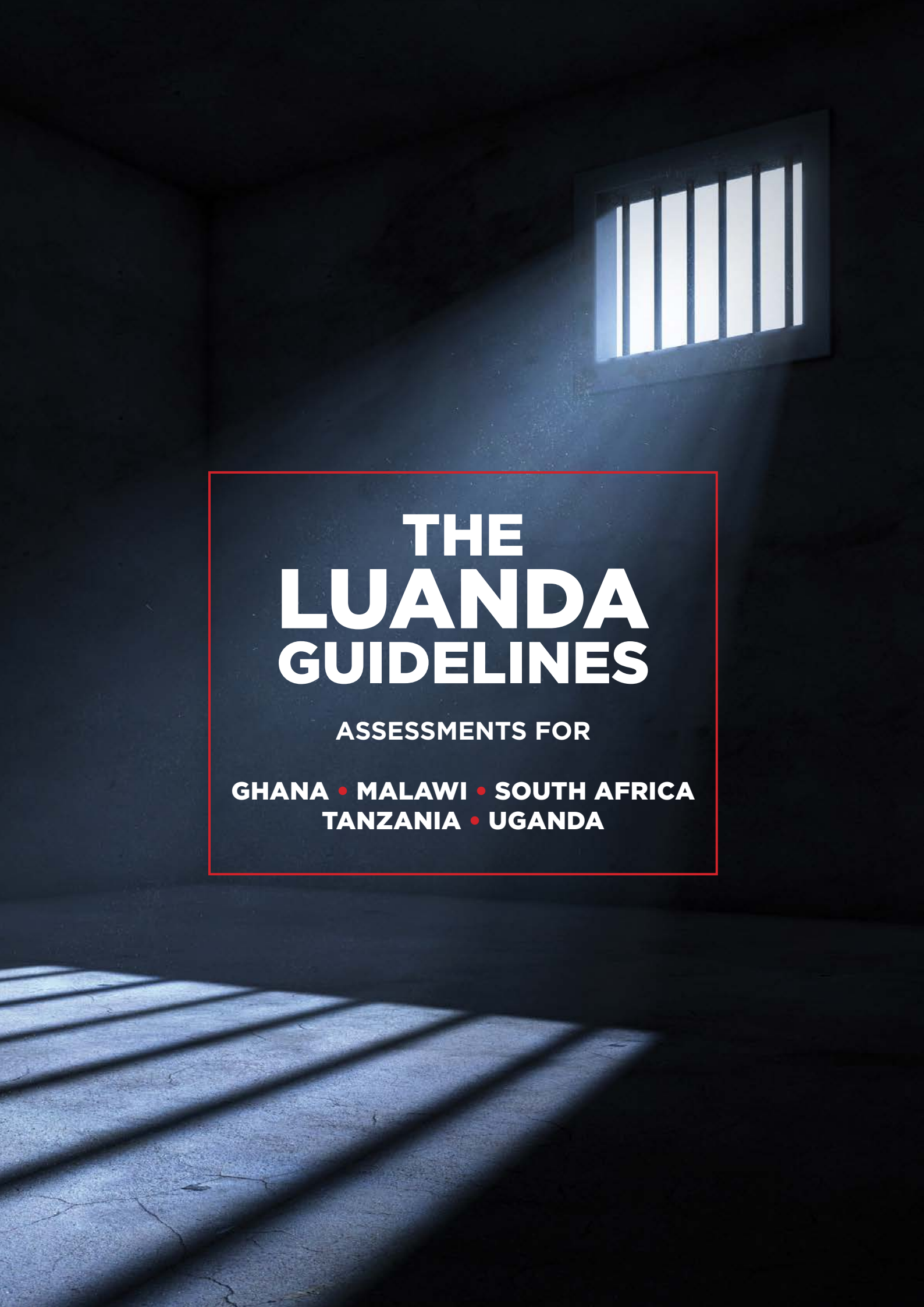


THE LUANDA GUIDELINES

ASSESSMENTS FOR

GHANA • MALAWI • SOUTH AFRICA
TANZANIA • UGANDA

THE LUANDA GUIDELINES

ASSESSMENTS FOR

GHANA • MALAWI • SOUTH AFRICA
TANZANIA • UGANDA

ABOUT APCOF

The African Policing Civilian Oversight Forum (APCOF) is a Not-for-Profit Trust working on issues of police accountability and governance in Africa. APCOF promotes the values which the establishment of civilian oversight seeks to achieve, namely: to assist in restoring public confidence; developing a culture of human rights, promoting integrity and transparency within the police; and good working relationships between the police and the community. While APCOF is active in the field of policing, its work is located in the broader paradigm of promoting democratic governance and the rule of law.

APCOF achieves its goals through undertaking research, and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and police oversight bodies in Africa.

CONTACT APCOF

The African Policing Civilian Oversight Forum
Suite 103–105, Building 17
The Waverley
Wyecroft Road, Mowbray 7925
South Africa

Tel: +27 21 447 2415
Fax: +27 21 447 1691
Email: info@apcof.org.za
Web: www.apcof.org.za
Twitter: @APCOF
Facebook: African Policing Civilian Oversight Forum

Designed and typeset by COMPRESS.dsl

CONTENTS

FOREWORD 12

ABBREVIATIONS AND ACRONYMS 14

CHAPTER 1: GHANA
Baseline assessment: The Luanda Guidelines and Ghana's framework for arrest, police custody and pre-trial detention 17

1. Introduction 17

2. Overview of this review 18

3. Domestic framework for arrest, police custody and pre-trial detention 18
   - Application of the international normative framework for human rights in Ghana 18
   - Overview of human rights guarantees in Ghana 18
   - Overview of policing in Ghana 19
   - Overview of remand detention in Ghana 19
   - Other relevant institutions 20

4. Arrest 20
   - The Luanda Guidelines 20
   - Legal basis for arrest in Ghana 21
   - Procedural safeguards in respect of arrest and the rights of an arrested person in Ghana 21

5. Police custody 22
   - The Luanda Guidelines 22
   - Procedural safeguards during police custody in Ghana 22

Conditions of detention in police cells in Ghana 23
Questioning and confessions in Ghana 23

6. Access to legal assistance services 23
The Luanda Guidelines 23
Access to legal assistance services in Ghana 23

7. Pre-trial detention 24
The Luanda Guidelines 24
Framework for making pre-trial detention orders in Ghana 24
Conditions of detention in pre-trial facilities in Ghana 25

8. Data collection and access to information 26
The Luanda Guidelines 26
Data collection and access to information in Ghana 26

9. Standards of conduct and training for law enforcement officials 27
The Luanda Guidelines 27
Standards of conduct and training for law enforcement officials in Ghana 27

10. Vulnerable groups 27
The Luanda Guidelines 27
General provisions pertaining to discrimination in Ghana 28
Children 28
Women 28
Persons with disabilities 29
Non-nationals 29
Other vulnerable groups 29
Lesbian, gay, bisexual, transgender and intersex people (LGBTI) 29

11. Accountability architecture 30
The Luanda Guidelines 30
Judicial oversight and habeas corpus 30
Accountability architecture in Ghana 30
General 30
The police 31
Prisons 32

CHAPTER 2: MALAWI
Baseline assessment: The Luanda Guidelines and Malawi's framework for arrest, police custody and pre-trial detention 41

1. Introduction 41

2. Overview of this review 42

3. Domestic framework for arrest, police custody and pre-trial detention in Malawi 42

Application of the international normative framework for human rights in Malawi 42
Overview of human rights guarantees in Malawi 42
Overview of policing in Malawi 43
Overview of remand detention in Malawi 43
Other relevant institutions 43

4. Arrest 44
The Luanda Guidelines 44
Legal basis for arrest in Malawi 44
Procedural safeguards in respect of arrest and the rights of an arrested person in Malawi 45

5. Police custody 46
The Luanda Guidelines 46
Procedural safeguards during police custody in Malawi 46
Conditions of detention in police cells in Malawi 47
Questioning and confessions in Malawi 47

6. Access to legal assistance services 47
The Luanda Guidelines 47
Access to legal assistance services in Malawi 48

7. Pre-trial detention 48
The Luanda Guidelines 48
Framework for making pre-trial detention orders in Malawi 48
Conditions of detention in pre-trial facilities in Malawi 49

8. Data collection and access to information 50
The Luanda Guidelines 50
Data collection and access to information in Malawi 50

9. Standards of conduct and training for law enforcement officials 50
The Luanda Guidelines 50
Standards of conduct and training for law enforcement officials in Malawi 51

10. Vulnerable groups 51
The Luanda Guidelines 51
General provisions pertaining to discrimination in Malawi 52
Children 52
Women 53
Persons with disabilities 54
Non-nationals 54

11. Accountability architecture 54
The Luanda Guidelines 54
Judicial oversight and habeas corpus 54
Accountability architecture in Malawi 54
General 55

The police 55
Prisons 56

12. Opportunities for reform 56

CHAPTER 3: SOUTH AFRICA
Baseline assessment: The Luanda Guidelines and South Africa's framework for arrest, police custody and pre-trial detention 65

1. Overview 65
Introduction 65
A methodological framework for the review 66
Summary of the international normative framework 67
Part 1: Arrest 67
Part 2: Police custody 68
Part 3: Pre-trial detention 68
Part 4: Registers and access to information 69
Part 5: Procedures for serious violations of human rights in police custody and pre-trial detention 69
Part 6: Conditions of detention in police custody and pre-trial detention 69
Part 7: Vulnerable groups 69
Part 8: Accountability and remedies 70
Part 9: Implementation 70
Overview of South Africa's performance against the Luanda Guidelines 70

2. A review of arrest, police custody and remand detention in South Africa: Coordination and institutional reform 71
Introduction 71
A coordinated approach 71
Resisting a 'tough on crime' approach to policing 72
The South African Police Service Act, detective services and the impact on delays 73
Remand detention management 74
Custody monitoring 74
Coordination 74
Remand 75
Police cell monitoring 75
Prosecutions 75

3. A review of arrest, police custody and remand detention in South Africa: Process issues 76
Introduction 76
Risk to freedom of movement 76
Risk to freedom of movement as a category of measurement 76
Review of risk to freedom of movement 77
Stop and search 77
Arrest 78

Charge 79
Police custody 80
Remand detention 81
Remand orders 81
Bail 81
Duration of remand detention 82
Justification for the category of measurement 82
Duration of remand detention in South Africa 83
Postponement of bail hearings 83
Custody time limits 84
Court utilisation and backlog 84
Incomplete dockets and investigations 84
Postponement of trials 85
Use of pre-trial hearings 85
Access to legal services 86
Conditions of detention 86
Category of measurement 86
Framework in South Africa 86
Police custody 86
Remand detention 87
Accused persons' compliance with conditions of release 88
Compliance with conditions of release as a category of measurement 88
Framework in South Africa 88
Effectiveness and efficiency of the criminal justice system 89
Measuring effectiveness and efficiency in the criminal justice system 89
Framework in South Africa 89
Community perceptions of the effectiveness and efficiency of the criminal justice system 90
Measuring community perceptions 90
Framework in South Africa 90
Perceptions 90
Impact of resource allocation on community perceptions of the justice system 91

4. A review of arrest, police custody and remand detention in South Africa: Vulnerable groups 92
Children in conflict with the law 92
Constitutional framework 92
Legal framework 92
Arrest 93
Pre-trial assessments 94
Police custody 94
Diversion 95
Remand detention 95
Success and challenges of the Criminal Justice Act 96
A need for training 96
Dwindling numbers 96
Changes in remand detention 97
Child and youth care centres 98

Other vulnerable groups 98
Women 99
Arrest and police custody 99
Remand detention 99
LGBTI persons and communities 100
Migrants and refugees 100
Economically and geographically marginalised persons 101
Persons with mental health-disorders 101

5. Recommendations for reform 102
Measuring and tracking remand justice in South Africa 102
To the Office for the Criminal Justice System Review 102
To the South African Police Service 103
To the Department of Correctional Services 103
Police law reform 103
To the SAPS 103
Oversight and monitoring 103
To the Office for the Criminal Justice System Review 103
To the South African Police Service and the Civilian Secretariat for Police Service 104
To the National Prosecuting Authority 104
To the Department of Social Development and the South African Human Rights Commission 104
Use of force during arrest 104
Bail 104
Court utilisation and backlogs 105
To the Office of Chief Justice 105
To the South African Police Service 105
To the Office of the Chief Justice and the National Prosecuting Authority 105
Conditions of detention 105
To the Department of Correctional Services 105
To the Department of Justice and Constitutional Development 105
Community perceptions of the criminal justice system 105

Annexure 1:
Proposed categories and indicators for measuring remand detention in South Africa 106

CHAPTER 4: TANZANIA
Baseline assessment: The Luanda Guidelines and Tanzania's framework for arrest, police custody and pre-trial detention 123

1. Introduction 123

2. Overview of this review 124

3. Application of the international normative framework for human rights in Tanzania 124

4. Domestic framework for arrest, police custody and pre-trial detention in Tanzania 124
Human rights generally 124
Policing 125
Prisons 125
Other relevant sectors 125

5. Arrest 126
The Luanda Guidelines 126
Legal basis for arrest in Tanzania 126
Procedural safeguards in respect of arrest and the rights of an arrested person in Tanzania 127

6. Police custody 128
The Luanda Guidelines 128
Procedural safeguards in Tanzania 128
Conditions of detention in police cells in Tanzania 128
Questioning and confessions in Tanzania 129

7. Access to legal assistance services 129
The Luanda Guidelines 129
Access to legal assistance services in Tanzania 129

8. Pre-trial detention 130
The Luanda Guidelines 130
Framework for making pre-trial detention orders in Tanzania 130
Conditions of detention in remand facilities in Tanzania 131

9. Data collection and access to information 132
The Luanda Guidelines 132
Data collection and access to information in Tanzania 132

10. Standards of conduct and training for law enforcement officials 132
The Luanda Guidelines 132
Standards of conduct and training for law enforcement officials in Tanzania 132

