CENTRAL EUROPEAN UNIVERSITY

Congestion in one of the Brazilian Detention Facilities

TOPIC

ACCESS TO JUSTICE FOR PRE-TRIAL DETAINEES IN TANZANIA

This Thesis is Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws in Human Rights (HR LL.M) of the Central European University

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List of Abbreviations

ACHRP	African Charter on Human and Peoples Rights
AIDS	Acquired Immunodeficiency Syndrome
CHRGG	Commission on Human Rights and Good Governance
CSO's	Civil Society Organizations
DPP	Director of Public Prosecution
EAC	East African Community
HIV	Human Immunodeficiency Syndrome
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICECSR	International Covenant on Economic Social and Cultural Rights
LAC	Legal Aid Clinic- University of Dar es Salaam
LHRC	Legal and Human Rights Centre
LSRP	Legal Sector Reform Program
NGO's	Non-governmental Organizations
TLS	Tanganyika Law Society
TPS	Tanzania Prisons Service
URT	United Republic of Tanzania
UN	United Nations
ECOSOC	United Nations Economic and Social Council

Abstract

Inaccessibility of justice for pretrial detainees has been the problem persisting for decades now. Despite of all the efforts in trying to get rid of this problem there are still so many outstanding challenges to be confronted. The author of this thesis aims at shading light on some of these stumbling blocks in Tanzania together with proposing way out of these issues.

In particular this thesis deals with the issues of inaccessibility of justice for pre trial detainees in Tanzania. This work is therefore divided in five chapters as follows;

Chapter one deals with the process involved in writing this thesis. It defines the parameters of the thesis, explains the problem but also some of the aspects of access to justice are discussed. However, this chapter explains justification on choosing this topic together with methods used for data collection and analysis.

Chapter two deals with conceptual analysis of various determinants of access to justice for pre trail detainees but also define some of the key terms. This chapter explains the concept of access to justice for pre trial detainees but also set the parameters of engagement as outlined in chapter one. In particular this chapter deals with some of the fundamental determinants of access to justice for pre trial detainees which are access to free legal assistance, bail, timely exposition of cases, alternative sentence and appeals. The aim is to show not only the relevance of these issues but also how denial of one of these elements results into violation of so many other rights of detainees.

Chapter three takes a couple of steps further by analyzing international, regional and domestic legal frameworks regulating the issues of access to justice for pre trail detainees in Tanzania. In this respect this chapter explains the history of various instruments and inclusion of aspects of access to justice for detainees as well as critically looking at their application at the domestic level. Apart from that, this chapter surveys existing Tanzania Legal framework with lieu of understanding adequacy and effectiveness of laws that regulate issues of access to justice for pre trial detainees.

Following this is chapter four which does an in-depth analysis of the gaps and challenges surrounding the implementation of the laws discussed in chapter three. In this respect this chapter identifies the reasons for institutions failure to comply with the laws regulating the issues of access to justice for detainees. This chapter raises institutional as well as many other challenges hindering effective implementation of these laws.

Chapter five finalizes this thesis by outline some of the recommendations and solutions for the improvement of detainees access to justice in Tanzania. These are long and short term recommendations. Various alternative methods of availing access to justice for pre trial detainees are discussed.

This is the breakdown of the thesis and hope will add into jurisprudence already existing but also be part of the solution for the long time debated issue in Tanzania and beyond.

1.0 CHAPTER ONE

1.1 Introduction

The issues of inaccessibility of justice have been inexistence for a long time now. This is the problem mostly affecting poor and vulnerable members of our community. The problem is even rampant to some specific groups in our community such as pre trial detainees. While other people are left with other options in pursuing the end of justice such as through legal aid or independent legal advisers, for pre trial detainees' situation is completely different.

In the first place many of them cannot access bail due to various reasons such as lack of legal counseling to enable them understand their right to bail and range of other rights, absence of sureties, inability to pay bonds, lack of knowledge on how to access bail and corruption which is rampant in many of the Tanzanian government institutions. Failure to obtain bail results into detainees getting locked in crowded detention facilities with very limited services.

While in custody pre trail detainees faces many challenges bust mostly violation of their rights such as right to food, clean water, sanitation, privacy, freedom from torture, treatment services, delay of their cases and appeals, violation of their right to be presumed innocent and many others. As a result of these violations detainees access to just get severely hampered which is the reason we need a global campaign against pre trial detention.

To deal with the issue of inaccessibility of justice for pre trail detainees this thesis will specifically examine five critical elements of access to justice for pre trial detainees which

are legal assistance, bail, timely disposition of cases, alternative sentence and appeals. In this respect, these five elements will be surveyed to show, firstly how they relate with access to justice for detainees, available instruments providing for these standards, challenges on the implementation of the available standards and lastly recommendations. Each stage enunciated here will form an independent chapter. In the end this thesis will be able to examine in detail the reasons for inaccessibility of justice for pre trial detainees and suggest solutions to the existing problems.

1.2 Thesis Statement

Access to justice for pretrial detainees requires proper implementation of the laws on access to bail, legal assistance, timely exposition of cases, proper detention facilities, alternative sentence and right to appeal.

1.3 Hypothesis

This thesis is seeking to prove the following hypothesis;

> "The limitation of access to justice for pre-trial detainees in Tanzania is mainly caused by poor implementation of the existing domestic and international standards guaranteeing timely access to justice for the pre trial detainees in Tanzania.

Depending on the employment of the above methodology the analysis will prove this hypothesis either positive or negative. In the end gaps, challenges and recommendations and solutions in addressing this problem will be detailed.

1.4 Justification

Despite of all efforts on improving accessibility of justice for pre trial detainees in different parts of the world, this problem has persisted for so many years now. This has attracted many actors and stakeholders working on this area but the problem stands still. There have been a lot of efforts by states and international community in general towards eliminating this problem but still there is little success so far.

Generally inaccessibility of justice by the pre-trial detainees is a manifestation of so many problems facing criminal justice systems in different countries particularly global south countries such as Tanzania. This is not only the problem caused by absence of adequate laws but also poor implementation and non compliance with the existing laws and standards. Manifestation of this problem is a delay of cases by courts which most of the time results in wrong convictions, also causing overcrowd in detention facilities and in total amounts to denial of access to justice for the detainees and those accused of committing criminal offences.

To address this issue there is no easy straight forward way but there is a need to have coordinated efforts coupled with thorough research to identify gaps in each particular setting also proposes methods and strategies to address the identified gaps. This is partly the reason and justification for researching and writing my thesis on this area. Ultimately, this thesis will articulate the major stumbling blocks in realization of access to justice for pretrial detainees in Tanzania in comparison with other jurisdiction and in the end identify gaps causing the problem and propose solutions to deal with the same stumbling blocks to ensure timely access to justice for pre-trial detainees in country.

1.5 Methodology

This research will extensively rely on the analysis of different existing literature on this area. In this respect an inclusive desk research will be carried out and different sources will be consulted such as academic papers, reports, documented practices from different countries, news papers, websites and laws articulating the rights and treatment of pre-trial detainee's in Tanzania and globally. There will be an overview description of the practice in Tanzania which will be carried out with lieu of making sure that gaps are well articulated and solutions proposed. Depending on the availability of time and resources interviews may be conducted.

2.0 CHAPTER TWO

ACCES TO JUSTICE: CONCEPTUAL ANALYSIS

2.1 Background:

Explained in chapter one above, this thesis addresses the central issue of "access to justice for pretrial detainees" in Tanzania. This is however, the problem shared by so many other countries in the world but particularly developing countries.[1] In this respect this thesis will dwell on examining among other things the stumbling blocks or setbacks towards realization of justice by pretrial detainees in Tanzania. It will also explore among other things the existing conditions which jeopardize the enjoyment of this right by the suspected offenders. Due to the complexity of the problem and in trying to find the solution to the problem, this thesis will address different aspects of the issue from the root causes and solutions while taking into consideration different disciplines such as legal, social and psychological aspects of criminal justice. These are some of the issues need to be taken into consideration if we meaningfully need to address the issue of inaccessibility of justice for pretrial detainees. Knowing criminal justice is one of the fields widely researched upon especially on the specific aspects of access to justice for pretrial detainees; this thesis will examine some of these aspects of access to justice; right to bail, legal assistance, timely exposition of cases, proper detention facilities, alternative sentence and right to appeal.[2]

[1] See, the Human Rights Watch Global Report on Prisons pages 3 – 17 which provides an overview of the global detention conditions in various countries. This report can be obtained through the following link as well; http://books.google.co.tz/books?id=cvsm6rkm6EoC&pg=PA6&lpg=PA6&dq=Global+report+on+pre+Trial+Detention&source=bl&ots=FOAEOHMWW9&sig=7Km08SJedaprdLFkxsX46YP7ynY&

[2] For the detailed definition of what constitute access to justice and controversies related to the definition of access to justice see, Blasi G, Framing Access to Justice: Beyond Perceived Justice for Individuals, Loyola of Los Angels Law Review, Summer 2009, also see, Kaufman D, "The Tipping Point on the Scale of Civil Justice, Taulo Law Review, 2009 pp 402 -403

2.2 Detainee

The use of the term "detainee" has been universally recognized to carry features connoting the person incarcerated under certain conditions or terms having committed offence(s) or been found guilty of committing an offence hence held in custody by the lawful order of the competent body.[3] In general terms, it refers to a person whose freedom of movement has been limited for the reasons of been under lawful detention.[4] Apart from the limitation of movement detainees retains all of his other civil, economic, social and cultural rights unless they are as well limited by the lawful order of the court and of course with justification.

