee fundamental freedoms of citizens, and prevent and combat crime. The Mozambican police face several challenges impacting on their ability to guarantee safety in the country, including a lack of resources, a lack of information exchange within the criminal justice system, high levels of corruption, accusations of political control, and extra-judicial killings. [49]

The Constitution upholds the independence and impartiality of the judiciary.[50] It also provides that the President of the Republic nominates the president and the vice-president of the High Court.[51] The judiciary is managed by the Superior Council of the Judiciary.[52]

[44] A new Criminal Procedure Code is still under discussion in Parliament.
[45] The Prison Policy was approved with Resolution 65/2002 by the Council of Ministries to comply with the recommendations given during the Kampala Conference on prison reforms in Africa.
[46] See T. Lorizzo & J. Redpath, 'Revolution in pre-trial detention in Mozambique', available at http://www.osisa.org/law/mozambique/revolution-pre-trial-detention-laws-mozambique (accessed 10 March 2016).
[47] Law Decree 22/93 approved the Organic Statute of the PRM. The law was amended by Law 16/2013.
[48] A. Nuvunga, B. Nhamirre, J. Matine and T. Lorizzo, *Militarização da Formação Policial em Matalane e na ACIPOL é Preocupante.* Centro de Integridade Publica (CIP), Newsletter 10/2016.
[49]Amnesty International, *Licence to Kill: Police accountability in Mozambique* (2008) (AFR 41/001/2008); Amnesty International Report, *State of the World's Human Rights, Human Rights in the Republic of Mozambique* (POL 10/001/2009); Amnesty International, *I can't believe in justice any more: Obstacles to justice for unlawful killings by the police in Mozambique* (AFR 41/004/2009); M. Mosse, 'A Corrupçâo do Sector da Justiça em Moçambique' (2006) 3 Documento de Discussâo Centro de Integridade Pública de Moçambique. Maputo, Moçambique.
[50] Constitution of Mozambique, s. 217. The principle is reiterated in article 10 of Law 24/2007.
[51] Constitution of Mozambique, s. 226(2).
[52] Constitution of Mozambique, ss. 221 and 222.

There are four levels within the Mozambican judiciary: District courts, which hear cases eligible for a prison sentence of up to 12 years; Provincial courts; three Appeal Courts; and the Supreme Court. These courts are regulated by Law 24/2007 (*Lei Orgânica dos Tribunais Judiciais*). In addition, Community Courts, regulated by Law 4/1992, can hear minor criminal offences.[53] Finally, the Constitutional Council, created in 1990 but only operational since 2003, is mandated to rule on the constitutionality of legislation (both prior to its enactment and through constitutional litigation) and on the legality of administrative acts. It also has election-related powers.[54]

1.5. Zambia

The current Zambian Constitution dates from independence in 1964 and was amended extensively in 1991, 1996 and 2016. However, the 2016 amendment did not affect the Bill of Rights, which was subject to a referendum in August 2016 during the general elections. But the voter turnout was lower than the 50% required by law and the referendum failed. [55] Therefore, this report does not make reference to the new provisions.

Constitutional supremacy is enshrined in section 1(1). The Zambian Constitution lists a series of values in its Preamble (democracy, equality, human rights, justice and good governance) and sets, inter alia, morality, patriotism, democracy and constitutionalism, human dignity and non-discrimination, good governance and sustainable development as underlying constitutional values;[56] section 9 requires that these values shall apply in the interpretation of the Constitution, in the enactment and interpretation of subordinate legislation and in the development and implementation of national policy.

All rights are subject to the general limitations clause, which states that 'the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or public interest'.[57] In addition, section 25 of the Zambian Constitution contains a derogation clause, prescribing that the following rights may be limited in times of war and state of emergency by a law of general application: the right to liberty; protection from deprivation of property; the right to privacy; freedom of conscience, thought and religion; freedom of expression; freedom of assembly

[53] T. Lorizzo, *The Interaction between a Plurality of Mechanisms of Conflict Resolution and the State in Mozambique. The Case of Community Courts in Maputo* (2016) forthcoming publication.
[54] Constitution of Mozambique, ss. 241 to 248.
[55] 'Referendum vote flops, fails to meet the threshold', *Lusaka Times,* 19 August 2016, available at https://www.lusakatimes.com/2016/08/19/referendum-vote-flopsfails-meet-threshold/ (accessed 26 September 2016).
[56] Constitution of Zambia, s. 8.
[57] Constitution of Zambia, s. 11.

and association; freedom of movement; the right to non-discrimination; and the protection of young persons from exploitation. The Constitution contains other rights-specific derogations, which are examined below where relevant.

The Constitution is silent on the status of international law in Zambia. Section 63(2)(e), however, gives Parliament the power to approve international agreements and treaties before they are ratified or acceded to. Zambia is largely a dualist state, and international treaties and conventions which are ratified by it must be domesticated by the adoption of implementing legislation. Courts have the option of referring to international law for interpretation purposes even in the absence of domesticating legislation.[58] There have been some rulings by the High Court that take judicial notice of rights enshrined in international conventions ratified though not domesticated by Zambia, but these judgments are not binding on other High Court benches and subsequent benches have then ruled without taking such rights into consideration. One judgment of the Supreme Court made reference to international human rights law in the 1995 case of *Sata v Post Newspapers Ltd and Another*, but the court has been largely silent on the issue since then.[59]

The criminal justice process in Zambia is regulated mainly by the Criminal Procedure Code Act of 1934, the Penal Code Act of 1931, the Juveniles Act of 1956, the National Prosecution Authority Act of 2010, and the Plea Negotiations and Agreements Act of 2010. The police are regulated by the Zambia Police Act of 1966, and prisons, by the Prisons Act of 1966. These have been amended piecemeal since then. Zambia's Criminal Procedure Code and Penal Code are very similar to the Kenyan texts, at least before the post-2009 amendments. This can be explained by the two countries having been ruled by the same colonial power.

The Zambian police are constitutionally mandated to protect life and property, preserve peace, law and order, ensure security of the people, detect and prevent crime and uphold the Bill of Rights.[60] Other specialised law enforcement agencies exist and focus on specific crimes, including matters of corruption and drug-related offences. Prisons are managed by the Zambia Correctional Service, a constitutionally established institution under the authority of the Ministry of Home Affairs.[61]

The Zambian judiciary is a six-tier system comprising Local Courts, Small Claims Courts, Subordinate (magistrates) Courts, the High Court, the Court of Appeal, the Supreme Court and the Constitutional

[58] M. Hansungule, 'Domestication of international human rights law in Zambia', in M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (2010) Pretoria: PULP, pp. 71-82.
[59] M. Hansungule, 'Domestication of international human rights law in Zambia', in M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (2010) Pretoria: PULP, pp. 74-78.
[60] Constitution of Zambia, s. 193.
[61] Constitution of Zambia, s. 193(1)(c).

Court.[62] The Supreme Court and Constitutional Court are equivalently ranked.[63] Serious crimes (such as homicides, robbery and treason) are tried before the High Court as a court of first instance, and all other criminal matters are heard by the Subordinate Courts and appealed to the High Court, although the High Court has 'unlimited or original jurisdiction in civil and criminal matters'.[64] The Supreme Court is the final court of appeal in all other matters except constitutional matters, which are reserved for the Constitutional Court.[65] Several other specialised courts exist, but do not have criminal jurisdiction. The independence and impartiality of the judiciary are upheld in the Constitution.[66]

1.6. International human rights law relevant for this study

This study reviews rights contained in the ICCPR, UNCAT, the UNCRC and the AChHPR. These treaties and conventions were ratified by all five countries. In addition, the Second Optional Protocol to the ICCPR (1989) on the abolition of the death penalty provides an international basis for the right to life (see section 3.2.5.), but was ratified only by Mozambique. Finally, the Optional Protocol to the Convention against Torture (OPCAT) supports complaints and oversight mechanisms, which are examined in section 5.2. The Protocol was ratified by Burundi and Mozambique, and signed by Zambia.

There are numerous international and regional soft law instruments that give further detail to the rights of arrested, accused and detained persons. Reviewing them all would constitute a study in itself. Because these instruments do not contain enforceable rights, this study does not make any reference to them. However, soft law instruments can provide additional support to those seeking to ensure that the rights of arrested, accused and detained persons, enshrined in international and regional human rights law and/or in domestic constitutions, are upheld. The relevant soft law instruments include:

- UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), adopted in 1955 and revised in 2015;
- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988);
- UN Basic Principles on the Role of Lawyers (1990);

[62] Constitution of Zambia, ss. 120, 124, 127, 130, and 133.
[63] Constitution of Zambia, s. 121.
[64] Constitution of Zambia, s. 134.
[65] Constitution of Zambia, s. 125.
[66] Constitution of Zambia, s. 122(1).

- UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (2010) – adding a gender perspective to the UNSMR;
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013);
- UN Basic Principles on the Independence of the Judiciary (1985);
- ACHPR Kampala Declaration on Prison Conditions in Africa (1996);
- ACHPR Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) (2002);
- ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003);
- ACHPR Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2005).

Interestingly, because four of the five countries (Burundi, Côte d'Ivoire, Kenya and Mozambique) have adopted a monist approach to international law, the rights recognised in international human rights treaties ratified by each country have either constitutional (Burundi), quasi-constitutional (Côte d'Ivoire and Mozambique) or legal value (the status under Kenyan law is unclear)[67]. In several instances, rights enshrined in international human rights law are not reflected in domestic constitutions or legislation. In countries of monist tradition, domestication would not be required for international human rights to be enjoyed. Therefore, ratification should suffice to claim enjoyment of these human rights. However, with the exception of Kenya, there is usually little, if any, jurisprudence based on international human rights law to uphold the rights of arrested, accused and detained persons. It is hence unclear whether these international rights have effectively entered the legal culture of the countries under review.

[67] See N. Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13(2) *AHRLJ*, pp. 415 to 440.

2. Rights immediately following police arrest and during police custody

This chapter analyses the international human rights law framework, constitutionally enshrined rights and subordinate legislation on police arrest and police custody prior to first court appearance (or, in the case of Burundi and Côte d'Ivoire, until transfer to prison, which can take place without first being heard by a judge). It includes, in some instances, police interrogation.

2.1. Rights immediately following arrest

Table 2 Overview of the constitutional and legislative recognition of the rights during arrest

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Prohibition of arbitrary and/or unlawful arrest	Yes	Direct	Gives right	Direct	Gives right	Indirect	Gives right	Direct	Gives right	No	Gives right
Prohibition of abuse of force upon arrest	Yes	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right
Right to be informed of reasons for arrest	Yes	No	No	No	No	Direct	Gives right	No	Gives right	Direct	No
Right to remain silent and/or privilege against self-incrimination at the moment of arrest	No	No	No	No	No	Direct	Gives right	No	No	No	No

Right to privacy during arrest	No	Direct	Procedural	No	Procedural	Direct	Procedural	Direct	Procedural	Indirect	Procedural

2.1.1. Prohibition of arbitrary or unlawful arrest

Arbitrary arrest is prohibited under article 9(1) of the ICCPR.

The Burundian and Ivorian constitutions state that an arrest may be pursued only for acts that constituted a criminal offence in law at the time of the arrest, thereby prohibiting unlawful, or arbitrary, arrest.[68] The Kenyan Constitution, despite being the most comprehensive constitution analysed in this study, does not expressly prohibit arbitrary or unlawful arrest. However, its section 49 provides extensive rights to arrested persons, which should alleviate the consequences of a possible arbitrary arrest. The Mozambican Constitution states that nobody can be arrested except in accordance with the law.[69]

The Zambian Constitution enshrines only the right not to be unlawfully detained, as examined below. In Zambia, given that it is a dualist state, the ICCPR cannot be directly invoked before a court, hence opening the possibility for arbitrary arrest to take place without being declared unconstitutional or contrary to international law. Legislation by and large determines in which circumstances an arrest may be performed, be it by the police, a prosecutor, a judge or, in some jurisdictions, by a private person.

Burundian law determines that an arrest may be performed by a judicial police officer or by a prosecutor.[70] A judicial police officer can perform an arrest in case of *flagrante delicto*,[71] as well as if he or she reasonably suspects that an offence punishable by a prison sentence of at least a year has been committed and that the suspect may flee.[72] In addition, the police may arrest upon the instruction of the prosecutor, who directs the investigation of crimes (and hence plays the role of an

[68] Constitution of Burundi, s. 39(1) and (2), Constitution of Côte d'Ivoire, s. 21.
[69] Constitution of Mozambique, s. 59.
[70] Burundian CPC, ss. 15, 31(2) and 50. See also article 143 of the Judiciary Code.
[71] Burundian CPC, s. 21.
[72] Burundian CPC, s. 15.

investigative judge).[73] A prosecutor may also issue an arrest warrant in order to detain a person in prison (in remand detention).[74]

In Côte d'Ivoire, arrest in *flagrante delicto* can be effected by any person, who must bring the suspect to the nearest judicial police officer.[75] Once the judicial police officer is notified, or if he or she effects the arrest, he or she must immediately inform the prosecutor, who will take over from the police. Similarly, if the investigating judge is called by the prosecutor, he or she takes over the investigation from the latter.[76] The police can arrest individuals for petty offences, including disruptive behaviour (such as debauchery), being destitute or a lunatic, witchcraft-related practices, public vagrancy, and begging.[77] There are four types of arrest warrants under Ivorian law, all following an investigation and formal charge: the order to appear before a judge (subpoena) (*mandat de comparution*); the order to bring a person before a judge, by coercive means if necessary (*mandat d'amener*); the order to bring a person in remand detention (*mandat de dépôt*); and the arrest warrant (*mandat d'arrêt*) to locate a person and bring him or her to the prison indicated on the warrant.[78] Arrest warrants can be issued by a prosecutor,[79] an investigating judge[80] or a trial judge.[81]

Under Kenyan law, a police officer may perform an arrest of a person without a warrant only in limited circumstances listed in section 29 of the CPC, including when he or she reasonably suspects the person of having committed a 'cognizable offence'[82] and when in cases of *flagrante delicto*. In addition, any private person may perform an arrest of a person reasonably suspected of having committed a cognizable offence or a felony, and must take him or her to the nearest police without delay.[83] Finally, a magistrate may arrest a person committing an offence in his or her presence and immediately issue a warrant for that person's detention.[84] Since 2003, the CPC no longer authorises arrest for petty offences but county by-laws may allow such arrests by *askaris*, who are municipal law

[73] Burundian CPC, ss. 1, 3(2) and 8.
[74] Burundian CPC, ss. 110 and 338.
[75] Ivorian CPC, ss. 53 and 72.
[76] Ivorian CPC, ss. 53 to 73.
[77] Ivorian *Décret n° 69-356 du 31 juillet 1969, déterminant les contraventions de simple police et les peines qui leur sont applicables* (Decree No. 69-356 of 31 July 1969 determining minor offences and applicable penalties), s. 2(8), 2(11), 3(14); Ivorian CC, ss. 189 to 194.
[78] Ivorian CPC, s. 120.
[79] Ivorian CPC, ss. 69 and 70.
[80] Ivorian CPC, s. 120.
[81] Ivorian CPC, s. 646.
[82] Defined in the Kenyan CPC as 'an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant' (Kenyan CPC, s. 2).
[83] Kenyan CPC, ss. 34 and 35.
[84] Kenyan CPC, ss. 38 and 39.

enforcement officials. Arrest warrants are issued by judges or magistrates and executed by police.[85] However, an irregularity of the warrant does not affect the validity of proceedings.[86]

Mozambican law used to authorise arrest by police or prosecutors without a warrant in circumstances other than *flagrante delicto*.[87] However, in 2013 the Constitutional Council declared this provision unconstitutional, stating that only a judicial authority can authorise the arrest *fora flagrante delicto*. Arrest in *flagrante delicto* can be effected by police or prosecutors if the offence is punishable by a prison sentence.[88] The new Penal Code decriminalised outdated offences, such as mendicancy and vagrancy.[89]

Zambian law is similar to Kenyan law in relation to arrest, and the wording of both CPCs is almost identical. Arrests[90] by police without a warrant are possible in limited circumstances, including for cognizable offences and if an offence is committed in the police officer's presence.[91] The Zambian CPC also authorises the police to arrest individuals for petty offences, such as not having ostensible means of subsistence, or if they are 'by repute' a 'habitual robber, housebreaker or thief'. A magistrate may also arrest and immediately issue a warrant against a person committing an offence in his or her presence.[92] Private arrests are possible for offences committed *in flagrante delicto* or when a person is reasonably suspected of having committed a felony.[93] Arrest warrants are issued by judges or magistrates and executed by police.[94] Similarly to Kenyan law, an irregularity of the warrant does not affect the validity of proceedings.[95]

2.1.2. Prohibition of abuse of force during arrest

The international prohibition of torture and other ill-treatment, which would be used to support the prohibition of abuse of force, including at the time of arrest, is enshrined in article 7 of the ICCPR, articles 1, 2 and 4 of UNCAT and article 5 of the AChHPR. The right to life is recognised in article 6(1)

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[85] Kenyan CPC, ss. 49, 90 and 100 to 113.
[86] Kenyan CPC, s. 113.
[87] Mozambican CPC, s. 293 and Law 2/1993.
[88] Mozambican CPC, s. 287 to 290. If the offence in punishable only by a fine, the person can be arrested if his or her name and address are unknown. The person must be brought 'as soon as possible' before a judicial authority; there is no strict time frame.
[89] These crimes constituted criminal offences as per ss. 256 and 260 of the previous CP.
[90] Arrest is defined in section 18(1) of the Zambian CPC as touching or confining the body of the person being arrested, unless such person submits to custody by word or action.
[91] Zambian CPC, s. 26.
[92] Zambian CPC, s. 36.
[93] Zambian CPC, ss. 31 and 32.
[94] Zambian CPC, ss. 47, 91 and 100 to 113.
[95] Zambian CPC, s. 113.

of the ICCPR and article 4 of the AChHPR. Both rights are reflected in all five constitutions, and given further legislative guidance.

The prohibition of abuse of force by police during arrest is recognised in all five domestic constitutions under the right to life[96] and the prohibition of torture and other ill-treatment.[97] However, the right to life is qualified in several constitutions. In Kenya, the right to life may be limited by the Constitution or in any written law.[98] The Zambian Constitution provides that the death of a person will not be considered unconstitutional if it is the 'result of use of force that is reasonably justifiable' in cases of self-defence, 'to effect a lawful arrest or to prevent the escape', to suppress a riot, insurrection, mutiny or 'following lawful acts of war and to prevent the commission of a criminal offence'.[99] This wording is very general, and, in relation to police action, compliance with the law (which in itself is often worded in general terms) appears to suffice in most cases to cause the lawful death of a person.

The Burundian, Ivorian and Mozambican constitutions do not qualify the right to life, and so death by police can be authorised only under the respective limitations clauses (which Côte d'Ivoire does not have), which usually require a law of general application. Subordinate legislation generally enshrines the principles of reasonableness, proportionality and necessity when using force, including firearms, although most laws lack the necessary degree of specificity to effectively limit abuse of force by police and to serve as a necessary legal basis to rule on the illegality of such use of force.

Burundian, Ivorian and Mozambican legislation are quite general, but authorise the use of (lethal) force, thereby raising an issue of constitutional compliance and interpretation. Burundian law states that the police must act with professionalism in compliance with the Constitution and international law, and may use force only if 'absolutely necessary'.[100] The Ivorian Police Code of Ethics states that the police may not use violence or impose inhuman or degrading treatment on anyone, and that the use of firearms must be strictly necessary 'to the aim pursued', thereby indirectly authorising the police to kill if necessary. [101] Under Mozambican law, the police are authorised to use force only in case of resistance, flight or attempted flight, and this use must be guided by the principles of

[96] Constitution of Burundi, s. 24; Constitution of Côte d'Ivoire, s. 2; Constitution of Kenya, s. 26; Constitution of Mozambique, s. 70; Constitution of Zambia, s. 12.
[97] Constitution of Burundi, s. 25; Constitution of Côte d'Ivoire, s. 3; Constitution of Kenya, s. 29; Mozambique, s. 70; Constitution of Zambia, s. 15.
[98] Constitution of Kenya, s. 26(3).
[99] Constitution of Zambia, s. 12(3).
[100] Burundian Police Act 2004, ss. 2 and 3; Decree-law No. 1/035 of 4 December 1989 on the general status of the judicial police (*Décret-loi n° 1/035 du 4 décembre 1989 portant statut général de la police judiciaire* ('Police Decree-law')) ss. 13 and 15.
[101] Ivorian Code of Ethics of the National (*Code de déontologie de la Police Nationale*), ss. 9 and 10.

necessity, proportionality and reasonableness.[102] It is important to note that torture is criminalised in Burundi and Mozambique, which could serve as a further legal basis to prosecute officials who abuse force during arrest.[103]

In this regard, only the Kenyan legislation is detailed and specific. Its CPC enshrines the principle of reasonableness and necessity when effecting an arrest. The Sixth Schedule of the National Police Service Act, which was adopted in 2014, contains detailed provisions on the use of force by police, including the use of firearms, and its wording is geared towards controlling any abuse of force by police.[104] In addition, if any police action results in serious injury or death, the police must report the incident to the Independent Police Oversight Authority (IPOA), which will investigate the matter. Failure to report such an incident constitutes a criminal offence.[105] Finally, torture by police was criminalised in 2014.[106] However, torture at the hands of other law enforcement officials, including prison officials, does not constitute a criminal offence under Kenyan law.

Keeping in mind the derogations to the right to life authorised under the Zambian Constitution, Zambian law is also general, authorising the use of firearms within the bounds of necessity and proportionality only to prevent an escape or if a person resists arrest.[107] The unnecessary use of force by police constitutes a ground for disciplinary action.[108]

2.1.3. Right to be informed of reasons, to remain silent, against self-incrimination and to privacy at the time of arrest

Under international human rights law, the right to be informed of the reasons for arrest *at the time of arrest* is enshrined in article 9(2) of the ICCPR.

Generally, but with the exception of Kenya and Zambia, the constitutions and laws of the countries under review are silent on the right to be informed of the reasons for arrest, on the right to remain silent or on the protection against self-incrimination at the moment of arrest. In Burundi, Côte d'Ivoire and Mozambique, in particular, reference should therefore be made to international human rights law when such rights are infringed and litigated.