11. Vulnerable groups 133
The Luanda Guidelines 133
General provisions pertaining to discrimination in Tanzania 134
Women 134
Children 134
Persons with disabilities 135
Non-nationals 136

12. Accountability architecture 136
The Luanda Guidelines 136
Accountability architecture in Tanzania – general observations 136
The CHRAGG 136
Judicial oversight and habeas corpus 137

Complaints mechanisms 137
Internal 137
External 137
Monitoring mechanisms 137
Independent oversight mechanisms 138
Inquests and inquiries 138

13. Opportunities for reform 139

CHAPTER 5: UGANADA
Baseline assessment: The Luanda Guidelines and Uganda's framework for arrest, police custody and pre-trial detention 149

1. Introduction 149

2. Methodology 149

3. Legislative framework 150

4. The Luanda Guidelines 150
Arrest 150
Arrests must be a measure of last resort 151
Searches 152
Register 152
Rights of arrested persons 152
Police custody 152
Legal assistance services 154
Pre-trial detention 156
Data collection 158
Complaints and oversight 158
Internal oversight and accountability mechanisms 158
Uganda Police Force 158
Uganda Prison Service 159
Uganda Peoples' Defence Forces 159
External oversight and accountability mechanisms 159
National mechanisms 159
Inspectorate of Government 160
Uganda Human Rights Commission 160
The judiciary 161
Parliament 161
Visiting justices 161
Civil society organisations 161
Regional mechanisms 162
African Commission on Human and Peoples' Rights 162
Special Rapporteur on Prisons and Conditions of Detention in Africa 162
African Court on Human and Peoples' Rights 163
Committee of Experts on the Rights and Welfare of the Child 163

International mechanisms 163
Human Rights Committee 163
Committee against Torture 164
Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other mechanisms 164
Universal Periodic Review 165
International Committee of the Red Cross 165
Vulnerable groups 165
Children 165
Women 166
Persons with disabilities 167
Non-nationals 167

5. Strategies for implementation of the Luanda Guidelines 168
Advocacy and raising awareness 168
Amendment and implementation of legislation 168
Use of the Luanda Guidelines by national oversight and accountability mechanisms 168
Use of regional mechanisms to promote the Luanda Guidelines 168
Coordinated efforts 169

6. Conclusion and recommendations 169
African Commission on Human and People's Rights 169
African Committee of Experts on the Rights and Welfare of the Child 169
African Court on Human and Peoples' Rights 170
Uganda government 170
Ugandan security agencies 170
Uganda Human Rights Commission 170
Civil society organisations 170

FOREWORD

In 2014, the African Commission on Human and Peoples' Rights ('the African Commission') adopted a progressive, subordinate instrument on the rights of persons in the context of pre-trial justice, namely the Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa. For practitioners, the standards articulated in what have become known as the 'Luanda Guidelines' for the location of their adoption, offer a blueprint for a rights-based approach to an area of criminal justice that is in crisis across the African continent. The impact of arbitrary and excessive arrest, police custody and pre-trial detention was well documented in advocacy efforts that led to the adoption by the African Commission of the Luanda Guidelines, and was of mutual and profound concern to the African Commission and all its stakeholders. The African Policing Civilian Oversight Forum (APCOF) is amongst those that therefore commend the African Commission for taking a robust and comprehensive approach to reducing the numbers entering the criminal justice system and for offering enhanced protections for individuals within the system.

The potential of the Luanda Guidelines to have a transformative impact on pre-trial justice practices in Africa depends on the extent to which all stakeholders use them to inform their reform work at the national level. APCOF has supported the African Commission in its leading role on the implementation of the Luanda Guidelines through, amongst other initiatives, pilot implementation projects in a number of countries. The aim of these pilot projects is twofold: firstly, to raise awareness of the Luanda Guidelines, and, secondly, to encourage national implementation strategies that will improve pre-trial justice at the national level while also serving as a positive example for other African states seeking to embark on such reform.

Across the target countries, the methodologies were similar, with some adaptation for particular contexts and national priorities: a baseline study of the current legislative, policy and administrative framework for arrest, police custody and pre-trial detention in the country as compared with the requirements of the Luanda Guidelines; a national consultation process to promote discussion of the study's findings and identify opportunities for reform; and the development of a national plan of action for reform.

This publication provides examples of the baseline studies completed in some of the pilot countries. Although the findings and priorities for reform identified in the baseline studies differ from country to country, there is one common issue of concern, namely that, while national legal frameworks may largely align with the Luanda Guidelines, the most significant challenge is the interpretation and application of that legal framework in practice. The national plans of action that were developed subsequent to these baseline studies reflect that concern and highlight the importance of a

coordinated approach to pre-trial justice across the criminal justice chain, as well as the critical role played by the police in exercising their powers at the very entry point of the criminal justice chain. APCOF is now working in partnership with stakeholders at the national level in a number of countries to address these and other issues.

As Honourable Commissioner Med SK Kaggwa, Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, has noted, 'the Guidelines reflect our collective aspirations of our states, national human rights institutions and civil society organisations in promoting a rights-based approach to this critical area of criminal justice'. The Luanda Guidelines make significant demands of our states in terms of the use and conditions of arrest, police custody and pre-trial detention – and so they should, given the extent to which pre-trial justice can impact the realisation of other interrelated rights, including the right to development. With the explicit link made between sustainable development and pre-trial justice in Goal 16 of the Sustainable Development Goals, the Luanda Guidelines are a timely initiative to support states parties in their work not only to realise the rights in the African Charter on Human and Peoples' Rights, but also to support sustainable development for all.

In 2017, the Luanda Guidelines may remain aspirational standards in practice. However, the African Commission, APCOF, and other stakeholders are actively encouraging and supporting national implementation efforts to realise the vision for pre-trial justice of the Commission as well as the aspirations of its stakeholders.

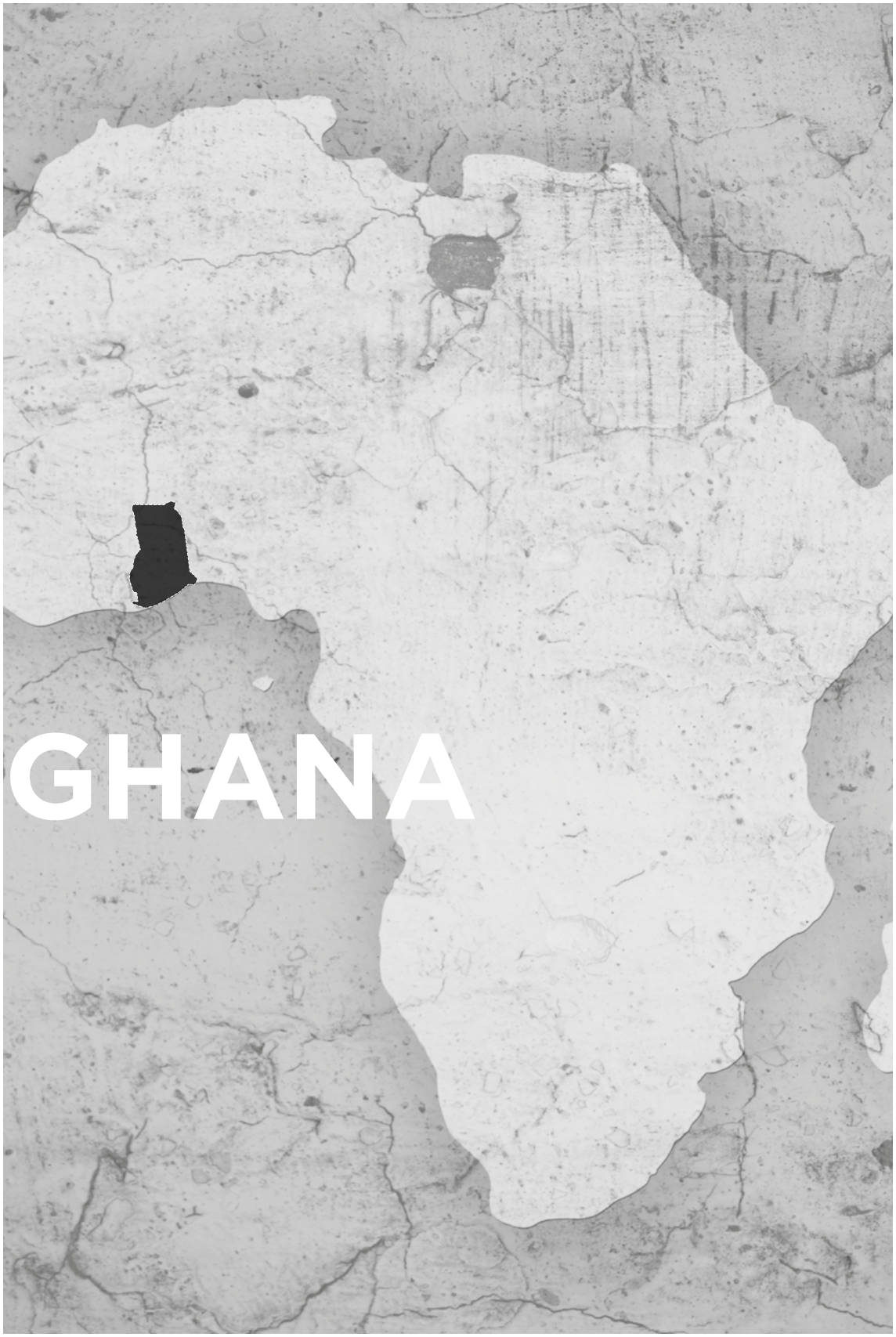
Louise Edwards

Programme Manager
African Policing Civilian Oversight Forum

ABBREVIATIONS AND ACRONYMS

AChHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADRM	alternative dispute-resolution mechanism
APCOF	African Policing Civilian Oversight Forum
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CHRAGG	Commission for Human Rights and Good Governance
CHRAJ	Commission on Human Rights and Administrative Justice
CHREAA	Centre for Human Rights Education, Advice and Assistance
CHRI	Commonwealth Human Rights Initiative
CJA	Child Justice Act
CPA	Criminal Procedure Act
CPC	Criminal Procedure Code
CPF	community policing forum
CRA	continuous risk assessment
CRC	Constitution Review Commission
CRPD	Convention on the Rights of Persons with Disabilities
CSA	Correctional Services Act
CSO	civil society organisation
CSP	Civilian Secretariat for Police
CYCC	child and youth care centre
DCS	Department of Correctional Services
DoH	Department of Health
DoJ&CD	Department of Justice and Constitutional Development
DPME	Department of Planning, Monitoring and Evaluation
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
DSD	Department of Social Development
EMPP	Electronic Monitoring Pilot Project
FHRI	Foundation for Human Rights Initiative

FOWODE	Forum for Women in Democracy
GSGDA	Ghana Shared Growth and Development Agenda
HIV	human immunodeficiency virus
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICT	information and communications technology
IGG	Inspectorate of Government
IGP	Inspector-General of Police
IPID	Independent Police Investigative Directorate
ISCCJ	Intersectoral Committee on Child Justice
JATT	Joint Anti-Terrorism Task Force
JCPS	Justice, Crime Prevention and Security
JICS	Judicial Inspectorate for Correctional Services
JLOS	Justice Law and Order Sector
LASA	Legal Aid South Africa
LGBTI	lesbian, gay, bisexual, transgender and intersex
LHRC	Legal and Human Rights Centre
MHRC	Malawi Human Rights Commission
MPS	Malawi Police Service
MTSF	Medium-Term Strategic Framework
NDP	National Development Plan
NGO	non-governmental organisation
NPA	National Prosecuting Authority
NPM	new public management
OCJ	Office of the Chief Justice
OCJSR	Office for the Criminal Justice System Review
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
OSISA	Open Society Initiative for Southern Africa
OSJI	Open Society Justice Initiative
PALU	Pan-African Lawyers Union
PPR	police–population ratio
PSU	Professional Standards Unit
SALC	Southern Africa Litigation Centre
SAPS	South African Police Service
TB	tuberculosis
TPF	Tanzania Police Force
TPS	Tanzania Prisons Service
UHRC	Uganda Human Rights Commission
UN	United Nations
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCED	International Convention for the Protection of All Persons from Enforced Disappearances
UNCRC	United Nations Convention on the Rights of the Child
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UPDF	Uganda Peoples' Defence Forces
UPF	Uganda Police Force
UPR	Universal Periodic Review


GHANA

CHAPTER 1

GHANA

Baseline assessment: The Luanda Guidelines and Ghana's framework for arrest, police custody and pre-trial detention

1. Introduction

During its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa ('the Luanda Guidelines'). The adoption of the Luanda Guidelines is part of the ACHPR's mandate to formulate standards, principles and rules on which African governments can base their legislation.[1] The African Charter on Human and Peoples' Rights (AChHPR) provides all people with the rights to life, dignity, equality, security, a fair trial, and an independent judiciary.[2] The Luanda Guidelines will assist states to implement these obligations in the specific context of arrest, police custody and pre-trial detention.

The ACHPR has acknowledged that the pre-trial justice environment presents significant and concerning human rights challenges in Africa. It has specifically pointed to arbitrary arrest and detention, the risk of torture and other-ill treatment, corruption, high rates of overcrowding in police cells and prisons, conditions of detention that do not meet minimum agreed standards, and the denial of procedural safeguards, as being of particular concern. According to the ACHPR, the consequences of the systematic violation of human rights in the pre-trial context contribute significantly to rights abuses and inefficiencies in the rest of the criminal justice chain, undermine the rule of law, and delay or deny fair criminal justice outcomes.

The Luanda Guidelines reflect the collective aspirations of African states, national human rights institutions and civil society organisations aimed at achieving a rights-based approach to pre-trial aspects. While the adoption of such guidelines is a significant step towards this objective, reform will only be achieved through sustained commitment by all stakeholders to implement the Luanda Guidelines at national level.