2.3 Pre-trial Detainees

Different from normal convicted and sentenced prisoners as explained above, "pretrial detainees" are those people under custody awaiting trial.[5] This includes people under police custody or in detention facilities who have not found guilty of an offence alleged to commit. Their cases may be pending or yet to be formally instituted in the court of competent jurisdiction. The detention of the persons awaiting trial has been for a long time a subject of international debate. Some of the reasons in favor of the pretrial detention have been said to prevent the offender from interrupting the smooth administration of justice or protect him from the public or vice versa. Though some of these outlined reasons sound persuasive mandatory pre trial detention can only be necessary and inevitable where release of the

[3]Viljoen F, The Special Rapporteurs on Prisons and Conditions of Detention in Africa: Achievements and Possibilities, Human Rights Quarterly, Vol. 27, No 1 2005 p 131

[4] Viljoen F, The Special Rapporteurs on Prisons and Conditions of Detention in Africa: Achievements and Possibilities, Human Rights Quarterly, Vol. 27, No 1 2005 p 126, interprets detainees as the person deprived of liberty by the government institution of the similar reasons as mentioned in the paragraph and includes the prisoners who have been legally sentenced.

[5] Ibid pp 125 -126

detainee will obstruct the smooth administration of justice.[6] This is because pre trial detention limits individuals' right to liberty and works against presumption of innocence[7] and there must be justification for any limitation imposed on any of these rights. On the other hand and based on the conditions of many of our detention facilities prudence demand that individuals should only be detained when it is so necessary and inevitable.[8]

2.4 Access to Justice for Pretrial Detainees

Delay or denial of access to justice is both the reason and one of the consequences of detention of accused persons. In this respect ensuring access to justice for pre-trial detainees will entail doing away with detention or retain it when it is absolutely necessary for the administration of justice. As aforementioned above and as per my thesis statement, access to justice embodies in itself several other elements such as right to bail, right to have the case heard in a reasonable time, right to legal assistance, proper detention facilities and right to alternative sentence where the law allows. It is absurd that, for long time now the world has been struggling over these issues but the move towards combating problems related to access

[6] There is no clear cut so far on what amount to "obstruction of the smooth administration of justice" but this could be examined on cases by case basis. For instance non appearance of the detainee for the trial could be one of them. See also Bisimba H and Maina C.M; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre 2005 pp 201 - 203

[7] Two international instruments guarantee these rights to liberty and presumption of innocence. These are Universal Declaration of Human Rights Articles 1, 3 and 11, CCPR articles 9 and 14(2) also Tanzanian Constitution articles 15 and presumption of innocence article 13(6) (b). Limitation to these provisions in Tanzania is regulated by article 31 which allows limitation on very few specific circumstances except that the right to be presumed innocent cannot be derogated.

[8] See Goldkamp J, Danger and Detention: A Second Generation of Bail reform, The Journal of Criminal Law and Criminology, Vol. 76 No 1, Spring 1985 p 3. See also Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008.See also Goldkamp J, Bail Decision Making and Pretrial Detention: surfacing Judicial Policy, law and Human Behavior Vol. 3 No 4 1979 p 228 -229; Further articulation on the issue of detention, curtailments of individual liberty and presumption of innocence are well articulated by Yale Law Journal on "Constitutional Limitations on the Conditions of Pretrial Detention" Yale Law Journal, Vol 79, No 5, 1970 pp 150 – 153. See also Saxena R.K et al Combat Law: The Human Rights & Law Bimonthly, Vol 7 Issue 2 March-April 2008, pp 24 -26

to justice for pretrial detainees seem to be going back and forth.[9] Shaw states that;- the stumbling blocks towards full transformation on this area has not been the non existence of the norms but rather ineffectiveness of the existing norms, non implementation or non compliance with the existing norms by the implementing authorities or law enforcement agencies; sometimes the total failure by the implementing agency to put into practice some of these norms.[10] Following these failures access to justice for pre-trial detainees has remained an illusion or dream far beyond reach. To fully understand the issue of access to justice for pre trail detainees, following hereunder is the conceptualization of few of the relevant aspects of access to justice for pre trial detainees. These are important in understanding the whole plight of inaccessibility of justice for pre trial detainees.[11]

2.4.1 Legal Assistance

Another important aspect of access to justice for prisoners is the whole issue of provision of legal assistance for pretrial detainees.[12] Legal assistance entails free legal counseling to the accused from the time of arrest throughout all trial processes, availability of free legal counselor when questioning the accused and through the entire process; free court fee; free bail and all other necessary assistance to enable the accused defend the case.[13] There is no

[9] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008. Among other things the author documents the reasons for the failure of the institutionalization of the project on pretrial detention services in South Africa. See pp 122-125

[10] Shaw M; Reducing the Excessive Use of Pretrial Detention, Open Society Justice Initiative, Spring 2008, p 5

[11] See, Blasi G, Framing Access to Justice: Beyond Perceived Justice for Individuals, Loyola of Los Angels Law Review, Summer 2009

[12] Makaramba R.V, "Promoting the Sound Working Relationship between the Prison Department and the Court". The paper presented in the two days workshop for the Senior Officers of the Prisons Services Department in Tanzania; July, 2010, p 10

[13] C.M Peter, Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag, Koln 1997 pp 336 – 348, Bisimba H and Maina C.M; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre 2005 pp 468 – 471 but also the case of Khasim Hamisi Manywele v. Republic, High Court of Tanzania at Dodoma, Criminal Appeal No. 39 of 1990. See also Ginsburg R B, Access to Justice: The Social responsibility of Lawyers: In Pursuit of

objection that the provision of legal assistance to pretrial detainees do not only conform to the international minimum human rights set standards for the fair treatment of detainees; but it also significantly lessen the burden of the court in ascertaining the evidence related to the cases before it. Apart from that, legal assistance works hand in hand with provision of bail without hard conditions to the accused.[14] Provision of legal assistance therefore, minimizes the time spent on each case and consequently fast track the hearing of the cases hence an effective tool in working out backlog of cases in courts.[15] Despite its importance though, in some other countries legal assistance is not a human rights guarantee per see to suspects of criminal offenses and in this respect, there is no law governing this area to that effect. [16]To some other countries legal assistance is guaranteed to only few accused of heinous offences such as murder and treason while the indigent or poor and accused of petty offences are left without any legal assistance.[17] Absence of legal assistance to accused of offences creates the gap and class between those who/ "have" and those who/ "have not", in terms of accessing justice but also the gap between accused of grave offences vis a vis those accused of minor offences which consequently leaves the accused of petty offences without assistance and

Access to Justice in the United States, Washington University Journal of Law and Policy, 2001 pp 1- 15 and Ramgobin A; Reflection on the Challenges Facing Public Interest Lawyers in Post- Apartheid South Africa, Washington University Journal of Law and Policy, 2001 pp 77 – 97. See also Sarkin J. Current developments: Promoting Access to Justice in South Africa: Should the Legal Profession Have a Voluntary or Mandatory Role in Providing Legal Services to the Poor?, South African Journal on Human Rights Vol. 12. 2002 pp 630 - 645

[14] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008, pp 125- 126

[15] Ibid Pp 125 -128

[16] Tanzania has no constitutional provision on Provisions of free legal Assistance. However, legal assistance can be provided where there is need and of course in grave offences such as murder. See, Bisimba H and Maina C.M; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre 2005 pp 470 – 472 and Tanzania Criminal Procedure Act, 1985 section 310 and Legal Aid (Criminal Proceedings) Act, 1969 section 3.

[17]C.M Peter, Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag, Koln 1997 pp 336 – 375 also Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008, pp 33 -34 also Makaramba R.V, "Promoting the Sound Working Relationship between the Prison Department and the Court". The paper presented in the two days workshop for the Senior Officers of the Prisons Services Department in Tanzania; July, 2010, p 10

most of the time sent to prison without being given proper legal assistance to defend their cases.[18] It is worthy to note that, above the fast tracking of the cases legal assistance to the accused of different offenses acts as an intermediary procedure and makes possible other procedures such as bail and evidence assessment as aforementioned above.[19]

2.4.2 Bail

In elaborating the relationship between bail and detention of offenders Goldkamp points out that, bail

> "…is the gate keeping mechanism that governs the release or detention of the defendants before trial". [20]

Goldkamp points out bail as the very important mechanisms often used to determine the destiny of the offender. Bail is the mechanisms which can be used to let free the accused while awaiting trial or else hold accused behind the bars while awaiting trial. This is why access to bail is particularly important determinant of access to justice for pre trail detainees. Based on Goldkamp assertion bail is vital in any criminal justice system and conforms to the universally accepted principle that persons accused of criminal offences must be assumed innocent until proved guilty.[21] One way in which we can enforce this rule is by letting free the accused of various offences while awaiting their trial. However, despite of understanding

[18] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008, pp 33- 44; C.M Peter, Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag, Koln 1997 pp 336 – 348 addressing the issue of legal assistance to indigent and state responsibility thereto

[19] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008, pp 125- 126

[20] Goldkamp J, Bail Decision Making and Pretrial Detention: surfacing Judicial Policy, law and Human Behavior Vol. 3 No 4 1979 p 228. See also C.M Peter, Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag, Koln 1997 pp 529 – 531