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[102] Mozambican CPP, s. 306; Mozambican Law 16/2013, s. 33.
[103] Burundian CC, ss. 204 to 209; Mozambican CC, s. 160. However, torture is not defined under Mozambican law, and judges would therefore have to rely on international law for such definition.
[104] See also Kenyan National Police Service Act, s. 61.
[105] Fifth Schedule to the National Police Service Act, para. 13; Kenyan Independent Policing Oversight Authority Act 35 of 2011, s. 25.
[106] Kenyan National Police Service Act, s. 95.
[107] Zambia Police Act, s. 24.
[108] Zambia Police Act, s. 30(1)(h).

The Burundian Constitution recognises only a general right to privacy, and determines that house searches must be regulated by law.[109] The CPC regulates body and house searches. Body searches must be performed by a police officer of the same gender and must be necessary, whereas house searches must, among other requirements, be authorised by a judicial authority and take place only between 06h00 and 18h00 and in the presence of the owner.[110]

Under Ivorian law, house searches can be performed by police in cases of *flagrante delicto*, or by an investigating judge.[111] They can take place only between 04h00 and 21h00, except in hotels, theatres, clubs, bars and the like, where no time limits apply.[112]

The Kenyan Constitution upholds the right of all arrested persons to be 'promptly' informed of the reasons for arrest in a language that the person understands (without requiring that this take place at the moment of arrest)[113] and of the consequences of not remaining silent.[114] They have the right to remain silent (and to be informed of this right),[115] and the right not to be 'compelled to make any confession or admission that could be used in evidence against [them]'.[116] The Fifth Schedule of the National Police Service Act imposes a general obligation on the police to act in accordance with the Constitution. Furthermore, the Persons Deprived of Liberty Act imposes that detainees be 'promptly' informed of the reasons for deprivation of liberty and that they are not compelled to make a confession or to plead guilty.[117] In addition, constitutional provisions are very specific and could allow for direct implementation without the need for subordinate legislation.

The Kenyan Constitution also prohibits body and house searches.[118] However, the latter are subject to the general limitations clause and are regulated by law, the wording again being very similar to that in Zambian law. Arrested persons can be searched only if they cannot provide bail, and women have to be searched by women.[119] Houses, vehicles, vessels and aircraft can be searched, and vehicles, vessels and aircrafts can be impounded, if the police have reasonable suspicion that they contain stolen goods or were used for the commission of a crime.[120] The owner is not entitled to

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[109] Constitution of Burundi, ss. 28 and 43.
[110] Burundian CPC, ss. 45(2) and 4, 88, 90 and 91; Police Decree-law, s. 14.
[111] Ivorian CPC, ss. 57 to 59 and 92 to 100.
[112] Ivorian CPC, s. 59.
[113] Constitution of Kenya, s. 49(a)(i).
[114] Constitution of Kenya, s. 49(a)(iii).
[115] Constitution of Kenya, s. 49(a)(ii) and 49(b).
[116] Constitution of Kenya, s. 49(d).
[117] Kenyan Persons Deprived of Liberty Act, s. 7(a), (h) and (i).
[118] Constitution of Kenya, s. 31.
[119] Kenya CPC, ss. 25 and 27.
[120] Kenya CPC, s. 26; Kenya National Police Service Act, ss. 57 and 60.

compensation for damages caused to his or her vehicle, vessel or aircraft following a police search.[121] Persons in police custody cannot be subject to unreasonable searches, which must be conducted with 'decency' and by a person of the same sex (intersex persons may decide the gender of the person who will search them).[122] Search warrants may be issued by a judge or magistrate.[123]

The Mozambican Constitution contains some protection of privacy in relation to house searches, requiring that these take place under a judicial order and, if at night, with the consent of the owner or tenant.[124] House searches are regulated by the CPC, can be performed only with a written warrant, and force is allowed if entry is not voluntarily granted.[125] Body searches are weakly regulated by law.[126]

The Zambian Constitution requires that an arrestee (or detainee) be 'informed as soon as reasonably practicable, in a language he understands, of the reasons for his arrest or detention'.[127] The obligation to inform a person of the reasons for arrest is confirmed in case law, which requires that this statement of reasons forms part of the arrest.[128] However, the reasons can be provided once the person is in police detention rather than at the moment of arrest. The law is silent on this right. The Zambian Constitution protects the privacy of the home, but includes broad derogations that render the original right meaningless, including the possibility to enter a home in the interests of defence, public safety, public order, public morality, public health, town and country planning, protection of the rights and freedoms of others, inspection of premises by those entitled by law, and for purposes of enforcing a judgment order of court.[129] The CPC weakly regulates body searches[130] and authorises the search of a vehicle or house after having obtained a warrant from a magistrate or upon his or her own volition, if the police official has reasonable suspicion that it contains stolen property or that a crime is being committed or the matter is urgent. [131] However, the Supreme Court has upheld the validity of an arrest and conviction that was based on an illegal police search.[132]

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[121] Kenya CPC, s. 26(2).
[122] Kenyan Persons Deprived of Liberty Act, s. 10.
[123] Kenya CPC, ss. 118 to 122.
[124] Mozambican Constitution, s. 68(2) and (3).
[125] Mozambican CPP, ss. 300, 301 and 302.
[126] Mozambican Law 16/2013, s. 7.
[127] Constitution of Zambia, s. 13(2).
[128] *Silungwe v The People* (1974) ZR 130 (HC).
[129] Constitution of Zambia, s. 17.
[130] Zambia CPC, s. 22.
[131] Zambia CPC, s. 23 and Zambia Police Act, s. 15.
[132] *Liswaniso v The People* (1976) ZR 272 (SCZ Judgment No. 58 of 1976).

2.2. Prohibition of arbitrary detention

Table 3 Overview of the constitutional and legislative recognition of the prohibition of arbitrary detention

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozambique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Prohibition of arbitrary and/or unlawful detention	Yes	Direct	Gives right	Direct	No	Direct	Gives right	No	Gives right	Direct	Gives right

Arbitrary detention is prohibited under article 9(1) of the ICCPR and article 6 of the AChHPR.

The Burundian Constitution prohibits detention that falls outside the boundaries of the law.[133] Subordinate law reiterates this prohibition, and enshrines the principle that freedom is the rule and detention the exception.[134] The CPC clearly defines where a person can be held in custody before appearing before a judge, on which grounds and for what period of time (the latter is examined in section 3.2.1.). Suspects can be detained either at the location where they are arrested, in police custody, or at a 'place of safety', the latter being other places of detention including those under the responsibility of mayors or other administrative authorities.[135] Suspects can also be held by the secret services (*Service National des Renseignements*), who have similar powers to those of judicial police officers.[136] A person can be detained in police custody for the purpose of conducting a police or judicial investigation, as well as following the commission of a criminal offence *in flagrante delicto*.[137]

As will be examined below, police custody can last up to 14 days. However, police custody is also authorised, usually for no more than 24 hours, for reasons of 'safety' without automatically leading to a charge, including for public drunkenness, an illegal stay in the country, to verify a person's identity, if in a 'dangerous mental state', or to conduct a body or vehicle search.[138] The prosecutor

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[133] Constitution of Burundi, s. 39(1).
[134] Burundian CPC, ss. 31, 32 and 52; Police Decree-Law, s. 13.
[135] CPC 2013, arts. 31 and 32.
[136] Act no. 1/05 of 2 March 2006 determining the status of the national intelligence service (*Loi n° 1/05 du 2 mars 2006 portant statut du personnel du service national de renseignements*), s. 13.
[137] Burundian CPC, ss. 22, 31 and 32.
[138] Burundian CPC, ss. 41 to 46.

has the power (but not the obligation) to terminate unlawful police custody.[139] Therefore, a detainee does not have an automatic right to challenge unlawful police detention before a court.

The Ivorian Constitution prohibits arbitrary detention.[140] Detention prior to first court appearance is only authorised in police custody.

The Kenyan Constitution prohibits arbitrary detention or detention without just cause.[141] The Fifth Schedule to the National Police Service Act provides that police detention can take place only in a designated lock-up facility.[142]

The Mozambican Constitution prohibits only unlawful arrest but not unlawful detention.[143] Under the relevant subordinate legislation, detention prior to first court appearance is authorised in police cells and court cells (the latter are used particularly in cases of summary crime processes (*Processo Sumário Crime*).[144] However, the CC makes it a criminal offence to detain someone in an unknown place of detention for more than 12 hours, which could be read as authorising incommunicado detention for up to 12 hours.[145]

The Zambian Constitution prohibits unlawful detention and lists the circumstances under which detention may be allowed by law. These include circumstances in which a person is reasonably suspected of having committed a criminal offence, but so too ones in which a person is reasonably suspected of being 'of unsound mind', 'addicted to drugs or alcohol, or a vagrant', or is an illegal foreigner.[146] The CPC authorises police detention following an arrest without a warrant.[147]

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[139] Burundian CPC, s. 52.
[140] Constitution of Côte d'Ivoire, s. 22.
[141] Constitution of Kenya, s. 29.
[142] Fifth Schedule to the National Police Service Act, para. 10.
[143] Constitution of Mozambique, s. 59(1).
[144] Summary Crime Process applies to defendants charged with crimes punishable with a fine or up to one year imprisonment and a corresponding fine, caught *in flagrante* or *fora flagrante delicto*.
[145] CP, art. 200.
[146] Constitution of Zambia, s. 13(1).
[147] See Zambian CPC, s. 33.

2.3. Procedural rights during police detention

Table 4 Overview of the constitutional and legislative recognition of procedural rights during police detention

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to be promptly charged or informed of reasons for detention	Yes	No	No	No	No	Direct	No	Direct	Gives right	Direct	No
Right to be promptly brought before a judge	Yes	No	No	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right
Right to conditional release from police custody	No	No	No	No	No	Direct	Conditional right	No	No	No	Gives right

2.3.1. Right to be charged or informed of reasons for police detention

Article 9(2) of the ICCPR stipulates that a person be promptly informed of the charges against him or her. However, international human rights law does not require that this be provided during police custody.

Neither the Burundian Constitution nor its subordinate legislation enshrines the right to be informed of the reasons for police detention. However, following police interrogation (which may take place much later in the criminal justice process), the suspect must be able to read through and sign the minutes of the interrogation.[148] The Ivorian and Zambian constitutions and subordinate legislation are also silent on this right.

The Kenyan Constitution is silent on the right to inform a person of the reasons for police detention, but enshrines the right for a person to be informed of the reasons for arrest and for continued detention, at the first court appearance after 24 hours of police detention.[149] The police register

[148] Burundian CPC, s. 11.
[149] Constitution of Kenya, s. 49(1)(a)(i) and 49(1)(g).

must mention, among other details, the reason for police detention, but the suspect must not legally be informed of this.[150]

The Mozambican Constitution upholds the right to be informed of the reasons for one's arrest, but there is no time frame in which this must occur.[151] Its subordinate legislation provides that a suspect in custody must be charged within three to five days (whether the process was initiated through a complaint or not).[152] In addition, a person must be notified of the charge within 20 days of arrest for crimes punishable by a prison sentence of more than one year, within 40 days of arrest for crimes punishable with a heavier prison term (*prisão maior*),[153] and within 90 days of arrest for crimes within the exclusive competence of the criminal investigation police.[154]

2.3.2. Right to be promptly brought before a judge (maximum length of police detention)

Articles 9(3) and 9(4) of the ICCPR provide that anyone who is arrested or detained has a right to be promptly brought before a judge to decide on the legality of detention.

Neither the Burundian nor the Ivorian Constitutions reflects this right. The Kenyan Constitution is the most specific, determining that an arrested person must be brought before a court as soon as reasonably possible but at the latest within 24 hours of arrest or on the next court day.[155] The Mozambican Constitution provides that an arrested person must be brought before a judicial authority, without setting a deadline, and recognises the right of habeas corpus, which means that a judge must rule on an application on the legality of detention within eight days.[156] In contrast, the Zambian Constitution provides that an arrested or detained person must be brought before a court 'without undue delay'.[157]

In Burundi, the prosecutor (*Ministère Public*) is in charge of prosecuting, but also plays the role of an investigating judge (*magistrat instructeur*) who investigates for both the State and the accused and therefore gathers both inculpatory and exculpatory evidence. Despite not being a member of the judiciary, he or she also has the power to order that a person be placed in remand detention. In

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[150] Fifth Schedule of the Kenyan National Police Service Act, para. 8(a); Kenyan Persons Deprived of Liberty Act, s. 3(3).
[151] Constitution of Mozambique, s. 64.
[152] Mozambican CPC, ss. 350 and 352.
[153] Mozambican CP, s. 61.
[154] Mozambican Law 16/2013, s. 19.
[155] Constitution of Kenya, s. 49(1)(f).
[156] Constitution of Mozambique, ss. 64(2) and 66.
[157] Constitution of Zambia, s. 13(3).

Burundi, police custody can last for a maximum period of seven days. This can be extended by another seven days by a prosecutor, who also has the power to end police custody at any time.[158] In cases of *flagrante delicto*, this period is reduced to 36 hours.[159] At the end of the period, the prosecutor may order the transfer of the person to prison.[160] The suspect must appear before a judge within two weeks of prison transfer and has the right to approach a court beyond this deadline to decide on the legality of his or her detention.[161] Detention without being presented before a judge for a maximum of 28 days (14 days in police custody followed by 14 days in remand detention) must be seen as contrary to international standards.

Ivorian legislation provides that police custody can last for a maximum of 48 hours, renewable once for 48 hours by the prosecutor or the investigating judge.[162] However, a suspect caught *in flagrante delicto* can be transferred to prison after appearing before a prosecutor only (and not an investigating judge).[163] There is no set time limit within which the latter suspect must then be brought before the investigating judge. If the suspect was arrested on the basis of a warrant (not *in flagrante delicto*), he or she must appear before the investigating judge within 48 hours, failing which the detention is deemed arbitrary.[164] After appearing before a prosecutor or judge, and as soon as he or she has been transferred to prison, the suspect may apply to the judge or Indictment Chamber for conditional release.[165]

In order to bring the CPC in line with the Constitution, the Kenyan CPC was amended in 2014 and section 36A was introduced, which provides that a suspect arrested without a warrant must be brought before a court within 24 hours. However, neither section 33 (which reads that a person arrested without a warrant must be brought before a court 'without unnecessary delay') nor section 36 (which reads that a person arrested without a warrant for a minor offence must be brought before a court 'as soon as practicable') has been abrogated.

Under Mozambican law, a suspect must be brought to court within 48 hours of arrest without a warrant.[166] However, in cases of *flagrante delicto*, the law gives extensive leeway to the prosecutor

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[158] Burundian CPC, ss. 34 and 37.
[159] CPC 2013, art. 22.
[160] CPC 2013, art. 38.
[161] CPC 2013, art. 111(3).
[162] Ivorian CPC, ss. 63 and 76.
[163] Ivorian CPC, s. 70.
[164] Ivorian CPC, ss. 124, 125 and 133.
[165] Ivorian CPC, s. 142.
[166] Mozambican CPC, s. 311.

to extend police custody by up to three days in cases of 'absolute necessity' (bringing the total length of police custody to five days).

Similarly to the Kenyan legislation, but with the exception of the 2014 amendment, a person arrested without a warrant in Zambia must be brought before a court 'without unnecessary delay' and 'as soon as practicable'.[167] The Zambian Prisons Act authorises prison admission upon presentation of a warrant issued by police or immigration officials, which means a person may be admitted to prison without having been presented before a judge.[168]

2.3.3. Right to conditional release (right to police bail)

Police bail does not exist in Burundi, Côte d'Ivoire or Mozambique.

The Kenyan Constitution enshrines the right of arrested persons to be released on bond or bail.[169] While not explicitly providing this right at the stage of police custody, it does not exclude it either. The CPC provides for police bond and police bail. Police bond, with or without sureties, can be granted for non-serious offences other than murder, treason, robbery with violence and attempted robbery with violence, upon payment of a reasonable amount.[170] The same provision allows the police to release a person against whom there is insufficient evidence to proceed with a charge.[171] Police bail can be granted except if the person was arrested for murder, treason, robbery with violence, attempted robbery with violence and any drug-related offence, for an amount which may not be excessive.[172] Therefore, the law still makes a distinction between bailable and non-bailable offences during police custody, despite the 2010 Constitution having done away with this distinction.[173] As will be examined in section 3.2.1, the law was amended to do away with the differentiation between bailable and non-bailable offences, but only once the suspect is brought before a court.

The Zambian Constitution does not reflect this right at the stage of police detention. However, its legislation provides for the granting of police bond, with or without sureties, for non-serious

[167] Zambian CPC, ss. 30 and 33.
[168] Zambian Prisons Act, s. 55(1).
[169] Constitution of Kenya, s. 49(1)(h).
[170] Kenyan CPC, s. 36.
[171] Kenyan CPC, s. 36.
[172] Kenyan CPC, s. 123.
[173] N. Orago, 'Background report on pre-trial detention in the criminal justice system in Kenya' (2013) CSPRI Research report.

offences, for which no fee may be chargeable.[174] The police also have the power to cancel police bond if the accused is about to disappear, leave the country, interfere with witnesses or is likely to commit a similar offence.[175]

2.4. Rights during police interrogation

Table 5 Overview of the constitutional and legislative recognition of the rights during police interrogation

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to presumption of innocence during police custody	No	No	No	No	No	No	No	No	No	No	No
Right to remain silent during police custody	No	No	Conditional right	No	No	Direct	No	No	No	No	No
Privilege against self-incrimination during police custody	No	No	No	No	No	Direct	No	No	No	No	No

This section analyses the right of detainees in police custody in relation to possible police interrogation before the first court appearance.

By and large, the rights in relation to police custody are not directly reflected in the constitutions or legislation of the countries under consideration. They are usually recognised to accused persons only, after the person has been presented before a judge or, in some countries, only at the beginning of trial, when the person is formally charged. However, one cannot conclude that the jurisdictions under review regard those in police custody before their first court appearance as presumed guilty. There would be no logic to granting an accused the presumption of innocence but deny such presumption to a suspect in police custody. More broadly, the principle of reasonable doubt, requiring that the prosecution prove a person's guilt beyond a reasonable doubt, constitutes the

[174] Zambian CPC, ss. 16, 33 and 123.
[175] *The People v Benjamin Sinkwinti Chitungu, Joseph Antonio Arthur and David Muzuma* (1992).

'rationale for the presumption of innocence' and provides protection against possible abuse of state powers to detain and sentence innocent people. This principle requires that everyone benefits from the presumption of innocence at any stage of the criminal justice process, including at the moment of arrest.[176]

The presumption of innocence is recognised in none of the constitutions or legislations analysed in this report. Generally the terminology used in legislation ('arrested person', 'suspect', 'presumed author of an offence', etc.) indicates that a person must be considered innocent at this stage of the criminal justice process but it is never formally stated as such.[177]

The right to remain silent and the privilege against self-incrimination are not recognised in any of the constitutions or legislation analysed in this study, with the exception of Kenya and Burundi. The Kenyan Constitution enshrines the right of arrested persons (and by, extension, in police custody) to be informed of the consequences of not remaining silent,[178] the right to remain silent (and be informed of this right),[179] and the right to 'not to be compelled to make any confession or admission that could be used in evidence against [them]'.[180] However, these rights are not reflected in subordinate legislation. The second exception is Burundi, whose CPC states that a police official must inform the suspect of his or her rights before the start of an interrogation, including the right to remain silent.[181]

2.5. Police detention rights

Table 6 Overview of the constitutional and legislative recognition of police detention rights

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to safe police custody and to humane conditions of detention	Yes	Indirect	Procedural	Indirect	Procedural	Indirect	Gives right	Indirect		Indirect	Procedural

[176] I Currie and J De Waal, *The Bill of Rights Handbook*, 5th Ed. (2005), Juta: Cape Town, pp. 746 and 747.
[177] See, for example, Burundian CPC, ss. 91 and 95.
[178] Constitution of Kenya, s. 49(a)(iii).
[179] Constitution of Kenya, s. 49(a)(ii) and 49(b).
[180] Constitution of Kenya, s. 49(d).
[181] Burundian CPC, s. 10(5).

Right to be separated	No	No	Gives right	No	No	Direct	Gives right	No		No	No

At the international level, the right to safe police custody and to humane conditions of detention, as well as the right to separation, can be inferred, albeit indirectly, from the prohibition of torture and other ill-treatment, as enshrined in article 7 of the ICCPR, articles 1, 2 and 4 of UNCAT and article 5 of the AChHPR; it can also be inferred from the right of detainees to be treated with humanity and dignity, enshrined in article 10 of the ICCPR. As highlighted in section 2.1.2. above, all domestic constitutions reflect the prohibition of torture and other ill-treatment. In addition, a general right to human dignity (although not specific to detainees) is recognised in all domestic constitutions, save for the Zambian one which recognises a right to security.[182]

Domestic legislation usually adopts a procedural rather than a rights-based approach to custody. Burundi law obliges the police to maintain a custody register, in which the physical condition in which police detainees arrived at the station should be recorded.[183] The law also imposes that men and women be separated in police custody.[184] In Côte d'Ivoire, the law states that police detainees are under the responsibility of the police.[185] Access to a medical doctor has to be authorised by the prosecutor in the first 48 hours of police custody, but becomes a right if police custody is extended.[186] Mozambican law is silent on the issue of conditions of detention in police custody.

In addition, torture has been criminalised in Burundi and in Mozambique.[187] Zambian law states that a person in police custody shall be treated in a decent and humane manner, that detainees who need medical attention shall be given access to medical facilities, and that places of detention shall be clean, habitable and hygienic.[188]

The Fifth Schedule to the Kenyan National Police Service Act and the Persons Deprived of Liberty Act contain detailed provisions aimed at safeguarding police detention, including outlining the rights of

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[182] Constitution of Burundi, s. 21 and 27; Constitution of Côte d'Ivoire, s. 2(2); Constitution of Kenya, s. 28; Constitution of Mozambique, s. 6; Constitution of Zambia, s. 11.

[183] Burundian CPC, s. 35(2).

[184] Burundian CPC, s. 32(4).

[185] Ivorian Code of Ethics of the National Police (*Code de déontologie de la Police Nationale*), s. 10.

[186] Ivorian CPC, s. 64.

[187] Burundian CC, ss. 204 to 209; Mozambican CC, s. 160. However, torture is not defined under Mozambican law, and judges would therefore have to rely on international law for such definition.