The ACHPR Special Rapporteur on Prisons and Conditions of Detention, Commissioner Med Kaggwa (Special Rapporteur) led the development of the Luanda Guidelines, and is now engaging stakeholders on an implementation strategy at national level. With funding support from the United Nations Development Programme's (UNDP) Regional Service Centre for Africa, and with technical support from the African Policing Civilian Oversight Forum (APCOF), the Special Rapporteur will present and

invite discussion on this review with the aim of identifying the gaps between Ghana's current legislative and policy framework for arrest, police custody and pre-trial detention, and the opportunities for strategic interventions to promote reform.

2. Overview of this review

This review has been drafted by APCOF and was reviewed by the Centre for Human Rights Education, Advice and Assistance (CHREAA).

The review is based on desktop research of the current legislative and policy framework for police arrest, police custody and pre-trial detention in Ghana and analyses this against the requirements of the Luanda Guidelines.

The gaps and challenges will be discussed during consultations at a future date in Accra, Ghana, and a strategic plan of action for implementation of the Luanda Guidelines will be developed by stakeholders from across government, state security institutions, academia and civil society.

3. Domestic framework for arrest, police custody and pre-trial detention

Application of the international normative framework for human rights in Ghana

Ghana has ratified most of the international treaties relevant to arrest, police custody and pre-trial detention, including the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Covenant on Civil and Political Rights (ICCPR). Although Ghana is only a signatory to both the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and the International Convention for the Protection of All Persons from Enforced Disappearances (UNCED), it is nevertheless obligated to abstain from actions that

would frustrate the purpose and objectives of OPCAT and UNCED.[3] As party to the AChHPR, Ghana has also accepted the competence of the African Court on Human and Peoples' Rights to examine cases received from individuals and non-government organisations relating to human rights abuses in Ghana.[4]

The Constitution of the Republic of Ghana of 1992 ('the Constitution') does not treat national law as supreme to international law, but requires all treaties (including international human rights instruments) to be ratified by Parliament before taking effect, thereby creating a dualist system.[5]

Overview of human rights guarantees in Ghana

Chapter 5 of the Constitution provides for the 'fundamental human rights and freedoms' afforded to all natural and legal persons in Ghana, which resonates with its obligations under the international normative framework for human rights protections.[6] The fundamental human rights and freedoms relevant to arrest, police custody and pre-trial detention include the following: the right to life; protection from the unreasonable use of force; the right to personal liberty; the right to be *immediately* informed of the reasons for arrest, custody and/or detention; the right to legal representation; the right to a fair trial and to equal protection before the law; the right to keep juvenile offenders separate from adult offenders; the right to the presumption of innocence; the right to administrative

justice; the right to privacy; the right to human dignity; and the right to equality and freedom from discrimination.[7]

The rights of women, children and persons with disabilities are further enhanced by the additional protections provided for in domestic legislation, including the Children's Act, People with Disabilities Act, and Criminal Code Act, as well as international treaties to which Ghana is a party, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the United Nations Convention on the Rights of the Child (UNCRC), and the Convention on the Rights of Persons with Disabilities (CRPD).[8] Despite the existence of a robust legal framework, reports indicate a significant gap between rights provided for in law compared with those realised in practice.[9]

In 2010, a Constitution Review Commission (CRC) was established to conduct public consultations for the purpose of making potential recommendations for reforms to the 1992 Constitution. In 2011, the CRC published its report, which contained various recommendations, including: (1) abolishing the death penalty and replacing it with life imprisonment without parole; and (2) separating the office of the Attorney General from the Ministry of Justice in order to enhance the independence and rights-based approach of the judiciary.[10] In response, the government of Ghana published a White Paper in 2012 which adopted the recommendation to abolish the death penalty and acknowledged the recommendation to separate the office of the Attorney General from the Ministry of Justice. To date, however, neither of these recommendations has been implemented.[11]

Overview of policing in Ghana

The Ghana Police Service is established in terms of Chapter 15 of the Constitution, which mandates it to perform its 'traditional role of maintaining law and order'.[12] Further, the Ghana Police Service is subject to the provisions of the Police Service Act of 1970 ('Police Service Act'). The Inspector-General is the Head of the Police Service and is responsible for the operational control and administration of the police.[13] The primary functions of the police are provided for in section 1 of the Police Service Act, which include: (1) preventing and detecting crime, apprehending offenders, and maintaining public order and the safety of persons and property; and (2) performing functions conferred by law upon a police officer and obeying all lawful orders and commands received from superiors in the Police Service.[14]

As of 2014, there were 651 police stations and posts in 11 regions throughout the country.[15] Further, the 2013 *Annual Progress Report on the Implementation of the Ghana Shared Growth and Development Agenda (GSGDA)* reported that there were 32 117 members of the Ghana Police Service and that the Police-Population Ratio (PPR) was 1:747 compared with 1:847 in 2012. The report also noted that, in 2013, the Police Service received a total of 220 489 complaints throughout the country.[16]

There are numerous and credible reports relating to police impunity, corruption, excessive use of force, and brutality by members of the Ghana Police Service. Moreover, police salaries are low, thereby contributing to systemic corruption within the police service.[17]

Overview of remand detention in Ghana

The Ghana Prison Service is established in terms of Chapter 16 of the Constitution[18] and is subject to the provisions of the Prisons Service Decree of 1972. Section 1 of the Prisons Service Decree mandates the Prison Service to: (1) ensure the safe custody of prisoners; (2) maintain the welfare of prisoners;

and (3) undertake the reformation and rehabilitation of prisoners.[19] Established within the Ministry of the Interior and under the control of a Director-General, the Prison Service is responsible for managing the operations of all correctional facilities in the country.[20]

According to data provided by the International Centre for Prison Studies, there was a total of 43 prison facilities in Ghana in 2014, and the total prison population stood at 14 728, including both remand and sentenced detainees. As of October 2014, the percentage of prisoners awaiting trial was 21.5% of the entire prison population.[21] Amnesty International reports that some prisoners remain in pre-trial detention for 'years', and that overcrowding and basic service delivery in Ghana's prisons are a significant human rights concern.[22] The physical infrastructure of many prisons in Ghana is in furthermore in 'urgent need of extensive repairs'.[23]

Other relevant institutions

The Office of the Attorney General is established in terms of Article 88 of the Constitution, which provides that the Attorney General is the principal legal advisor to the government of Ghana.[24] The Attorney General is responsible for the prosecution of all criminal offences in the country, and is further responsible for the institution and conduct of all civil cases on behalf of the state.[25] Victims of crime can initiate criminal proceedings for minor criminal offences with written permission from the Attorney General.[26]

4. Arrest

The Luanda Guidelines

Part I of the Luanda Guidelines provides a definition of 'arrest' and sets out the principles of a rights-based approach to arrest which resonate with those of the AChHPR and other relevant international norms. The rights to liberty and security of the person are central in executing a lawful arrest, as no one may be subject to arbitrary arrest and/or detention, and arrests may not be made on the basis of race, religion, sex, gender, political opinion, or in any other discriminatory manner. The Luanda Guidelines further promote alternatives to arrest, when appropriate, and encourage states to establish diversion systems in an effort to enhance the rehabilitation of offenders.[27]

In addition, the Luanda Guidelines provide an extensive list of procedural guarantees relating to arrest, which include the following: (1) only individuals authorised by the state to make an arrest are allowed to do so, and an arrest must be made pursuant to a warrant or be based on reasonable suspicion that an offence has been committed; (2) officials must clearly identify themselves and the unit to which they belong when making an arrest; (3) the use of force and firearms must be limited to situations where this is absolutely necessary; (4) searches must be conducted in a manner consistent with human dignity and the right to privacy; and (5) authorities must maintain, and provide access to, an arrest register that is regularly and accurately maintained.[28]

The rights afforded to individuals subject to arrest are provided for in Guideline 4, which rights include the following:

- The right to freedom from torture and other forms of cruel, inhuman and degrading treatment or punishment;
- The right to be informed of the reasons for arrest and of any charges that have been brought;
- The right to silence and freedom from self-incrimination;
- The right to legal assistance;

- The right to humane and hygienic conditions in police custody, including water and sanitation;
- The right to contact a family member, or person of choice, and consular authorities if relevant;
- The right to access information in an accessible format and the right to an interpreter;
- The right to apply for release on bail or bail pending an investigation;
- The right to promptly challenge the lawfulness of arrest before a competent judicial authority;
- The right to freely access complaints and oversight mechanisms; and
- The right to reasonable accommodation which ensures equal access to substantive and procedural rights for persons with disabilities.[29]

Guideline 5 further requires that the above rights be communicated orally and in writing to all persons subject to arrest and that such persons be provided with the necessary facilities to exercise those rights.[30]

One of the core objectives of the Luanda Guidelines is to reduce the number of arbitrary and excessive arrests in a given country, and to enhance the rights of people subject to arrest. To assess the extent to which this objective is currently realised in Ghana's existing legislative framework, this review considers the following:

- The legal basis for arrest;
- Information relating to the number of people subject to arrest and the grounds for arrest;
- Information relating to the profile of people subject to arrest;
- Procedural safeguards for arrest; and
- The rights of persons subject to arrest.

The performance of Ghana against the Luanda Guidelines is discussed below:

Legal basis for arrest in Ghana

Article 14(1)(g) of the Constitution of Ghana states that no person shall be deprived of his or her liberty unless there is reasonable suspicion that he or she has committed, or is about to commit, a criminal offence under the laws of Ghana.[31] Further, section 10 of the Ghana Criminal Procedure Code of 1960 (CPC) allows an officer to execute an arrest on the basis of a warrant, the witnessing of an offence, or upon reasonable suspicion that an offence has been, or is about to be, committed.[32]

Procedural safeguards in respect of arrest and the rights of an arrested person in Ghana

In addition to providing the legal basis for arrest, Article 14 of the Constitution also provides procedural guarantees and a list of rights afforded to individuals who are subject to arrest. Procedural safeguards include the right to be immediately informed of the reason for arrest and of the right to a legal representative of the person's choice.[33] Arrested and detained persons also have the right to be brought before a competent judicial authority within 48 hours of arrest,[34] as well as the right to presumption of innocence.[35] Additional safeguards are provided for in terms of the CPC. These relate to the conducting searches of arrested persons and the use of force.[36] There is, however, no duty on a police officer to identify himself or her-self before executing an arrest, and there is no requirement for the establishment or maintenance of an arrest register. In addition, private citizens are permitted to make arrests in accordance with certain rules and procedures.[37]

In terms of rights afforded to arrested persons, Article 15 of the Constitution provides an additional set of rights based upon human dignity, which includes the right to dignity as an inviolable human right, the right not to be tortured or subjected to other forms of cruel, inhuman or degrading

treatment or punishment; and the right not to be subjected to any other condition that minimises an individual's dignity or worth as a human being.[38]

Despite extensive constitutional and statutory protections, international human rights reports suggest that arbitrary and excessive arrests remain a significant problem in Ghana. The Commonwealth Human Rights Initiative (CHRI) reports that allegations of arbitrary arrest are one of the most common police-related complaints made to the Commission for Human Rights and Administrative Justice, as arrest often becomes a tool of investigation.[39] Of particular concern is the lack of adherence to the 48-hour rule, with reports of suspects being detained for numerous days without appearing before a court, and of warrants being indefinitely renewed or allowed to lapse while an investigation continues.[40] The use of 'Friday night round-ups' is also reported as being a deliberate measure by the police to circumvent the 48-hour rule.[41]

Although there are limitations on the use of force permitted by law enforcement officials in executing an arrest, these restrictions still exceed what is provided for in the Luanda Guidelines and other international laws. In Ghana, the use of force is not considered a measure of last resort, and, consequently, force can be used to make a lawful arrest, to prevent an escape, to suppress a riot or to prevent the commission of a crime, even if the force results in the killing of the person being arrested.[42] In this regard, there is no requirement of imminence or of a grave threat of danger before the use of lethal force is permitted. Various reports further indicate that the use of force and unlawful killing by the police is a serious problem in Ghana, particularly when making arrests or managing public gatherings.[43] The United Nations (UN) Committee against Torture has expressed concerns about the lack of accountability for the lethal use of force by the police, and about the use of torture and other ill-treatment in police custodial facilities.[44]

5. Police custody

The Luanda Guidelines

Part II of the Luanda Guidelines sets out procedural and other safeguards in respect of persons deprived of their liberty as a result of police custody. The provisions are all designed to promote freedom from arbitrary detention and to emphasise the use of police custody as an exceptional measure of last resort. To promote the rights of persons in police custody, the Luanda Guidelines highlight the need for independent monitoring of police cells and provide for safeguards during questioning and interrogation. Guideline 7 includes guidance on decisions to grant police bail.

Procedural safeguards during police custody in Ghana

Persons detained in police custody have the right to appear before a magistrate within 48 hours of arrest.[45] However, this time limit is not consistently maintained.[46] The CHRI reports that the majority of detainees it interviewed in a study published in 2013 had not been presented to a judicial authority within the required time period.[47]

There are numerous and credible reports that police occasionally demand money from suspects to secure release on bail.[48]

Concerns have been raised about Police Service Instruction 171 which requires medical examinations of detainees to be conducted under the supervision of government medical officers. This, it is argued, undermines the requirement in the Luanda Guidelines and the normative framework for the prevention of torture regarding the rights of detainees to an independent medical examination.[49]

Despite a constitutional prohibition against torture and other ill-treatment,[50] torture, as defined in Article 1 of the UNCAT, is not a criminal offence in the Criminal Code.[51] Accordingly, accurate statistics on the prevalence of torture and other ill-treatment, including in the context of police custody, questioning and arrest, are difficult to ascertain, as torture is not a recognised criminal offence in Ghana.