[21] See article 13 (6) (b) of the Tanzanian Constitution also see, Juma H I and Peter CM (ed), Fundamental Rights and Freedoms in Tanzania; Mkuki na Nyota Publishers, 1998 pp 161 -162

this rule, law enforcers have been so reluctant in granting accused bail despite of it been the fundamental constitutional guarantee.[22] The explanation towards this denial of bail by the law enforcers have been said to be obstruction of good end of justice by the accused and the whole problem of reappearance for hearing after obtaining bail.[23] Even though these are justifiable reasons but still cannot stand against the rights of individuals by denying him bail. Therefore, while the move in the world is about reducing pretrial detention by for instance granting accused bail,[24] the efforts to achieve this ultimate goal in some countries have remained the dream far beyond reach.[25]

However, for those countries in positive move towards making right to bail accessible, one of the major reforms undertaken by these states are introduction of lighter bail conditions such as very cheap conditions for sureties and lift up of money requirements. These significantly reduce the number of pretrial detainees as many of the accused obtain bail easily and with no major conditions imposed on them.[26] Even though access to bail is still a limited right in many countries, where practiced has proved to be the effective means of improving access to justice for pretrial detainees especially by reducing the number of pretrial detainees which comes with a lot human rights violations. In this respect, there is need for robust protection

[22] See article 13 (6) (b) of the Tanzanian Constitution which entails right to bail as part of the presumption of innocence

[23] Ibid p 229 -231, See also, Geo L.J, "Reasons for Pretrial Detention," Georgetown Law Journal Annual Review for Criminal Procedure 2010, p 332, lists the minimum conditions for bail but also the test requirement for justification of pretrial detention.

[24] Shaw M; Reducing the Excessive Use of Pre-trial Detention, Open Society Justice Initiative, Spring 2008, p 5-6

[25] See, C.M Peter, Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag, Koln 1997 pp 527 -528. Among other this he documents the history of the bail and the difficulties in realisation of right to bail which consequently results into the congestion of prisons in Tanzania.

[26] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008, pp 122 – 124. Among other things shows the significance reduction of pretrial detainees after the introduction of the lenient conditions for the bail. See the same achievements in Chile documented by Venegas V. et al, "Boomerang: Seeking to Reform pre-Trial Detention Practices in Chile", Open Society Justice Initiative, Spring 2008, pp 44-55

of this right by law enforcers especially judiciary.[27] The current trend shows that, even though judiciaries try to implement this right, there are still so many hindering factors which make this mechanism ineffective.[28] Some of these stumbling blocks will be further explored in the following chapter where both laws and practice will be surveyed to fully appreciate the nature of the problem.

2.4.3 Proper Detention Facilities

In so many countries the issue of proper detention facilities for detainees has been a major issue of concern. [29]So many detention facilities are congested without necessary basic living amenities to enable detainees live a decent life while behind the bars.[30] In this respect detention does not only limit individual's right to liberty but also violates many other human rights of detainees such as right to humane treatment and dignity. This amounts to subjecting individuals to ill and inhuman treatment.[31]Apart from that many economic and social rights of detainees gets impacted by prolonged detention.[32] Many of the detainees as the reports indicate walks out of the prisons having been severely affected by the conditions of detention

[27] See, C.M Peter, Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag, Koln 1997 pp 528 -531 analysis of the case of Daudi s/o Pete v. The United Republic Miscellaneous Criminal Cause No. 80 of 1989 (unreported but reproduced in the book).

[28] Makaramba R.V, "Promoting the Sound Working Relationship between the Prison Department and the Court". The paper presented in the two days workshop for the Senior Officers of the Prisons Services Department in Tanzania; July, 2010.

[29] See UN Human Rights Committee, general Comment No. 9: Article 10 (Humane treatment of persons deprived of their liberty) HRI/Gen/1/Rev.9 Vol. I pp 180 - 181

[30] Yale Law Journal on "Constitutional Limitations on the Conditions of Pretrial Detention" Yale Law Journal, Vol 79, No 5, 1970 pp 141 – 143,

[31] Nangela D, "The State of Human Rights Practices in the Prisons Service Department of Tanzania", The paper presented in the two days workshop for the Senior Officers of the Prisons Services Department in Tanzania; July, 2010, pp 14 - 22

[32] See, Open Society Justice Initiative: The Socioeconomic Impact of Pretrial Detention: A Global Campaign for Pre Trial Justice Report, Open Society Foundation, New York, 2011. This details the impact of pre trial detention on socioeconomic rights of detainees and the public in general.

facilities.[33] Detention conditions need an intervention for them to conform to the international minimum set standards for the treatment of offenders.[34] However, this seems to be not a prioritized area of intervention by states which worsen the situation. Many states are reluctant in building new prisons or remand prisons due to the costs involved, not been a popular political goal and as a result exacerbate the deterioration of prisons conditions and mistreatment of detainees in these centers.[35]

2.4.4 Timely Disposition of Cases

Apart from access to bail another significant impediment towards the realization of access to justice for pretrial detainees is the whole issue of delay of cases despite of the legal prescription that requires cases to be concluded promptly.[36] Even though all of the existing international, regional and domestic norms and standards emphasize the need to have the detainee's cases heard on time concluding cases as required is still a major issue to be addressed today.[37] Therefore, many cases facing accused today get delayed by the courts and there are no mechanisms to hold them accountable for such delay. Consequently, delay in exposition of cases stands as a huge impediment towards realization of justice for pretrial detainees. It is absurd that there is no good explanation offered for delay of cases apart from complaints been directed to the existing bureaucracy in court processes. This bureaucracy is

[33] Ibid

[34] See, "Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment", Adopted by UNGA in Resolution No. 43/173 on 9th December, 1988 at New York. Also see the Pocket Book on International Human Rights Standards for Prison Officials" Published by United Nations Office of the Commissioner for Human Rights, New York and Geneva, 2005

[35] Makaramba R.V, "Promoting the Sound Working Relationship between the Prison Department and the Court". The paper presented in the two days workshop for the Senior Officers of the Prisons Services Department in Tanzania; July, 2010, p 15

[36] See publication of Commonwealth Human Rights Initiative; The Conditions of Prisons of Karnataka, New Delhi, 2010 p 23

[37] Human Rights and Prisons: A Pocketbook of International Human Rights Standards for Prison Officials, New York and Geneva 2005 p 18 - 21

most of the time caused by delayed hearing, long preliminary hearings, problems related to gathering and submission of evidence by the prosecutions side, corruption and general negligence on the side of judiciary, which in turn results to the backlog of cases pending to be heard by the courts.[38] However, summing up all of the above reasons the major issue could be lack of mechanism to hold judiciary and prosecution accountable in their functions. On the other hand, the problem is exacerbated and rooted in the poor implementation of norms and set standards for the treatment of detainee's by various actors especially law enforcers.[39] Different intermediary interventions may assist sorting this situation which may include assisting courts in ascertaining the proper candidates for bail and counseling of witnesses to quicken the exposition of cases, use of alternative dispute settlement mechanisms which will in turn reduce the backlog of pending cases in courts.[40] This will as well be examined in the following chapter.

2.4.5 Appeal

This is not only a guarantee by the international human rights standards but also the most important right reserved for the convicted upon proved guilty by the competent courts. This is the only means upon which individuals can challenge their conviction especially when conviction is due to wrong assessment of evidence or by corrupt magistrates. The practice shows that those convicted but awaiting appeal are usually incarcerated while awaiting the

[38] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008, pp 125 – 128 see also Henry A; Juvenile Detention Reform in the United States, Open Society Justice Initiative, Spring 2008, pp 145 - 149

[39] Makaramba R.V, "Promoting the Sound Working Relationship between the Prison Department and the Court". The paper presented in the two days workshop for the Senior Officers of the Prisons Services Department in Tanzania; July, 2010. This as a huge impediment as it limits individual's right to justice. See also See www.legalservices.gov.uk for the reasons and types of legal assistance provided in courts

[40] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008, pp 125 - 128

final pronouncement of the judgment on their guiltiness upon appeal.[41] This can be challenged as in that circumstance the appealed person should be treated as innocent until the final judgment is issued to prove his guilty. Continued long incarceration of a person who has resorted to against their conviction amount to enforcing his sentence before actually proved guilty and upon succeeding in appeal nothing can be done to remedy the suffering endured in prison, the time and sentence served. Prudence dictates that a person in appeal should be released on bail or else kept behind the bars when necessary but without serving the already imposed sentence. However, prolonged finalization of the appeal cases delays justice on the side of the accused person. Succeeding in appeal after long time incarceration may not serve purpose.[42]

Right to appeal is such an important tool to challenge injustice especially in those countries where judiciary is surrounded by corruption and other forms of negligence, which all have negative impact on the accused.[43] There is evidence that lower courts are more corrupt than High Court's and that been the case a lot of injustices happen at the lower courts, courts of first instance. A lot of reasons could be adduced for this practice but since it is not a devotion of this research to analyze this aspect, it will be set aside for a separate subject of research. In this circumstance, for those wrongly convicted at the lower courts but who manage to cross

[41] This is the experience found in Tanzanian prisons when visiting prisons in 2009 and 2011. For more information see, Tanzania Civil Society Special Report on Human Rights Compliance in prisons in Tanzania Mainland; Special Inquiry Committee of the Legal Aid Providers in Tanzania Mainland , September 2011

[42] In visiting the prisons in 2008, the team on Civil Societies upon which I was a member we were informed of the delay of appeal cases and some of the convicts complained of serving the whole sentence before their appeal was actually determined. See Tanzania Civil Society Special Report on Human Rights Compliance in prisons in Tanzania Mainland; Special Inquiry Committee of the Legal Aid Providers in Tanzania Mainland , September 2009