[188] Zambia Police Act, s. 18B(1)

police detainees (generally, to be entitled to all rights except that of liberty, and, specifically the rights to communicate 'upon the first instance of detention'; to separation – between men and women, children and adults, police detainees and convicted prisoners; to family visits; to access medical care; and to lodge complaints). Further provisions include outlining conditions of detention, keeping a custody register, recording the physical condition and medical history of the detainee, authorising inspections by the IPOA, and making it a criminal offence for the police not to comply with the schedule.[189] Torture by police and committing cruel, inhuman or degrading treatment against anyone in detention, including in police custody, constitute a criminal offence.[190]

2.6. Communication rights during police detention

Table 7 Overview of the constitutional and legislative recognition of the communication rights during police detention

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to legal representation	No	Indirect	Procedural	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	No
Right to family visits	No	Indirect	Procedural	No	No	No	Gives right	Direct	Gives right	No	No
Right to be informed of the reason for detention	No	No	Conditional right	No	No	Direct	Gives right	Direct	No	Direct	No

2.6.1. Right to communicate with a legal representative and/or family

The Kenyan, Mozambican and Zambian constitutions recognise a right to communicate with a legal representative during police detention.[191] In the other jurisdictions, this right is constitutionally granted only later in the judicial process. However, for Burundi, one could indirectly rely on a general

[189] Fifth Schedule of the National Police Service Act, paras. 4 to 14; Kenyan Persons Deprived of Liberty Act, ss. 3(3), 8, 9 and 24.
[190] Kenyan National Police Service Act, s. 95; Kenyan Persons Deprived of Liberty Act, ss. 5(2).
[191] Constitution of Kenya, s. 49(1)(c); Constitution of Mozambique, s. 63(4); Constitution of Zambia, s. 26(1)(d).

right to privacy of communications to support this particular right.[192] The right is widely recognised in subordinate legislation, with the exception, interestingly, of Kenya, whose legislation recognises only a right to family visits, subject to reasonable conditions imposed in the police standing orders.[193] Therefore, the Kenyan Constitution constitutes the basis for the right to communicate with a legal representative in police custody in that particular jurisdiction.

In Burundi, the CPC states that communication during police custody can be authorised by a judicial police officer.[194] The police officer must inform the family of a person's detention, but without the CPC indicating when this must take place. [195] Furthermore, the CPC recognises the right to choose counsel during the investigation – although, strictly speaking, this applies to interrogation by the prosecutor, it could be interpreted as applicable during police custody as well.[196]

The Ivorian CPC recognises the right to communicate with counsel in police custody, and puts an obligation on the judicial police officer to contact the legal representative or, if none is present in the area where the person is detained, a relative or friend who may provide legal assistance.[197] However, the law is silent on notification of, or visits by, family or other persons. Kenyan law recognises the right of all detainees to communicate with family and a legal representative.[198] In Mozambique, the CPC reads that a detainee may not communicate with anyone until the first court appearance, but the provision was declared unconstitutional by the Constitutional Court in 2013.[199] This right is not provided for in Zambian legislation.

A right to legal aid in police custody is recognised under Kenyan and Mozambican law. In Kenya the National Legal Aid Service (NLAS) was set up in law in 2016 (it has yet to be formally established) to make funds available for legal aid providers to provide legal aid to indigent persons in various matters including in criminal matters.[200] The officer in charge of a police station has the obligation to inform a person in custody of 'the availability of legal aid on being admitted to custody' and ask 'whether he or she desires to seek legal aid', and inform the NLAS within 24 hours if the person in

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[192] Constitution of Burundi, s. 28.
[193] Fifth Schedule of the National Police Service Act, para. 9.
[194] Burundian CPC, s. 36.
[195] Burundian CPC, s. 36.
[196] Burundian CPC, s. 95.
[197] Ivorian CPC, s. 76.
[198] Kenyan Persons Deprived of Liberty Act, s. 7(c), (g) and (j).
[199] Mozambican, CPC, s. 311(1); judgment 4/CC/2013 of the Constitutional Council, relying on s. 64(4) of the Constitution.
[200] Kenyan Legal Aid Act.

custody wishes to apply for legal aid.[201] The response to the question must be recorded in a register.[202]

In Mozambique the Institute for Legal Aid (*Instituto Patrocínio Assistência Judiciaria* (IPAJ)) was created to provide free legal assistance to indigent citizens, who must obtain a 'certificate of indigence' (*Atestado de Pobreza*), which costs around 50-100 Mt ($1.5-3), to prove it.[203]

2.6.2. Right to be informed of the reason for detention

The Kenyan, Mozambican and Zambian Constitutions enshrine the right to be informed of the reasons for one's detention.[204] The Mozambican Constitution also stipulates that a detainee must be informed of his or her rights.[205] Furthermore, the Zambian Constitution states that this information must be provided within 14 days, as it applies to all detainees including those in prison and hence may not materialise during police custody. Under Burundian legislation, a suspect must be informed of his or her rights during police custody and before being interrogated by the police.[206] The Kenyan legislation imposes that all detainees be informed of the reasons for detention, of their 'constitutional rights and guarantees relating to personal liberty and other fundamental rights and freedoms' and of the reasons for limiting such rights.[207] No other legislation reflects this right during police custody.

2.7. Conclusion

Although this project was developed with the aim of assessing constitutional compliance of domestic legislation, the present chapter highlights what will be confirmed throughout the study: with the exception of Kenya, there has been no genuine effort to adapt legislation following the adoption of new constitutions. Furthermore, rights may be enshrined in subordinate legislation without finding direct constitutional support. In countries of civil law in particular (and more specifically in Burundi and Côte d'Ivoire), the rights recognised in the constitutions are generic and may serve as an indirect

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[201] Kenyan Legal Aid Act, s. 42.
[202] Kenyan Legal Aid Act, s. 42.
[203] Law 6/94 on IPAJ and Law Decree 157/2013 containing the Organic Statute of IPAJ; the Ministerial Decree 153/2013 of 27 September, approved the Statute of IPAJ. The Ministerial Decree 156/2013 of 27 September approved the Statute of Provincial and District Delegations. See also T. Lorizzo, 'The African Commission's Guidelines on Pre-trial Detention: Implications for Angola and Mozambique' (August 2014) *CSPRI-PPJA Occasional Paper 1*, accessed 20 March 2016.
[204] Constitution of Kenya, s. 49(1)(a)(i) ; Constitution of Mozambique, s. 64; Constitution of Zambia, s. 26(1)(a).
[205] Constitution of Mozambique, s. 64.
[206] Burundian CPC, ss. 10(5) and 35.
[207] Kenyan Persons Deprived of Liberty Act, s. 7.

constitutional basis for a right, thereby facilitating constitutional compliance. Finally, it is important to note that although international human rights law recognises several rights to arrested persons and persons in police custody, there has been virtually no case law seeking to uphold these rights and basing litigation on international human rights law, notwithstanding that four of the five countries analysed here have a monist tradition.

In relation to arrest and police custody in particular, the prohibition of arbitrary arrest and detention and the prohibition of torture and other ill-treatment are the three rights almost systematically recognised in domestic constitutions. All other rights are only seldom recognised, with Kenya being the exception.

Subordinate legislation frames the use of force by police through the principles of proportionality, reasonableness and necessity, leaving wide discretion to the police, save for Kenya. Furthermore, torture is criminalised in Burundi, Kenya and Mozambique, but there is virtually no existing case law that finds police officials guilty of committing acts of torture, even though such acts have been documented, by, among others, these countries' National Human Rights Institutions.

The time limit of police custody is generally compliant with international best practice, with the exception of Burundi, where a person may be arrested and only be presented before a judge 28 days later. This has never been challenged before a court. Police bond or bail is recognised only in countries of common law tradition (Kenya and Zambia). Rights during police interrogation (presumption of innocence, right to remain silent, privilege against self-incrimination) are by and large not recognised in constitutions or domestic legislation, save for the prescriptive Kenyan Constitution. In addition, the right to legal representation by counsel of one's own choice is only formally recognised from the first court appearance, with the exception of Kenyan Mozambique, where legal aid is possible even during police custody.

3. Fair trial rights

This chapter analyses the international human rights law framework, constitutionally enshrined rights and subordinate legislation for accused persons during their trial, whether they are detained or not. International human rights law contains two broad provisions reflecting the principle of a right to a fair trial, including that of equality before the courts and before the law. These include articles 7 and 10 of the UDHR, article 14 of the ICCPR, and article 7 of the AChHPR.

It is important to note that the general principle of equality and prohibition of discrimination is reflected in all domestic constitutions analysed in this study, although the Ivorian Constitution echoes this right only in relation to access to justice.[208] The question of independence and impartiality of the judiciary was briefly examined in Chapter 1. The different components of the right to a fair trial are examined below.

3.1. General fair trial rights

Table 8 Overview of the constitutional and legislative recognition of the general fair trial rights

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Principle of legality	Yes	Direct	Gives right	Direct	No	Direct	Gives right	Direct	Gives right	Direct	No
Right to presumption of innocence	Yes	Direct	Conditional right	Direct	Conditional right	Direct	Gives right	Direct	No	Direct	No
Right to be informed of the charge	Yes	Indirect	Gives right	No	Gives right	Direct	Gives right	Indirect	Gives right	Direct	Gives right

[208] Constitution of Burundi, ss. 22 and 38; Constitution of Côte d'Ivoire, s. 20; Constitution of Kenya, s. 27(1); Constitution of Mozambique, s. 11; Constitution of Zambia, ss. 11 and 23.

Right to a speedy trial	Yes	Direct	Conditional right	No	Conditional & procedural	Direct	No	No	Gives right	Direct	No
Protection against double jeopardy	Yes	Indirect	No	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right
Right not to be detained while awaiting trial	Yes	No	Gives right	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Conditional right
Right to legal representation	Yes	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Conditional right

3.1.1. Principle of legality

The principle of legality, which holds that a person may be found guilty only of an offence that existed under domestic or international law at the time the offence was committed and that a person is entitled to the most lenient sentence applicable, is enshrined in article 15 of the ICCPR and article 7(2) of the AChHPR.

This principle is recognised in the Burundian, Ivorian, Kenyan, Mozambican and Zambian constitutions.[209] It is also reflected in most of the subordinate legislation, except for that of Côte d'Ivoire and Zambia. The first sections of the Burundian CPC outline the general principles of criminal law applicable in this jurisdiction, including the principle of legality, which was confirmed by a 1962

[209] Constitution of Burundi, s. 40; Constitution of Côte d'Ivoire, s. 21; Constitution of Kenya, s. 50(2)(a); Constitution of Mozambique, s. 59(2); Constitution of Zambia, s. 18(2)(a).

ruling of the court of first instance.[210] The Kenyan Penal Code identifies the different forms of liability and provides for the definition of an offence, with both these aspects of the Code reflecting the principle of legality.[211] The Mozambican Penal Code, too, contains several general principles of criminal law, including that of legality.[212]

3.1.2. Right to the presumption of innocence

The right to the presumption of innocence is contained in article 14(2) of the ICCPR as well as 7(1)(b) of the AChHPR. This cardinal principle of criminal law is reflected in all the constitutions.[213]

Under Burundian law, this right would be reflected only through the terminology used ('presumed author of an offence').[214] However, its anti-corruption legislation refers to those 'presumed guilty' of acts of corruption, hereby derogating from this cardinal principle of criminal law.[215] The Ivorian prison legislation partially reflects this right, in that its prison legislation defines detained accused persons as all those who have not been subject to a final judgment.[216] The Kenyan legislation limits itself to stating that a person entering a plea agreement must be reminded of the right.[217]

Mozambican legislation does not directly reflect this right. Nevertheless, the Supreme Court ruled in 1999 that the provisions on unbailable offence were unconstitutional based on a violation of the right to the presumption of innocence, a judgment which was, however, not binding on lower courts.[218] The Constitutional Council ruled in 2013 that unbailable offences were unconstitutional as they violated section 3 of the Constitution[219] and are not based on a violation of the right to the presumption of innocence.[220] Therefore, this constitutional right, while having been reaffirmed by

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[210] Burundian CPC, ss. 1 to 11 ; Arrêt du 10 août 1962 par le Tribunal de Première instance du Burundi, cited in *Revue juridique du Rwanda et du Burundi*, 1963, p. 12.
[211] Kenyan Penal Code, ss. 2 and 4.
[212] Mozambican Penal Code, s. 8, Special Part of the Penal Code.
[213] Constitution of Burundi, ss. 39 and 41; Constitution of Côte d'Ivoire, s. 22(2); Constitution of Kenya, s. 50(2)(n); Constitution of Mozambique, ss. 59(1) and 60; Constitution of Zambia, s. 18(4).
[214] See for example, Burundian CPC, ss. 91 and 95.
[215] Act No. 1/37 of 28 December 2006 on the creation, organisation and functioning of the anti-corruption special brigade (*Loi n° 1/37 du 28 décembre 2006 portant création, organisation et fonctionnement de la brigade spéciale anti-corruption*), s. 1.
[216] PA Decree.
[217] Kenyan CPC, s. 137F.
[218] Judgment 214/99 of the 2nd Criminal Session of the High Court, also known as '*cabeça cortada*' Judgment; however, it would only have become binding if it had become 'Assento', which is a judgment of the Supreme Court following two or more conflicting judgments issued by conflicting chambers of the Supreme Court.
[219] Which reads that 'the Mozambican State is based on the respect for and guarantees peoples' fundamental human rights and freedoms'.
[220] Judgment 4/CC/2013.

the courts, has not yet served as a binding basis for constitutional litigation. The right is not reflected in Zambian legislation.

3.1.3. Right to be informed of the charge pending against the accused

This right is reflected in article 14(3)(a) of the ICCPR.

The Kenyan and Zambian constitutions directly uphold the right to be informed of the charge, whereas the Burundian and Mozambican constitutions indirectly enshrine this right, in that they recognise the right to a fair hearing in the former case and a right to trial in the latter case.[221] This right is not contained in the Ivorian Constitution.

The Burundian legislation provides that a person who is being investigated must be informed of the charge when appearing before the prosecutor (who fulfils the role of the investigating judge), whereas anyone summoned to appear in court (whether detained or not) to answer criminal charges must be informed of such charges in the summons.[222] Failure to do so may render proceedings invalid, in all cases during the investigation and only if it affects the rights of the accused in relation to summons.[223] The exception of invalidity may be raised by the accused, the prosecutor, the judge, or the parties claiming civil damages. [224]

Similarly, the Ivorian legislation requires that the investigating judge inform the person who is being investigated of the facts alleged against him/her in the summons and at the first hearing.[225] Lack of compliance with these provisions nullify the particular judicial act or the entire proceedings, which may be raised by the accused, the investigating judge, the prosecutor, the judge or the parties claiming civil damages.[226] The summons to appear for trial must also mention the charge.[227]

Kenyan and Zambian legislation require that the summons compelling the accused to appear in court contain the charge brought against him/her, outline what the charge entails and be stated in

[221] Constitution of Burundi, s. 38; Constitution of Kenya, s. 50(2)(b); Constitution of Mozambique, s. 65(1); Constitution of Zambia, s. 18(2)(b).
[222] Burundian CPC, ss. 73 and 138.
[223] Burundian CPC, ss. 73 and 154.
[224] Burundian CPC, ss. 158 to 162.
[225] Ivorian CPC, ss. 112 and 121.
[226] Ivorian CPC, ss. 136 and 170 to 172.
[227] Ivorian CPC, ss. 268 and 378.

ordinary language.[228] In addition, Kenyan law imposes that detainees be 'promptly' informed of the charge pending against him/her.[229]

Mozambican law determines that the person must be notified of the charge or for the prosecutor to start an investigation within strict time frames.[230] The decision to charge is taken by the prosecutor.[231]

3.1.4. Right to be tried without undue delay

The right to be tried without undue delay is reflected in article 14(3)(c) of the ICCPR and article 7(1)(d) of the AChHPR.

This right is reflected in the constitutions of Burundi ('to be tried within a reasonable time'), Kenya ('to have the trial begin and conclude without unreasonable delay') and Zambia ('to be tried within a reasonable time') constitutions, but not in those of Côte d'Ivoire and Mozambique.[232]

A first note is that different jurisdictions have different understandings of when a trial starts. In Burundi, Côte d'Ivoire and Mozambique, the trial would only start at the end of the investigation. In Kenya, the trial only starts when an accused person is formally charged, which may be later than the first court appearance. In Zambia, the trial would start at first court appearance, much earlier than in countries of civil law tradition. Therefore, depending on the jurisdiction in which one is operating, understandings of what a 'trial' is and the reasonable time frame in which it should be completed differ significantly. As such, time frames are examined below to assess the length of time a 'trial' comprises both in the investigative phase and the trial itself.

Burundian law does not set clear time frames for an investigation or trial. The prosecutor decides on remand detention and conducts the investigation. Once the latter is completed, for which no time limit is set in law, the prosecutor summons the accused to trial. The accused will be informed of the comprehensive charges against him or her only at the end of the investigation.[233] Although the law does not set time frames for the completion of trial, it imposes strict time limits on the length of

[228] Kenyan CPC, ss. 91, 134 and 137; Zambian CPC, ss. 92, 134 and 137.
[229] Kenyan Persons Deprived of Liberty Act, s. 7(a).
[230] 20 days for offences punishable with a prison sentence of more than one year, 40 days for offences punishable with a heavier prison term (*prisão maior*); 90 days for the most serious offences, including kidnapping, human trafficking, corruption or drug-related offences: Mozambican CP, s. 61 and Mozambican Law 16/2013, s. 19.
[231] Constitution of Mozambique, s. 236.
[232] Constitution of Burundi, s. 38; Constitution of Kenya, s. 50(2)(e); Constitution of Zambia, s. 18(9).
[233] Burundian CPC, ss. 134, 138, 148(2) and 209.

remand detention (see below), thereby ensuring that those on trial are not detained for an unnecessarily long period of time if their trial lasts longer than the legal limitations. At trial, a judge must 'take all necessary measures to find the truth', without requiring that this take place within a 'reasonable' or set time frame; however, a judgment must be issued within one month after the conclusion of proceedings.[234]

Under Ivorian law, the Indictment Chamber will rule on whether to charge a suspect, following the investigation by the prosecutor and/or the investigating judge.[235] The Indictment Chamber must rule with 15 days of completion of the investigation, for which there is no set time frame. [236] Ivorian law also imposes strict time limits on the length of remand detention (see below). Furthermore, it determines that the written version of a judgment must be issued within three days of the delivery of the oral judgment.[237]

This right is not reflected in Kenyan or Zambian legislation. However, the UN Human Rights Committee has found in the *Luboto* case that Zambia violated the right to a fair and speedy trial in relation to a trial that took eight years to conclude.[238]

Mozambican law determines that the maximum period between communication of the charge, or of the commencement of the investigation, and the decision of the court on a guilty verdict, cannot exceed three months if the maximum sentence faced by the accused is up to one year's imprisonment, and four months if the maximum sentence is more than one year's imprisonment.[239]

3.1.5. Protection against double jeopardy (non bis in idem)

This right is reflected in article 14(7) of the ICCPR. Furthermore, it is contained in the Kenyan, Mozambican and Zambian constitutions.[240] The Burundian Constitution contains the right to be heard equitably which, read together with the ICCPR, could provide a constitutional basis for this right.[241] Although the right is not reflected in its constitution, Côte d'Ivoire's legislation does clearly reflect it.[242] This right is also reflected in the Kenyan, Mozambican and Zambian legislation.[243]

[234] Burundian CPC, ss. 184 and 200(2).
[235] Ivorian CPC, s. 191 and ss. 210 to 218.
[236] Ivorian CPC, s. 194(2).
[237] Ivorian CPC, ss. 367 and 477.
[238] *Benard Lubuto v Zambia* (2001) AHKR 37 (HRC 1995).
[239] Mozambican CPC, s. 308.
[240] Constitution of Kenya, s. 50(2)(o); Constitution of Mozambique, s. 59; Constitution of Zambia, s. 18(5).
[241] Constitution of Burundi, s. 38.
[242] Ivorian CPC, s. 356.

3.1.6. Right not to be detained while awaiting trial

The right to bail, or the principle that remand detention should be the exception rather than the rule, is enshrined in article 9(3) of the ICCPR. Furthermore, article 9(4) of the ICCPR requires that anyone on remand must be able to petition a court swiftly in order for the court to rule on the lawfulness of detention.

Section 2.3.2 above already examined the right to be brought before a judge promptly following arrest and subsequent detention. This section focuses on the right to be released while awaiting or on trial.

The right to bail is directly enshrined in the Kenyan Constitution, which reads that arrested persons have a right to bond or bail 'on reasonable conditions' and will be held in remand only if there are 'compelling reasons' for them not to be released. The wording clearly confirms that remand detention must be seen as the exception rather than the rule. The Mozambican Constitution, although not enshrining a right to bail, states that a judge must rule on the lawfulness and continuation of remand detention, the duration of which must be set in law.[244] Furthermore, anyone detained must have access to a court to rule on the lawfulness of detention.[245]

The Zambian Constitution does not recognise the right to bail or the principle that freedom is the rule, but states that a person may only be detained on remand 'upon reasonable suspicion of his having committed, or being about to commit, a criminal offence'.[246] However, it authorises any detained person to request to be presented before a court every three months to have one's case and continued detention reviewed.[247] The Zambian Constitution also enshrines the right of remand detainees to be released, with conditions or not, if they are not tried 'within a reasonable time'.[248] The Burundian and Ivorian constitutions are silent on this right.

Despite limited constitutional protection, the right to bail is recognised in law in all five jurisdictions under review.

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[243] Kenyan CPC, s. 138; Mozambican CPC, s.138 (3); Zambian CPC, s. 138.
[244] Constitution of Mozambique, s. 64(1) and (2).
[245] Constitution of Mozambique, s. 66.
[246] Constitution of Zambia, s. 13(1)(e).
[247] Constitution of Zambia, ss. 26(1)(c) and 26(2)
[248] Constitution of Zambia, s. 13(3).