A November 2013 mission to Ghana by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment confirmed that torture does occur in individual cases during arrest, transfer to police stations and interrogation, but that there is no evidence that it constitutes a widespread and systematic practice of the Police Service.[52]

The Special Rapporteur observed scars on inmates' bodies in at least three of the stations visited (Nkawkaw central police station, Ejisu police station, the Cape Coast regional police station and Kotokuraba central police station) that were 'consistent with allegations of beatings with canes or batons'.[53]

Conditions of detention in police cells in Ghana

Conditions in police custody are described as 'extremely poor', with overcrowding, poor ventilation, and lack of access to water and basic hygiene and bedding.[54]

Questioning and confessions in Ghana

Evidence statements, including confessions, are only admissible if taken before an independent witness approved by the person under questioning or interrogation.[55] However, the Evidence Decree does not refer to the prohibition against torture, and there is no guidance for the judiciary about making assessments on the admissibility of confessions obtained under torture as evidence.[56]

In 2011, it was reported that the government was piloting the use of closed-circuit television in interrogations rooms at selected police station.[57]

The CHRI states that, of the respondents in its study who reported experiencing torture in police custody, 74% indicated the reason for such torture as being the extraction of a statement or confession.[58] However, there is no information regarding the number of police officers, if any, who have been investigated, charged or sentenced for using torture or other ill-treatment to extract evidence or a confession.

6. Access to legal assistance services

The Luanda Guidelines

Guideline 8 of the Luanda Guidelines sets out the requirements for the provision of legal assistance services for persons in conflict with the law. The use of the term 'legal assistance services' instead of 'lawyer' is deliberate, as it acknowledges that there is a range of legal service providers, such as paralegals, who can provide legal information and assistance for persons who are deprived of their liberty. However, this expanded definition does not detract from the importance of access to lawyers, which access must remain at the centre of any legal aid programme.

Access to legal assistance services in Ghana

The Constitution guarantees access to legal aid, and a legal aid scheme has been established to provide legal assistance services in criminal and civil matters for persons who earn the minimum

wage or less.[59] In 2008, it was reported that the legal aid scheme was handling up to 8 000 cases per year.[60] In practice, the system is underfunded and understaffed, and, accordingly the scheme only provides assistance for persons who are charged with capital offences or offences that attract a life sentence. Most suspects and detainees who are unable to afford a lawyer therefore do not have access to legal representation.[61]

Access to legal aid is described by Amnesty International as inadequate, resulting in 'limited or non-existent' legal aid services for eligible defendants.[62] A survey by the CHRI revealed that 47% of detainees interviewed were not advised of their right to legal representation, and the majority did not receive assistance unless their family was able to pay for a private lawyer.[63] Access to justice is further restricted by language barriers that prevent individuals from understanding court proceedings in the absence of translation or legal assistance services.[64]

The government has committed itself to increasing the capacity of the legal aid scheme in response to the CRC report and recommendations.[65]

The Justice for All Programme has made use of paralegals to address the challenges of prolonged pre-trial detention and trial delays. The programme embeds paralegals at the Prisons Service headquarters and all central prisons with the aim of reviewing pending cases and identifying cases for dismissal, trial or appeal.[66] There is, however, no information available on the work of the paralegal units.

7. Pre-trial detention

The Luanda Guidelines

Part III of the Luanda Guidelines establishes a detailed framework for the promotion of a rights-based approach to the making of pre-trial detention orders, and for safeguarding the rights of persons who are subject to such orders. As with police custody, such guidelines emphasise that pre-trial detention should be ordered only as an exceptional measure of last resort, and that states should have in place alternatives to detention. This part shifts the focus of the Luanda Guidelines from the police to the judiciary, providing guidance on the type of considerations that should be included in judicial decisions to order and review pre-trial detention, and sets out procedures in the case of delays in investigation or judicial proceedings that may result in prolonged pre-trial detention. Lastly, it establishes safeguards for persons who are subject to pre-trial orders, including that pre-trial detainees be held in officially recognised places of detention and have access to a lawyer.

Framework for making pre-trial detention orders in Ghana

There are credible reports that some police officers circumvent the remand system by signing remand warrants themselves and take detainees directly to prison, rather than producing suspects at court within 48 hours of arrest.[67]

There are also reports of prolonged pre-trial detention as a result of significant trial delays, with some detainees spending more time in pre-trial detention than the maximum sentence provided for the crime for which they are accused.[68] Potential contributors to delays are backlogs, including ineffective tracking and filing systems in the country's police stations where files are 'simply lost or overlooked'.[69] Amnesty International also reports that the lack of access to legal assistance services for pre-trial detainees further contributes to trial delays.

As of November 2013, Ghana's prison population stood at 14 101, of which 25% were pre- trial detainees.[70] In terms of the profile of persons who are most impacted by arbitrary or prolonged pre-trial detention, a study by CHRI, in collaboration with the UNDP and Open Society Justice Initiative (OSJI), revealed that pre-trial detention has a significant impact on low-income persons who are the 'breadwinners' for the family, usually 'married men, approximately twenty-nine years of age, with some school education and supporting a number of dependents'.[71]

In the same survey, the CHRI reported that two out of every five persons surveyed who were in pre-trial detention had been charged with non-violent economic crimes.[72] This raises significant concerns about the appropriate use of pre-trial detention orders, and whether the judiciary is imposing the least restrictive conditions that will reasonably ensure the appearance of the accused and protect victims, witnesses and the community. Also concerning is the 17% of interviewed detainees who were granted bail but were unable to comply with bail conditions[73] – which raises issues about the appropriateness of cash bail requirements when dealing with detainees who are socio-economically disadvantaged.

Review of pre-trial detention orders, and tracking detainees in the system, has been enhanced by the establishment of the Justice for All Programme. From 2009 to 2013, the programme reviewed 350 remand cases and reduced the number of detainees with expired remand warrants from 1 872 to 763.[74] However, there are reports that provisions requiring the court to grant unconditional or conditional release to persons who have been held in pre-trial detention for an unreasonable length of time are rarely observed in practice.[75]

Conditions of detention in pre-trial facilities in Ghana

Upon entry into the prison system, all detainees are informed of their rights and obligations.[76] Detainees are permitted to practise their religion and enjoy visitation and communication rights with relatives.[77]

The capacity of Ghana's prisons was increased with the inauguration of a new 2 000-capacity prison in 2011.[78]

The conditions of detention in Ghana, where most pre-trial detainees await trial, pose one of the most significant human rights challenges for the country.[79] The prison conditions are variously described as harsh, life-threatening and severely overcrowded (with prison capacity at 140%[80]), with poor sanitation conditions and scarcity of food and medical supplies.[81] It is reported that many prisoners rely on family members or non-government organisations for medicine, food and other basic supplies.[82] The conditions of detention in Ghana's prisons also pose a serious threat to the health of detainees, with reports of detainees contracting tuberculosis, malaria, HIV and hepatitis, or enduring chronic illness without adequate access to medical care.[83] In 2012, there were 94 'natural deaths in custody, including some as a result of malaria, tuberculosis and HIV/Aids.[84]

Torture by prison officials is an offence under the Prisons Service Act and subject to imprisonment of up to five years,[85] which is not commensurate with the seriousness of the crime and does not fulfil Ghana's obligations as signatories to the UNCAT. Severe overcrowding has a negative impact on the staff-to-prisoner ratio, which is currently at 1:7, which has diminished the physical safety of detainees, including pre-trial detainees. There are concerning reports of prisoner-prisoner violence, particularly violence committed by prisoners with some prescribed authority under Prison Standing Order No. 460 (known as 'black coats') who are permitted to exercise special powers and disciplinary functions.[86]

The Prison Service Decree permits corporal punishment in the prison system, with up to 15 strokes of a light cane for male prisoners who are over the 'apparent age' of 18 years,[87] although there are reports that caning is no longer practised.[88] Other permissible disciplinary measures include solitary confinement, food reduction and hard labour.

It is reported by some commentators that pre-trial detainees are generally held in a separate section of prisons from sentenced prisoners,[89] while others have observed that pre-trial detainees are never held separately.[90]

The Justice for All Programme was established in 2007 with the aim, inter alia, of addressing overcrowding in Ghana's prisons by reducing the number of pre-trial detainees. The programme is a joint initiative of the Supreme Court, the Ministry of Justice and the Attorney-General. One of the Justice for All initiatives is the Remand Review Project, which convenes courts in prisons to review cases of persons on remand.[91] Detainees who have spent a minimum of five years in pre-trial detention are eligible to have their remand reviewed through this programme.[92]

8. Data collection and access to information

The Luanda Guidelines

Part IV of the Luanda Guidelines sets out the requirement for registers at all stages of the pre-trial process – from arrest, to police custody and pre-trial detention – and provides for access to registers by detainees, lawyers, family members, oversight authorities, and any other organisation with a mandate to visit places of detention. This part further sets out the minimum information required to be recorded in a register and will eventually be accompanied by a Model Custody Register to be developed by the ACHPR.

Guidelines 39 and 40 of the Luanda Guidelines deal specifically with data collection and access to information, respectively. These provisions require that states establish processes for the systematic collection of disaggregated data on the use of arrest, police custody and pre-trial detention, and ensure that there are systems and processes to guarantee the right of access to information for persons in police custody and pre-trial detention, their lawyers, family members and others.

Data collection and access to information in Ghana

The Constitution enshrines the right of all persons accused of criminal offences to access all information relevant to their case, and the right to appeal. The law does not guarantee the rights of victims to receive information on the investigation, prosecution or appeal of their cases.[93] However, information can be obtained by victims through a request to the Registrar of the Court or the police.[94]

It is reported that record-keeping in the criminal justice system is inadequate, which contributes to prolonged pre-trial detention.[95]

By 2013, the Freedom of Information Bill, which was introduced in 2002, had not been passed by Parliament.[96]

There is no information on the extent to which different entities in the criminal justice chain, including the police, prosecutorial services, the judiciary and prisons, collect, analyse and share pre-trial detention-related data.

9. Standards of conduct and training for law enforcement officials

The Luanda Guidelines

Guideline 36 of the Luanda Guidelines provides that states must establish enforceable standards of conduct for law enforcement officials which are commensurate with internationally recognised standards of conduct, and must establish disciplinary processes for non-compliance. Reference in this section should be made to the UN Code of Conduct for Law Enforcement Officials in terms of the minimum standards that should be included in national codes of conduct.

Standards of conduct and training for law enforcement officials in Ghana

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reports that complaints of torture and other ill-treatment are generally in relation to the conduct of the police rather than prison officials.[97]

The Police Service Act sets out a range of behaviours that are classed as misconduct, and establishes a process for discipline through the National Redemption Council.[98] However, the Police Service Act does not set out basic positive standards of conduct for the police, and there is no code of conduct against which police performance in terms of the Constitutional Bill of Rights can be measured.

There is no recent information about the extent to which law enforcement officials receive training on human rights issues. Police personnel received training through the UNDP Access to Justice Programme until 2010,[99] and there is reference in the 2008 government report under the Universal Periodic Review to 'training programmes to ensure that police officers are sensitised and trained in the tenets of international and national human rights standards.[100] The Commonwealth Secretariat's Human Rights Unit worked with the Ghana Police Training College to develop a human rights training manual in 2004, but there is no information regarding whether that manual has been incorporated into basic or in-service training.[101] The CHRI has observed that training standards are 'poor' and that recruits generally have low levels of education.[102]

In 2008, 100 police prosecutors received training from the Kwame Nkrumah University of Science and Technology, in collaboration with Fordham University (US), in prosecutorial skills.[103]

10. Vulnerable groups

The Luanda Guidelines

Part VII of the Luanda Guidelines focuses specifically on the rights of vulnerable persons in pre-trial detention. It contains general provisions requiring states to enshrine the right to freedom from discrimination in law, and then establishes specific protections in relation to the following categories of persons, in addition to a general requirement that non- discrimination apply to all categories of persons afforded protection in the AChHPR, and *any other status*:

- Children
  - Definition of a child as anyone aged below 18 years.
  - Laws and policies to promote diversion and alternatives to pre-trial detention.
  - Safeguards for arrest, police custody and pre-trial detention.
  - Right to be heard and provision of legal assistance services.

  - A framework for the conduct of officials and the establishment of specialised units.
  - Access to third parties.

- Women
  - Safeguards for arrest and detention, including that women be held separately from male detainees.
  - Provisions regarding children who accompany women.

- Persons with disabilities
  - Definition of disability, which includes physical, mental, intellectual or sensory disability.
  - Legal capacity and access to justice.
  - Accessibility and reasonable accommodation.

- Non-nationals
  - Refugees.
  - Non-citizens.
  - Stateless persons.

General provisions pertaining to discrimination in Ghana

The Constitution prohibits discrimination on the grounds of sex, race, colour, ethnic origin, tribe, creed, religion, social or economic standing, or political opinion.

Children

The Children's Act defines a child as one below 18 years of age,[104] with the age of criminal responsibility being set at 12 years.[105] The Juvenile Justice Act 2003 emphasises reform and reintegration over a punitive and disciplinary approach to children in conflict with the law, with the principle of the best interests of the child reflected in this framework. However, the Committee on the Rights of the Child has expressed concern that the principle of the best interests of the child is not systematically applied in practice,[106] nor is the juvenile justice system as set out in the legislative framework functioning across the country. It expressed particular concern regarding the limited number of remand homes and the poor conditions of detention in those that do exist.[107]

Both the Juvenile Justice Act and the Children's Act of 1998 prohibit corporal punishment as a disciplinary measure in places of detention. However there are reports that children held in the Senior Correctional Facility in Accra (the only juvenile facility in Ghana) are subject to corporal punishment by prison officials.[108]

In correctional facilities, the age of detainees is not recorded on warrants, but the government has advised the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that the Prison Service will conduct an investigation into the age of a detainee if there are suspicions that he or she may be a juvenile, and will arrange for the transfer of any juveniles to the Senior Correctional Centre, a dedicated facility for juvenile detainees.[109] During his mission to Ghana in November 2013, the Special Rapporteur did observe juveniles being held with adults in the overcrowded Sekondi prison.[110]

Women

The Constitution prohibits discrimination on the grounds of gender. During its last review of Ghana, the Committee on the Elimination of All Forms of Discrimination against Women called on the

government to ensure that judicial officers receive training on the CEDAW and related domestic legislation.[111]

Access to justice for women in Ghana is impeded by low levels of legal literacy. In its 2006 review of Ghana, Committee on the Elimination of All Forms of Discrimination against Women recommended that the government collaborate with the Commission on Human Rights and Administrative Justice to raise awareness among women of human rights and legal literacy.[112]

Conditions of detention for women in Ghana's prisons are generally better than for the male populating, and there is less overcrowding by comparison. Nsawam prison has established a mother-and-baby unit, but there are no special allocations for pregnant or breastfeeding women in any of the country's other prisons.[113]

Persons with disabilities

The Constitution guarantees the right of persons with disabilities (defined as physical, sensory, intellectual and mental disabilities) to enjoy equality and all human rights and freedoms.[114] The Persons with Disability Act focuses mainly on employment, health care and access to infrastructure, but does not provide guidance on the rights of persons with disabilities in the criminal justice system.[115] The requirements for access to public spaces with 'appropriate facilities' for such access will nonetheless extend to the justice system. However, inaccessibility and the slow pace of infrastructure upgrade mean that the rights provided for in legislation are not realised in practice.[116]

Persons with mental disabilities are often taken by the police (sometimes at the request of family members) to prayer camps and hospitals without their consent,[117] with many experiencing prolonged periods of detention.[118] The Mental Health Act sets out procedures for persons with mental disabilities to challenge their detention. However, there is no information on the number of persons arrested and transferred to prayer camps or hospitals, nor whether they have access to the procedures to secure their release.