[43] See the impact of prolonged pre trail detention on Open Society Justice Initiative: The Socioeconomic Impact of Pretrial Detention: A Global Campaign for Pre Trial Justice Report, Open Society Foundation, New York, 2011.

to the high court can easily get acquitted. However, this is only possible where there is free legal assistance and simplified appeal procedures. It is from this aspect the right to appeal is a very critical part on access to justice for pre trial detainees but also those convicted but with zeal to appeal against their conviction and sentence. Despite of its importance though, right to appeal for the convicted has never been a reality in many countries especially global south countries. Many of the convicted people fail to appeal against their conviction due to several reasons such as failure to obtain copies of judgments, lack of legal counseling; poor follow up on appeal cases and lack of coordination between the prison departments and other responsible organs of state such as judiciary. Consequently, convicted people fail to appeal against their conviction despite there being all chances to succeed at the appeal stage. This as aforementioned does not only violate the rights of detained but limits to a greater extent access to justice for the convicted who would wish to appeal hence an important aspect of access to justice.[44]

2.4.6 Alternative Sentence

Alternative sentencing encompasses administration of different types of punishment or corrective measures which do not entail detaining the offender. They can be imposed on the accused person when found guilty of the offence without for instance sending him to prison.[45] As discussed above, this could be very important and useful tool to use to lessen the severity of damage for those convicted but appealed their sentence. Alternative sentence could be very instrumental with lesser effect on convicted person but who have decided to

[44] See Tanzania Civil Society Special Report on Human Rights Compliance in prisons in Tanzania Mainland; Special Inquiry Committee of the Legal Aid Providers in Tanzania Mainland , September 2009

[45] For the meaning and different types of alternative sentence see, Kahan M. D " What do Alternative Sanction Mean?", The University f Chicago Law Review, Vol. 63 No 2 (Spring, 1996), Pp 591 -593

appeal his conviction. Alternative sentence involve sending the person to work at the public institution or in the community, in public services centers such as hospitals or cleaning the roads, reporting to the police station or in court every after certain specified period of time and to stay for a certain time without committing any or certain type of offences.[46] Upon succeeding at the appeal stage the person subjected to such sentence will have not suffered many negative effects as the incarcerated person. This is why alternative sentence is instrumental when discussing pretrial detention.

However, despite the fact that so many countries have laws related to this aspect there has been limited implementation[47] due to several reasons including absence of coordination between the judiciary and other state institutions and in some other countries absence of mechanisms to enforce these types of punishments. This is one of the very critical issues to be addressed if we have to make access to justice for pretrial detainees anyhow meaningful. The key player in this whole processes is the Judiciary. However, judiciary seems to be reluctant to undertake this responsibility.[48] As aforementioned, due to inefficient criminal justice systems within different countries the issue of alternative sentence has not been possible even where judiciary is willing to abide.[49] In this respect, judiciary uses only one type of sanction against the offenders found guilty even those petty offenders, which is

[46] Ibid Pp 591 - 594

[47] In Tanzania for instance, even though there is plurality of laws on alternative sentence there is no mechanisms for the enforcement of these laws in place. One of the issues facing the enforcement of these laws is coordination between the court and the local community/council and the police who would be responsible for the supervision of the sentenced. This does not only make the matter difficult but renders the whole system and procedure inoperative. See also

[48] Hatchard J, "Judicial Recognition and Protection of the Constitutional Rights of Prisoners", Journal of African Law, Vol. 39, No. 1 1995 pp 93 – 96. One of the major issues criticized by this paper is the judiciary "hands off" altitude towards the protection of prisoner's rights.

[49] Mchome S.E, Enforcement of Parole System in Tanzania Mainland", The paper presented in the two days workshop for the Senior Officers of the Prisons Services Department in Tanzania; July, 2010, p 12 – 14. Some of the stumbling blocks having been covered on footnote 36 but other like, shortage of supervisory staff, funding, knowledge of the magistrates on the effectiveness of the procedure etc

sending them to prison. By large this violates individual's right to justice as mere malfunction of justice system in the particular setting results into violation of person's right. Apart from that and as noted above the life behind bars for any reason and regardless of the setting has never been easy life and most of the time is accompanied by a multiple violation of other human rights of the person living in these settings.

2.5 Conclusion

On the basis of the above reviewed materials and the limitations on access to justice for pre trial detainees the following are the concluding remarks. Even though many authors have managed to pinpoint the existing problems towards realization of access to justice by pretrial detainees they have failed to show what are the underlying root causes for each problem and many if not all have failed to suggest the viable solution towards these issues. This thesis therefore, will among other things try to address issues not well articulated by many authors by looking more deeply on the underlying root causes for the failure of each aspect of access to justice but also more visibly show the gaps and suggest a solution.

3.3 CHAPTER THREE

INTERNATIONAL, REGIONAL AND DOMESTIC FRAMEWORKS ON ACCESS TO JUSTICE FOR PRE TRIAL DETAINEES

3.1 Introduction

Chapter three of this thesis will focus at pinpointing from the international, regional and domestic legal instruments, specific sections related to access to justice for detainees. In this respect some of the provision will be brought into the light and discussed. While doing that the author will focus at showing relevance of these provisions as well as historical background towards their enactment. This part will as well discuss the extent to which each provision is relevant in access to justice for pre trial detainees while at the same time explaining the consequences of failure to comply or enforce each aspect of access to justice. The issue of whether Tanzania complies with these standards will as well be discussed.

3.2 PART I

3.2.1 International Instruments on Access to Justice for Detainees

At the international level, there are binding and non binding instruments aiming at protecting the rights of vulnerable such as women, children, minorities even those at risk of encountering violation of their rights based on the situation they are placed in. In this respect people under detention for whatever the reason such as psychiatric patients and detainees have similar protection under the international law. These instruments seek to protect detainee's right to justice by encapsulating some of the acceptable standards for the treatment

of detainees but also in accelerating the determination of their cases. Some of these standards and guarantees are as discussed in chapter two above. The fact that many of these major instruments entail features of access to justice for detainees justify the fact that access to justice for pretrial detainees is a major human rights issue and of great concern.[50] Below are few of the international human rights instruments encompassing rights related to access to justice for pretrial detainees.

3.2.2 Universal Declaration of Human Rights (UDHR)

As the oldest[51] and universally accepted set of human rights standards, this declaration encompass some of very important provisions related to the treatment of detainees and access to justice for pre trial detainees in general. Some of these articles are like those related to right to "life", "liberty and security",[52] "prohibition of torture",[53] "equality before the law",[54] "prohibition of arbitrary arrest",[55] "fair trial and presumption of innocence".[56] As one can recall and as indicated above, Universal declaration came into being immediately after the second world. The period of Second World War was characterized by massive violation of human rights but mostly the captives of war or prisoners of war who most of the time were subjected to torture, killing and all types of human rights violation. At the end of the war

[50] UN (2003) "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers". Professional Training Series No. 9 of the OHCHR and IBA: Global Voice for Legal Profession, Geneva, pg 317.
[51] UDHR is one of the first human rights instruments to be adopted after the Second World War 1948. It is as well one of the most ratified international convention and has also been adopted to form part of the bill of rights in some of the states constitution.
[52] UDHR article 3
[53] Ibid article 5
[54] Ibid article 7
[55] Ibid article 9
[56] Ibid article 11 which states, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense"

states decided to come up with one new accord on the protection of various human rights and few of them were rights of people under detention who were in the period of war ill treated. In this respect it was then necessary to have detainees rights fully protected.

Right to life meant to ensure that everybody's right to life is guaranteed and secured. This means in no circumstance a person's right to life can be limited without justifiable grounds. Since then, many other instruments have held the same position.[57] Right to liberty, prohibition against arbitrary arrest, guarantee of fair trial, equality before the law and presumption of innocence sought to guarantee an individual total freedom and protection by the law. In this respect, a person's liberty can no longer be limited without a justifiable ground; when lawfully arrested the person must be presumed innocent and treated as such. Nonetheless, the arrested person must be promptly brought before the competent impartial body to determine his case. Freedom from torture ensures individuals are well treated as human beings and with all respect and dignity even when they are in custody for the accusations of committing offences.

As the oldest covenant with universal acceptance and recognition, one would expect to see it been rigorously applied and adhered to by all states especially those articles related to access to justice for pretrial detainees. This has not been the case which does not only undermine the spirit of the convention but the international efforts in guaranteeing access to justice for pre trial detainees.