Burundian law clearly states that freedom is the rule and remand detention is the exception.[249] Remand detention in prison is first ordered by a prosecutor, if there is *prima facie* evidence against the person under investigation (as a formal charge will come only at the end of the investigation), if the offence is punishable by a prison sentence of at least one year's imprisonment, and if it constitutes the sole means to maintain evidence or avoid witness intimidation, maintain public order, end the crime or prevent its recurrence, or ensure that the accused will be present at trial. The person must then be presented before a court within two weeks of the transfer to prison, which will verify the validity of the remand detention order.[250] Both the prosecutor and the accused can appeal a remand warrant or an order to release a person on bail (or its conditions).[251]

The Burundian Supreme Court has provided some guidance on acceptable grounds for remand detention: ill health can justify bail,[252] and being accused of a violent crime is an insufficient ground of itself to justify remand detention. [253] However, the same court has ruled that lack of compliance with legal prescripts in relation to remand detention are not grounds for appeal before the Court of Cassation if they were not raised before the trial court (meaning they cannot constitute new grounds for appeal before the Court of Cassation).[254]

Finally, Burundi has a system in place of regular review of remand detention. Remand detention orders can be issued by a court only for a maximum duration of 30 days, renewable for a total maximum duration of one year if the maximum sentence of the offence for which the accused is tried is less than five years. Remand detention can last for a maximum of three years if the maximum sentence of the offence for which the accused is tried is more than five years.[255] Appealing one's verdict and/or sentence does not affect one's status in relation to detention, and the accused retains the right to challenge his or her detention. However, it is unclear whether the maximum length of remand detention must be complied with in case of appeal.[256] Finally, the law requires that the time spent in remand detention be deducted from the time spent serving the final sentence in case of a guilty verdict.[257]

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[249] Burundian CPC, ss. 31, 32, 52 and 110.
[250] Burundian CPC, ss. 52, 110 to 115 and 209; Burundian Act on the Penitentiary Regime, s. 5.
[251] Burundian CPC, ss. 111, 124 to 133. The appeal must be lodged within two days of the decision (for the prosecutor) or within two days of being notified (for the accused). The decision on the appeal must be taken within seven days during the trial and within two weeks between closing of arguments and sentencing.
[252] Cour d'appel de Ngozi, Affaire RPCA.7 du 27.10.2004.
[253] Cour suprême, Affaire RPC.1291 du 09.10.2000.
[254] Cour suprême, Affaire RPC.1283 du 28.10.2002.
[255] Burundian CPC, s. 115.
[256] Burundian CPC, ss. 266 and 267.
[257] Burundian CPC, s. 205.

Ivorian legislation clearly states that liberty is the rule and detention the exception.[258] Remand detention is decided by the investigating judge, for an initial period of four months renewable every four months but within the maximum durations outlined below.[259] The accused, prosecutor and Attorney General can appeal a remand detention order or a decision to release a remand detainee, both during the investigative phase (before the Indictment Chamber) and during trial (before the trial judge).[260]

Release may be subject to certain conditions, including the payment of bail.[261] Strict time frames are set for remand detention, depending on the seriousness of the offence for which a person is investigated (but not yet formally charged, as this takes place at the end of the investigation). For minor offences punishable by a prison sentence of less than six months, remand detention may not last for more than five days; for misdemeanours, remand detention may not last for more than six months; and for crimes, remand detention may not last for more than 18 months (with the exception of the most serious offences, including murder, rape and aggravated robbery, for which there is no limit to remand detention).[262] Importantly, anyone on trial for a crime (*crime*) before a Jury court must be detained for the duration of trial (but not during the investigation).[263] Finally, an accused may request to be released while his or her case is decided on appeal, but it is unclear whether the original time frames in relation to remand detention must also be complied with if the case is heard on appeal.[264]

Kenyan legislation has yet to be harmonised to fully reflect relevant constitutional prescripts in relation to remand detention and to be consistent with each other. However, it states, following legislative amendments in 2014, that remand detention must be the exception and can only be ordered by a court on strict grounds. These grounds are that there must be a risk that the suspect or accused may flee, must be kept in detention for his or her protection, is already serving a sentence, or has breached a bail condition in the past.[265] Release may be associated with the payment of bail, bond or the provision of sureties.[266] The CPC also lists several criteria to be taken into consideration

[258] Ivorian CPC, s. 137.
[259] Ivorian CPC, s. 138.
[260] Ivorian CPC, ss. 140, 141, 142 and 186.
[261] Ivorian CPC, ss. 144 and following.
[262] Ivorian CPC, s. 138.
[263] Ivorian CPC, s. 150.
[264] Ivorian CPC, ss.. 142 and 496.
[265] Kenyan CPC, ss. 36A(5) and 123A(1).
[266] Kenyan CPC, ss. 114, 115 and 123 to 133.

when granting bail, including the seriousness of the alleged offence and the strength of the evidence against the accused.[267]

Remand detainees ordinarily serve their remand detention in prison but the law now authorises that it also be served in police custody, following an order of the court.[268] Following a 2014 legislative amendment, remand detention requested by a police officer can only be ordered by a court for a period of 30 days, renewable twice (hence for a total of 90 days).[269] The Bail and Policy Guidelines provide some clarification, however, on remand detention in police custody, as they provide for the police to request from a court that a suspect be remanded to their custody if they, the police, can show 'reasonable grounds that necessitate continued detention'.[270] Therefore, the provisions of the CPC should be read as meaning that remand detention ordered by a court will be served in prison, unless the police expressly requests that the suspect be kept in police custody.

For terrorism-related offences the period for remand detention is 30 days, which it is assumed will be served in prison, and may be extended to 360 days.[271] Furthermore, if a person is charged with offences relating to terrorism, narcotics, organised crime, human trafficking or money laundering, the prosecutor may appeal the decision to release a person on bail, which will stay the release order for 14 days.[272] The law allows an accused to apply for bail while the case is under appeal, although it is unclear if the time frames outlined above should be complied with after a first verdict is issued.[273]

Two provisions of the Kenyan CPC (sections 36 and 123) providing for non-bailable offences (murder, treason, robbery with violence, attempted robbery with violence and any drug-related offence) have not been repealed following the adoption of the new Constitution, which did away with non-bailable offences. However, new provisions have been adopted in 2014 aiming at bringing the law in line with the new Constitution and provide for a right to apply for police bail or for bail before the court no matter the charge (sections 36A and 123A). This said, courts were brought to examine applications for bail by accused charged with offences listed as non-bailable under sections 36 and 123, before

[267] Kenyan CPC, s. 123A.
[268] The Fifth Schedule to the National Police Service Act states that remand detention should be served in police custody, whereas the Prisons Act states that remand detention should be served in prison: see N. Orago, 'Background report on pre-trial detention in the criminal justice system in Kenya' (2013) CSPRI Research report, p. 9.
[269] Kenyan CPC, s. 36A(4)(c), (7) and (9).
[270] Kenya Bail and Policy Guidelines (2015) para 4.37. The length of police remand detention is 14 days and it is unclear whether it is renewable.
[271] Kenyan Prevention of Terrorism Act, s. 33, as amended by the Security Laws (Amendment) Act, 2014. However, the Bail and Police Guidelines state that police remand detention may be up to 30 days, renewable twice (Kenya Bail and Policy Guidelines (2015) para 4.38).
[272] Kenyan CPC, ss. 364(1)(c) and 379A.
[273] Kenyan CPC, ss. 356 and 357.

the adoption of sections 36A and 123A.[274] In 2010 the High Court examined such application for bail and ruled that all arrested persons were entitled to apply for bail, without however granting an accused an automatic right to bail. It found that bail could be denied if there were compelling reasons to do so in the case under review.[275] A similar ruling was made in 2013.[276] Since 2014 the compelling reasons for denying bail have been clearly outlined in the legislation.[277]

In Mozambique, the Constitutional Council in a 2013 judgment reiterated the principle that liberty is the rule and detention the exception, relying on the general constitutional principle that the State must respect the rights and freedoms of all.[278] This judgment confirmed that the law prescribes that only a court may order remand detention at the first court appearance, which in practice was (and still is) at times taken by other authorities such as administrative chiefs and police.[279] A person can be released pending trial (by the investigating judge) or during trial (by the trial judge) by granting a Statement of Identity (*termo de identidade*) or by granting bail (*caução*).[280]

The regime is different depending on whether the person is accused of having committed an offence punishable by a prison sentence of up to one year (*processo correccional*) or of more than one year (*querela*).[281] The law determines what conditions can be imposed for those released pending trial.[282] It also sets clear criteria upon which remand detention can be ordered, either in *flagrante delicto* (the offence must be punishable by a prison sentence) or not (the sentence must be of more than one year and there must be sufficient evidence against the accused), and excludes collection of

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[274] See N. Orago, 'Background report on pre-trial detention in the criminal justice system in Kenya' (2013) CSPRI Research report, pp. 13 and 14.
[275] *Aboud Rogo Mohammed and Another v Republic*, Criminal Case 793 of 2010, available at http://kenyalaw.org/Downloads_FreeCases/7932010.pdf (accessed 20 April 2016), paras. 8, 15, 16-20.
[276] *Allan Bradley v Republic*, Criminal Case 16 of 2013, available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=66980537294968725418490 (accessed 20 April 2016), paras 1, 3 to 10.
[277] Kenyan CPC, s. 123A. The reasons for denying bail are that the accused has violated his or her bail conditions in the past and it is likely that he or she will do so again, or should be kept in custody for his or her own protection. Furthermore, a court will have regard to 'all the relevant circumstances' in making a decision on bail or bond, but in particular 'the nature or seriousness of the offence; […] the character, antecedents, associations and community ties of the accused person; […] the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and […] the strength of the evidence of his having committed the offence'.
[278] Judgment 4/CC/2013, citing section 3 of the Constitution of Mozambique.
[279] Contrary to Mozambican Law 2/93 and Mozambican CPC 263.
[280] Mozambican CPC, ss. 270 and 275.
[281] Mozambican CPC, s. 271.
[282] Mozambican CPC, s. 270. These include not to flee the country, not to visit certain places and people or not to perform certain activities.

evidence as a reason for remand detention.[283] The accused has the right to challenge the lawfulness of his or her detention before a court, as per the constitutional prescript.[284]

Mozambique does not have a mechanism for regular review of remand detention, although the prosecutor is mandated, in general terms, to verify the legality and duration of detention.[285] There is also no maximum length of remand detention set out in law in Mozambique, but the law sets strict time frames between arrest and notification of the charge and duration of trial (see section 3.1.3. above).[286] The fact that an accused appeals his or her sentence does not deprive him or her of the right to apply for bail.[287]

While the Zambian Constitution determines only that liberty is the principle in general terms (as anyone may be detained 'upon reasonable suspicion of having committed, or being about to commit, a criminal offence'; see above), subordinate legislation does not build on this principle. The CPC does make provision, however, for the possibility to apply for bail or sureties, a decision to be taken by a court either during the investigation or during trial. Courts have developed guidelines regarding the factors to be taken into consideration when deciding on a bail application, which include the nature of the charge, the strength of the evidence and the possible prejudice caused to the accused or the State if the person was released or kept in detention.[288] However, the law also makes provision for non-bailable offences, including murder, treason and aggravated robbery.[289] A decision to grant a person bail or to keep him or her in remand detention may be appealed before the courts.[290]

There is no mechanism in Zambian law for regular review of remand detention, despite the constitutional provision that a person be presented before a court every three months (see above).[291] An accused may apply to be released on bail while his or her conviction is reviewed on appeal.[292] However, the High Court has ruled that the provisions on non-bailable offences remain

[283] Mozambican CPC, ss. 286 and 291.
[284] Mozambican CPC, arts. 312, 316 and 314 (and the entire Chapter VII of Title II of the CPC), echoing s. 66 of the Constitution.
[285] Constitution of Mozambique, s. 236 and Law 22/2007.
[286] Twenty days for offences punishable with a prison sentence of more than one year, 40 days for offences punishable with a heavier prison term (*prisão maior*); 90 days for the most serious offences, including kidnapping, human trafficking, corruption or drug-related offences: Mozambican CP, s. 61 and Mozambican Law 16/2013, s. 19.
[287] Mozambican CPC, s. 658.
[288] *Anupbhai Munabhai Patel v the Attorney General* 1993/HC/366.
[289] Zambian CPC, ss. 123 to 133.
[290] Zambian Supreme Court Act, s. 22.
[291] Constitution of Zambia, s. 26(1)(c).
[292] Zambian CPC, ss. 332 and 336; Supreme Court Act, s. 22.

applicable while the case is heard on appeal[293] and that bail cannot be granted if the accused has not filed a notice of intention to appeal.[294]

3.1.7. Right to legal representation

The cardinal principle of the right to a fair trial is contained in articles 14(3)(b) and (d) of the ICCPR, which enshrine the right of the accused to have both counsel of his or her choice and access to legal aid at the state's expense 'where the interests of justice so require'. The right to a defence and the right to have counsel of one's choice is also contained in article 7(1)(c) of the AChHPR.

Both the Burundian and Ivorian constitutions uphold the right of an accused to a defence, which includes the right to be represented by counsel of one's choice.[295] The Kenyan Constitution enshrines the right of an accused to be represented by counsel of his or her choice and the right to free legal representation 'if substantial injustice would otherwise result', as well as the right to be informed of both rights promptly.[296] The Mozambican Constitution also enshrines the right of the accused to a defence, to be represented by counsel of choice and the right to free legal representation if the accused cannot for 'economic reasons, engage a private attorney'.[297] Finally, the Zambian Constitution enshrines the right of an accused to defend him- or herself or to choose counsel, or to be granted legal aid as provided in subordinate legislation.[298]

The Burundian legislation reflects this right throughout the investigative phase and trial. The accused must be informed of the right.[299] Although the CPC's wording appears to suggest that that trial can proceed only if the accused has legal representation, legal aid is not automatic (with the exception of offences punished by a minimum prison sentence of 20 years), nor is there legal consequence if the accused is not represented.[300] However, trial will proceed even if the accused does not has his or her own counsel and/or lacks access to legal aid. As such, the CPC should be re-worded to reflect clearly that legal representation is a conditional right and not automatic.

In addition, the African Commission on Human and Peoples' Rights (ACHPR) found Burundi in violation of article 7(1)(c) of the AChHPR in that its former legislation authorised a judge to suspend

[293] *Kambarange Kaunda v The People* 1990-1992 ZR 215.
[294] *Mayonde v The People* (1976) ZR 129 (HC).
[295] Constitution of Burundi, s. 39(3) and 40.
[296] Constitution of Kenya, s. 50(2)(g) and (h).
[297] Constitution of Mozambique, ss. 62 and 65.
[298] Constitution of Zambia, s. 18(2)(d).
[299] Burundian CPC, s. 210.
[300] Burundian CPC, ss. 95, 113, 154, 166 and 210.

access to counsel during trial.[301] Today, a court can still suspend the right to access counsel during the investigation (but not during trial) if it is necessary 'for the discovery of the truth or proper administration of justice'.[302] The latter provision's compliance with the constitutional limitations clause or international human rights law has never been tested. However, the Constitutional Council ruled in 2014 that the provisions relating to the trial of *flagrante delicto* cases, in which the length of procedures are shortened,[303] did not violate the international and domestic right to a defence and to access counsel.[304]

There is no legislation on legal aid at state expense in Burundi, and/or the determination of how legal aid is understood and under which conditions it is made available. A draft Legal Aid Bill was prepared in 2009 by the Ministry of Justice and the United Nations Office in Burundi; it focuses on regulating the provision of legal representation in court, but is not currently before Parliament.[305] However, the legislation regulating the legal profession states that a judge can appoint counsel ex officio or invite the Bar to assign counsel if an accused lacks the means to appoint one him- or herself.[306] In 2000, the Supreme Court ruled that the accused's right to a defence was not violated if he or she duly requested free legal aid but was unable to obtain it.[307] Nevertheless, the law provides for mandatory free legal aid when the accused is a child, is mentally disabled or faces a sentence of 20 years or more.[308]

Ivorian legislation also covers this right extensively, enshrining the right to counsel during the investigation as well as trial. During the investigation, the person being investigated may be heard only in the presence of his or her lawyer if he or she has appointed one, and may receive the assistance of a friend or relative if there are no lawyers in that area.[309] He or she must also be informed of this right.[310] During trial, the accused may be represented by counsel if he or she is tried

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[301] African Commission on Human and Peoples' Rights, *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*, Comm. No. 231/99, 14th Activity Report 2000-2001, para 30.
[302] Burundian CPC, s. 97.
[303] See specifically Burundian CPC, ss. 209, 211, 216, 218, 219 and 221 of the CPC 2013.
[304] Cour Constitutionnelle du Burundi, *Affaire RCCB 284 du 2 juin 2014, Buntinimana et consorts* (Inconstitutionnalité de certaines dispositions du Code de procédure pénale), Bulletin officiel du Burundi n°6bis et 7/2014, 928-31.
[305] Avant-projet de loi portant cadre légal de l'aide juridique et de l'assistance judiciaire au Burundi, ss. 27-60.
[306] Act No. 014 of 29 November 2002 on the reform of the status of legal counsel (*Loi n° 014 du 29 novembre 2002 sur Réforme du statut de la profession d'avocat*), s. 55.
[307] Cour suprême du Burundi/Chambre judiciaire, Affaire RPC.1243 du 27.11.2000.
[308] Burundian CPC, s. 210.
[309] Ivorian CPC, ss. 76-1, 76-2 and 112.
[310] Ivorian CPC, ss. 76-1.

for a misdemeanour (*délit*) and must have access to counsel if he or she is tried before a jury for a crime (*crime*).[311] Draft legal aid legislation is being developed.

The Kenyan CPC reflects the right of the accused to have access to counsel of one's choice.[312] Furthermore, the National Legal Aid Service was set up in law in 2016 (but not yet formally established at the time of writing) to make funds available for legal aid providers to provide free legal aid to indigent persons. Any detained person must be notified of his or her right to apply legal aid by the officer in charge of a prison upon admission and the answer must be recorded in a register.[313] The officer must contact the NLAS within 24 hours if the detainee wishes to access legal aid.[314] Furthermore, a court must inform an unrepresented accused 'promptly' of his or her right to legal representation and, 'if substantial injustice is likely to result', 'promptly inform the accused of the right to have an advocate assigned to him or her' and inform the NLAS to provide legal aid to him or her.[315]

The relevant provisions in the Mozambican legislation on legal aid were outlined in section 2.6.1. above. Access to counsel of one's choice is regulated by the Bar Association Statute Law 28/2009.

Although the Zambian legislation does not expressly reflect the constitutional right to choose counsel, its CPC contains numerous references to the accused's advocate and his or her power regarding the leading of evidence at trial or representation of the accused at trial in particular.[316] The Zambian Legal Aid Act regulates the granting of legal aid to indigent accused. Before subordinate courts, the magistrate will consider the accused's request for legal aid against the interests of justice, whereas before the High Court, legal aid is mandatory where the 'court considers that there are insufficient reasons why the accused should not be granted legal aid'.[317] The presumption of necessity is therefore reversed. Legal aid is provided by the Legal Aid Board, and can be either a lawyer admitted to the Bar or before the subordinate courts, or a legal assistant (a person who has a law degree but has not yet been admitted to the Bar).[318]

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[311] Ivorian CPC, ss. 274, 275, 278 and 408.
[312] Kenyan CPC, s. 193; Kenyan Persons Deprived of Liberty Act, s. 7(c).
[313] Kenyan Legal Aid Act, s. 42; Kenyan Persons Deprived of Liberty Act, s. 6(b).
[314] Kenyan Legal Aid Act, s. 42.
[315] Kenyan Legal Aid Act, s. 43.
[316] See for example Zambian CPC, ss. 157, 168, 191, 195, 205, 212 and 224.
[317] Ibid, s 9(2).
[318] Legal Aid Act Chapter 34 of the Laws of Zambia, ss. 5 and 8(1); *Patel v Attorney General* (High Court) 1969.

3.2. Communication rights during trial

Table 9 Overview of the constitutional and legislative recognition of the communication rights during trial

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to an interpreter	Yes	Indirect	Procedural	No	Gives right	Direct	Conditional right	No	Gives right	Direct	Conditional right
Right to be informed of one's rights	No	Indirect	No	No	No	Direct but partial	Conditional right	No	No	Direct but partial	No

3.2.1. Right to an interpreter

Article 14(3)(f) of the ICCPR reflects the right of an accused to an interpreter at no cost if he or she does not understand the language used in the proceedings.

This right is directly enshrined in the Kenyan Constitution, which recognises the right to 'have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial'.[319] It also states that information must be provided in a language that the accused understands.[320] The Zambian Constitution likewise states that an accused may receive the free assistance of an interpreter at trial if he or she does understand the language used.[321] The Burundian Constitution contains the right to a fair hearing which, read together with the ICCPR, could provide a constitutional basis for this right.[322] The Ivorian and Mozambican constitutions are silent on the right.

Despite its limited constitutional recognition, this right is nevertheless reflected by and large in subordinate legislation. Under Burundian law, the suspect under interrogation or the accused may request an interpreter at no cost, although the decision to grant such assistance or not is left to the

[319] Constitution of Kenya, s. 50(2)(m).
[320] Constitution of Kenya, s. 50(3).
[321] Constitution of Zambia, s. 18(2)(f).
[322] Constitution of Burundi, s. 38.

prosecutor or the judge.[323] The Ivorian CPC provides that an accused who does not speak sufficient French, is deaf-mute or illiterate must be provided with the assistance of an interpreter, but is silent on who pays for this service.[324] The Kenyan and Zambian CPCs provide that evidence must be explained to the accused or his or her advocate in a language he or she understands, and that a judgment may be translated in the language of the accused 'if practicable'.[325] In addition, Kenyan law imposes that all detainees, including accused persons in remand detention, have access to the services of an interpreter.[326] The Mozambican CPC enshrines the right of the accused to have an interpreter at no cost at trial if he or she does not understand Portuguese or is deaf-mute.[327]

3.2.2. Right to be informed of one's rights

Some rights examined in this chapter are made known to the accused during trial. This is the case, for example, with the right to remain silent. The present section examines the direct recognition of the right to be informed of, at a minimum, fair trial rights.

The right to be informed of one's rights is partially enshrined in the Kenyan Constitution, which contains the right of accused persons to be informed of the charges against them in advance of the evidence to be adduced against them,[328] and the Zambian Constitution, which also only contains the right to be informed of the charge against the accused.[329] The Burundian Constitution contains the right to be heard equitably, which could provide a constitutional basis for this right.[330]

The Kenyan legislation requires that all detainees, including accused persons in remand detention, be informed of the reasons for detention, of their 'constitutional rights and guarantees relating to personal liberty and other fundamental rights and freedoms', and of the reasons for limiting such rights.[331] None of the other legislation reflects this right specifically at the trial stage.

[323] Burundian CPC, ss. 77, 108 and 195.
[324] Ivorian CPC, ss. 102, 272, 344, 345, 397, 398, 434 and 344.
[325] Kenyan CPC, ss. 170 and 198; Zambian CPC, ss. 170, 195, 223(4)(c), 245(5)(c) and 306A.
[326] Kenyan Persons Deprived of Liberty Act, s. 7(f).
[327] Mozambican CPC, s. 260.
[328] Constitution of Kenya, ss. 50(2)(b) and 50(2)(j).
[329] Constitution of Zambia, s. 18(2)(b).
[330] Constitution of Burundi, s. 38.
[331] Kenyan Persons Deprived of Liberty Act, s. 7.