There is also no information on the extent to which persons with intellectual disabilities or mental illness are provided with special protection or access to medical assistance. It is reported that detainees with mental illness are not 'routinely identified and therefore not transferred to general or psychiatric hospitals'.[119]

Non-nationals

Migrant workers who are in conflict with the law have access to consular and diplomatic assistance.[120] There is nevertheless no information on the extent to which the rights of all categories of non-nationals are protected in the context of pre-trial detention.

Other vulnerable groups

Lesbian, gay, bisexual, transgender and intersex people (LGBTI)

Despite a constitutional guarantee of non-discrimination, there are numerous and credible reports that LGBTI persons are subject to discrimination and violence by law enforcement officials, including arbitrary arrest and ill-treatment in places of detention. In July 2011, the Western Regional Minister encouraged community reporting of persons suspected to be lesbian or gay and instructed Ghana's security forces to arrest LGBTI persons,[121] raising significant concerns about arbitrary arrest and detention, as well as discrimination by security forces against Ghana's LGBTI population.

Consensual sexual activity between same-sex adults is a criminal offence under the Criminal Code and punishable by up to 25 years' imprisonment.[122] Amnesty International reports that, in March 2012, two women were arrested and detained at James Town Police Station for engaging in illegal practices following their planned wedding ceremony, but were released following the intervention of their relatives.[123]

The Committee on the Rights of the Child and the Universal Periodic Review (UPR) have both recommended that same-sex acts be decriminalised.[124]

11. Accountability architecture

The Luanda Guidelines

Part VII of the Luanda Guidelines sets out an accountability architecture that is comprised of internal and external oversight, judicial, complaints and monitoring mechanisms, and also provides for remedies.[125] Furthermore, such guidelines establish procedures for serious violations of human rights in police custody and pre-trial detention, making it clear that the state has a responsibility to account for and explain any violations.[126]

Judicial oversight and habeas corpus

Redress for human rights abuses is available through an application and hearing at the Supreme Court.[127] The Habeas Corpus Act protects the right to liberty,[128] and the Constitution provides that all persons who are unlawfully detained have the right to compensation through civil law procedures.[129] However, there are numerous practical obstacles to accessing justice through this mechanism, including access to legal assistance services and delays in hearing matters due to backlogs at every level in the court system.[130] Although judicial independence is guaranteed in the Constitution,[131] there are credible allegations of impartiality and corruption, particularly bribery and the falsification of evidence in matters concerning the police.[132]

A retired Supreme Court judge heads a Judicial Complaints Unit with a mandate to receive complaints from the public in relation to, inter alia, unlawful arrest or detention, missing trial dockets and bribery. The unit received 158 complaints in 2012.[133]

Accountability architecture in Ghana

General

There are numerous and credible reports of impunity in cases of torture and other human rights abuses by law enforcement officials against person in conflict with the law,[134] particularly in relation to what is described as systematic police brutality.[135] Where police officers are disciplined, it is reported that they are dismissed, without any further consideration of criminal charges for serious violations of the law.[136] There is no statistical information on the number of law enforcement officials who have been investigated and prosecuted for disciplinary and criminal offences.

The Commission on Human Rights and Administrative Justice (CHRAJ) is a statutory mechanism that serves as Ghana's national human rights institution in accordance with the Paris Principles. It has a mandate to promote, protect and enforce human rights set out in Chapter V of the Constitution and to promote administrative justice.[137] It essentially serves three functions – that of a national human rights institutions, that of an anti-corruption agency and that of an ombudsman. It investigates

complaints from natural or legal persons[138] of corruption, abuse of power and unfair treatment by public officials, but must refer criminal investigations to the police or public prosecutors.[139] The CHRAJ submits annual reports to Parliament, which, in turn, reports annually to the President on the realisation of human rights.

There are reports that the CHRAJ does not receive adequate funding for its mandated activities,[140] including the resources necessary to conduct regular monitoring of places of detention.[141] The CHRAJ receives 13 000 complaints per year.[142] In 2011, it conducted monitoring of over half (28 out of 42) of Ghana's prisons, but, in the previous 22 months, it did not conduct any monitoring visits.[143]

The Law Reform Commission conducts research, receives proposals and makes recommendations to government on law reform.[144]

The police

Internal oversight is provided by the Police Intelligence and Professional Standards Bureau, which has a mandate to receive and investigate allegations of violence and human rights abuses against the police. According to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Bureau dismissed 108 officers, reduced the ranks of 132 officers, and issued a warning to 239 between January 2011 and June 2013, with 433 cases pending as at November 2013.[145] In serious cases, matters against police officers can, and are, referred to the Criminal Investigation Department for institution of criminal proceedings.[146] The most common form of complaint involves unprofessional conduct (poor handling of cases) or unfair treatment.[147] The Bureau also has a mandate to inspect police custody facilities, but there is no information on the extent to which these visits happen, nor of the results of any inspection.

There are reports that victims of police violence or abuses are reluctant to complain.[148]

Where complaints are in fact made, there are reports that the police fail to follow up and investigate.[149] The Inspector-General of Police (IGP) has ordered an investigation into the excessive use of force by the police in Accra,[150] but, at the time of writing, there was no information on the progress or outcome of that investigation.

Police Service Instruction No. 171 provides for medical examinations in the presence of a police officer. However, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has expressed concern about the lack of routine medical examinations, during investigations, by medical doctors that are qualified in forensic medicine, as well as about the lack of such examinations as a result of a court order or when a person is admitted to prison. This raises significant concerns about the extent to which Ghana is fulfilling its obligation to undertake independent and thorough investigations into torture and other serious human rights abuses.[151]

The Police Council is a constitutional body with a mandate to advise the President on policing-related matters.[152] There was, however, no information on the extent to which the Police Council engages in an external oversight role over the conduct of police, but the CHRI has expressed concerns that the Council lacks both the political independence and necessary resources to fulfil its mandate.[153]

The Auditor General and other independent bodies are reported to conduct inspections of places of detention.[154] In 1998, the government established a 'human rights hotline' for the public to report human rights abuses by the police to the Attorney General's Office.[155] As at April 2008, 70 cases had been reported to the hotline.[156] More recent statistics are, however, not available.

The Ministry for Internal Security also has an oversight function and has previously established commissions of inquiry into deaths resulting from police conduct.[157]

Prisons

Prisoners can make complaints of ill-treatment, neglect, misconduct or human rights violations against prison officials to the block commander, director or officer in charge of a prison, who is then responsible for ensuring that the complaint is received at command level.[158] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has expressed concern that only three complaints have been received by Prison Command, given that the entire prison population is approximately 15 000.[159]

Deaths in custody are reported to the police and coroner, and an autopsy is conducted by a doctor under the authority of the Ministry of Justice. In 2012, there were no reported cases of unnatural deaths recorded in Ghana's prison system.[160]

The government permits independent monitoring of prisons by local and international human rights groups. However, during 2013 there were no reported monitoring visits.[161]

Endnotes

1 African Charter on Human and Peoples' Rights (AChHPR), s 45(1)(b).

2 Ibid., s 2, 3, 5, 6, 7, 26.

3 United Nations Office of the High Commissioner for Human Rights, *Reporting Status for Ghana,* available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GHA&Lang=EN (accessed on 5 June 2015).

4 Protocol to the AChHPR on the Establishment of an African Court on Human and Peoples' Rights, Art. 34(6).

5 Constitution of the Republic of Ghana, 282 of 1992 ('Constitution'), Ch. VII, Art. 75(2). See, also, *New Patriotic Party v Attorney General* (CIBA Case), 1 GLR 378, 412 (1997–1998).

6 Ibid., Ch. VI, Art 33.

7 Ibid., Ch. V.

8 United Nations Office of the High Commissioner for Human Rights, *Reporting Status for Ghana,* available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GHA&Lang=EN.

9 Human Rights Council (2008), Summary prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(c) of the annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/3, 2 April 2008, at para 2.

10 Amnesty International (2012), *Ghana: Submission to the UN Universal Periodic Review,* 14th Session of the UPR Working Group, October–-November 2012, Index AFR 28/003/2012, at 4.

11 Amnesty International (2013), *Ghana: End Impunity through Universal Jurisdiction. No Safe Haven Series 10*, at 13–14, available at https://www.amnesty.org/download/Documents/.../afr280042012en.pdf (accessed on 5 June 2015).

12 Constitution, Art. 200(3).

13 Ibid., Art. 202(2).

14 Police Service Act 350 of 1970, s 1(1).

15 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 11.

16 Republic of Ghana (2013), *Annual Progress Report on the Implementation of the Ghana Shared Growth and Development Agenda for 2010--2013,* available at http://ghana.um.dk/en/~/media/Ghana/Documents/2013%20APR%20Final%20Version%20December%202014.pdf (accessed on 5 June 2015).

17 Commonwealth Human Rights Initiative (CHRI) (2007), *The Police, The People, The Politics: Police Accountability in Ghana,* Accra, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 11 November 2014), Ch. IV. See, also, U.S. Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

18 Constitution, Ch. XVI.

19 Prisons Service Decree, 1972 NRCD 46.

20 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez, Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 16.

21 International Centre for Prison Studies, *World Prison Brief: Ghana,* available at http://www.prisonstudies.org/country/ghana (accessed on 5 June 2015).

22 Amnesty International (2013), *Annual Report 2013: Ghana,* available at http://www.amnesty.org/en/region/ghana/report-- 2013 (accessed on 11 November 2014).

23 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 17.

24 Constitution, Ch. VII, Art. 88.

25 Ibid, Ch. VIII, Art. 88(3)–(6).

26 Criminal and Other Offences (Procedure) Act 30 of 1960, s 56(1).

27 Guidelines on the Conditions of Arrest, Police Custody and Pre--Trial Detention in Africa ('Luanda Guidelines'), Part I, 1–2.

28 Ibid., Guideline 3.

29 Ibid., Guideline 4.

30 Ibid., Guideline 5.

31 Constitution, Art. 14(1)(g).

32 Criminal Procedure Code 30 of 1960, s 10.

33 Constitution, Art. 14(2).

34 Ibid., Art. 14(3).

35 Ibid., Art. 15(3).

36 Criminal Procedure Code, s (3),(6).

37 Ibid., s 12.

38 Constitution, Art. 15(1)(2).

39 C HRI (2007), *The Police, The People, The Politics: Police Accountability in Ghana,* Accra, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 5 June 2015), at 29.

40 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices: Ghana for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 5 June 2015).

41 R Atuguba (2006), *Structure of the Ghana Police Service and Its Effect on Accountability,* Ghana, at 24.

42 Constitution, Art. 13.

43 C HRI (2007), *The Police, The People, The Politics: Police Accountability in Ghana,* Accra, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 5 June 2015), at 29–30.

44 Amnesty International (2012), *Ghana: Submission to the UN Universal Periodic Review,* 14th Session of the UPR Working Group, October–November 2012, Index AFR 28/003/2012, at 6.

45 Constitution, Art. 14(2).

46 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 25.

47 CHRI (2013), *The Socioeconomic Impact of Pretrial Detention in Ghana,* Open Society Justice Initiative (OSJI), New York, at 10.

48 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014). See, also, CHRI (2013), *The Socioeconomic Impact of Pretrial Detention in Ghana,* OSJI, New York, at 10.

49 Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 10.

50 Constitution, Art. 15(2).

51 Criminal Code 29 of 1960.

52 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 12.

53 Ibid.

54 Ibid., para 44.

55 Evidence Act 1975 (NRCD 323), s 120(2).

56 Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 13.

57 Ibid. at para 10.

58 CHRI (2013), *The Socioeconomic Impact of Pretrial Detention in Ghana*, OSJI, New York, at 33.

59 Constitution, Ch. XXVI, Art. 294; Courts Act, s 114(1) and Legal Aid Scheme Act 542 of 1977, s 2(2).

60 Government of Ghana (2008), *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Ghana,* UN Doc A/HRC/WG.6/2/GHA/1, 8 April 2008, at para 54.

61 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 26. See, also,Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 10.

62 Amnesty International (2013), *Annual Report 2013: Ghana,* available at http://www.amnesty.org/en/region/ghana/report--(accessed on 11 November 2014).

63 CHRI (2013), *The Socioeconomic Impact of Pretrial Detention in Ghana,* OSJI, New York, at 10.

64 Ibid.

65 Government of Ghana (2011), *Report of the Constitutional Review Commission: From a Political to a Developmental Constitution,* 20 December 2011, available at http://www.ghana.gov.gh/index.php/information/reports/2573- (accessed on 11 November 2014). See, also, Human Rights Council (2014), *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Visit to Ghana,* UN Doc A/HRC/26/25/Add.5, 6 May 2014, at para 24.

66 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 23.

67 Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 10.