[57] See, International Covenant on Civil and Political Rights and International Covenant of Economic, Social and Cultural Rights which have some resemblance with UDHR

3.2.3 International Covenant on Civil and Political Rights (ICCPR)[58]

As discussed in the previous section above, UDHR was followed by so many other international agreements acknowledging or emphasizing its content. The enactment of these covenants was a desire to enforce the spirit of UDHR which was not a binding instrument upon the states.[59] In this respect, one of the instruments entered upon and widely accepted by states is ICCPR.[60] This is one of those important instruments widely articulate civil and political rights of all people but importantly rights of detainees. The covenant encompasses several provisions related to access to justice for pretrial detainees such as; prohibition from torture which is the big issue for the treatment of pretrial detainees in so many countries.[61] Others are like, right to liberty and security of person,[62] right to humane treatment when deprived of liberty[63] and right to fair trial.[64] This convention forms the Human Rights Committee (HRC), which has played a very significant role in the interpretation, promotion and protection of human rights guaranteed by this instrument.[65]

HRC has adopted a large number of recommendations and interpretation related to the rights of detainees.[66]

[58] ICCPR was adopted by UNGA by Res. 2200A (XXI), UN. Doc. A 6316 (1996)
[59] It is worthy to not that UDHR despite of it been a document of moral authority was not binding upon states. It was rather important to come up with some sort of binding document hence the CCPR
[60] The number of countries which have ratified ICCPR so far are 167 and the list can be obtained on the following link http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang= out sourced on 26th November, 2011
[61] ICCPR article 7
[62] Ibid article 8
[63] Ibid article 10
[64] Ibid article 14
[65] See article 28 to 45 of the ICCPR for the establishment of the committee and mandate of the committee which among other things includes; interpreting the convention, receiving complaints, examining the state reports and issuing recommendations on the specific aspects related to the implementation of the convention.
[66] See General Comments No. 9 article 10 (humane treatment of persons deprived of their liberty) and General Comment No.21 on the same article 10.

This is to say with the progressive interpretation of the rights enshrined in this instrument, coupled with states adherence to these rights, this instrument can be fully utilized to guarantee the rights of pre trail detainees. But as usual there is always a discrepancy between the content of the instrument and its implementation on the ground.

3.2.4 International Covenant on Economic Social and Cultural Rights (ICESCR)

This is yet another fundamental convention very relevant to the welfare of the detainees. As for the ICCPR, ICESCR came into force in 1966. Contrary to ICCPR though, ICESCR was not rigorously ratified by states and there are diverse reasons for that. This covenant covers vastly the issues related to the accessibility of economic, social and cultural rights by all people. These are very important determinants of access to justice for pretrial detainees. Some of the articles closely related to access to justice for pretrial detainees include: right to health or medical services,[67] right to food[68] and right to education.[69] These are key players in ensuring other directed civil rights of the detainees are fulfilled in accordance to the provision of the laws.

Availability of economic and social rights for the detainees upholds the fundamental principle of presumption of innocence but also right to life, dignity and freedom from torture. Even though, right to life, dignity and presumption of innocence are guarantees of civil and political rights, manifestation of the realization of these rights partly depends on the

[67] Article 12 of the convention which states, *"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*"

[68] Article 11, *"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"*

[69] Article 14

fulfillment of economic, social and cultural rights of the detainees. Whether the state upholds civil and political rights of the detainee, manifestation of it could be how they respect and fulfill economic, social and cultural rights of the same person. On the other hand denial of one set of rights been economical and cultural rights may cascade to violation of various other civil rights of the person. For instance, if accused is denied treatment for the fact of been accused of commission of offence, the same person can claim violation of his civil rights such as right to dignity, freedom from torture and right to life. In this respect these rights are interdependent and violations of one set of rights be it either economic social and cultural rights may easily lead to the violation of various other rights of the person which may of course be civil and political rights. This is perhaps the reason for claiming and insisting on indivisibility and interdependence of rights.[70]

3.2.5 Standard Minimum Rules for the Treatment of Prisoners[71]

These are few of the internationally recognized standard rules for the treatment of prisoners. They came into force as a devoted set of principles dealing specifically with rights of prisoner and detainees. The aim of these principles were to secure full protection of detainees and prisoners rights who are most of the time prone to violation of their rights for the reasons of been under custody.

This body of rules entails detailed information on how to treat detainees serving their sentence but also contain the detailed rules in relations to the treatment of those awaiting trials. In a way they also take a further and explain the manner in which some of the

[70] See, Petersmann E.U, On "Indivisibility" of Human Rights, EJIL (2003), Vol. 14 No 2 pp 381 - 385
[71] Adopted by UN Congress on the Prevention of Crime and d the Treatment of Offenders , Geneva 1955 and approved by ECOSOC by its resolution No. 663 (XXIV) of 31st July 1957 and (LXII) of 13th May 1977

provision of CESCR will apply in relation to prisoners and people under detention. Rule 84 to 93 contains information related to health, education work, shelter and communication of the detained prisoner awaiting trial and the outside world. Even though these are not binding rules they save as a yard to stick to measure the extent in which states fulfills their duty in protection of the rights of detainees.[72]

3.2.6 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment [73]

These principles seek to specifically protect the rights of people under all forms of detention and custody or those awaiting trials. These principles further elaborated Standard Minimum Rules for the Treatment of Prisoners but also covered other groups such a psychiatric patients and or mentally ill persons.

Expanding from the provision of CCPR and other instruments governing the civil rights of the detainees, these principles stipulate the rights of the detainees from the moment of being arrested to the final disposition of their cases. In this respect the following important aspects of access to justice are covered: humane treatment while in custody,[74] prompt hearing,[75] access to court, condition of detention facilities[76] and right to legal assistance. Even though these principles are not binding but as aforementioned they are inspirational and all states abiding to the rule of law and observing good standards for the treatment of people under

[72] Compare these with A Pocketbook of International Human Rights Standards for Prison Officials, New York and Geneva 2005

[73] Adopted by General Assembly by Res. 43/173 on 9th December, 1988 at New York

[74] Principle 6 which states, *"No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*

[75] Principle 37 which states, *"A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest"* also read Principle 38

[76] See principle 8

custody are expected to conform to the standards listed in these principles. Apart from the first part of these principles urge states to adhere to these principles and forbids violation of the rights of detainees.

3.2 PART II

3.2.1 Regional Instruments

Apart from the above international human rights instruments; African region has several instruments detailing the rights of pre trial detainees. These are binding agreements and non binding declarations which all emphasize on protecting the various rights of detainees. The following section will discuss some of these instruments listing the content, history and relevance in the protection of the rights of detainees. These are as follows;

3.2.2 African Charter on Human and people Rights (ACHPR)[77]

Regionally this is the basic instrument protecting human rights in Africa. Among other things this charter deals with the rights of those detained. From the charter the following are rights related to the proper treatment of people under detentions; equality before the law,[78] right to life and personal integrity,[79] right to dignity and prohibition of torture,[80] right to liberty and security[81] and right to fair trial.[82] Despite all these conventions and the articles related to the rights of people under detention still Africa is estimated to be a region with some of the

[77] Adopted on 27th June 1981 by the assembly of the Head of States of the Organization of Africa Unity at Nairobi and entered into force on 21st October, 1986. O.A.U. Doc.CAB/LAG/67/3/Rev.5
[78] ACHPR article 3
[79] Ibid Article 4
[80] Ibid Article 5
[81] Ibid Article 6
[82] Ibid Article 7

extremely bad detention facilities.[83] The establishments of the special rapporteur on the conditions of prisons seems to be of less assistance in solving the issues hence calling for specialized strategies in dealing with this problem.[84] This is due to the fact that despite there been the special rapporteur on prison conditions in Africa still prison conditions remain in bad conditions and in other places worsened.

3.2.3 Other Regional Documents

Other regional documents relevant to the conditions and welfare of the detainees and especially pretrial detainees are like, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), 2003, Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004, Lilongwe Plan of Action for Accessing Legal Aid in the Criminal Justice System in Africa, November 2007, Kadoma Declaration on Community Service, 1998, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa and Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa, 2002. All these body of principles aim at improving in one way or another prisons conditions and welfare of people under detention.

[83] See the report of the Special Rapporteur on the Prison Conditions of 2004 page 36 which is also found on this link http://www.achpr.org/english/Mission_reports/Special%20Rap_Prisons_South%20Africa.pdf. See also Long D and Muntingh L, The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia. International Journal of Human Rights Vol. & No. 13 December 2010 pp 99 - 118

[84] See Long D and Muntingh L, The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia. International Journal of Human Rights Vol. & No. 13 December 2010 pp 99 – 118 also see Viljoen F, The Special Rapporteurs on Prisons and Conditions of Detention in Africa: Achievements and Possibilities, Human Rights Quarterly, Vol. 27, No 1 2005

3.3 PART III

3.3.1 Domestic Legislation

Tanzania as any other country has legal documents and policies aiming at improving the conditions of those in custody. The root of access to justice for the pretrial detainees in Tanzania can be traced from the provision of the constitution and other legal binding documents. Some of these documents are discussed here under as follows;

3.3.2 The Constitution of the United Republic of Tanzania of 1977

This is the "mother law" *of all the laws of the United Republic of Tanzania*. The Constitution indicates government's commitment to the fulfillment of the rights contained in the Universal Declaration of Human Rights, 1948 (UDHR)[85] and other international human rights instruments as listed above. The UDHR is categorically referred to or incorporated by Article 9(f) of this Constitution. Moreover, in an effort to realize these rights, the constitution has the Bill of Rights and Duties[86] incorporated by the 5th Constitutional amendment. Basic Rights and Duties Enforcement Act of 1994,[87] was enacted to enforce the rights enshrined under the Bill of Rights in the constitution. It follows from this logic that, all rules, regulations, policies and practices in Tanzania, are required to conform to the same spirit of the Constitution and

[85] The UDHR was adopted by the resolution of the United Nations General Assembly (UNGA) on 10 December, 1948. The UDHR recognizes civil, political, economic, social, cultural and other rights. Although this is not binding document, the principles contained in UDHR are now considered to be legally binding on States either as customary International law, general principles of law, or fundamental principle of humanity. Also see UN (2003) **Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers**. Professional Training Series No. 9 of the OHCHR and IBA: Global Voice for Legal Profession, Geneva, pgs 3 to 6.