3.3. Evidence-related rights during trial

Table 10 Overview of the constitutional and legislative recognition of the evidence-related rights during trial

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to present and challenge evidence	Yes	Indirect	Conditional right	No	Conditional & procedural	Direct	Gives right	No	Gives right	No	Gives right
Right not have evidence obtained under torture excluded	Yes	Indirect	Gives right	Indirect	No	Direct	No	Direct	No	Indirect	No
Right to remain silent	Yes	Indirect	Conditional right	No	No	Direct	Conditional right	No	Gives right	No	No
Privilege against self-incrimination	Yes	Indirect	Gives right	No	No	Direct	Conditional right	No	Gives right	Direct	No

3.3.1. Right to present and challenge evidence

Article 14(1) of the ICCPR protects the right to equality before the courts. Furthermore, its article 14(3)(e) recognises the right to examine witnesses and present one's own witnesses. More generally, article 7(1)(c) of the AChHPR enshrines the right to a defence, which the ACHPR has interpreted as incorporating the equal right of the accused and the prosecutor to present and challenge evidence.[332]

[332] ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle N.6.

The Kenyan Constitution directly recognises the right to adduce and challenge evidence.[333] The Burundian Constitution contains the right to equal protection of the law and the right to be heard equitably which, read together with the ICCPR, could provide a constitutional basis for this right.[334] The right is not reflected, directly or indirectly, in the Ivorian, Mozambican or Zambian constitutions.

Burundian legislation provides that both the prosecutor and the accused may present and challenge evidence, as well as the judge and the victim claiming civil damages, if he or she has joined the trial. The accused always has the final word.[335] The Supreme Court ruled in 2005 that additional evidence obtained following an inquiry by the judge may not affect the charge sheet.[336] However, a 2005 Supreme Court ruling also determined that a judge may interrupt proceedings if he or she considers that he or she has sufficient evidence to make a ruling, possibly before the accused has presented his or her entire defence.[337]

Although Ivorian legislation almost exclusively deals with incriminating evidence, it states that both the prosecutor and the accused may present evidence, and that the accused has the final word.[338] However, the right of the accused to cross-examine state witnesses is only expressly provided for proceedings before a trial jury, and the accused may only put his or her questions through the presiding officer.[339] Before the other criminal courts, the presiding officer has the possibility to put the questions of the accused to the witness.[340] Also, the accused must pay a stipend to the witnesses he or she has called to testify.[341]

The Kenyan CPC and Evidence Act guarantee that the prosecutor and the accused have the right to call, examine and cross-examine witnesses and present documentary evidence, and that all evidence must be taken in the presence of the accused and/or his or her legal representative.[342]

Mozambican law confirms that the accused may present witnesses.[343] Furthermore, questions to witnesses which the judge regards as misleading, tricky, mischievous or vexatious are prohibited during trial. The judge may ask questions him- or herself.[344]

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[333] Constitution of Kenya, s. 50(2)(k).
[334] Constitution of Burundi, ss. 22 and 38.
[335] Burundian CPC, s. 170.
[336] Cour Suprême, Chambre Judiciaire (pénale), Affaire RPS 52 du 21.2.2005, Nouvelle Revue de Droit du Burundi. juin/juillet 2005, 19.
[337] Cour suprême du Burundi/Chambre administrative, Affaire R.A.A 597 du 30.12.2005, C.S./Adm. Nouvelle Revue de Droit du Burundi, avril/mai 2007, 7.
[338] Ivorian CPC, ss. 346, 506 and 530.
[339] Ivorian CPC, ss. 281 and 312.
[340] Ivorian CPC, s.445.
[341] Ivorian CPC, s. 281.
[342] Kenyan CPC, ss. 144 to 161, 194, 307 to 311; Evidence Act.

The Zambian CPC confirms that the accused may present evidence and examine and cross-examine witnesses and that all evidence must be taken in his or her presence.[345] The accused is the last to take the stand.[346]

3.3.2. Right to have evidence obtained under torture excluded

Article 15 of UNCAT prohibits the use of evidence obtained under torture against the accused.

Beyond the general prohibition of torture and other ill-treatment reflected in all constitutions (see section 2.1.2. above), two domestic constitutions reflect this right. Kenya's Constitution states that evidence obtained in violation of the Bill of Rights must be excluded 'if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice'.[347] It is therefore a qualified exclusion, although evidence obtained under torture would always render the trial unfair and hence be excluded. The Mozambican Constitution also provides that evidence obtained through torture or coercion, among other means, must be invalidated.[348]

In addition, the Burundian CPC states that statements of the accused obtained under torture must be declared null and void.[349] Although Zambian courts have not ruled on evidence obtained under torture, the Supreme Court has ruled that evidence obtained as a result of an illegal search, and therefore in violation of the right to privacy, should be admissible as long as it is relevant to the case. The Court found that it was not its responsibility to assess the manner in which the evidence was obtained. [350]

3.3.3. Right to remain silent and the privilege against self-incrimination

Article 14(3)(g) of the ICCPR upholds the right of the accused not to testify against him- or herself or to confess guilt.

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[343] Mozambican CPC, ss. 381, 390 and 398.
[344] Mozambican CPC, s. 437.
[345] Zambian CPC, ss. 143 to 159, 191, 207 to 209, 292 to 295.
[346] Zambian CPC, ss. 212 and 296.
[347] Constitution of Kenya, s. 50(4).
[348] Constitution of Mozambique, s. 65.
[349] Burundian CPC, s. 52(3).
[350] See the cases of *Liswaniso v The People* (1976) ZR 277 (SC) and *Liswaniso Sitali and Others v Mopani Copper Mines* PLC (2004) ZR 176 (SC).

The Kenyan Constitution directly enshrines the rights of the accused to remain silent and against self-incrimination.[351] The Zambian Constitution contains the right of the accused not to give evidence at trial.[352] The Burundian Constitution encompasses the right to an equitable hearing which, read together with the ICCPR, can provide an indirect constitutional basis for this right.[353] The right is not reflected in the Ivorian or Mozambican constitutions.

None of the legislation examined in this study requires that the accused make a statement in court, thereby confirming that he or she has the right to remain silent.[354]

However, Burundian law enshrines the right of the suspect to remain silent during police interrogations in the absence of his or her lawyer, which could be interpreted as meaning that the suspect is denied the right to remain silent if his or her lawyer attends interrogations by the prosecutor.[355] It also enshrines the right not to provide self-incriminating evidence, both during the investigative and the trial stage. Failure by the police or the prosecutor to grant the suspect the possibility to remain silent during the investigate stage renders the interrogation null and void.[356] Finally, if an accused pleads guilty to an offence, the confession must be repeated before the judge, who must ensure that it was obtained with full knowledge of the law, in particular of the sentence the accused may face. [357] However, the law does not require the judge to ask the accused whether he or she made the confession voluntarily.

Ivorian legislation does not reflect the right of the accused to remain silent or the privilege against self-incrimination.

Kenyan law reflects that the accused must be reminded of the right to remain silent and of the privilege against self-incrimination when entering a plea agreement only (which is reached by a prosecutor and recorded by a court).[358] The law also expressly recognises to any detained person the right not to be compelled to make a confession or to plead guilty.[359] Any person interrogated (whether as a suspect or a witness) under the Terrorism Act is obliged to answer questions, but self-

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[351] Constitution of Kenya, ss. 50(2)(i) and (l).
[352] Constitution of Zambia, s. 18(7).
[353] Constitution of Burundi, s. 38.
[354] The Kenyan and Zambian CPCs expressly state that the accused need not make a statement in court: see s. 311 of the Kenyan CPC and s. 157 of the Zambian CPC.
[355] Burundian CPC, s. 95.
[356] Burundian CPC, ss. 74 and 174.
[357] Burundian CPC, ss. 244 to 252, and more specifically s. 251.
[358] Kenyan CPC, ss. 137 A to 137 O.
[359] Kenyan Persons Deprived of Liberty Act, s. 7(h) and (i).

incriminating evidence cannot be used against him or her if a charge were to follow the information provided.[360]

The Mozambican CPC indicates that the judge must inform the accused that he or she is not obliged to answer questions posed to him or her, thereby reinforcing both the right to remain silent and the privilege against self-incrimination.[361]

The Zambian High Court relied on section 18(7) of the Constitution to declare section 53(1) of the Corrupt Practices Act unconstitutional. In terms of this provision, a person charged under the Act and wishing to make a statement was obliged to do so only under oath, thereby being forced to undergo cross-examination.[362]

3.4. Transparency rights during trial

Table 11 Overview of the constitutional and legislative recognition of the transparency rights during trial

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to be tried and sentenced in an open court	Yes	Direct	Conditional & procedural	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Conditional right
Right not to be tried and sentenced in absentia	Yes	Indirect	Conditional & procedural	No	Conditional & procedural	Direct	Conditional & procedural	No	Conditional & procedural	Direct	Conditional & procedural

[360] Kenyan Terrorism Act, s. 34(2)(5) to (7).
[361] Mozambican CPC, s. 425(1).
[362] *Thomas Mumba v The People* HNR/438/1984.

3.4.1. Right to be tried and sentenced in an open court

Article 14(1) of the ICCPR enshrines the right to be tried and sentenced in an open court, with two limitations. In relation to trial, the public 'may be excluded for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. In relation to sentencing, derogation to the principle of an open court is authorised only under international human rights law in cases involving children (this is dealt with in section 5.1. below).

The Burundian Constitution enshrines the right to be tried (and sentenced) in public, although the judge may decide to hold hearings *in camera* when a public hearing may affect public safety or 'morality'.[363] The Ivorian Constitution is silent on this right. The Kenyan Constitution enshrines the right to a public trial (and, by extension, sentencing),[364] without indicating (beyond the general limitations clause) how this right may be limited.[365] The Mozambican Constitution states that trial must take place in a public court, except 'in order to safeguard personal, family, social or moral privacy, or for material reasons of trial security or public order'.[366] The Zambian Constitution reflects this right but lists limitations whereby the right to a public trial may be curtailed both in relation to trial and sentencing. These include the interests of justice, defence, public safety, public morality, welfare of persons under the age of 18 years, or the protection of the private lives of persons concerned.[367]

The Burundian CPC states merely that the judge may decide to hold closed hearings, either ex officio or at the request of the prosecutor, the accused or his or her lawyer or the victim. Closed hearings are automatic in cases involving minors younger than 18.[368] The relevant provision does not reflect the criteria, contained in the Constitution or in international human rights law, that should guide the judge in ruling on the exclusion of the public. Furthermore, although the location of the provision in the CPC would indicate that this applies only to trial *stricto sensu* and not to sentencing, the CPC does not state clearly that the judgment has to be delivered in public.

[363] Constitution of Burundi, ss. 40 and 206.
[364] The Kenyan CPC defines the trial as starting with the plea (section 282) and ending with the sentence (section 322).
[365] Constitution of Kenya, s. 50(2)(d).
[366] Constitution of Mozambique, s. 65.
[367] Constitution of Zambia, ss. 18(10) and (11).
[368] Burundian CPC, s. 170.

The Ivorian CPC states that a judge may rule to hold *in camera* hearings if these are 'dangerous to order and morality'; the decision is taken in a public hearing.[369] The judgment must always be delivered in public.[370]

The Kenyan CPC states that court proceedings must be held in an open court, without setting conditions for *in camera* hearings.[371] A judgment must always be read out in open court.[372]

The Mozambican CPC reiterates the constitutional principle outlined above. A judge may rule on *in camera* hearings but can admit the presence of those who need to intervene during the trial, including lawyers or other professionals.[373]

The Zambian CPC largely reflects the Constitution, determining that an open court is the rule but that certain circumstances may justify holding closed hearings. These are the interests of 'justice, defence, public safety, public order or public morality' and 'the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings'.[374] However, judgment must be delivered in open court.[375] The State Security Act authorises the prosecutor to request that a court hold closed hearings in matters relating to state security.[376]

3.4.2. Right not to be tried *in absentia*

Article 14(3)(d) of the ICCPR enshrines the right of the accused to be tried in his or her presence.

The Burundian Constitution does not directly uphold this right, but the right to a fair hearing, read together with the ICCPR, could provide a constitutional basis for it.[377] The Kenyan Constitution contains the right not to be tried (and, by extension, sentenced)[378] *in absentia*.[379] The Zambian Constitution reflects the right not to be tried *in absentia*, except if the attitude of the accused renders 'the continuance of the proceedings in his presence impracticable and the court has ordered

[369] Ivorian CPC, ss. 306 and 390.
[370] Ivorian CPC, ss. 306 and 390.
[371] Kenyan CPC, s. 77.
[372] Kenyan CPC, s. 168(1).
[373] Mozambican CPC, s. 407.
[374] Zambian CPC, s. 76.
[375] Zambian CPC, s. 168.
[376] Zambian State Security Act, Cap 111, s. 15(1).
[377] Constitution of Burundi, s. 38.
[378] The Kenyan CPC defines the trial as starting with the plea (section 282) and ending with the sentence (section 322).
[379] Constitution of Kenya, s. 50(2)(f).

him to be removed and the trial to proceed in his absence'.[380] The Ivorian and Mozambican constitutions do not reflect this right.

The Burundian CPC provides certain procedural guarantees aimed at ensuring the presence of the accused at trial, although it is not required that he or she receive summons to appear in court in person.[381] The CPC allows for a judgment to be issued in the absence of the accused. The accused can oppose this judgment within 30 days, but need not be notified of this possibility in person.[382]

The Ivorian CPC allows for the accused to be tried and sentenced *in absentia*, although the rules differ depending on the seriousness of the crime. If he or she is tried for a *crime*, the accused will be summoned twice, but there is no requirement that the summons be delivered in person. The absent accused may not be represented by a lawyer and is deprived of his or her civil rights as a consequence of his or her absence.[383] An accused charged with a misdemeanour (*délit*) may also be tried *in absentia*, but with fewer safeguards to secure his or her presence and fewer consequences if he or she is absent.[384] For minor offences, the accused may request to be tried in his or her absence.[385]

The Kenyan and Zambian CPCs, in very similar terms, do not require that summons be served on the accused in person; this should be done only 'if practicable'.[386] A trial may continue in the absence of the accused (except if charged with a felony) following an adjournment, but a court may set aside a conviction if the accused, who was absent when judgment was delivered, provides valid reasons for his or her absence.[387] Furthermore, a detained accused must be notified of the hearing at which judgment will be delivered and must be brought from prison, although his or her absence does not invalidate the judgment.[388] Finally, the accused may request not to attend his or her trial.[389] The constitutionality of these provisions should be challenged.

Mozambican law regulates trial *in absentia* in that it provides for different consequences if the accused is absent at trial. If the absence was justified, the trial will be postponed; if the absence was unjustified and the accused was detained, the court must verify whether the accused remains in

[380] Constitution of Zambia, s. 18(2).
[381] Burundian CPC, ss. 137 to 155.
[382] Burundian CPC, ss. 253 to 260.
[383] Ivorian CCP, ss. 597 and following.
[384] Ivorian CCP, ss. 403 and 478.
[385] Ivorian CCP, s. 407.
[386] Kenyan CPC, ss. 91 to 99; Zambian CPC, ss. 91 to 99.
[387] Kenyan CPC, s. 206; Zambian CPC, s. 203.
[388] Kenyan CPC, s. 168; Zambian CPC, s. 168.
[389] Kenyan CPC, s. 99; Zambian CPC, s. 99.

custody.[390] The accused may also forfeit his or her right to appear in court when tried for minor offences, and then be represented by a lawyer.[391]

3.5. Sentencing rights

Table 12 Overview of the constitutional and legislative recognition of the sentencing rights

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Prohibition of the death penalty	Yes	Indirect	Gives right	Direct	Conditional right	No	No	Direct	Gives right	No	No
Right not to be sentenced to unusual or degrading punishment	Yes	Indirect	Conditional right	Indirect		Direct	No	No	Gives right	Indirect	No
Right to review or appeal one's sentence	Yes	No	Gives right	No	Conditional right	Direct	Gives right	No	Gives right	No	Gives right

3.5.1. Prohibition of the death penalty

The death penalty is not prohibited under international law. However, article 6 of the ICCPR states that it can be allowed only if it has not yet been abolished; 'only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide'; and following a final judgment by a competent court. In addition, those sentenced to the death penalty must have a right to seek pardon or commutation of sentence. It cannot be imposed on children or pregnant women. The Second Optional Protocol to the

[390] Mozambican CPC, ss. 317, 418 and 419.
[391] Mozambican CPC, s. 547.

International Covenant on Civil and Political Rights aiming at the abolition of the death penalty has been ratified by Mozambique only, out of the five countries under review. Although UNCAT excludes 'lawful sanctions' from the definition of torture, the psychological effect of a sentence of death could amount to torture or, at a minimum, ill-treatment.[392]

The right to life is enshrined in all the constitutions examined in this study.[393] The Ivorian and Mozambican constitutions expressly prohibit the death penalty.[394] The Kenyan Constitution authorises the intentional deprivation of life if authorised by the Constitution (including through its limitations clause) or by law.[395] The Zambian Constitution also authorises the intentional deprivation of life 'in execution of sentence of Court in respect of a criminal offence under the law in force in Zambia'.[396] The right to be free from torture and other ill-treatment was examined in section 2.1.2. above.

The death penalty was abolished in Burundi in 2009 and in Côte d'Ivoire in 2000. However, the Ivorian CC still provides for the death penalty as a mandatory sentence for serious crimes such as treason, premeditated murder or aggravated robbery.[397] The sentence cannot be imposed on women while they are pregnant.[398] Judges no longer impose this sentence, but there are no clear guidelines in law as to what sentence should replace the mandatory death penalty. Burundian law provides for mandatory life sentences for the crimes of genocide, crimes against humanity, war crimes, voluntary manslaughter (including murder), torture resulting in the death of the victim, aggravated cases of rape, and armed robbery resulting in the death of the victim.[399]

In Côte d'Ivoire, there is no right to apply for parole (it is a possibility considered and granted only by the head of prison) and judges may impose life sentences for the most serious crimes (including crimes against prisoners of war, treason, public violence with intent to commit murder, murder, aggravated assault of direct family members, aggravated rape, unlawful detention accompanied by

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[392] J. Méndez, 'The death penalty and the absolute prohibition of torture and cruel, inhuman, and degrading treatment or punishment' (2012) 20(1) *Human Rights Brief*, pp. 2 to 6.
[393] Constitution of Burundi, s. 24 ; Constitution of Côte d'Ivoire, s. 2; Constitution of Kenya, s. 26(1); Constitution of Mozambique, s. 40(1) ; Constitution of Zambia, s. 12(1).
[394] Constitution of Côte d'Ivoire, s. 2; Constitution of Mozambique, s. 40(2).
[395] Constitution of Kenya, s. 26(3).
[396] Constitution of Zambia, s. 12(1).
[397] Ivorian CP, ss. 34, 141, 343 and 394.
[398] Ivorian CP, s. 34.
[399] Burundian CC, ss. 200, 207, 211, 262(6) and 558.

acts of torture, and pillaging);[400] thus, life imprisonment without the option of parole is a possibility in Ivorian law.

Kenyan law still authorises (albeit without making it mandatory) the death penalty for the most serious offences (treason, murder, (attempted) robbery with violence), and judges still sentence individuals to the death penalty, although the last execution took place in 1987.[401] Children cannot be sentenced to death and the sentence cannot be executed on women while they are pregnant.[402] However, there are no clear guidelines in law as to what length of imprisonment those sentenced to the death penalty should serve.

Mozambican law prohibits life sentences.[403]

Zambian law still provides for the mandatory death sentence for the crime of aggravated robbery, treason and murder (except where there are extenuating circumstances).[404] Although individuals are still sentenced to death, the last execution took place in 1997.[405] There are no clear guidelines on how a sentence of death should be commuted. In 1995 the UN Human Rights Committee found in relation to Zambia that mandatory life sentences were contradictory to the ICCPR, but the legislation has not been amended since then.[406] Furthermore, the Supreme Court ruled in 2007 that the death penalty did not amount to inhuman and degrading treatment since it was authorised by the Constitution.[407] Furthermore, the law provides for life sentences, mostly as optional prison sentences (including for acts of rioting, rape, child trafficking, homosexual intercourse, child pornography, manslaughter, homicide, grievous bodily harm and aggravated robbery);[408] whoever is sentenced to life imprisonment cannot apply for a remission of sentence.[409]

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[400] Ivorian CPC, Title III; Ivorian CC, ss. 140, 257, 287, 344, 346, 354, 374, 464.
[401] Kenyan PC, ss. 25, 40, 204, 296; and 297; Death Penalty Database, *Kenya*, Cornell University, available at http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya (accessed 15 April 2016).
[402] Kenyan PC, ss. 25(2) and 211.
[403] Mozambican CC, s. 59.
[404] Zambian Penal Code, ss. 43, 201 and 294.
[405] Death Penalty Database, *Zambia*, Cornell University, available at http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=zambia (accessed 15 April 2016).
[406] *Lubuto v Zambia Commission* No. 390/1990.UN. Doc. CCPR/C55/zd/390/Rev/1.(1995).
[407] See the case of *Benjamin Banda and Cephas Kufa Miti v The Attorney General* (2007) (unreported).
[408] Zambian Penal Code, ss. 81, 133, 138 to 141, 143, 155 to 161, 177A, 202, 215, 224, 294.
[409] Zambian Prisons Act, s. 109(1).

3.5.2. Right not to be sentenced to unusual or degrading punishment

Article 8(3) of the ICCPR prohibits compulsory labour but authorises hard labour as a lawful sentence if imposed by a court. Similarly, UNCAT in principle prohibits torture, but authorises 'pain or suffering arising only from, inherent in or incidental to lawful sanctions'.[410]

The prohibition of torture in domestic constitutions was examined in section 2.1.2 above. In addition, the prohibition of slavery is enshrined in the Burundian and Ivorian constitutions.[411] Forced labour is expressly prohibited in the Kenyan Constitution.[412] The Mozambican Constitution authorises forced labour if it is exercised within the legislative framework regulating prisons.[413]

Burundian law provides for the sentence of 'public presentation of the perpetrator', aimed at bringing about a form of restorative justice by having the perpetrator apologise in public.[414] However, this sentence may be carried out before an appeal process has been completed and could therefore be imposed on someone who will be acquitted on appeal. Considering that mob justice is an issue in Burundi, the person who has been sentenced in this way faces significant risks of physical harm and societal exclusion.[415]

Kenyan law authorises the sentence of imprisonment with hard labour, subject to medical oversight, for certain offences such as attempted burglary, theft or cheating, or 'carnal connection with an idiot or imbecile'.[416] The constitutionality of these provisions is open to challenge.