68 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

69 Amnesty International (2012), *Prisoners Are Bottom of the Pile: The Human Rights of Inmates in Ghana,* at 27.

70 The International Centre for Prison Studies, available at www.prisonstudies.org (accessed on 11 November 2014).

71 CHRI (2013), *The Socioeconomic Impact of Pretrial Detention in Ghana,* OSJI, New York, at 9.

72 Ibid. at 10.

73 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

74 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 23.

75 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

76 Government of Ghana (2008), *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1: Ghana,* UN Doc A/HRC/WG.6/2/GHA/1, 8 April 2008, at para 25.

77 Ibid. at para 34.

78 Amnesty International (2012), *Ghana: Submission to the UN Universal Periodic Review,* 14th Session of the UPR Working Group, October–November 2012, Index AFR 28/003/2012, at 5.

79 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

80 The International Centre for Prison Studies, available at www.prisonstudies.org (accessed on 11 November 2014).

81 Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 10. See, also, UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 23; Amnesty International (2013), 'Public Statement: Ghana: Amnesty International welcomes Ghana's support of recommendations to improve conditions and reduce overcrowding in prisons but regrets Ghana's rejection of recommendations to decriminalise same-sex relations, and to combat the climate of homophobia and discrimination against LGBT persons. AI Index AFR

28/001/2013, 20 March 2013, available at http://www.amnesty.org/en/library/info/AFR28/003/2012/en (accessed on 11 November 2014); Human Rights Council (2008), Summary prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(c) of the annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/3, 2 April 2008, at para 10; US Department of State, Bureau of Democracy, Human Rights and Labor (2013). *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

82 Amnesty International (2012), *Ghana: Submission to the UN Universal Periodic Review,* 14th Session of the UPR Working Group, October–November 2012, Index AFR 28/003/2012, at 5.

83 Ibid. at 4. See, also, CHRI (2013), *The Socioeconomic Impact of Pretrial Detention in Ghana,* OSJIG, New York, at 10.

84 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 21.

85 Prisons Service Act, 1972 (NRCD 46), s 25.

86 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 19–20.

87 Prisons Service Decree, s 44.

88 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 60.

89 Ibid. at para 17.

90 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

91 Government of Ghana (2008), *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Ghana,* UN Doc A/HRC/WG.6/2/GHA/1, 8 April 2008, at para 53. See, also, Amnesty International (2012), *Ghana: Submission to the UN Universal Periodic Review,* 14th Session of the UPR Working Group, October–November 2012, Index AFR 28/003/2012, at 4. See, also, Ghana News Agency (2014), 'Ninety remand prisoners benefit from Justice for All programme, 8 August 2014, available at http://www.ghananewsagency.org/social/ninety--remand-- prisoners--benefit--from--justice--for--all--programme--78289 (accessed on 11 November 2014).

92 *Judicial Service Annual Report,* 2009.

93 Courts Act, s 70.

94 CHRI and ActionAid International (2009), *Audit of Key Legislation in Ghana for Information Access Opportunities: Report of the Findings,* at 8–9.

95 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

96 Amnesty International (2013), *Annual Report 2013: Ghana,* available at http://www.amnesty.org/en/region/ghana/report-- 2013 (accessed on 11 November 2014). See, also, Human Rights Council (2008), Summary prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(c) of the annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/3, 2 April 2008, at para 3.

97 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana UN Doc A/HRC/25/60/Add.1, at para 16.

98 Police Service Act 350 of 1970, s 18–19. See, also, Police Force (Disciplinary Proceedings) Regulations, 1974 (LI 993).

99 Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 25.

100 Government of Ghana (2008), National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/1, 8 April 2008, at para 24.

101 CHRI (2007), *The Police, The People, The Politics: Police Accountability in Ghana,* Accra, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 11 November 2014), at 24.

102 Ibid.

103 Government of Ghana (2008), National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/1, 8 April 2008, at para 30.

104 Juvenile Justice Act 653 of 2003.

105 Criminal Code 554.

106 Committee on the Rights of the Child (2006), Concluding observations: Ghana, UN Doc CRC/C/GHA/CO/2, 17 March 2006, at para 28.

107 Ibid. at para 73.

108 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 63.

109 Ibid at para 18.

110 Ibid.

111 Committee on the Elimination of Discrimination against Women (2006), Concluding comments of the Committee on the Elimination of Discrimination against Women: Ghana. UN Doc CEDAW/C/GHA/CO/5, 25 August 2006, at para 14.

112 Ibid.

113 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 66–67.

114 Constitution, Art. 29.

115 Persons with Disability Act 715 of 2006.

116 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

117 Human Rights Watch (2012), *'Like a Death Sentence': Abuses against Persons with Mental Disabilities in Ghana,* October 2012, at 11.

118 Ibid. at 12.

119 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 50.

120 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (2014), Concluding observations on the initial report of Ghana, UN Doc CMW/C/GHA/CO/1, 26 September 2014, at para 27.

121 Amnesty International (2013), 'Public statement: Ghana: Amnesty International welcomes Ghana's support of recommendations to improve conditions and reduce overcrowding in prisons but regrets Ghana's rejection of recommendations to decriminalise same--sex relations, and to combat the climate of homophobia and discrimination against LGBT persons', AI Index AFR 28/001/2013, 20 March 2013, available at http://www.amnesty.org/en/library/info/AFR28/003/2012/en (accessed on 11 November 2014).

122 Amnesty International (2013), *Annual Report 2013: Ghana,* available at http://www.amnesty.org/en/region/ghana/report--2013 (accessed on 11 November 2014).

123 Ibid.

124 Amnesty International (2013), *Annual Report 2013: Ghana,* available at http://www.amnesty.org/en/region/ghana/report-- 2013 (accessed on 11 November 2014). See, also, Amnesty International (2013), 'Public statement: Ghana: Amnesty International welcomes Ghana's support of recommendations to improve conditions and reduce overcrowding in prisons but regrets Ghana's rejection of recommendations to decriminalise same--sex relations, and to combat the climate of homophobia and discrimination against LGBT persons', AI Index AFR 28/001/2013, 20 March 2013, available at http://www.amnesty.org/en/library/info/AFR28/003/2012/en (accessed on 11 November 2014).

125 Luanda Guidelines, Part VII.

126 Ibid., Part V.

127 Constitution, Ch. XXVI, Art. 294; Courts Act, s 114(1) and Legal Aid Scheme Act s 33(1).

128 Habeas Corpus Act 244 of 1964.

129 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

130 Human Rights Council (2014), *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Visit to Ghana,* UN Doc A/HRC/26/25/Add.5, 6 May 2014, at para 24.

131 Constitution, Art. 127.

132 CHRI (2007), *The Police, The People, The Politics: Police Accountability in Ghana,* Accra, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 11 November 2014), at 57.

133 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

134 Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 19. See, also, Human Rights Council (2008), Summary prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(c) of the annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/3, 2 April 2008, at para 10.

135 Ibid. at par 19. See, also, US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

136 Human Rights Council (2008), Summary prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(c) of the annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/3, 2 April 2008, at para 19.

137 Commission on Human Rights and Administrative Justice Act 456 of 1993, s 7; Constitution, Ch. XVIII, Art. 219(2).

138 *Republic v Fast Track High Court: Ex parte CHRAJ and Richard Anane,* 21 December 2007.

139 AfriMAP and OSIWA (2007), *Ghana: Justice Sector and the Rule of Law,* 78.

140 Human Rights Council (2008). Summary prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(c) of the annex to Human Rights Council Resolution 5/1: Ghana, UN Doc A/HRC/WG.6/2/GHA/3, 2 April 2008, at para 3. See, also, Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 14; US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

141 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 37.

142 Human Rights Council (2014), *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Visit to Ghana,* UN Doc A/HRC/26/25/Add.5, 6 May 2014, at para 27.

143 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

144 Law Reform Commission Act 822 of 2011, s 1–3.

145 UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana UN Doc A/HRC/25/60/Add.1, at para 14.

146 Government of Ghana (2008*), National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Ghana,* UN Doc A/HRC/WG.6/2/GHA/1, 8 April 2008, at para 24. See also, UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 32.

147 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

148 Ibid. See, also, UN Human Rights Council (2014), *Report of the Special Rapporteur on Torture and Other Cruel,*

Inhuman or Degrading Treatment or Punishment, Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 34.

149 CHRI (2007) *The Police, The People, The Politics: Police Accountability in Ghana,* Accra, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 11 November 2014), at 30.

150 US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

151 UN Human Rights Council (2014), Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 36.

152 Constitution, Art. 203.

153 CHRI (2007), *The Police, The People, The Politics: Police Accountability in Ghana,* Accra, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 11 November 2014), at 51.

154 Committee against Torture (2011), Concluding observations of the Committee against Torture: Ghana, UN Doc CAT/C/GHA/CO/1, 15 June 2011, at para 18.

155 Human Rights Council (2008), *Report of the Working Group on the Universal Periodic Review: Ghana,* UN Doc A/HRC/8/36, 29 May 2008, at para 8–17.

156 Government of Ghana (2008), *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Ghana,* UN Doc A/HRC/WG.6/2/GHA/1, 8 April 2008, at para 31.

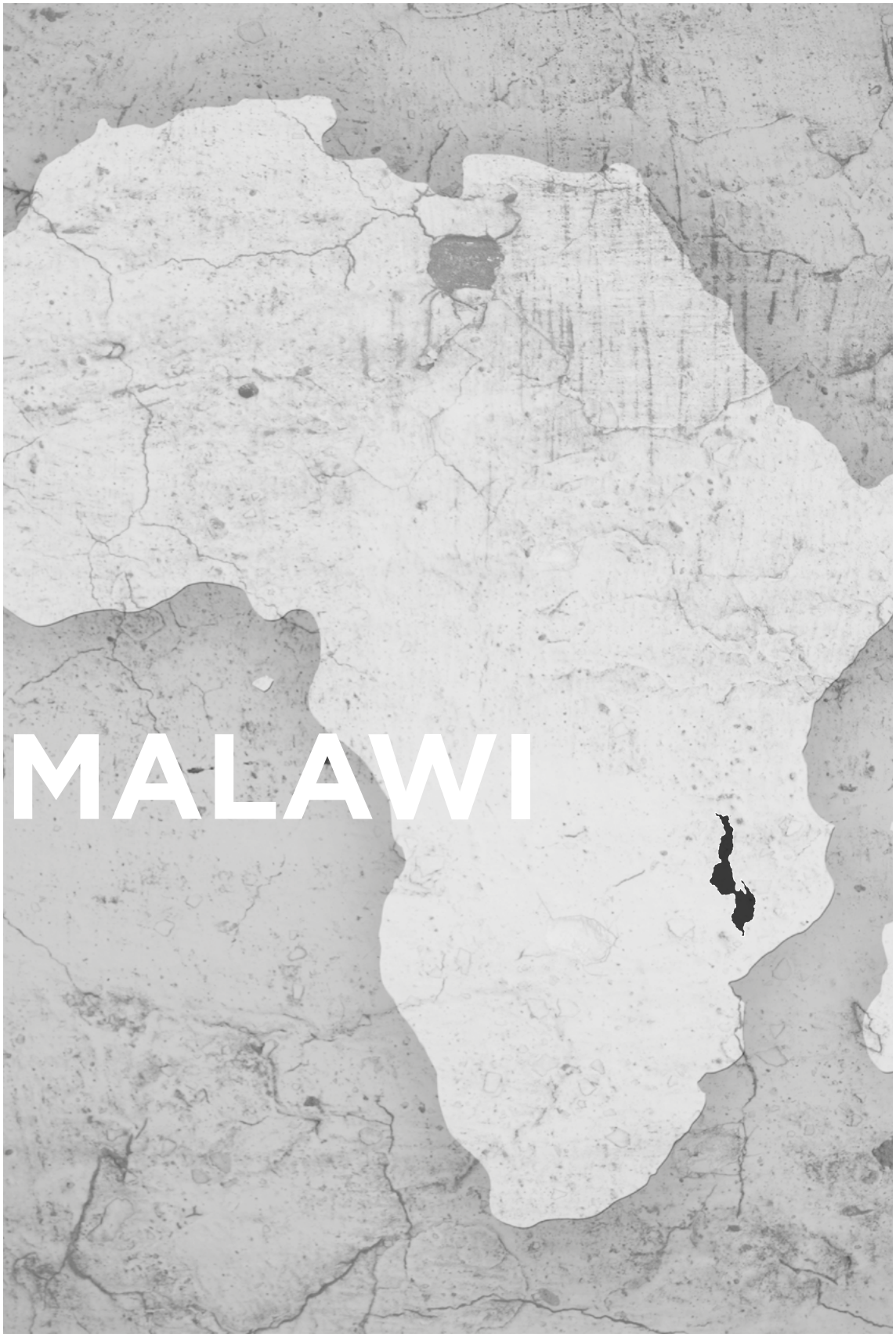
157 Commonwealth Human Rights Initiative (2007), *The Police, The People, The Politics: Police accountability in Ghana*, available at http://www.humanrightsinitiative.org/publications/police/police_accountability_in_ghana.pdf (accessed on 15 March 2017), at 63.

158 Prisons Service Act, s 22(1).

159 UN Human Rights Council (2014), Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 33. See, also, US Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013,* available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed on 11 November 2014).

160 UN Human Rights Council (2014), Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez: Addendum: Mission to Ghana, UN Doc A/HRC/25/60/Add.1, at para 21.

161 Ibid.


MALAWI

CHAPTER 2

MALAWI

Baseline assessment: The Luanda Guidelines and Malawi's framework for arrest, police custody and pre-trial detention

1. Introduction

During its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa ('the Luanda Guidelines'). The adoption of the Luanda Guidelines is part of the ACHPR's mandate to formulate standards, principles and rules on which African governments can base their legislation.[1] The African Charter on Human and Peoples' Rights (AChHPR) provides all people with the rights to life, dignity, equality, security, a fair trial, and an independent judiciary.[2] The Luanda Guidelines will assist states to implement these obligations in the specific context of arrest, police custody and pre-trial detention.