[86] Articles 12 to 29 of the Constitution of Tanzania of 1977

[87] Cap. 3 of the R.E 2002 of the Laws of Tanzania

any law which violates the principles entailed in the constitution becomes null and void ab initio.

The Constitution has the provision related to the rights of prisoners or those in pre trial detention. In this respect, prisoners are treated on equal basis with all other persons and all rights guaranteed to people in the constitution are also presumed to be guaranteed equally to those in detention. The Constitution guarantees the right of presumption of innocence[88] for everyone including a prisoner and all other persons detained but not convicted by the Court of competent jurisdiction.[89] The constitution also prohibits inhuman treatment[90] and torture[91] of detained persons. Article 17(1) of the said Constitution allows detention of a person for the purpose of implementing punishment legally pronounced by the court of competent jurisdiction. Fundamentally and in line with the presumption of innocence the constitution recognize right to bail as the constitutional guarantee to all people accused of committing various offences. This means that the constitution by itself is against the pre-trial detention and guarantees people freedom from been detained. However and as mentioned earlier on, this has not been fully implemented in protection of detainees hence the detention of many pre trial detainees in Tanzania.

3.3.3 The Prisons Act of 1967[92]

This act deals with the issues related to the organization of prisons, discipline of prisoners, powers and duties of prison officials, and duties and rights of prisoners. This law also

[88] Article 13(6)(b) of the Constitution of Tanzania, 1977
[89] Article 107A of the Constitution of Tanzania provides that, The Judiciary shall be the authority with final
[90] Article 13(6)(d) of the Constitution of Tanzania, 1977.
[91] Article 13(6)(e) of the Constitution of Tanzania, 1977
[92] Cap. 58 R.E 2002

contains the specific part related to the administration of the prisons.[93] Part seven of the act deals with the matters related to the already convicted prisoners while part twelve covers those who are not convicted yet. Part thirteen details procedures related to the release of prisoners while the remaining two parts covers offences. This act covers some of the very important and significant human rights of prisoners such as to education[94] the right to health services;[95] the rights to clothing;[96] bedding;[97]and food;[98] the right to worship;[99] communication;[100]and payment of gratuity.[101]

It is absurd that, despite of the details provided in this law still prison conditions deteriorate on the daily basis. Mistreatment of prisoners and pre trail detainees are rampant and provisions of the basic needs articulated in this law remain uncertain.

3.3.4 The Criminal Procedure Act of 1985

This law is relevant in cases of persons who want to appeal against their conviction. As aforementioned earlier on it is my appeal that people convicted by the lower courts who wishes to appeal against their conviction should be treated as innocent until their cases have been fully determined by the courts of higher level and with competent jurisdiction. The law provides under section *363* that;

[93] See part 6 of the Prisons Act of 1967
[94] Section 62 of the Prisons Act,
[95] Sections 20, 21, 22, 54, 58, 59, 61, 65 and 74 of the Prisons Act, Cap. 58.
[96] Sections 66 (1) and 77 of the Prisons Act, Cap. 58
[97] Sections 66 (2) and 77 of the Prisons Act, Cap. 58
[98] Sections 66 (4) and 77 of the Prisons Act, Cap. 58
[99] Sections 44 and 45 of the Prisons Act, Cap. 58
[100] Sections 46 and 47 of the Prisons Act, Cap. 58. Letters and visitations of relatives are allowed. Visiting Justices are also allowed see section 48 for the list of recognizes
[101] Section 67 of the Prisons Act; provide that "[A] prisoner may be paid gratuity by the government in accordance with the rates prescribed."

"*[I]f the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court*."

The same right is exercisable for appellants/prisoners, who want to appeal against the decision of the subordinate courts such as primary court or district court or court of resident magistrates. This is due to the fact that, all prisoners having been sentenced normally are placed under the same prison authority. Also based on the fact that there is no segregation based on the gravity of offences committed by the prisoners, they all fall under the same authority and get equal treatment. Appeal following this procedure has never been easy and there are numerous reasons for failure to comply with this procedure. They will be explained in the following part when examining state compliance.

3.3.5 The Penal Code, Cap. 16

This law provides for the range of offences and seeks to protect rights, life, dignity, respect and protect rights of all people including prisoners. This law prohibits a range of offenses such as assaults; [102]unnatural sex (anal sex);[103] murder; [104]wounding;[105] sexual offences such as rape and sexual assaults[106]and other criminal offence. Prisoners and all people in custody such as pre trial detainees enjoy the rights detailed in this law and can be held liable in case they commit these offences while behind the bars as well. The tragedy is despite of all these provisions people behind the bars have been subjected to some of these treatments without

[102] See: Sections 240 to 243 of the Penal Code, Cap. 16.
[103] See: Section 54 of the Penal Code, Cap. 16.
[104] See: Section 196 of the Penal Code, Cap. 16
[105] See: Section 228 of the Penal Code, Cap. 16.
[106] See: Sections 130, 135 and various provisions in the Penal Code

offenders held accountable. For instance, people get assaulted by their fellow inmates, sexually harassed, raped and even wounded by the prison officials without violators of their rights held accountable. This is to say despite there been violations of the rights of the detainees these violations are categorically forbidden by the law and those who commits them regardless of their position have to be held accountable. Therefore, on one hand we have the law prohibiting commission of certain offences while on the other hand non compliance with the law leads to the violation of the rights of detainees. Therefore, non compliance with the law leads to the violation of the rights of detainees guaranteed by the laws of the land hence impairing detainees access to justice as well.

3.3.6 The Children and Young Persons Act[107]

This is the law dealing with juvenile offenders. It establishes the approved schools and juvenile remand homes[108] (special prisons for minors). The establishment of juvenile remand homes is to firstly to separate children in conflict with the law from the adults as per the requirement of the international human rights instruments related to the rights of prisoners and management of prisons.[109] However, this separation aim at achieving the role of rehabilitation of offenders where children in conflict with the law rehabilitated than punished for the commission of the offences hence the reason for calling them juvenile approved schools. Apart from that, the other intention of designating approved schools for juveniles is

[107] Cap 13 R.E 2002
[108] See section 26 of the Children and Young Persons Act, Cap. 13
[109] See: Article 37 of CRC; Article 10 (2) (b) of ICCPR; also rules 13.4 and 26.3 of the UN Standards Minimum Rules for the Administration of Juvenile Justice as well as Rule 29 of the UN Rules for the Protection of Juveniles Deprived of their Liberty

to ensure good treatment of children and young persons in a manner which promote their sense of dignity and worth as well as facilitating their reintegration into society after release.

3.3.7 The Commission for Human Rights and Good Governance[110]

The Commission for Human Rights and Good Governance (CHRGG) is the executive body with autonomous power.[111] The Law establishing the commission mandates the commission to undertake "visits" in prisons and all other places of detention or related facilities with the intention of inspecting the facilities and the conditions of the persons detained in these areas. After such visitation the commission issues report containing set of recommendations with the intention of redressing the found existing problems.[112] In exercise of this responsibility of visiting prisons, every prisoner exercises his or her right to express their opinion regarding prison conditions and general treatment of the officials.

The CHRAGG undertakes prisons visits at least once in the year when there is enough funding. This conforms to rule 55 of the Standard Minimum Rules for Treatment of Prisoners of the United Nations. During these visits by CHRAGG, prisoners are normally given chance to communicate freely and confidentially with the inspectors. Even though these visits take place annually, there has been very little improvement on prisoner's conditions as a result of CHRAGG visits and reports. Several reasons could be associated to this situation but suffice to say situation on the ground stand still and perhaps CHRAGG has to adopt a different mechanism rather than just report writing.

[110] See URT Constitution article 129 together with Human Rights Commission Act of 2001, Cap 391
[111] See also article 129 – 131 of the URT Constitution which establishes the Commission and its mandate.
[112] Section 6 (1) (h) of the Commission for Human Rights and Good Governance Act, Cap.391

3.4 Conclusion

Having gone through different international, regional and domestic legal provisions related to the protection of different rights of detainees, the following two parts will then examine in detail the shortcomings of the provisions by itself but also in the implementation process. In this respect, I will examine the adequacy of these standards and later the whole aspect of compliance by the implementing officials. This is due to the fact that, despite all the efforts to come up with the instruments addressing the issue of access to justice for detainees still the problem stand unchallenged.

4.0 CHAPTER FOUR

TANZANIA COMPLIANCE WITH THE STANDARD RULES FOR THE TREATMENT OF DETAINEES

4.1 Background

This chapter is taking a step forward to analyze the relevance and Tanzania compliance with the above discussed instruments. Specifically this part will examine the extent in which Tanzania has complied with the existing norms in the protection of the rights of pre trial detainees but also the extent in which the existing domestic laws conforms to the international recognized norms. Critically, this chapter will examine the conducts of specific actors with lieu of establishing their conformity with the instruments described above. In this respect, this part will concentrate on examining the application of the international instruments at the domestic level while at the same time examining the extent in which the practice of the law enforcers conform to both international, regional and domestic standards guaranteeing pre trail detainees right of access to justice. In this respect, the critical elements of access to justice for pretrial detainees been legal assistance, bail, timely disposition of cases, alternative sentence, right to appeal, and others such as economic and social rights of the detainees will be examined.