Ivorian legislation prohibits corporal punishment as a sentence in that it is not provided for as a sentence under the Criminal Code.

Corporal punishment was abolished from the Mozambican legal framework in 1989. Between 1983 and 1989, lashing in public, in addition to a prison term, was authorised as a sentence for theft and certain other criminal offences.[417]

Under Zambian law, courts are free to impose 'hard labour', in addition to any prison sentence, unless the law expressly excludes it (the exclusion applies, for example, to cases of contempt of court).[418]

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[410] UNCAT, art. 1.
[411] Constitution of Burundi, s. 26; Constitution of Côte d'Ivoire, s. 3.
[412] Constitution of Kenya, s. 30(2) and 51.
[413] Constitution of Mozambique, s. 84; Law Decree 26643/1936, Title IV.
[414] Burundian CC, s. 92.
[415] Human Rights Watch, *Mob Justice in Burundi: Official Complicity and Impunity* (March 2010), p. 105.
[416] Kenyan PC, ss. 146 and 308; Prisons Act, s. 43.
[417] Law 4/1989; *Lei da Chicotada* (Law of Lashing) introduced by Law 5/1983.

3.5.3. Right to appeal one's sentence

The right to appeal is enshrined in article 14(5) of the ICCPR and article 7(1) of the AChHPR.

The Kenyan Constitution is the only constitution expressly enshrining this right.[419] The right to an equitable hearing is enshrined in the Burundian Constitution, and read together with the ICCPR and the AChHPR could provide a constitutional basis for the right to appeal one's sentence.[420]

Under Burundian law, the right to appeal a verdict is an automatic right of the accused, the prosecution, the person declared liable to pay civil damages, and/or the person who was granted civil damages.[421] Deadlines vary depending on whether the person was sentenced following a case of *flagrante delicto*.[422] In 2011, the Constitutional Court ruled that a provision of the Judicial Code allowing a judge to continue proceedings despite a party having appealed a ruling opposing an application for recusal of the judge was contrary to sections 19 and 39 of the Constitution.[423]

The Ivorian CPC provides that a verdict may be challenged on appeal by the accused, the prosecution, the person declared liable to pay civil damages, and/or the person who was granted civil damages.[424] Appeals to regular jurisdictions are authorised for minor offences or misdemeanours (*contraventions* and *délits*), but not for crimes (*crimes*) as these are tried before a Jury court. In the latter case, the only possibility is an appeal before the Court of Cassation if the accused was acquitted or if the interests of law so require.[425]

Under Kenyan law, the accused has the right to appeal within a certain deadline, except if he or she pleaded guilty.[426] Title IX of the Mozambican CPC regulates the appeal process.[427] Section 321 to 351A of the Zambian CPC regulate the appeal process.[428]

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[418] Zambian CPC, ss. 26(1), 116.
[419] Constitution of Kenya, s. 50(2)(q).
[420] Constitution of Burundi, ss. 19 and 38.
[421] Burundian Judicial Code, ss. 4 to 38; Burundian CPC, ss. 261 to 271.
[422] Burundian CPC, ss. 215, 216, 262, 266(5) and (6).
[423] Cour constitutionnelle du Burundi, Affaire RCCB 252 du 11 août 2011, Gahungu Athanase, Bizimana Isaac, Bashir Tariq et autres (Inconstitutionnalité de l'article 117 du Code de l'organisation et de la compétence judiciaires), Bulletin Officiel du Burundi N°2/2013, 273.
[424] Ivorian CPC, ss. 487 and following.
[425] Ivorian CPC, ss. 566 and 567.
[426] Kenyan CPC, ss. 347 and following.
[427] Mozambican CPC, ss. 645 to 672.
[428] Zambian CPC, ss. 321 to 351A.

3.5.4. Impact of conviction on other fundamental rights after having served a sentence

The Kenyan Constitution clearly states that detainees retain all their other fundamental rights, except if such enjoyment is 'clearly incompatible with the fact that the person is detained'.[429] The Mozambican Constitution also states that sentenced individuals may not be deprived of their fundamental rights.[430] The Burundian, Kenyan and Zambian constitutions impose limitations on the eligibility of members of parliament if they are serving a sentence or have been sentenced to serious offences (in Burundi, subordinate legislation must determine when a person is eligible after having served a sentence; in Kenya, being found guilty of abuse of office disqualifies a person for life; in Zambia, a person is ineligible for five years after having served a sentence).[431]

Subordinate legislation allows the courts to associate criminal penalties with other penalties that affect the enjoyment of civil and political rights in particular. In Burundi, Côte d'Ivoire and Mozambique, criminal courts may impose, in addition to a criminal conviction, that the sentenced person pay civil damages to a victim.[432] In Burundi, a judge may impose several prohibitions for a certain time period, including to hold public office, to exercise a profession, to submit tenders or to use bank cards.[433] Under Ivorian law, sentenced people must (in case of a crime) and may (in case of a misdemeanour) for a limited period be deprived of the right to hold certain public functions, to carry firearms and to exercise some education-related functions after having served a prison sentence.[434] A person sentenced *in absentia* is automatically deprived of these rights.[435] Zambian prisoners do not have the right to vote. [436]

3.6. Conclusion

Although the project was developed with the aim of assessing the constitutional compliance of domestic legislation, this chapter confirms what has already been highlighted: that, with the exception of Kenya, there has been no genuine effort to adapt legislation following the adoption of new constitutions. Furthermore, rights may be enshrined in subordinate legislation without finding direct constitutional support. Particularly in countries of civil law tradition, such as Burundi and Côte

[429] Constitution of Kenya, s. 51(1).
[430] Constitution of Mozambique, s. 61.
[431] Constitution of Burundi, s. 165; Constitution of Kenya, s. 99(2) and (3); Constitution of Zambia, s. 65.
[432] Mozambican CC, ss. 105 to 109.
[433] Burundian CC ss. 65 to 68 and 338, 443, 532, 562 and 619.
[434] Ivorian CC, s. 66.
[435] Ivorian CPC, s. 605; Ivorian CC, s. 68.
[436] Zambian Electoral Act No. 12 of 2006, ss 7(1)(f) and 19(c).

d'Ivoire, the rights recognised in the constitutions are generic and may serve as an indirect constitutional basis for a right, thereby facilitating constitutional compliance. Finally, it is important to note that while international human rights law recognises extensive trial rights, there has been virtually no case law that seeks to uphold these rights and base litigation on them, even though four of the five countries analysed here are monist.

The most fundamental trial rights are generally enshrined in domestic constitutions and subordinate legislation. These are the principle of legality, the presumption of innocence (which is usually not recognised in police custody), the right to be informed of the charge, the right to a speedy trial, the right to legal representation and the right to apply for bail. Zambian and Kenyan legislation on bail are not compliant with their own constitutional prescripts. Regular review of remand detention occurs only in Burundi, Côte d'Ivoire, and, since 2014, in Kenya. Legal aid is available in Kenya, Mozambique and in Zambia.

Evidence-related rights are usually recognised in all jurisdictions, although the right to have evidence obtained under torture automatically excluded is only recognised in Burundian law, and UNCAT could be relied upon in all other countries of monist tradition. There are systematic limitations on the right to be tried in an open court and not to be tried and sentenced *in absentia*, although these limitations seem by and large to be in line with the (rather general) limitations contained in international law.

Finally, the death penalty is still recognised in law and in the constitutions of Kenya and Zambia, while Ivorian legislation and its Constitution are in conflict in this regard. A life sentence without the option of parole is a possibility in Burundi, Côte d'Ivoire and Zambia. Corporal punishment as a sentence is a possibility in Kenya and Zambia, even though both have ratified UNCAT and prohibit torture in their constitutions. The right to appeal is possible in all jurisdictions, except in Côte d'Ivoire when tried before a jury court; this is a practice common in civil law countries where the institution of the Jury court still exists.

4. Detention rights: pre-trial and sentenced detention

This chapter analyses the international human rights law framework, constitutionally enshrined rights and subordinate legislation on detention, both on remand and while serving a sentence. It includes, in some instances, police interrogation.

4.1. Legality of detention and notification rights

Table 13 Overview of the constitutional and legislative recognition of the legality of detention and notification rights

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Prohibition of unlawful and/or arbitrary detention	Yes	Direct	Gives right	Direct	Gives right	Direct	Gives right	No	Gives right	Direct	Gives right
Right to be informed of the reasons for detention	No	No	No	No	No	No	Gives right	Direct	Conditional right	Direct	Gives right
Right to be informed of one's rights	No	No	Gives right	No	No	No	Gives right	Direct	Conditional & procedural	No	Gives right

4.1.1. Prohibition of unlawful and/or arbitrary detention

This right is enshrined in article 9(1) of the ICCPR and article 6 of the AChHPR.

The Burundian Constitution prohibits detention which falls outside the boundaries of the law and for acts which did not constitute a criminal offence at the time of their commission.[437] The Ivorian Constitution prohibits arbitrary detention.[438] The Kenyan Constitution prohibits arbitrary detention or detention without just cause.[439] The Mozambican Constitution prohibits unlawful detention.[440] The Zambian Constitution prohibits unlawful detention and lists the circumstances under which detention may be allowed by law, including when a person is reasonably suspected of having committed a criminal offence, but so too circumstances in which a person is either reasonably suspected of being 'of unsound mind' and/or 'addicted to drugs or alcohol, or a vagrant', or is an illegal foreigner.[441]

The Burundian Act on the Penitentiary Regime[442] states that remand and sentenced detainees may be detained only in a prison, and lists the types of warrants that can authorise prison admission.[443] A prisoner's release on the day of the expiration of the sentence is guaranteed, and as such the Prison regulations impose that prison authorities keep accurate records to ensure compliance with the length of sentence.[444]

The Ivorian CPC also contains a closed list of the types of orders that can permit prison admission and what information such orders must contain. The admission of the prisoner must be recorded in the prison register, which has to reflect mandatory information including the date of expiry of the sentence.[445] Regulations list all the prisons in the country.[446] It is a criminal offence, punishable by a sentence of three months to one year's imprisonment, for a public official to order arbitrary, illegal or abusive detention, or to be aware of it and not report it.[447]

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[437] Constitution of Burundi, s. 39(1) and (2).
[438] Constitution of Côte d'Ivoire, s. 22(1).
[439] Constitution of Kenya, s. 29.
[440] Constitution of Mozambique, ss. 59(1) and 66(1).
[441] Constitution of Zambia, s. 13(1).
[442] Burundian Act No. 1/026 of 22 September 2003 on the penitentiary regime *(Loi n° 1/026 du 22 septembre 2003 relative au Régime pénitentiaire*) *(*'Act on the Penitentiary Regime').
[443] Burundian Act on the Penitentiary Regime, ss. 5 and 5.
[444] Burundian Act on the Penitentiary Regime, s. 55; Prison Regulations 2004, ss. 5, 6, 16, 17, 21, 26, 26, 31, 32, 40 and 145. If the release day is a holiday, all measures must be taken, by the prison director, to ensure the release on the said day: Prison Regulations 2004, s. 121.
[445] Ivorian CPC, s. 685.
[446] Implementing *Loi n° 61-155 du 18 mai 1961 portant organisation judiciaire* (Law No. 61-155 of 18 May 1961 on judicial organisation), which was modified and completed by various pieces of legislation : *Loi n°64-227 du 14 juin 1964* (Law No. 64-227 of June 14, 1964), *Loi n°97-399 du 11 juillet 1997* (Law No. 97-399 of July 11, 1997), *Loi n° 98-744 du 23 décembre 1998* (Law No. 98-744 of 23 December 1998) and *Loi n° 99-435 du 6 juillet 1999* (Law No. 99-435 of July 6, 1999).
[447] Ivorian CC, ss. 215 to 220.

The Kenyan Prisons Act determines that admission to a prison may only take place upon presentation of a warrant or order of a court, which will then be deemed lawful.[448]

The Mozambican CPC determines that admission to prison is only permitted upon presentation of a warrant dated and signed by judicial authority, identifying the sentenced or accused person and the reason of his or her detention.[449] It also states that release from prison at the completion of the sentence follows a court order.[450] It is unclear how the prison system deals with prisoners whose release orders are not issued, apart from the possibility of their challenging their detention based on the violation of the constitutional right to habeas corpus.[451]

The Zambian Prisons Act lists the types of warrants that are necessary for prison admission.[452] Furthermore, it mandates the Minister of Home Affairs to designate a building as a prison which may therefore not have been built for that purpose.[453] The officer in charge of a prison is responsible for ensuring that those whose sentence has expired are released, and detailed prison records must be kept for that purpose. [454]

4.1.2. Right to be informed of one's rights and of the reasons for detention

The right to be informed of the reasons for one's detention is enshrined in the Mozambican and Zambian constitutions. The Mozambican Constitution provides that a detained person must be informed, in a language he or she understands, of the reasons for detention and the detainee's rights.[455] The Zambian Constitution also states that this information must be provided to the detainee in a language he or she understands and that this information must be given 'as soon as practicable' and within 14 days. [456] However, remand detainees should be informed of the reasons for detention when being charged or appearing before a prosecutor, whereas sentenced inmates should have received such information in the judgment.

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[448] Kenyan Prisons Act, ss. 30 to 32.
[449] Mozambican CPC, s. 303.
[450] Mozambican CPC, s. 636.
[451] Constitution of Mozambique, s. 66(1). The Constitution provides that a court must rule on such application within eight days.
[452] Zambian Prisons Act, s. 55(1).
[453] Zambian Prisons Act, s. 3(1).
[454] Zambian Prison Rules, rr 11, 12 and 112.
[455] Constitution of Mozambique, s. 64.
[456] Constitution of Zambia, s. 13(2).

The Ivorian legislation is silent on the matter. In Burundi, the reason for detention must be recorded in the prison register, but this information need not be communicated to the prisoner.[457] However, prisoners must be informed of their rights and duties upon admission.[458] Mozambican law does not indicate when the reasons for detention should be provided, although those arrested *in flagrante delicto* should be informed at the moment of arrest of the reason for their arrest and subsequent detention; such information will otherwise be provided in the warrant of arrest. Detainees should be informed of their duties (but not their rights) upon admission to prison.[459]

The Kenyan legislation imposes that all detainees be informed of the reasons for detention, of their 'constitutional rights and guarantees relating to personal liberty and other fundamental rights and freedoms' and of the reasons for limiting such rights.[460]

Zambian law is also silent on the right to be informed of the reasons for detention, but a 1970 ruling found that notification provided within 16 days rendered the detention order invalid.[461] Additional case law has ruled on the level of detail required in a detention order[462] and that the detaining authority must indicate in what language the information should be conveyed if the detainee does not speak English.[463] The Prison rules indicate that prisoners must be informed upon admission of their rights and duties, prison discipline and available complaints mechanisms, and that such information must be displayed in writing in every prison and be easily accessible.[464]

[457] Ordinance no. 550/782 of 30 June 2004 on the internal regulations of penitentiary facilities (*Ordonnance n° 550/782 du 30 juin 2004 portant Règlement d'ordre intérieur des établissements pénitentiaires*), s. 16.
[458] Burundian Act on the Penitentiary Regime, s. 11.
[459] Mozambican Law Decree 26643/1936, Title V (Prisoners' Treatment).
[460] Kenyan Persons Deprived of Liberty Act, s. 7.
[461] *Chipango v Attorney-General* (1970) SJZ 179.
[462] See *Re Kapwepwe and Kaenga* (1972) ZR 248 and *Mutale v Attorney-General* (1976) ZR 139.
[463] *Chakota and Three Others v Attorney-General* 1979/HP/D/1482.
[464] Zambian Prison Rules, rule 110.

4.2. Conditions of detention

Table 14 Overview of the constitutional and legislative recognition of the conditions of detention

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to safe custody and to humane conditions of detention	Yes	Indirect	Conditional right	Indirect	Conditional right	Direct	Conditional right	Indirect	Conditional right	Indirect	Conditional right
Right to legal representation	No	No	Gives right	No	Gives right	No	Conditional right	No	Gives right	No	No
Right to be separated	Yes	No	Partial right	No	Gives right	No	Gives right	No	Gives right	No	Gives right

4.2.1. Right to safe custody and to humane conditions of detention

At the international level, the right to safe custody and to humane conditions of detention can be inferred from the prohibition of torture and other ill-treatment, enshrined in article 7 of the ICCPR, articles 1, 2 and 4 of UNCAT and article 5 of the AChHPR, as well as the right of detainees to be treated with humanity and dignity, enshrined in article 10 of the ICCPR. Article 10(3) of the ICCPR also enshrines the principle that detention of sentenced prisoners should be focused on their 'their reformation and social rehabilitation'.

As highlighted in section 2.1.2 above, all domestic constitutions enshrine the prohibition of torture and other ill-treatment. In addition, a general right to human dignity (albeit not specific to detainees) is enshrined in all domestic constitutions, save for the Zambian one which recognises a right to security.[465] In addition, the Kenyan Constitution prohibits corporal punishment and requires that

[465] Constitution of Burundi, ss. 21 and 27; Constitution of Côte d'Ivoire, s. 2(2); Constitution of Kenya, s. 28; Constitution of Mozambique, s. 6; Constitution of Zambia, s. 11.

Parliament adopt legislation providing for humane conditions of detention in line with international standards.[466] The Persons Deprived of Liberty Act was adopted in 2014.

The use of corporal punishment as a disciplinary measure in prison is prohibited or has been abolished in Burundi, Côte d'Ivoire, Mozambique and Zambia.[467] The Kenyan Prisons Act still authorises corporal punishment, under medical supervision, despite its prohibition in the Constitution.[468] The Kenyan Persons Deprived of Liberty Act prohibits forced labour 'except in execution of a lawful sentence' and except to clean detention facilities and to 'facilitate their [the prisoners'] rehabilitation'.[469] A 2002 decision by the Zambian High Court ruled that corporal punishment was contrary to section 15 of the Constitution and was declared null and void.[470] The legislative provisions authorising corporal punishment as a disciplinary measure in prison were subsequently repealed.

Solitary confinement is authorised: in Burundi, for a maximum of two days, with access to the outdoors for four hours a day; in Côte d'Ivoire, for 10 days to two months; in Kenya, for up to 30 days and with the possibility of being coupled with a reduced diet; in Mozambique, for up to 30 days; in Zambia, for up to 25 days and with the possibility of being coupled with a reduced diet.[471]

Subordinate legislation regulates prison conditions in all five jurisdictions reviewed in this study, covering issues such as the use of force, discipline, access to health care, food, communication and family visits.[472] However, the language used in Burundian and Ivorian legislation and regulations is too vague to set clear standards against which implementation could be verified by oversight mechanisms or, ultimately, by a court. The Mozambican Prison Policy is progressive and human rights-focused. In addition, torture committed by prison officials constitutes a criminal offence in Burundi and in Mozambique.[473] In Kenya, cruel, inhuman or degrading treatment of a detainee (but

[466] Constitution of Kenya, ss. 29(e) and 51(3).
[467] Burundian Prison Regulations, ss. 87 and 89; Mozambican Law 4/1989.
[468] Kenyan Prisons Act, ss. 54 and 55.
[469] Kenyan Persons Deprived of Liberty Act, s. 19.
[470] *John Banda v The People* (2002) AHRLR 260, Zambian High Court, 1999.
[471] Burundian Prison Regulations 2004, arts. 87 and 89; Ivorian PA Decree, s. 6; Kenya Prison Rules, ss. 69 to 76; Mozambican Law Decree 26643/1936, s. 359(7); Zambian Prisons Act, ss. 95, 96 and 97.
[472] Burundian Act on the Penitentiary Regime, ss. 31, 32, 35 and 38; Burundian Prison Regulations 2004, ss. 95, 100 and 138; Ivorian PA Decree, ss. 11, 15, 33, 118, 151 and 154; Kenyan Prisons Act, ss. 12 and 53; Kenyan Prison Rules, ss. 45 to 65; Kenyan Persons Deprived of Liberty Act; Mozambican Law Decree 26643/1936; Title IV; Mozambican Prison Policy 65/2002; Zambian Prisons Act, s. 29; Zambian Prison Rules, ss. 13, 16, 17, 25, 65, 89, 104, 107, 116, 121, 128, 130 to 139, 156, 166 and 171.
[473] Burundian CC, ss. 204 to 209; Mozambican CC, s. 160. However, torture is not defined under Mozambican law, and judges would therefore have to rely on international law for such a definition. See also Kenyan National Police Service Act, s. 95.

not torture) constitutes a criminal offence.[474] As noted above, torture by law enforcement officials constitutes a criminal offence only if it is committed at the hands of police.

Burundian and Mozambican law provide for (vague) rehabilitation and reintegration programmes.[475] Kenyan legislation states that detainees must have ‘access to educational opportunities and reading material that is beneficial to their rehabilitation and personal development’ and to ‘reasonable access to news media’. Detainees must also be prepared by prison authorities for reintegration into society.[476] Furthermore, the level of reformation and rehabilitation of a prisoner must be taken into consideration for remission of a sentence.[477] Ivorian legislation is silent on rehabilitation programmes. Zambian legislation does not provide for such programmes, but states that the level of reformation and rehabilitation of a prisoner must be taken into consideration for compulsory after-care orders.[478]

4.2.2. Right to legal representation

Subordinate legislation in all jurisdictions except Zambia authorises communication between a prisoner and his or her legal representative post-trial (understood as accessing a lawyer after all opportunities for appeal have been exhausted).[479] In Kenya, the law states that the confidentiality of communications between a prisoner and his or her legal representative is no longer protected after judgment has been delivered. However, a detainee must be notified of the possibility of legal aid upon admission.[480] In Zambia, communication between a prisoner and his or her legal representative is authorised only when the prisoner is party to legal proceedings, which would indicate that such communication is not authorised once judgment has been issued (but would be authorised if the prisoner were involved in any other legal proceedings, whether related or not to the original criminal trial).[481]

[474] Kenyan Persons Deprived of Liberty Act, s. 5(2).
[475] Burundian Act on the Penitentiary Regime, ss. 12 and 41; Mozambican Prison Policy 65/2002, II Guideline Principle.
[476] Kenyan Persons Deprived of Liberty Act, ss. 18 and 26.
[477] Kenyan Prisons Act, s. 46.
[478] Zambian Prisons Act, s. 17(1)(b).
[479] Burundian Act on the Penitentiary Regime, s. 37; Burundian Prison Regulations, s. 99; Ivorian PA Decree, ss. 31 and 125; Kenya Prisons Act, s. 59.
[480] Kenyan Legal Aid Act; Kenyan Persons Deprived of Liberty Act, s. 6.
[481] Zambian Prison Rules, s. 135.