The ACHPR has acknowledged that the pre-trial justice environment presents significant and concerning human rights challenges in Africa. It has specifically pointed to arbitrary arrest and detention, the risk of torture and other-ill treatment, corruption, high rates of overcrowding in police cells and prisons, conditions of detention that do not meet minimum agreed standards, and the denial of procedural safeguards as being of particular concern. According to the ACHPR, the consequences of the systematic violation of human rights in the pre-trial context contribute significantly to rights abuses and inefficiencies in the rest of the criminal justice chain, undermine the rule of law, and delay or deny fair criminal justice outcomes.

The Luanda Guidelines reflect the collective aspirations of African states, national human rights institutions and civil society organisations to achieve a rights-based approach to pre-trial matters. While the adoption of the Luanda Guidelines is a significant step towards this objective, reform will only be achieved through sustained commitment by all stakeholders to implement the such guidelines at the national level.

The ACHPR Special Rapporteur on Prisons and Conditions of Detention, Commissioner Med Kaggwa, (Special Rapporteur) led the development of the Luanda Guidelines and is now engaging stakeholders on an implementation strategy at national level. With funding support from the United Nations Development Programme's (UNDP) Regional Service Centre for Africa, and technical support from the African Policing Civilian Oversight Forum (APCOF), the Special Rapporteur will present and invite

discussion on this review with a view to identifying the gaps between Malawi's current legislative and policy framework for arrest, police custody and pre-trial detention, and the opportunities for strategic interventions in order to promote reform.

2. Overview of this review

This review paper has been drafted by APCOF and was reviewed by the Centre for Human Rights Education, Advice and Assistance (CHREAA).

The review is based on desktop research of the current legislative and policy framework in respect of police arrest, police custody and pre-trial detention in Malawi, and analyses these aspects against the requirements of the Luanda Guidelines.

The gaps and challenges were discussed during a meeting in Lilongwe, Malawi, from 22 to 23 September 2014, with a strategic plan of action for implementation of the Luanda Guidelines to be developed by stakeholders from across government, state security institutions, academia and civil society.

3. Domestic framework for arrest, police custody and pre-trial detention in Malawi

Application of the international normative framework for human rights in Malawi

Malawi has ratified, or is a party to, most of the international treaties relevant to arrest, police custody and pre-trial detention.

Malawi has a dualist approach to the incorporation of international norms into the domestic legal framework, for the Constitution requires that legislation to implement international conventions be passed by the legislature before such conventions have direct application in Malawi.[3] However, the Supreme Court of Appeal has ruled that the state is nonetheless bound by the provisions of international conventions even if Parliament has not enacted enabling legislation, provided that the international norms are consistent with the Constitution.[4]

Overview of human rights guarantees in Malawi

Chapter 4 of the Constitution of Malawi enshrines a range of human rights and freedoms. Those relevant to the pre-trial environment include the rights to life, liberty and human dignity, to protection from torture and other ill-treatment, to protection from corporal punishment related to judicial proceedings, and to protection from discrimination. In addition, individuals have the right not to be detained without trial or to be detained because of political views or the inability to fulfil contractual obligations.[5]

The constitutional framework for the protection of the human rights of persons subject to arrest, police custody and pre-trial detention is generally consistent with the requirements of the Luanda Guidelines.[6] However, implementation of the constitutional protections has not been realised. This is particularly the case in relation to the presumption of innocence, to the right to reasonable and affordable bail conditions, to pre-trial detention time limits and to freedom from torture and other ill-treatment.[7]

The gap between the legislative framework and the practical realisation of rights can be attributed to a number of causes, including the lack of effective and efficient case-flow management,[8] impunity

resulting from ineffective complaints and oversight mechanisms,[9] a lack of effective training, constrained human and financial resources, and delayed reform of the Prisons Act.

Overview of policing in Malawi

The Malawi Police Service (MPS) is established in terms of the Constitution and, under the Ministry of Home Affairs, is responsible for preventing, investigating and detecting crime, apprehending and prosecuting offenders, preserving law and order, protecting life, property and fundamental rights and freedoms, and enforcing all laws.[10]

The MPS is regulated by the Constitution, the Police Act,[11] the Criminal Procedure and Evidence Code,[12] and the Penal Code.[13] As of 2011, it operated in four administrative regions, comprising 34 police stations, eight substations and 35 posts.[14] Branches that deal directly with pre-trial detainees include Administration, Community Policing Services, the Criminal Investigations Department, and Prosecutions and Legal Services.[15] In 2010, the police to population ratio was more than 1 000 persons per police officer, double the recommended target.[16]

Legislative reform in 2010 aligned the powers and functions of the police with the constitutional framework for the protection of rights, and an MPS Strategic Development Plan was in place until 2015.[17] However, there are numerous and credible reports, including from the government of Malawi, that the new legislative framework for policing has not been implemented and that arbitrary arrest, excessive use of force, and corruption, torture and ill-treatment persist.[18] Capacity, training and effectiveness are constrained by a lack of resources.[19]

Overview of remand detention in Malawi

Article 163 of the Constitution establishes the Malawi Prisons Service, which consists of penal institutions, labour camps, special and secure schools, and other institutions used to house, detain or secure persons, excluding holding cells in police stations.[20] Remand detainees fall under the responsibility of the Prisons Service, with the definition of prisoner in the Prisons Act including any person under detention in any prison, whether convicted or not.[21]

The Prisons Service falls under the Ministry of Internal Affairs and Public Security and is commanded by the Chief Commissioner for Prisons. All prisons officers are bound to promote and protect human rights, the Constitution, and any other law.[22] As of 2010, the warder to prisoner ratio was 1:11 across Malawi's 32 prisons, many of which were constructed prior to independence and require immediate and substantial infrastructure upgrades.[23]

Unlike the MPS, which has a new legislative framework that reflects constitutional standards and protections, the Prisons Service is subject to legislation that was enacted in 1955. The government of Malawi reports that the Prisons Act is currently under review by a Special Law Commission.[24]

Other relevant institutions

The Office of the Director of Public Prosecutions (DPP) is established by the Constitution and the DPP is responsible for all prosecutions in Malawi. However, such office operates without enabling legislation and is subject to significant structural and resource constraints.[25]

The judiciary, which consists of the Supreme Court, High Court and Magistrate's Court, is led by the Chief Justice and is responsible for the independent and impartial interpretation, protection and enforcement of the Constitution and all other laws of Malawi.[26] The effectiveness of the judiciary in

dealing with pre-trial detention has been limited by capacity constraints and the central role of the prosecution in determining the pace and veracity of pre-trial proceedings. Regarding the latter, the role of the judiciary in providing effective oversight in respect of pre-trial detainees has recently been strengthened by amendments to the Criminal Procedure and Evidence Code, which now establishes pre-trial custody limits.[27]

4. Arrest

The Luanda Guidelines

Part I of the Luanda Guidelines sets out the framework for arrest that accords with the AChHPR and other relevant international norms. The rights to liberty and security of the person are central to this part, and the grounds for arrest in Guideline 2 are designed to address issues of arbitrary arrest and to limit the use of arrest to exceptional circumstances as a measure of last resort. The Luanda Guidelines also promote alternatives to arrest, where appropriate, for minor crimes and encourages states to establish diversion systems.

The Luanda Guidelines set out in detail a range of procedural guarantees concerning arrest, including the grounds for arrest, requirements for officials to identify themselves, limitations on the use of force and firearms, a framework for the conduct of searches, and provision for maintenance of an arrest register.[28] The rights of an arrested person are set out at length in Guideline 4 and include the right to:

- Freedom from torture and other ill-treatment;
- Be informed of the reason for arrest and any charges;
- Silence and freedom from self-incrimination;
- Access legal assistance, a family member or other person of choice, and medical assistance;
- Humane conditions in police custody;
- Information in an accessible format;
- Release on bail or bond;
- Challenge the lawfulness of arrest;
- Freely access complaints and oversight mechanisms; and
- Reasonable accommodation for persons with disabilities.

Guideline 5 requires that arrested persons be informed of the above rights in a language and format that are accessible and understandable, and of the right to the necessary facilities to exercise these rights.

Ultimately, the Luanda Guidelines seek to reduce the number of unnecessary and arbitrary arrests and to protect persons subject to arrest from human rights abuses. To determine the extent to which this is realised by the current framework in Malawi, the present review considers the following issues:

- The legal basis for arrest, information on the number and profile of persons who are subject to arrest, and the grounds for arrest.
- Procedural safeguards for arrest and the rights of persons subject to arrest.

Malawi's performance against these provisions is discussed below.

Legal basis for arrest in Malawi

The MPS is the primary agency responsible for arrests in Malawi. Arrests are usually made by the Criminal Investigations Department, either on its own initiative or at the direction of the DPP or other

agencies.[29] The law provides the police with power to grant bail in certain minor cases, or to divert suspects from the criminal justice system, on the basis of the nature and circumstances of the offence, the views of the victim, and personal conditions of the suspect, such as age or disability.[30] The police must report arrest, bail and custody decisions to the nearest magistrate's court so that there is judicial oversight over persons held in police custody.[31]

Despite constitutional guarantees of freedom from arbitrary arrest, there are numerous and credible reports that the MPS overuses its power of arrest and arrests either in contravention of the law or on the basis of discrimination against particular persons or groups.[32] There are also concerns that the diversion options available to the police are not effectively utilised in relation to minor offences.[33]

For example, the MPS uses sections 180 and 184 of the Penal Code (the 'rogue and vagabond laws'), which are broadly and vaguely constructed, to arrest and detain vulnerable and marginalised persons.[34] The use of arrest in these circumstances is arguably unlawful or inappropriate, given the alternatives to arrest available to MPS officer for minor and petty offences.[35] According to a study by the Southern Africa Litigation Centre (SALC) and the CHREAA:[36]

> The arrest of persons for minor nuisance-related offences is often applied disproportionately to the poor in society, who are more likely to be assumed to [commit] such offences, and are more likely to be found in circumstances that could lead to such arrests and who are less able to assert their rights and access legal support to dispute unlawful arrests.

Research by the Open Society Initiative for Southern Africa (OSISA) revealed that, in the majority of cases where arrests are made pursuant to the 'rogue and vagabond laws', the individuals charged are either discharged or acquitted.[37] This raises significant concerns about the appropriateness of these Penal Code provisions and the extent to which MPS officers are exercising their discretion in conducting arrests in such circumstances or diverting suspects from the criminal justice system.

Further, Article 19(6) of the Constitution, in line with the Luanda Guidelines, prohibits arrest and detention for failing to fulfil a contractual obligation. However, the government of Malawi has confirmed reports that the MPS has indeed arrested people on the basis of a failure to pay debts.[38]

Procedural safeguards in respect of arrest and the rights of an arrested person in Malawi

In terms of Article 42 of the Constitution of Malawi, persons subject to arrest have the right to:[39]

- Be promptly informed of the reason for their arrest and in a language they understand;
- Consult confidentially with a legal practitioner of their choice and to be informed of this right promptly, or, where the interests of justice so require, be provided with the services of a legal practitioner by the state;
- Silence;[40]
- Be charged within 48 hours;[41]
- Be treated in a manner that is consistent with human dignity;
- Challenge the lawfulness of their arrest either in person or through a legal practitioner before a court of law;
- Release if the arrest is unlawful;
- The presumption of innocence;[42] and
- Bail pending trial.[43]

Although the constitutional guarantees afforded to persons under arrest in Malawi mirror the requirements of the Luanda Guidelines, there are significant concerns about the extent to which these standards are met in practice. This includes failure to inform suspects of the reason for their arrest, of their right to legal counsel, and of their right to be released on bail.[44] The OSISA study identified lack of resources and a lack of knowledge of the procedural safeguards as factors contributing to the lack of implementation of the constitutional guarantees.[45]

Of particular concern is the failure by the MPS to adhere to the requirement that an arrested person be charged and brought before the court within 48 hours.[46] The government of Malawi acknowledges that the time limits are not always respected,[47] and in fact the OSISA study found that 11 of 87 suspects held in Lilongwe at the time that the fieldwork was conducted had been held in detention for more than five days.[48]

There are also concerns about the excessive use of force and firearms by the police during arrests,[49] despite the legal framework for the lawful use of force and firearms by the MPS that is based on the international normative framework.[50]

Concerns about the use of force and firearms extend to reports of extrajudicial executions of suspects, in respect of which there have been few prosecutions of alleged perpetrators.[51]

Furthermore, there is concern about the application of section 35 of the Police Act, which provides the police with extensive powers to search without a warrant.[52] The United Nations (UN) Human Rights Committee has called on the government to repeal the law so as to prevent searches that interfere with liberty and privacy.[53] In consequence, the relevant provision was referred to the Law Commission for review and possible revision in 2014 (the outcome of such review was not known at the time of writing).[54]

5. Police custody

The Luanda Guidelines

Part II of the Luanda Guidelines sets out procedural and other safeguards in respect of persons who are deprived of their liberty as a result of police custody. The provisions are all designed to promote freedom from arbitrary detention and emphasise the use of police custody as an exceptional measure of last resort. To promote the rights of persons in police custody, the Luanda Guidelines highlight the need for independent monitoring of police cells and provide for safeguards during questioning and interrogation. Guideline 7 includes guidance on decisions to grant police bail.