4.1.2 Legal Assistance

As discussed above, presence of the legal counselor/officer at the time of questioning the accused and in subsequent stages is important to ensure rights of the accused are protected.[113]

[113] See, Bisimba H and Maina C.M; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre 2005 pp 470 – 472, also see McQuiod-Mason D; The Delivery of Civil Legal Aid Services in South Africa, Fordham In'l L.J.111 (2000), Mindley J.R, Cases and Comment: Access to Legal Services: A Need to Canvass Alternatives, South African

This includes making sure that the accused does not admit the facts he is not clear about or is not forced to make confession for the commission of the offence he did not commit. Apart from that, legal counselors ensures that the accused right to remain silent is enforced and guaranteed at all times during the questioning which is an element of fair trial. As noted above, legal assistance eases the assessment of evidence.[114] Apart from all these facts, availability of legal counseling to assist accused at the time of questioning and in subsequent stages of hearing has still remained a dream far beyond reach for many especially global south or developing countries. This is caused by many reasons such as limited number of lawyers vis a vis the country population, lack of specialized criminal law lawyers, lack of lawyers who engage in pro bono activities and unaffordable nature of services for accused who want to engage private lawyers. All these factors makes the availability of legal counseling to vulnerable, poor and marginalized population a dream yet to be realized.

Apart from that, free legal assistance as a substitute for private legal counseling is still unavailable service to accused. This is due to the fact that few lawyers engage in pro bono legal counseling and the fact that there are few organizations providing these services many of which are situated at the urban areas. People from rural areas, who are mostly poor, vulnerable and more likely to be accused and convicted of the offences they are accused of are left without any assistance which infringes their right of access to justice.

Journal on Human Rights Vol. 8 No.1 1992 and [113] C.M Peter, Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag, Koln 1997 pp 336 – 348

[114] Ehlers L, "Frustrated Potential: The Short and Long Term Impact of Pre-trial Services in South Africa", Open Society Justice Initiative, Spring 2008

For instance, legal assistance in Tanzania is not a constitutional guarantee neither it is mandatory to the accused of offences.[115] Tanzania has a specific legislation on the provision of legal assistance but unfortunately this law covers only accused of grave offences such as murder and treason.[116] The rest of the accused especially of misdemeanor and petty offences are often left without legal assistance and most of the time subjected to detention where they face many challenges and violation of their rights. Many of these people accused of offenses are most of the time illiterate and unaware of their rights and basic legal concepts yet are unrepresented in the courts of law. This is so even where the opposite party in the proceeding (the prosecutor) is a qualified lawyer with all skills of engaging the court. This does not only infringe the rights of the accused but defeat the concept of *"equality of arm"* in proceedings and it is so likely that many people get convicted due to lack of proper and adequate defense on their cases.

With these facts it is evidently clear that Tanzania fall short of the standard which require accused of offences to be availed legal assistance to enable them defend their case. The recommendation on this shortfall will be discussed in the following chapter.

4.1.3 Bail

As noted in chapter one above, this is not only a constitutional guarantee but also a fundamental principle in criminal law that accused of offenses must always be presumed innocent until proved guilty by the court of competent jurisdiction. This means they must be

[115] See, Bisimba H and Maina C.M; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre 2005 pp 470 – 472 also see, Legal Aid (Criminal Proceedings) Act, 1969.
[116] See section 3 of Legal Aid (Criminal Proceedings) Act, 1969.

treated as such and such treatment must be reflected in the manner in which accused are treated. Importantly accused of should be released on bail so long as their release does not obstruct the good end of justice.[117] Despite the fact that there are pluralities of binding instruments guaranteeing this right, still has not been a reality. Many people accused of committing offences spend long time in custody due to failure in obtaining bail. There are diverse reasons as to why accused of offences fail to obtain bail which are like inability to secure surety, lack of proper identification documents, failure to pay bribe to the magistrates or police officers and so on.[118] The result of this is that people have been constantly subjected to detention where they spend so long time awaiting the finalization of their cases. However, the failure to obtain result into them been sent in custody where they face massive violation of their human rights due to overcrowding, limited services, violence from other inmates and prison officials, prone to infectious diseases such as tuberculosis, malaria and HIV and in many cases torture. [119] Apart from that all, staying in detention results to accused conviction in the end and this is due to the fact that, people in detention have no time to prepare evidence against their accusation neither can they access legal assistance while in custody.

Tanzania has ratified many of the conventions guaranteeing individual's right to bail but also presumption of innocence.[120] Apart from that the Constitution of the United Republic of Tanzania guarantee individual's right to bail within the broad concept of presumption of

[117] See, Bisimba H and Maina C.M; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre 2005 pp 201– 203 also Juma H I and Peter CM (ed), Fundamental Rights and Freedoms in Tanzania; Mkuki na Nyota Publishers, 1998 pp 161 -162

[118] See Tanzania Civil Society Special Report on Human Rights Compliance in prisons in Tanzania Mainland; Special Inquiry Committee of the Legal Aid Providers in Tanzania Mainland , September 2009

[119] See Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

[120] Tanzania is signatory of UDHR, ICCPR and CESCR and also ACHPR which all guarantee presumption of innocence.

innocence.[121] Despite of all these instruments, right to bail is still a challenge for accused of many offences in Tanzania. In the prisons visits undertaken in 2009 and 2011 figures shows that many of people found in detention facilities are those awaiting trial.[122] These are people accused of committing bail-able offences or petty offences. This shows state failure to live up on the standards agreed on when ratifying international, regional even domestic legislations. As aforementioned, people in these detention centers suffer multiple violations of their rights due to overcrowding.

4.1.4 Timely Disposition of Cases

This is yet another important element of access to justice for pre trail detainees. Various international and regional instruments[123] require expeditious determination of cases. Quick disposition of cases prevent multiple violation of human rights of accused which might happen due to long incarceration. Even though there is no specific time required for the court to fully determine the cases, prudence demands each case to be assessed on its merit. Failure to determine the cases timely violates individual rights of fair trial which is fundamental in determination of any criminal case.

In Tanzania the average time for determination of criminal cases is one year and a half and in complicated cases it takes up to three years. On instances where an individual is denied bail coupled with prolonged determination of case, that person may be subjected to other various

[121] See article 13 (6) (b)
[122] See Tanzania Civil Society Special Report on Human Rights Compliance in prisons in Tanzania Mainland; Special Inquiry Committee of the Legal Aid Providers in Tanzania Mainland , September 2009
[123] See, Bisimba H and Maina C.M; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre 2005 pp315 – 334, see also Yash Ghai and Cottrell J, Marginalised communities and Access to Justice, Routledge, New York 2010, pp 3 -4

types of violations of his rights. In congested detentions with limited social services, prolonged trials can be of highly negative effect. The major reason for long delay in determination of cases is most of the time caused by a few number of magistrates compared to the backlog of cases, complicated and bureaucratic procedure of trial resulting from involvement of various institutions in trial process such as police, prosecutor and court both playing different roles in prosecution. The result of this procedure is that when one institution delays the rest of the players stand stuck hence the delay of the whole process. That been the case, there is high need to review the whole issue of timely disposition of cases with lieu of for this right to be rigorously enforcing it. This will ensure detainees are not held in custody for a long period which in most cases has severe consequences on their lives.

4.1.5 Alternative Sentence

As noted from the introduction this is one of the strategies which can be adopted by the judiciary to make sure that detainees convicted but appealing their conviction are not held in custody while waiting the final determination of their cases. In this regard, alternative sentence can be used to lessen the extent of suffering resulting from the incarceration in case the appellant successfully pursue his appeal.

Tanzania has several laws which provides for the alternative sentence and the type of people who can be subjected to these types of punishment. Nonetheless, when visiting prisons in 2009 and 2011 many of the prisoners found in prisons were those prisoners who qualified for alternative sentence from incarceration. This has not been the case and many reasons are

adduced for that failure been, lack of supervisory mechanisms, ignorance of magistrates who would impose such penalty and failure of the accused in claiming such sentence.

Therefore, despite of having so many laws which provides for the alternative sentence which would reduce the effects of incarceration to the offenders as well as population in detention facilities still these laws have not been fully implemented. This is also a backlash on the access to just for detainees especially those appealing on their conviction and with likelihood of been acquitted in the end.

4.1.6 Appeals

Many human right instruments dealing with criminal cases guarantee individuals right of appeal. In fact that is the only mechanisms many of the wrongfully convicted prisoners can use in challenging their conviction. It is necessary for the appeal to be guaranteed by states to ensure all individuals who get convicted have all chances to mitigate their conviction.

Despite having many human rights instruments guaranteeing right of appeal this is yet another problem in many states. For instance, when visiting Tanzania detention centers in 2009 I found many people who were in prison wanted to appeal but could not do so due to various reasons. Some of these were, inability to obtain judgments, lack of legal counseling, inability to make follow up of their cases while in detention and discouragement from the prison officials who would encourage the prisoners to just stay and serve their sentence while awaiting release by probation or presidential prerogative of mercy.

In this respect appeal has never been easy and despite of the fact that convicted people would want to appeal their conviction still it has never been an easy task for many of them. Hence realization of these constitutional rights has remained a dream far beyond reach.

4.1.7 Economic and Social Rights of the Detainees

Even though this thesis centrally address the issues of access to justice for pre trail detainees from the civil rights perspective, there is a close link between realization of detainees civil rights on one hand and the implication it has on the economic, social and cultural rights of the detainees on the other. Again, non realization of detainee's civil rights has a huge impact on the realization of detainee's economic and social rights. For instance, pre trial detention is one form of violation of human rights of the detainees due to the fact of it been unnecessary in the first place and also prolonged. Pre trial detention has a multiple impact on the social economic and cultural rights of the detainees.