4.2.3. Right to be separated

Articles 10(2) and 10(3) of the ICCPR enshrine the right of remand and the right of convicted prisoners, juveniles and adults, to be separated. The separation of men and women is not echoed in international human rights law. The right of remand and convicted prisoners to be separated is enshrined in Ivorian, Mozambican and Zambian legislation.[482] The right of children and adults to be separated is enshrined in all five jurisdictions,[483] as is the right of men and women to be separated.[484]

4.3. Conclusion

As noted previously, although the project was developed with the aim of assessing constitutional compliance of domestic legislation, this final thematic chapter confirms what has been highlighted: there has been no genuine effort to adapt legislation following the adoption of new constitutions. In relation to detention examined here, this is true even of Kenya, where the Constitution does not list prisoners' rights but calls for the adoption of subordinate legislation which is in line with international best practice. In the criminal justice chain, prisoners' rights find the least constitutional support, and legislation is usually sporadic and general.

More specifically, beyond the general right enshrined in all constitutions not to be arbitrarily or unlawfully detained, virtually no other rights find a constitutional basis (with three exceptions noted above). Subordinate legislation is often general and not fully in line with international best practice, with the possible exception of the Mozambican Prison Policy. For example, solitary confinement is still authorised for extensive periods of time in the five jurisdictions; standards for conditions of detention are usually set in general terms, making oversight more difficult; rehabilitation programmes are not clearly provided for in the majority of jurisdictions; and corporal punishment is still authorised as a disciplinary measure in Kenya.

[482] Ivorian PA Decree, s. 7; Mozambican Law Decree 26643/1936, ss. 11 to 13; Mozambican Prison Policy 65/2002; Zambian Prisons Act, s. 60(2).
[483] Burundian CPC, s. 229(2); Ivorian PA Decree, s. 7; Kenyan Prison Rules, s. 32; Kenyan Persons Deprived of Liberty Act, s. 12(3); Mozambican Prison Policy 65/2002; Zambian Prisons Act, s. 60(2).
[484] Burundian Prison Regulations, s. 46; Ivorian PA Decree, s. 7; Kenyan Prisons Act, s. 36; Kenyan Persons Deprived of Liberty Act, s. 12(3); Mozambican Prison Policy 65/2002; Zambian Prisons Act, s. 60(1).

5. Overarching issues

This chapter examines three issues that are best analysed on their own rather than in any of the above chapter, as the answers provided are by and large similar throughout the criminal justice process. These are the regime applicable to children, oversight over places of detention and the right to redress following a violation of the rights of an arrestee, suspect, accused and/or detainee.

In relation to children, the first section outlines specific rules applicable to children at the moment of arrest, during trial and in detention (police custody and prison). However, the issue of children in conflict with the law and the attempt, at least in some countries, to provide adequate responses to them is the topic of separate research. The purpose of this report is not to be comprehensive in relation to children in conflict with the law.

5.1. Regime applicable to children

5.1.1. International framework

The United Nations Convention on the Rights of the Child (UNCRC) affords extensive rights to children (any person under the age of 18) in conflict with the law, both in respect of arrest and detention, on the one hand, and trial, on the other. The UNCRC has been ratified by all five countries under review in this study.

As stated in article 3 of the UNCRC, the general principle in relation to children's rights is that any action taken concerning a child should have the best interests of the child as a primary consideration.

In relation to arrest and detention, article 37 of the UNCRC enshrines the following rights:

- the right to be free from torture and other ill-treatment;[485]
- the prohibition of the death penalty and life imprisonment without parole;[486]
- the prohibition of unlawful or arbitrary arrest;
- the use of detention as a measure of last resort and only for the shortest appropriate period;
- the right to human dignity, taking into consideration the needs of the detained child;
- the right to be separated from adults unless it is in the child's best interests not to be separated; [487]

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[485] This right is also reflected in article 17(2)(b) of the ACRWC which, however, does not qualify the right of separation.
[486] This right is also reflected in article 6 of the ICCPR.
[487] This right is also reflected in articles 16(1) and 17(2)(a) of the ACRWC.

- the child's right to maintain contact with his or her family during detention;
- the right to have prompt access to 'legal and other appropriate assistance'; and
- the right to challenge the legality of one's detention before a court or another 'competent, independent and impartial authority', which should deliver a ruling promptly.

In relation to trial, article 40 of the UNCRC enshrines the following rights:

- the 'dignity and worth' of a child suspected of, accused of or sentenced for a criminal offence must be respected and his or her age, desirability for reintegration and future constructive role he or she can play in society must be taken into account;[488]
- the right not to be accused or sentenced for an act that did not constitute a criminal offence under national or international law at the time of the commission;
- the right to the presumption of innocence;[489]
- the right to be promptly and directly or through his or her parents, be informed of the charged against him or her;[490]
- the right to have access to legal or other assistance to prepare his or her defence;[491]
- the right to a speedy and fair trial;[492]
- the right not to be compelled to give evidence or to confess guilt;
- the right to examine and cross-examine witnesses;
- the right to an appeal;[493]
- the right to an interpreter;[494]
- the right to privacy during legal proceedings;[495]
- states should adopt laws and policies establishing a minimum age for criminal capacity and setting up diversion programmes.[496]

In addition, the African Charter on the Rights and Wellness of the Child (ACRWC) provides for the right of mothers detained with their children, requiring that expectant mothers and mothers of infants and young children in conflict with the law be granted special treatment, including that preference be given to a non-custodial sentence, that the death sentence not be imposed on such

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[488] Article 17(1) of the ACRWC echoes this right: 'Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.' In addition, article 17(3) of the ACRWC reads that '[t]he essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation'.

[489] This right is also reflected in article 17(2)(c)(i) of the ACRWC.

[490] This right is also reflected in article 17(2)(c)(ii) of the ACRWC.

[491] This right is also reflected in article 17(2)(c)(iii) of the ACRWC.

[492] This right is also reflected in article 17(2)(c)(iv) of the ACRWC.

[493] This right is also reflected in article 17(2)(c)(iv) of the ACRWC.

[494] This right is also reflected in article 17(2)(c)(ii) of the ACRWC.

[495] This right is echoed in article 17(2)(d) of the ACRWC, which prohibits access by the media and the public to trials involving minors.

[496] This right is also reflected in article 17(4) of the ACRWC, which imposes that legislation set a minimum age for criminal capacity.

mothers, and that the aim of incarceration be reformation and social reintegration and rehabilitation.

Many of these rights were examined in the chapters above and not all are reflected in juvenile-specific provisions. However, the following sections briefly examine how each of the countries under review addresses juvenile justice in their legal systems at the moment of arrest and in police custody, during trial and in prison (but not in alternative care).

5.1.2. Burundi

The Burundian Constitution contains two relevant provisions in relation to children in conflict with the law. Section 44, a generic provision, states that children are entitled to specific measures aimed at upholding their well-being, health and physical safety and to be protected from abuse. Furthermore, section 46 enshrines the principle that detention of children must be a measure of last resort and, if a child is detained, it must be for the shortest time possible. The provision also states that children of 16 years and younger must be separated from other detainees and that conditions of detention must be appropriate to their age.

Subordinate legislation reflects these constitutional provisions and, in some regards, provides more rights to children in conflict with the law. The age of criminal capacity is set at 15 years of age.[497] The CPC regards a child as anyone younger than 18 years old.[498]

The CPC lays out general principles that should inform the entire criminal justice process in relation to children, namely that the best interests of the child, including continued access to education, must guide any decision taken in relation to children in conflict with the law, and that detention must be a measure of last resort.[499]

The law is silent on measures relating to arrest, with the exception of body searches, which must be authorised in writing by a parent or guardian if the child is younger than 15, and by the parent or guardian and the child if the child is between 15 and 18 years old.

In relation to police custody and interrogation, a child must receive legal assistance during police interrogation; failure to do so nullifies the interrogation.[500] Police officials and prosecutors must

[497] Burundian CC, s. 28 and Burundian CPC, s. 66(a)8°..
[498] Burundian CPC, ss. 222 and following.
[499] Burundian CPC, s. 222.
[500] Burundian CPC, s. 224.

determine the identity of the child and notify his or her parents or guardians of the investigation or charges against the child.[501] Derogating from the laws of general application, a child remanded in prison following an arrest warrant issued by a prosecutor must be presented before a judge within seven days (and not the 15-day period applicable to adults).[502]

The trial of children younger than 18 is specifically regulated by articles 233 to 243 and 357 to 359 of the CPC. Children are tried in juvenile courts *(Chambre des Mineurs du Tribunal de Grande Instance* for first instance proceedings and *Cour d'Appel siégeant en Chambre des Mineurs* for appeals).[503] Except where specifically provided, the rules of general application apply to children as well.[504] Importantly, the CPC provides that court proceedings involving children (accused or victims) must always be held *in camera* or the proceedings will be nullified.[505] Extending from the provisions applicable to police custody, the CPC provides that children under the age of 18 must have a legal representative during trial.[506] A child, his parents or guardians or legal representative may appeal a judgment under the same rules as those applying to normal proceedings.[507] Finally, sentenced children aged between 15 and 18 years are entitled to a reduced prison sentence.

A child may be held in remand detention until the end of the trial, and the decision to remand a child must be guided by the nature and gravity of the offence.[508] It is unclear whether the general provisions on regular review of remand detention apply to children, although nothing indicates otherwise.

As stated above, children younger than 18 should be detained in a special place of care or a wing of the prison that caters specifically for children, but in any case be separated from adults in prison, a requirement that goes further than the constitutional prescript that children of 16 years of age and younger be separated from older prisoners.[509]

The Act on the Penitentiary Regime also states that children must be separated from adults.[510] It provides in general terms that children in detention must be treated with dignity and that their best

[501] Burundian CPC, ss. 223 and 225.
[502] Burundian CPC, s. 230.
[503] Burundian CPC, ss. 234, 235 and 239.
[504] Burundian CPC, s. 233.
[505] Burundian CPC, ss. 170 and 236.
[506] Burundian CPC, ss. 166(3) and 210.
[507] Burundian CPC, ss. 238 and 239.
[508] Burundian CPC, ss. 227, 229 and 231.
[509] Burundian CPC, s. 229.
[510] Burundian Act on the Penitentiary Regime, s. 7.

interests and needs must always be borne in mind.[511] Furthermore, children of school-going age must have access to education in prison.[512] Also, pregnant women and mothers with children up to the age of three are identified as a vulnerable group and must enjoy special facilities that address their special needs, including access to information on parental duties and children's rights. [513]

5.1.3. Côte d'Ivoire

The Ivorian Constitution states, in general terms, that it is the state's duty to protect children (as well as the elderly and the disabled) but does not give further indication as to what this general duty entails.[514] The Constitution contains no other constitutional provisions on the rights of children.

The Ivorian CC sets the age of criminal capacity at 10 years of age.[515] The CPC regards children to be anyone younger than 18 years old.[516] Ivorian legislation is silent on the arrest, police custody or police interrogation of children.

The trial of children is regulated by a separate chapter of the Ivorian CPC.[517] A children's judge (*Juge des enfants*) will conduct the investigation and is responsible for determining the age of the child and informing his or her parents or guardians of the criminal proceedings taken against the child.[518] The law does not determine when the parents or guardians must be notified. Children are tried for minor offences (*contraventions*) and misdemeanours (*délit*s) before a juvenile court (*Tribunal pour enfants*) and for crimes (*crimes*) before a Juvenile Jury Court (*Cour d'Assises pour mineurs*).[519]

In addition, children must be tried separately from adults, except those aged 16 and older charged with a *crime*, who may be tried with their adult co-accused.[520] All hearings before juvenile courts are held *in camera*, except those before the Juvenile Jury Court.[521] The procedure of *flagrante delicto* cannot apply to children.[522] They cannot choose their own legal representative; instead, a legal representative will be appointed by the prosecutor or the chairperson of the Bar. If there is no lawyer in the area where the minor is detained, the prosecutor may appoint a person 'with all the required

[511] Burundian Act on the Penitentiary Regime, s. 48.
[512] Burundian Act on the Penitentiary Regime, s. 49.
[513] Burundian Act on the Penitentiary Regime, ss. 44 to 47.
[514] Constitution of Côte d'Ivoire, s. 6.
[515] Ivorian CC, s. 116.
[516] Ivorian CPC, s. 765.
[517] Ivorian CPC, ss. 756 to 808.
[518] Ivorian CPC, ss. 768 to 770.
[519] Ivorian CPC, ss. 759 to 763 and 776 to 789.
[520] Ivorian CPC, ss. 772 to 774.
[521] Ivorian CPC, s. 782.
[522] Ivorian CPC, s. 766.

qualities'.[523] The CPC also provides for specific appellate courts and appeal proceedings for judgments made against children.[524]

The Ivorian CC provides clear rules regarding the sentencing of children: any child aged 10 to 13 may be found guilty but cannot have a criminal sentence imposed on him or her; he or she can receive only measures of protection, assistance, supervision or education. [525] Children aged between 13 and 16 years may be exempt from receiving a criminal sentence; alternatively, they will benefit from a shorter prison sentence than what is provided for adults.[526] Children aged between 16 and 18 may benefit from an exemption of criminal sentence or from a shorter prison sentence.[527]

Children charged with a *crime* and aged 13 to 18 may be held in remand as a measure of last resort, in which case they must be separated from adults.[528] They may also receive a prison sentence, as a measure of last resort, in a separate facility or wing of the prison.[529] However, such a sentence may be imposed only if the child is younger than 21, at which age the young person must be either released or transferred to the general prison population. This decision is made by the judge in his or her ruling.[530] Finally, infants and young children can stay with their mothers in detention until the age of two years.[531] The law also regulates minors in detention.[532]

5.1.4. Kenya

The Kenyan Constitution enshrines a set of rights afforded to children, the overarching principle being that the child's best interests are of 'paramount importance' in every matter concerning him or her.[533] In relation to children in conflict with the law, the Constitution states that children may be detained only as a measure of last resort, for the shortest appropriate period of time, separate from adults and in conditions that take into account the child's sex and age.[534]

[523] Ivorian CPC, s. 770.
[524] Ivorian CPC, ss. 790 to 797.
[525] Ivorian CC, s. 116.
[526] Ivorian CC, ss. 114 to 118; Ivorian CPC, s. 757 and 786.
[527] Ivorian CC, ss. 114 to 118; Ivorian CPC, ss. 757 and 758.
[528] Ivorian CPC, ss. 770 and 771.
[529] Ivorian CPC, ss. 801 to 804.
[530] Ivorian CPC, ss. 785 and 801 to 804.
[531] Ivorian PA Decree, s. 162.
[532] Section V of the Ivorian PA Decree.
[533] Constitution of Kenya, s. 53(2).
[534] Constitution of Kenya, s. 53(1)(f).

Under Kenyan law, the age of criminal capacity is set at eight years. However, if the child is younger than 12, he or she is presumed not to have criminal capacity, unless it is proven that he or she had the capacity to understand his or her criminal action or omission.[535]

The right to be free from torture and other ill-treatment is expressly stated in the Children Act. Furthermore, police have an obligation to avoid using firearms, 'especially against children'.[536] Beyond these two specific provisions, the arrest of children is subject to the law of general application, and children may be arrested *in flagrante delicto.*[537]

The constitutional obligation to separate children from adults is reflected in subordinate legislation, including in relation to police custody.[538]

The trial of children in conflict with the law is regulated by the Children Act, which sets up Children's Courts to try children for all offences except charges of murder and where a child is tried with an adult.[539] All hearings are held *in camera*, although '*bona fide* registered representatives of newspapers or news agencies' may be present.[540] The Children Act additional contains guidelines on the factors to take into consideration when a court makes an order against a child, reflecting the constitutional obligation to take the child's best interests into account.[541] Children must be granted legal representation during trial, but the law is silent on this possibility in police custody. [542]

The Children Act and its Fifth Schedule contain further safeguards for children in conflict with the law, including the right to be informed of the charges 'promptly and directly', the right to be presented before a judge within 24 hours, the right to a speedy trial, the right against self-incrimination, the right to an interpreter, the right not to be sentenced to death, life imprisonment or corporal punishment, the right to appeal and the right to privacy.[543] Moreover, the Fifth Schedule aims to facilitate access to bail for children who could not be brought before a judge without delay; however, the 2014 amendment to the CPC in relation to bail appears more lenient than these provisions and should therefore supersede the provisions of the Children Act.[544]

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[535] Kenyan CP, s. 14.
[536] Kenyan Children Act, s. 18(1); National Police Service Act, Sixth Schedule, s. B3.
[537] See, for example, s. 29 of the Children Act.
[538] Kenyan Children Act, s. 18(3); National Police Service Act, Fifth Schedule, s. 5(e); Kenyan Persons Deprived of Liberty Act, s. 12(3)(b).
[539] Kenyan Children Act, s. 73.
[540] Kenyan Children Act, s. 74.
[541] Kenyan Children Act, s. 76. See also s. 4.
[542] Kenyan Children Act, s. 77.
[543] Kenyan Children Act, s. 186 and Fifth Schedule.
[544] Kenyan Children Act, Fifth Schedule, s. 5; Kenyan CPC, ss. 36A and 123A.

The Legal Aid Act provides that the officer in charge of a remand home for children (as well as other places of custody) of the availability of legal aid and whether the child wants to access legal aid. The officer must record the answer and notify the NLAS within 24 hours. Also, a court has the possibility to order the NLAS to provide legal aid to an unrepresented child.[545]

The Children Act provides for several alternative places of detention for children.[546] The detention of children is regulated in the Persons Deprived of Liberty Act, which provides, among other things, that children must have access to education 'so far as is practically reasonable', and that prison authorities are responsible for notifying parents of guardians of the child's detention.[547] Infants may stay with their mothers until they are four years old, and mother and child must be detained separately from all other detainees.[548]

5.1.5. Mozambique

The Mozambican Constitution contains a general provision on children's rights, stating that the 'paramount interests of the child' must be taken into consideration in all acts 'carried out by public entities or private institutions'.[549] In addition, the Constitution provides for mandatory legal aid of minors, to be provided by the prosecution services.[550]

Child justice legislation was adopted in 2008 in the form of the Law 7/2008 on the Promotion and Protection of the Rights of Children (*Lei de Promoção e Protecção dos Direitos da Criança*) and Law 8/2008 on the Jurisdictional Organisation for Minors (*Organização Tutelar de Menores*), which contains some provisions applicable to children in conflict with the law, in order to reflect the rights contained in the Constitution, the UNCRC and the ACRWC.

Under Mozambican law, the age of criminal capacity is set at 16 years of age. Furthermore, children and juveniles aged between 16 and 21 have *relative* criminal capacity, which affects the sentences that can be imposed on them.[551]

The law does not contain any specific provisions in relation to the arrest and police custody of children, who are subject to the law of general application.

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[545] Kenyan Legal Aid Act, especially ss. 42 and 43.
[546] Kenyan Children Act, ss. 47 to 72.
[547] Kenyan Persons Deprived of Liberty Act, ss. 18(3) and 21.
[548] Kenyan Prisons Act, s. 30; Kenyan Persons Deprived of Liberty Act, ss. 12(3)(d) and 22.
[549] Constitution of Mozambique, s. 47(3).
[550] Constitution of Mozambique, s. 236.
[551] Mozambican CP, ss. 46 and 47.

Children under the age of 16 are always tried before juvenile courts. Children and juveniles aged between 16 and 21 years are tried before juvenile courts or normal courts, depending on the offence for which they are tried. Children aged between 16 and 18 can receive a maximum prison term of eight years, while juveniles between 18 and 21 years old can be sentenced to a maximum prison term of 12 years.[552]

Prison legislation does not contain any specific provisions on incarcerated children, with the exception of the provision of education for sentenced children aged between 16 and 21, along with a provision that babies remain with their sentenced mothers until they turn three. [553]

5.1.6. Zambia

The Zambian Constitution contains no provisions on children's rights, whether generic or specific to children in conflict with the law.

The age of criminal capacity is set at eight years of age, and the presumption of criminal capacity can be rebutted for children aged between eight and 12.[554] In 2007, the UN Human Rights Committee criticised Zambia's age of criminal capacity as being too low.[555] The law has not been amended since.

The law is silent on the arrest of children.

The Juveniles Act states that children should be released on police bail except in three situations: if the child is charged with 'homicide or other grave crime'; if the child must be separated from 'any reputed criminal or prostitute'; or if the release of a child would 'defeat the ends of justice' (an assessment made by the police officer in charge of the station).[556] Alternatively, until the child appears before a court, he or she should be brought into a place of safety rather than in remand detention unless this impracticable, the child is of 'unruly or depraved […] character', or the state of physical or mental health of the child does not warrant such alternative care. Again, this assessment is made by the police officer in charge of the station.[557] A court may then order a juvenile to be held in remand or in a place of safety. [558]

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[552] Mozambican CP, ss. 107 and 108; Law 8/2008 on the Jurisdictional Organisation for Minors, s. 25.
[553] Law Decree 26643/1936, Chapter V, Sessions I and III.
[554] Zambia Penal Code, s. 14.
[555] Concluding Observations of the Human Rights Committee UN DOC CCPR/C/ZMB/CO/3/CRP.1.
[556] Zambia Juveniles Act, s. 59.
[557] Zambia Juveniles Act, s. 60.
[558] Zambia Juveniles Act, ss. 61 and 62.

Children may be tried before juvenile courts, which are subordinate courts sitting to hear juvenile cases, although this is not mandatory.[559] They hear all cases against a child except if a child is tried jointly with an adult.[560] The Juvenile Court ruled in 1979 that a parent or guardian should be present during the trial of a child.[561] Proceedings before a juvenile court may be held *in camera*, although this is not mandatory.[562] Children will not be granted systematic legal representation.[563]

The law provides for some limitations and safeguards on the sentencing of children, including the prohibition of the death penalty; the fact that the words 'conviction' and 'sentence' may not be used when a child is found guilty of an offence; and the promotion of a sentence of community service or counselling for children aged between 12 and 16. [564] Importantly, children may not be sentenced to imprisonment or to a detention camp.[565] However, a child may be sentenced to detention in a reformatory school or to be caned.[566] The latter in particular is contrary to the right to be free from torture, enshrined in the Zambian Constitution.

In police custody and in remand detention, children as far as possible should be separated from adults.[567] There are no specific provisions on the detention of sentenced children in prison since this is prohibited by law. Infants will stay with their mothers in prison until the age of four.