Apart from that and as aforementioned, the consequences of violation of detainees civil rights in many cases manifests in denial of economic and cultural rights of this group. For instance, denial of bail leads to detention of individuals which causes overcrowding in detention facilities hence limitation of their social rights such as food, water, treatment services, denial of education, right to work and right to development in general. While visiting prisons in 2009 many of the complaints directed to us were those related to the limitation of social rights of the detainees. This has been the serious problem and causes many problems.

It is as well important to underscore the fact that, non provision of social services or social rights to the detainees significantly impair their ability to access their civil rights. For instance, it may be very impractical for a sick, hungry and frustrated detainee to stand charges facing them. In this respect, it is of paramount importance to avail detainee's with these rights to ensure they are able to defend their civil rights through due process.

Based on the above explanation, I found it important to look at some of these social rights and the way denial of these rights by detainees affect access to justice for pretrial detainees. However, before indulging in looking at one of these rights and the way states provides them to the detainees it is important to emphasize that I will focus on two major instruments which are Covenant on Economic Social and Cultural Rights and The Minimum Standard Rules for the Treatment of Prisoners.

While the Minimum Rules contain the detailed list of social and economic rights specifically for the detainees CESCR states as follows in article 2 (2);

> *"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*

This means, there is no discrimination allowed in the provision of these rights. It means as well even those detained for commission or accusations for commission of the offences cannot be denied these rights merely because they are detainees or accused of committing

criminal offences. Limitations on the rights covered in this convention are as allowed under article 4 of the convention and not in any other circumstance. [124]

Having said so I will now discuss one of these detainees rights often violated and which has significant impact not only to the detainees but also to the larger community. This is right to health.[125]

Right to Health[126]

This is yet another important determinant of access to justice. In a way right to health is guaranteed to everyone including those in detention. Even though there has not been specific recommendation by Committee on Economic Social and Cultural Rights on the issue of access to health services by the people under detention, still the interpretation and application of the services covers all human beings including those in detention.

It should be noted that, the consequences of pre trial detention caused by inaccessibility of justice by detainees has a significant impact on their health as well as the community health. Due to overcrowding detainees have been subjected to unhygienic environment where they do contract infectious diseases such as tuberculosis, hepatitis C and even HIV caused by sexual transactions in

[124] Article 5 (2) of the Convention reads as follows, "*The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".*

[125] See, Article 12 of the CESCR and Principle 8 of Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment

[126]

detention centers.[127] Apart from that and due to the large number of inmates other determinants[128] of right to health such as food, access to fresh air, sanitation facilities, clean water and health services such as testing and treatment facilities are inadequate. The consequences of this has been detainees getting out of prison with massive effects on their health but sometimes death resulting from unavailability of curative services.[129] Apart from that, the consequences of limitation of right to health in detention has a significance to the public health baring in mind that detainees stay in detention for a short while and later join the community with the possibility of spreading the diseases they contract in detentions. It should be noted that, where the detainee is suffering from the diseases it is impossible for such detainee to with stand charges laid against him. In this respect the health of the detainee is of paramount importance in discharging justice.

This is to say; insignificant as it may appear, right to health has a very significant role to play when it comes to access justice for detainees. It is then important to have this right protected and guaranteed to detainees. Apart from that, conducts which may lead to violation of this right must be addressed which means respect for civil and political rights of the detainees.

[127] See the African Special Rapporteur Report on Prisons and Condition of Detention in Africa: Mission to the Republic of South Africa, 2004

[128] For the determinants of right to health see, Committee on Economic, Social and Cultural Rights General Comment No. 14, Right to the Highest Attainable Standard of Health (article 12)

[129] See, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment

5.0 CHAPTER FIVE

5.1 OBSERVATIONS AND RECCOMMENDATIONS

From the above analysis, there are several points of observation which can lead to different general recommendations. Observations are mainly based on the shortcomings identified from the above analysis. In this part I will identify some of the key issues worthy to be considered in order to reform criminal justice system in Tanzania and specifically pre trail detainee's access to justice. These are as follows;

- As noted from the introduction above, the issue of inaccessibility of justice by pre trial detainees is mainly caused by non implementation or compliance with the existing human rights norms and standards. Despite the fact that we have multiple laws governing and guaranteeing the rights of pre trial detainees with lieu of ensuring access to justice, still the situation has remained the same for years. The reason for this as identified above is failure by states organs to adhere to these standards which delay access to justice for pre trail detainees.

As a recommendation I would suggest that, government conduct legal audit with lieu of consolidating these laws into single piece of code to ease reference to them. Apart from the government should enact action plan to ensure these standards are implemented at the domestic level. Baring in mind the costs which might be involved in the whole process I would

suggest that government prioritize them within the action plan to ensure those urgent issues are dealt with as soon as possible.

- Apart from that the other outstanding challenge is the issue of coordination of state institution dealing with the matters of access to justice for pre trial detainees. The fact that issues of detainees are dealt with by different government institutions makes it difficult to hold those responsible for delay of their rights accountable.

  To deal with this there is a need to do two things; one is to conduct survey in order to identify challenges facing each institution which in turn makes them delay detainee's cases as well as sending them to prison. Following this step is to develop an implementable action plan towards dealing with these issues and will entail for instance prioritizing them and identify the proper solution for each problem. It may be worthy to note that, not all issues will need money to get them solved so it will be of paramount importance to identify and separate those which will cost money and those which will not cost money and deal with them as a matter of priority.

- Another outstanding challenge is the whole issue of unavailability of legal services for poor ad indigent which would help many pre trial detainees obtains their rights as soon as possible. For instance and as pointed out many of the detainees in detention facilities could not obtain bail because of various reasons such as failure to know bail conditions, absence of sureties, high costs of bonds and corruption. The situation would have been different if state had the law and mechanisms in place that would ensure availability of

legal counselor from the time of arrest to the time of prosecution. The studies show the earlier the intervention the more likely that detainee's rights will be protected and respected.

To reach this goal, the state has to at least put in place the legal aid policy or framework that will govern the issues of provision of legal aid for pre trial detainees. The law should categorically state that all individuals are entitled to free legal advice whenever they need such service, provide for funding on this strategy and of course ensure this strategy is implemented without any discrimination. This could take long but at least intervention should start with sorting out the current situation in detention facilities.

Apart from that, state should work with other actors working on this area to ensure that they don't duplicate efforts in some of the projects are areas of intervention. For instance, state could legalize and acknowledge the existence of other complimentary units such as paralegals or ward tribunals which play very significant role in ensuring access to justice for pre trial detainees. State could also providing funding for those engaged in these activities or other incentives to ease their involvement in this field.

- As for the issue of congestion and overcrowd in detention facilities, there is need for immediate intervention to decongest the detention facilities. This is not the easy task baring in mind the fact that the global movement is to reduce the magnitude of pre trial

detention. In this respect there is need to come up with well crafted solution towards this issue. I will offer some of the suggestions as follows;

That, state should come up with the clear and specific provision of the law detailing the procedure in determination of criminal cases. This should be as specific as possible detailing time to fulfill each aspect of trial been evidence collection and assessment of evidence, time for hearing and time within which sentence will be pronounced. The good example of this will be Tanzania Child Act, 2008 which among other things demands that juvenile's cases must be finalised with the day offender will be brought to court.

However and when necessary bail should be highly emphasized and encouraged as one of the methods of solving the issue of congestion in detention facilities. Since URT constitution guarantee individual's right to bail, it is then very important for the judiciary to adhere to this right and avail individuals with right to bail. This as aforementioned will assist in solving the issue of overcrowd in detention.

- Apart from that, the issue of appeal seems to be not well coordinated and there is lack of clear procedure and mechanisms to ensure appeals are longed and heard on time. When visiting prisons it was not clear as to who is responsible to assist the prisoners get the copy of their judgments, who should help them draw appeal documents and who should

make follow up to ensure their appeals are heard on time. This makes appeal for those who would want to appeal their conviction impossible matter to pursue.

To curb this situation I would recommend the following; there must be clear appeal procedures to be followed by those who are incarcerated in prisons and who would wish to appeal against their conviction. Different from now where it is not so clear on who should make follow up on the cases from obtaining the judgment, drawing the appeal documents, longing the appeal and monitoring the hearings, there should now be a separate mechanism to ensure this process works and appeals happen. This will help those who want to appeal, appeal on time but also could be one of the ways to decongest detention facilities.

5.2 CONCLUSION

Having gone through this thesis there are several conclusions which can be drawn from this topic. Some of them are as follows;

- That, access to justice for pre trial detainees is still a problem requiring immediate attention to end its predicament to the detainees but also public at large.
- Despite the existence of laws and human rights standards guarding the rights of detainees, there is still a wide gap between what laws provides vis a vis the practice. This makes detainee's situation problematic. In this respect there is

urgent need by states to take actions that will rectify the situation as immediately as possible.

- In tackling detainees problems there is need for the government to prioritize these issues when drawing action plans but with the ultimate goal of ensuring access to justice for all pre trial detainees after a given time. Prioritization could take into consideration type of the issues facing detainees, costs involved in tackling them, time needed to deal with them, state capacity and the nature or causes of the problem. This will ensure in the end detainees issues are dealt with sustainably.

With effective criminal justice system that will take into consideration all human rights of detainees enshrined in different instruments, access to justice for pre trail detainees will no longer be a dream but a reality.

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