5.2. Domestic oversight and complaints mechanisms

5.2.1. International framework

International human rights treaties usually set up a Treaty Monitoring Body (TMB) to oversee the effective implementation of the said treaty. TMBs have several tools at their disposal to exercise such oversight, including reviewing state reports, making concluding observations about them, and receiving communications (or complaints) from other state parties and from individuals. TMBs include the UN Human Rights Committee set up to oversee the implementation of the ICCPR, the UN Committee against Torture to oversee the implementation of UNCAT, and the ACHPR set up to oversee the implementation of the AChHPR.

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[559] Zambia Juveniles Act and Zambian Penal Code, s. 63.
[560] Zambia Juveniles Act, s. 65.
[561] *The People v Dimeni* (1979) ZR 234(HC).
[562] Zambia Juveniles Act, s. 119.
[563] See for example the safeguards put in place in relation to the presentation of evidence when a child does not have legal representation: Zambia Juveniles Act s. 64(3).
[564] Zambia Juveniles Act s. 68; Zambia Penal Code, ss. 25 and 138(4).
[565] Zambia Juveniles Act, ss. 72(1) and 73.
[566] Zambia Juveniles Act, s. 73.
[567] Zambia Juveniles Act, ss. 58 and 62.

UNCAT contains additional provisions requiring that states set up domestic complaints and investigative mechanisms to allow victims of torture and other ill-treatment to file a complaint and to have their case 'promptly and impartially' investigated and examined by competent authorities.[568] Its Optional Protocol requires state parties to set up an independent National Preventive Mechanism mandated to regularly visit all places of detention and at a minimum to make recommendations and have a policy advisory role.[569] These requirements would apply to ordinary police and prosecution services but also to National Human Rights Institutions and specialised oversight institutions. The latter three are briefly examined hereunder.

5.2.2. Burundi

Burundi's National Human Rights Institution, the National Independent Human Rights Commission (*Commission Nationale Indépendante des Droits de l'Homme* (CNIDH)) was created not by the Constitution but by subordinate legislation. It can receive complaints of human rights violations and investigate these.[570] However, its powers are limited and it can issue only opinions and recommendations. In addition, the CNIDH has the power to visit all places of detention, including police cells. It does visit places of detention and receives and investigates alleged human rights violations, including those relating to the criminal justice system and allegations of torture in particular. However, these seldom result in effective prosecutions.

5.2.3. Côte d'Ivoire

Although not created by the Constitution, the National Human Rights Commission (*Commission Nationale des Droits de l'Homme* (CNDH)) was created by subordinate legislation and established in 2012. It can receive complaints of alleged human rights violations, conduct a non-judicial investigation and make recommendations. As part of its investigation, it can request authorisation from the prosecutor to visit places of detention, including police cells and prisons.

[568] UNCAT, articles 12 and 13.
[569] OPCAT, articles 18 to 22.
[570] *Loi N° 1/04 du 05 janvier 2011 portant creation de la Commission Nationale Indépendante des Droits de l'Homme* (Act no. 1/04 of 5 January 2011 creating the National Independent Human Rights Commission), ss. 4 and 36.

5.2.4. Kenya

The Kenyan Constitution establishes a Kenya National Commission on Human Rights (KNCHR), the broad mandate of which includes promoting human rights, monitoring compliance with human rights 'in all spheres of life in the Republic, including observance by the national security organs' (which are the army, the police force and the intelligence services), receiving complaints and taking 'steps to secure appropriate redress' for victims of rights violations, and investigating rights violations on its own initiative or following complaints.[571] Its powers include issuing summons and requesting documentation. The KNCHR conducts scheduled and unscheduled visits to places of detention, including police cells and prisons.[572]

However, the IPOA was created in 2011 and its mandate includes receiving and investigating complaints of alleged disciplinary and criminal offences committed by the police; making recommendations following its investigation, including recommendation of criminal prosecution, disciplinary action, or compensation; regularly visiting police stations; and broadly overseeing police action, including to oversee and review internal disciplinary processes.[573] It has extensive powers, including to request documentation, obtain a warrant to enter premises, to search and seize, to interview, to issue summons, or to provide information to victims of unlawful police conduct on how to obtain financial compensation. [574] The police have the obligation to notify the IPOA of any death in custody as well as any police action that results in death or serious injury, which the IPOA may then investigate. [575]

Finally, the Persons Deprived of Liberty Act established an internal complaints mechanism whereby a detainee may complain orally or in writing to the prison authorities, which have an obligation to investigate and make recommendations that must be communicated to the complainant. The complainant has the possibility of appealing to the Minister of Justice. It is a criminal offence for an official to 'wilfully [obstruct, conceal or fail] to act on a complaint lodged by or on behalf of a person deprived of liberty'.[576]

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[571] Constitution of Kenya, s. 59; Kenya National Commission on Human Rights Act, 2011.
[572] Constitution of Kenya, s. 59(2)(d); KNCHR 'Our Work – Transitional Justice', available at http://www.knchr.org/OurWork/TransitionalJustice/Institutionalreforms.aspx (accessed 27 September 2016).
[573] Kenya Independent Police Oversight Authority Act, 2011, s. 6.
[574] Kenya Independent Police Oversight Authority Act, 2011, s. 7.
[575] Kenya Independent Police Oversight Authority Act, 2011, ss. 7(1)(a)(x) and 25; Kenya National Police Service Act, Fifth Schedule, paras. 11 and 13.
[576] Kenyan Persons Deprived of Liberty Act, s. 27.

5.2.5. Mozambique

Although not established in the Constitution, a National Commission of Human Rights (*Comissão Nacional Direitos Humanos* (CNDH)) was formed by law in 2009 and has been operational since 2012.[577] It is mandated to receive complaints and has the power to visit all places of detention. It has been appointed as NPM in 2014 following Mozambique's ratification of OPCAT, although there have been international concerns regarding its lack of independence. Furthermore, the Human Rights League, an NGO, signed a Memorandum of Understanding in 2009 with the Ministry of Justice to access places of detention.

5.2.6. Zambia

The Zambia Human Rights Commission is mandated to receive complaints and investigate human rights violations. It has extensive powers to do so, including powers to issue summons, interview persons, request documents, require that a person disclose information, and issue recommendations, among them for the release of a person from detention, for the payment of financial compensation, and for a public official to be sanctioned and the victim to seek redress before a court.[578] It also has the power to visit prisons and make recommendations to the Commissioner of Prisons. Visiting powers are also granted to judges, magistrates, town clerks and council secretaries.[579]

In addition, the Police Public Complaints Authority (PPCA) is an autonomous body mandated to receive complaints and investigate allegations of rights violations by the police, and to make recommendations to the Director of Public Prosecutions for criminal prosecution, to the Inspector General of police internal disciplinary action and to the Anti-Corruption Commission or any other relevant body or authority.[580]

5.3. Right to redress following rights violations

The right to redress is reflected in two major international treaties, namely the ICCPR and UNCAT. Redress here is understood as encompassing the right to an effective remedy and the right to reparations. The latter entails restitution, compensation, rehabilitation, satisfaction and guarantees

[577] Mozambican Law 33/2009.
[578] Zambia Human Rights Commission Act, 1996.
[579] Zambia Prisons Act, ss. 123-127.
[580] Zambia Police Act, s. 57B to 57G.

of non-repetition.[581] However, as will be shown below, legislation on redress usually provides only for the possibility of financial compensation.

Article 9(5) of the ICCPR provides that anyone unlawfully arrested or detained is entitled to an enforceable right to compensation, a form of reparation. Article 14(6) of the ICCPR provides that anyone who has been the victim of a miscarriage of justice is also entitled to compensation, which must be provided for in domestic law.

Article 14 of UNCAT provides that state parties must make provision in their domestic law for victims of torture to obtain redress, including 'fair and adequate compensation' and 'the means for as full rehabilitation as possible'.

In Burundi, section 23 of the Constitution imposes on the State the obligation to compensate any person financially who is a victim of arbitrary treatment by an action or omission of the State or any of its organs. However, a court would be required to find such treatment arbitrary, for which the law gives an important role to the prosecutor. Indeed, as highlighted in several sections above, many procedural requirements would render proceedings null and void if they are not met. However, the exception of nullity must be raised before the court hearing the principal matter, either by the prosecutor or the accused.[582] Furthermore, if public officials do not comply with some legal prescripts, they may face disciplinary or, in some instances, criminal proceedings, but both of these have to be instituted by the prosecutor. [583]

Finally, victims of torture at the hands of state officials can claim for damages from the State if they institute a civil action during the criminal trial of the official who allegedly committed the offence of torture. Therefore, obtaining civil damages is dependent on a criminal conviction of the perpetrator. This action can also be brought by civil society organisations on behalf of the victim.[584] Any other arbitrary treatment which a suspect or accused faces (such as malicious prosecution, for example) would have to be challenged solely on the basis of the constitutional provision.

[581] CAT, General Comment no. 3 on the implementation of article 14 by States Parties, UN Doc. CAT/C/GC/3, para. 2.
[582] Burundian CPC, ss. 2, 5, 9, 52, 73, 74, 154, 158-62, 165, 224 and 236.
[583] Burundian CPC, ss. 47, 52, 111 and 115. For example, s. 392 of the CC provides that police or prosecution officials who do not comply with timeframes set in law face a sentence of imprisonment of eight days to one month, whereas s. 411 of the CC makes it a criminal offence for public officials to commit any arbitrary act that violates a fundamental right.
[584] Burundian CPC, ss. 64 and 289.

The Ivorian Constitution and legislation are silent on the issue of redress to be provided by the state. Victims can claim civil damages from the alleged perpetrator if they institute a civil action during his or her criminal trial.

The Kenyan Constitution provides that anyone can institute court proceedings before the High Court (or subordinate courts, once the relevant legislation has been adopted) to claim that a right contained in the Bill of Rights has been 'denied, violated or infringed, or is threatened' and seek redress. The action, for which no fee may be levied, may be instituted by the aggrieved person directly, on behalf of someone else or of a group or in the public interest. The Chief Justice must adopt rules to enable these proceedings, although the absence of such rules does not limit the right to institute proceedings. Furthermore, the Constitution contains a non-exhaustive list of the types of relief that a court may order if it finds that a fundamental right has been violated. These include: a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of a law not justified under the limitations clause, an order for compensation, or an order of judicial review.[585] No legislation reflects these direct constitutional remedies.

The Mozambican Constitution states that citizens have the right to approach a court to file a complaint and apply for compensation if their fundamental rights have been violated.[586] In addition, the Constitution provides that the State is liable to pay financial compensation to anyone whose fundamental rights have been violated by unlawful actions of public officials.[587] Although for several years local and international NGOs had unsuccessfully attempted to bring actions against the State based on this constitutional provision, the Administrative Court ordered the Ministry of Interior to compensate a family 500 000 meticais (12 000 USD) because their 11-year-old child had been killed by police during a public protest in Maputo.[588] The Criminal Code also provides that a person found guilty before the lower courts, but whose conviction is overturned on appeal by a court of review, is entitled to compensation.[589]

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[585] Constitution of Kenya, ss. 22 and 23.
[586] Constitution of Mozambique, s. 79.
[587] Constitution of Mozambique, s. 58.
[588] Judgment n. 89/2012, of process n. 214/2010 – 1st Chamber of Administrative Court. For reports of unsuccessful actions brought against the state, see Amnesty International, *I can't believe in justice any more: Obstacles to justice for unlawful killings by the police in Mozambique* (AFR 41/004/2009), available at http://www.amnistia-internacional.pt/dmdocuments/Mocambique_Obstaculos_Justica.pdf (accessed 10 August 2015).
[589] Mozambican CC, s. 151(10)

The Zambian Constitution contains two relevant provisions in relation to redress: the right to seek compensation if unlawfully arrested or detained,[590] and the right of the victim (but not someone on behalf of the victim, which weakens the possibility of public interest litigation) to seek redress before the High Court if one's fundamental rights have been violated.[591] Neither provision is reflected in subordinate legislation. However, there have been attempts to claim these rights before the courts.

In 1979, the High Court ruled that the police did not have the power to arrest and detain someone for the sole purpose of conducting an investigation, and compensated the plaintiff, who had been arrested and then released on police bond on the condition that he present himself to the police station regularly.[592] It is important to note that the courts have been hesitant to uphold the right to seek financial compensation for unlawful arrest and detention in relation to declarations of emergency. In 1997, the leader of the opposition was detained without trial following a failed coup attempt. The High Court declared it had no jurisdiction to hear the matter, ruling that it did not have sufficient facts at its disposal to assess the President's decision to detain someone following the President's declaration of a state of emergency and that the decision to detain was subject to executive discretion.[593]

[590] Constitution of Zambia, s. 13(4).
[591] Constitution of Zambia, s. 28.
[592] *Daniel Chizoka Mbandangoma v The Attorney General* (1979) ZR 45 (HC).
[593] *Dean Namulya Mungómba vs Attorney-General* 1997/HP/2617.

6. Conclusion

In the second half of the twentieth century, states progressively recognised a large array of fundamental rights for arrested, accused and detained persons. Several international treaties upheld extensive rights for arrested, accused and detained persons, treaties which all the countries reviewed in this study ratified. At the end of the twentieth century, several African states adopted new constitutions, one of the aims being to reflect their international commitment to uphold fundamental rights. However, the step following international ratification and/or constitutional recognition of fundamental rights would have been to review legislation to assess their compliance with new international and constitutional prescripts, and amend where necessary. The purpose of this study has been to assess the extent to which a sample of African states from different jurisdictions carried through this process.

First, the study highlighted that the constitutional basis for the rights of persons in conflict with the law is very different in each of the five countries analysed here. Despite these countries having ratified the same international conventions, and all having adopted new constitutions in recent years, the constitutions vary significantly from one another in their recognition of the rights of arrested, accused and detained persons. Of the 41 rights analysed in this study, only four are recognised in all constitutions: the prohibition of torture; the principle of legality; the presumption of innocence of the accused; and the right to legal representation of the accused (of one's own choice).

These rights could therefore be regarded as the most basic rights of persons in conflict with the law, even though seeking to establish a hierarchy among rights, especially of rights recognised under international human rights law, would be inadequate: at a minimum, all rights enshrined under international human rights law must be regarded as having equal status.

The study proceeded to show that the extent of the rights enshrined in domestic constitutions varies greatly. At the one end of the spectrum, the Kenyan Constitution contains very detailed rights granted to persons in conflict with the law. At the other end, the Ivorian Constitution, and to a lesser extent the Burundian, contains very few direct provisions upholding the rights of persons in conflict with the law; however, their rights are mostly upheld through generic provisions, such as the right to life, the right to human dignity, or the right to a fair trial. Instead of direct provisions upholding specific rights, such generic rights can provide a constitutional basis for a wider range of rights. However, because of their generic and non-specific nature, they are also less enabling and more open to interpretation, in particular before the courts, and therefore provide a weaker basis for requiring the adoption of subordinate legislation or for constitutional litigation. The generic nature of

these two constitutions may also be characteristic of countries of civil law tradition, a question that would need further research.

The Mozambican and Zambian constitutions are situated between these two extremes, providing some direct rights, without comprehensively reflecting all rights upheld under international human rights law. Also, despite four of the five countries having adopted a monist approach to international law, the Burundian Constitution is the only one granting constitutional value to international human rights law. Therefore, international conventions ratified by Côte d'Ivoire and Mozambique (and Kenya) could not replace constitutional recognition of these rights. The question could be asked, however, whether these rights should be upheld in domestic constitutions, or whether subordinate legislation is sufficient.

Secondly, this study highlighted that, save for Kenya, legislation regulating the criminal justice system usually predates the adoption of the most recent constitution and is often even outdated. This does not mean that the rights recognised in domestic constitutions are not upheld in subordinate legislation. On the contrary, legislation is more often compliant with international human rights law than constitutions. However, since legislation pre-dates the constitutions, it is not drafted with the aim of comprehensively enshrining the rights of suspects, accused and detained persons.

This results in some major weaknesses and contradictions remaining in the law, including weak protection of suspects in police custody (access to a legal representative, even of one's own choice, is for example usually only guaranteed from the first court appearance); weak informational rights (no country ever provides that suspects, the accused or detainees must be comprehensively informed of their rights, only of the charge); limited legal aid; weak independent oversight mechanisms over places of detention; and weak redress mechanisms (which are almost always limited to financial compensation and often require criminal trial or a criminal conviction of the official who violated the right of the suspect, accused or detained person). Some country-specific weaknesses were also noted in this report, such as the prominent role of the prosecutor in Burundi or the death penalty remaining in Kenya and Zambia.

Thirdly, there is very little judicial activism, in particular in Burundi, Côte d'Ivoire and Mozambique, to uphold the rights of persons in conflict with the law, despite the fact that all the countries have courts dedicated to upholding or interpreting their respective constitutions. The ruling of the Mozambican Constitutional Council 4/CC/2013 is a notable exception and could pave the way for future similar litigation. Just as importantly, countries of monist tradition could heavily rely on international human rights law to institute litigation, but this is seldom done.

Annexure 1

The table below captures all the tables outlined in the above sections. Green means that the right is directly recognised (either in the Constitution (C) or in Subordinate Legislation (SL)), orange means that the right is partially or conditionally recognised, or only receives procedural recognition, and red means that the right is not recognised.

Rights following police arrest and during police custody

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Prohibition of arbitrary and/or unlawful arrest	Yes	Direct	Gives right	Direct	Gives right	Indirect	Gives right	Direct	Gives right	No	Gives right
Prohibition of abuse of force upon arrest	Yes	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right
Right to be informed of reasons for arrest	Yes	No	No	No	No	Direct	Gives right	No	No	Direct	No
Right to remain silent and/or privilege against self-incrimination at the moment of arrest	No	No	No	No	No	Direct	Gives right	No	No	No	No
Right to privacy during arrest	No	Direct	Procedural	No	Procedural	Direct	Procedural	Direct	Procedural	Indirect	Procedural

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Prohibition of arbitrary and/or unlawful detention	Yes	Direct	Gives right	Direct	No	Direct	Gives right	No	Gives right	Direct	Gives right
Right to be promptly charged or informed of reasons for detention	Yes	No	No	No	No	Direct	No	Direct	Gives right	Direct	No
Right to be promptly brought before a judge	Yes	No	No	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right
Right to conditional release from police custody	No	No	No	No	No	Direct	Conditional right	No	No	No	Gives right
Right to presumption of innocence during police custody	No	No	No	No	No	No	No	No	No	No	No
Right to remain silent during police custody	No	No	Conditional right	No	No	Direct	No	No	No	No	No
Privilege against self-incrimination during police custody	No	No	No	No	No	Direct	No	No	No	No	No

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to safe police custody and to humane conditions of detention	Yes	Indirect	Procedural	Indirect	Procedural	Indirect	Gives right	Indirect		Indirect	Procedural
Right to be separated	No	No	Gives right	No	No	Direct	Gives right	No		No	No
Right to legal representation	No	Indirect	Procedural	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	No
Right to family visits	No	Indirect	Procedural	No	No	No	Gives right	Direct	Gives right	No	No
Right to be informed of the reason for detention	No	No	Conditional right	No	No	Direct	Gives right	Direct	No	Direct	No

Fair trial rights

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Principle of legality	Yes	Direct	Gives right	Direct	No	Direct	Gives right	Direct	Gives right	Direct	No

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to presumption of innocence	Yes	Direct	Conditional right	Direct	Conditional right	Direct	Gives right	Direct	No	Direct	No
Right to be informed of the charge	Yes	Indirect	Gives right	No	Gives right	Direct	Gives right	Indirect	Gives right	Direct	Gives right
Right to a speedy trial	Yes	Direct	Conditional right	No	Conditional & procedural	Direct	No	No	Gives right	Direct	No
Protection against double jeopardy	Yes	Indirect	No	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right
Right not to be detained while awaiting trial	Yes	No	Gives right	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Conditional right
Right to legal representation	Yes	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Gives right	Direct	Conditional right

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to an interpreter	Yes	Indirect	Procedural	No	Gives right	Direct	Conditional right	No	Gives right	Direct	Conditional right
Right to be informed of one's rights	No	Indirect	No	No	No	Direct but partial	Conditional right	No	No	Direct but partial	No
Right to present and challenge evidence	Yes	Indirect	Conditional right	No	Conditional & procedural	Direct	Gives right	No	Gives right	No	Gives right
Right not to have evidence obtained under torture excluded	Yes	Indirect	Gives right	Indirect	No	Direct	No	Direct	No	Indirect	No
Right to remain silent	Yes	Indirect	Conditional right	No	No	Direct	Conditional right	No	Gives right	No	No
Privilege against self-incrimination	Yes	Indirect	Gives right	No	No	Direct	Conditional right	No	Gives right	Direct	No

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Right to be tried and sentenced in an open court	Yes	Direct	Conditional & procedural	No	Gives right	Direct	Gives right	Direct	Gives right	Direct	Conditional right
Right not to be tried and sentenced in absentia	Yes	Indirect	Conditional & procedural	No	Conditional & procedural	Direct	Conditional & procedural	No	Conditional & procedural	Direct	Conditional & procedural
Prohibition of the death penalty	Yes	Indirect	Gives right	Direct	Conditional right	No	No	Direct	Gives right	No	No
Right not to be sentenced to unusual or degrading punishment	Yes	Indirect	Conditional right	Indirect		Direct	No	No	Gives right	Indirect	No
Right to review or appeal one's sentence	Yes	No	Gives right	No	Conditional right	Direct	Gives right	No	Gives right	No	Gives right

Detention rights

Right	Intl law	Burundi		Côte d'Ivoire		Kenya		Mozam-bique		Zambia	
		C	SL	C	SL	C	SL	C	SL	C	SL
Prohibition of unlawful and/or arbitrary detention	Yes	Direct	Gives right	Direct	Gives right	Direct	Gives right	No	Gives right	Direct	Gives right
Right to be informed of the reasons for detention	No	No	No	No	No	No	Gives right	Direct	Conditional right	Direct	Gives right
Right to be informed of one's rights	No	No	Gives right	No	No	No	Gives right	Direct	Conditional & procedural	No	Gives right
Right to safe custody and to humane conditions of detention	Yes	Indirect	Conditional right	Indirect	Conditional right	Direct	Conditional right	Indirect	Conditional right	Indirect	Conditional right
Right to legal representation	No	No	Gives right	No	Gives right	No	Conditional right	No	Gives right	No	No
Right to be separated	Yes	No	Conditional right	No	Gives right	No	Gives right	No	Gives right	No	Gives right

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