Procedural safeguards during police custody in Malawi

In addition to the rights set out above in relation to arrest, the Constitution of Malawi affords persons in police custody the right to be informed of the reason for their detention in a language that they understand (including the right to an interpreter[55]), the right to communicate with their next of kin, partner, spouse, religious counsellor or medical practitioner, the right to challenge the lawfulness of their detention, and the right to be released if such detention is unlawful.[56]

The procedural safeguards set out in Malawian law reflect the provisions of the Luanda Guidelines. However, there are numerous and credible reports that these safeguards are not always guaranteed in practice for reasons similar to those with respect to the failure to properly safeguard rights during arrest, namely inadequate resources and training.[57]

In relation to the right to police bail, officers have a discretion to determine whether a suspect will be granted bail or, if the interests of justice require detention, will be held in police custody prior to appearing before a judge within 48 hours of arrest.[58] If held in police custody, suspects have the right to treatment appropriate to their status as an unconvicted person.[59] There are reports that the MPS circumvents the 48-hour rule by using 'temporary remand warrants', that officers solicit bribes in exchange for granting bail to suspects, and that officers make decisions to grant bail based on levels of overcrowding rather than on the merits of the case.[60] The OSISA report found that, in Blantyre, Lilongwe, Mzimba, Thyolo and Zomba, detainees in police custody were held beyond the 48-hour limit, with the longest custody period recorded being seven months in Lilongwe.[61]

Conditions of detention in police cells in Malawi

The Constitution of Malawi recognises the right of all persons deprived of their liberty to be treated with respect and dignity, and to be held in humane conditions.[62] All pre-trial detainees have the right to treatment that accords with their status as an unconvicted person, to freedom from torture and other ill treatment, and to, at least, the provision of reading materials, adequate nutrition and medical treatment at the expense of the state.[63]

However, ill-treatment of detainees (whether deliberate or as a result of conditions of detention that do not meet the basic minimum standards for custodial facilities in relation to food, water and sanitation) is reportedly widespread.[64] Overcrowding is endemic,[65] and detainees in police custody do not have adequate access to medical assistance.[66] Furthermore, police station budgets do not allow for the provision of food for detainees, with many relying on their families for sustenance.[67] Allegations of torture and other ill-treatment (including excessive force and sexual abuse) persist,[68] and there are reports of deaths in police custody.[69]

Police holding facilities are not purpose-built (with many having no windows), are old, and are not regularly maintained.[70] The MPS has a programme to maintain and upgrade existing police structures and is reportedly constructing new buildings.[71] However it is not clear how this will be applied to the current police holding cells, many of which are in urgent need of upgrading.[72]

Questioning and confessions in Malawi

The Constitution guarantees the presumption of innocence, the right to remain silent, and the right not to be compelled to make a confession or admission.[73] The right to remain silent extends to interrogations as well as trial,[74] and evidence obtained in violation of this right, and of the right not to be tortured, is not admissible in court.[75] Moreover, courts should only admit into evidence confessions that are corroborated by supporting evidence, unless the court is 'satisfied beyond reasonable doubt that the confession was made by the accused and that its content are materially true'.[76]

Despite these protections, there are reports that police interrogators do use torture and other ill-treatment to obtain confessions and other evidence from suspects and witnesses.[77]

6. Access to legal assistance services

The Luanda Guidelines

Guideline 8 of the Luanda Guidelines sets out the requirements for the provision of legal assistance services for persons in conflict with the law. The use of the term 'legal assistance services' instead of 'lawyer' is deliberate, as it acknowledges that there is a range of legal service providers, such as

paralegals, who can provide legal information and assistance for persons who are deprived of their liberty. However, this expanded definition does not detract from the importance of access to lawyers, which access must remain at the centre of any legal aid programme.

Access to legal assistance services in Malawi

The Constitution guarantees the right of all suspects to consult confidentially with a legal practitioner of their choice and to be informed of this right promptly. Where the interests of justice so require, the Constitution also provides suspects with access to a legal advisor provided for by the state.[78]

In 2011, the Legal Aid Act was enacted, establishing an independent and decentralised Legal Aid Bureau. 'Legal aid' is defined in the Act as including legal advice, legal assistance, representation and civic education.[79] The Legal Aid Bureau is also empowered to enter into agreements with civil society partners for the delivery of legal assistance services in recognition of the central role currently played by civil society organisations (CSOs) with regard to legal and paralegal services across the country.[80] At the time of writing, the Legal Aid Bureau was not yet operational.

Currently, state legal assistance services are provided by the Legal Aid Department, which operates under the Ministry of Justice. Eligibility is on the basis of means and income, which are determined by a magistrate.[81] In practice, access to legal aid is constrained by a lack of financial and human resources,[82] as well as by the failure of the current scheme to extend its reach beyond Blantyre, Lilongwe and Mzuzu.[83] Not all persons who are unable to afford legal representation currently access legal aid services, as resource constraints generally limit assistance to all but homicide suspects.[84]

CSOs, such as the Centre for Legal Assistance and the Paralegal Advisory Service Institute, provide additional legal assistance services for vulnerable, marginalised and disadvantaged persons and those subject to excessive judicial delays.[85] The Paralegal Advisory Service Institute, for example, has 30 paralegals providing assistance for approximately half of Malawi's pre-trial detention population.[86]

7. Pre-trial detention

The Luanda Guidelines

Part III of the Luanda Guidelines establishes a detailed framework to promote a rights-based approach to making pre-trial detention orders, and to safeguard the rights of persons who are subject to such orders. As with police custody, the such guidelines emphasise that pre-trial detention should only be ordered as an exceptional measure of last resort, and that states should have in place alternatives to detention. This part shifts the focus of the Luanda Guidelines from the police to the judiciary, providing guidance on the type of considerations that should be included in judicial decisions to order and review pre-trial detention, and sets out procedures in the case of delays in investigation or judicial proceedings that may result in prolonged pre-trial detention. Lastly, it establishes safeguards for persons who are subject to pre-trial orders, including that pre-trial detainees be held in officially recognised places of detention and have access to a lawyer.

Framework for making pre-trial detention orders in Malawi

In Malawi, an accused can be granted bail by the police (see above) or by the courts in accordance with the Constitution, the Criminal Procedure and Evidence Code, and the Bail (Guidelines) Act. Bail should be granted unless releasing the accused would be likely to prejudice the interests of justice,[87] except in serious matters such as murder and armed robbery when bail will be granted only if the

accused can demonstrate exceptional reasons to compel the court to do so (which shifts the burden of proof for bail from the state to the accused).[88] In decisions about bail, the court is required to consider the interests of justice as being paramount in all cases.[89]

The UN Human Rights Committee has expressed its concern that alternatives to detention are not 'adequately applied in practice' and has called on the government of Malawi to increase the use of non-custodial alternatives such as bail.[90]

The Criminal Procedure and Evidence Code sets pre-trial custody time limits, which are determined by reference to the seriousness of the offence and the jurisdiction of the court before which the accused will appear.[91] For example, the custody limit for persons held in custody pending trial before the High Court is 30 days prior to committal, and 60 days prior to trial.[92] For serious offences (such as murder, rape and robbery), the custody limit after committal but before trial is 90 days.[93] Pre-trial detention can be extended for a maximum of 30 days where the court is satisfied that there is sufficient cause.[94] This provision promotes judicial oversight over pre-trial detainees in accordance with provisions of the Luanda Guidelines.

It is not clear, however, which justice sector agency has responsibility for ensuring that time limits are met. The OSISA study, for instance, found that there was a 'lack of buy-in from, or incentives for, officials to ensure adherence to custody time limits', and that the necessary data collection and reporting procedures required to systematically account for the length of time that detainees spend in pre-trial detention were not in place.[95]

Further, although the time limits are a positive development, trial delays as a result of profound challenges in the judicial system, including case backlogs, lack of appropriate record-keeping, and under-resourcing (human, financial and administrative) of the DPP and courts, mean that pre-trial detainees do not enjoy their right to trial within a reasonable time.[96] There is no reliable data on the number of pre-trial detainees who have been held in detention beyond the time limits, but research indicates that homicide detainees spend an average of two to three years awaiting trial.[97]

To address prolonged pre-trial detention and to reduce the backlog of cases in the court system, Malawi introduced the system of 'camp courts' in 2011. In terms of this system, magistrates, court clerks and police prosecutors visit prisons in order to conduct hearings in respect of pre-trial detainees who are detained unlawfully, are unable to meet bail conditions, or have experienced prolonged detention. The presiding magistrates can then decide to grant or reduce bail, dismiss cases or set trial dates.[98]

Conditions of detention in pre-trial facilities in Malawi

Article 42(1)(b) of the Constitution provides that all persons who are deprived of their liberty have the right to conditions that are consistent with human dignity, including medical treatment, adequate nutrition, and the provision of writing materials. The Prisons Act Regulations further provide for cell equipment (including the provision of blankets and sleeping mats) and specific dietary standards.[99]

In 2009, the High Court of Malawi detailed significant human rights violations in Malawi's prisons, including lack of nutrition, torture and other ill-treatment, poor infrastructure and lack of access to medical assistance.[100] It ordered the government to improve conditions of detention in prisons within 18 months, with a focus on reducing overcrowding and improving detainees' diet.[101] In its judgment, the court rejected the government's argument that lack of resources limited measures to address prison conditions. In response, the government reported that it planned to improve prison facilities and diets, and to strengthen non-custodial measures in an effort to reduce overcrowding.[102] The

government has also committed itself to reviewing the Prison Act, which was enacted in 1955 and does not reflect the current constitutional framework.[103]

However, overcrowding remains a profound concern in Malawi,[104] with prisons at 227.5% of capacity.[105] Pre-trial detainees constitute 16.6% of the total prison population of 12 505.[106] As a result, the conditions of detention in Malawi's prisons pose a serious risk to the life and health of detainees, with reports of deaths from conditions such as pneumonia, diarrhoea and inadequate diet.[107] Overcrowding is also attributed to the failure by prisons to segregate convicted and pre-trial detainees,[108] despite the constitutional guarantee of segregation.[109]

8. Data collection and access to information

The Luanda Guidelines

Part IV of the Luanda Guidelines sets out the requirement for registers at all stages of the pre-trial process – from arrest, to police custody and pre-trial detention – and provides for access to registers by detainees, lawyers, family members, oversight authorities, and any other organisation with a mandate to visit places of detention. This part also sets out the minimum information required to be recorded in a register and will eventually be accompanied by a Model Custody Register to be developed by the ACHPR.

Guidelines 39 and 40 of the Luanda Guidelines deal specifically with data collection and access to information, respectively. These provisions require that states establish processes for the systematic collection of disaggregated data on the use of arrest, police custody and pre-trial detention, and ensure that there are systems and processes to guarantee the right of access to information for persons in police custody and pre-trial detention, as well as their lawyers, family members and others.

Data collection and access to information in Malawi

Regarding general access to information in Malawi, the Constitution provides all persons with the right to access all information held by the state, but the lack of access-to-information laws has limited the practical realisation of this right.[110]

Prison record-keeping has been described as 'generally reliable'.[111] However, there are serious concerns about data collection and record-keeping in the policing and court environments.

An OSISA study in 2011 found that 'incomplete records and lost files' were a widespread problem for persons on remand, which is a factor contributing to poor case-flow management and the lack of effective monitoring of statutory pre-trial detention time limits.[112] The study also found that, in the five police stations surveyed, proper records were generally maintained, although there were some variations among stations and concerns that time and dates of arrest, admission, release and transfer were not recorded in the Cell Book or Custody Book.[113]

9. Standards of conduct and training for law enforcement officials

The Luanda Guidelines

Guideline 36 of the Luanda Guidelines provides that states must establish enforceable standards of conduct for law enforcement officials that are commensurate with internationally recognised

standards of conduct, and must establish disciplinary processes for non-compliance. Reference in this section should be made to the UN Code of Conduct for Law Enforcement Officials in terms of the minimum standards that should be included in national codes of conduct.

Standards of conduct and training for law enforcement officials in Malawi

The Constitution of Malawi requires all law enforcement officers to uphold the Constitution, to observe the rule of law, and to act only in pursuance of their lawful authority.[114]

All MPS officers receive general training (which includes training in respect of human rights, prohibition against torture, internal investigations, victims' rights, sexual abuse and trafficking in persons[115]), as well as basic training in detainee management, with officers in Mzimba attending a one-month specialist course in custody management.[116] However, ongoing training (which is the responsibility of the Human Resources Development Branch of the MPS) with respect to human rights and detainee management is described as 'irregular',[117] with calls from the UN Human Rights Committee for the MPS to strengthen police training for all officers, including offering specialist courses on the use of force and firearms.[118] During 2010, only 7% of MPS officials received in-service training, and the MPS has expressed concern that the training is not reaching sufficient numbers of officers.[119] A review of the police training curriculum by Ngwira and Mhango found that the police training schools lacked sufficient resources and materials, and, in some cases, used outdated laws for human rights training.[120]

Internal discipline is the responsibility of the Police Service Commission, which is established in terms of the Police Act. Discipline regarding lower-ranking officers is handled by the regional disciplinary committees (with reviews by the National Disciplinary Committee), which, in 2010, heard 335 cases and charged 65 officers for infringements ranging from insubordination to drunkenness.[121] Serious offences are heard by the Internal Affairs Unit, which, in 2010, heard 76 complaints (including complaints of corruption, bribery and ill-treatment).[122] Internal disciplinary proceedings are not open to the public and have been the subject of criticism for lacking transparency and credibility.[123]

Article 167 of the Constitution establishes the Prison Service Commission with a mandate to appoint and discipline members of the Malawi Prison Service. The Prisons Act regulates normative standards of behaviour and discipline. However, no information could be obtained regarding the use of these procedures and the outcomes (if any) of discipline-related processes.

10. Vulnerable groups

The Luanda Guidelines

Part VII of the Luanda Guidelines focuses specifically on the rights of vulnerable persons in pre-trial detention. It contains general provisions requiring states to enshrine the right to freedom from discrimination in law, and then makes specific protections available in relation to the following categories of persons, in addition to a general requirement that non-discrimination apply to all categories of persons afforded protection in the AChHPR, and *any other status*:

- Children
  - Definition of a child as anyone aged below 18 years.
  - Laws and policies to promote diversion and alternatives to pre-trial detention.
  - Safeguards for arrest, police custody and pre-trial detention.

  - Right to be heard and provision of legal assistance services.
  - A framework for the conduct of officials and the establishment of specialised units.
  - Access to third parties.

- Women
  - Safeguards for arrest and detention, including that women be held separately from male detainees.
  - Provisions in respect of children who accompany women.

- Persons with disabilities
  - Definition of disability, which includes physical, mental, intellectual or sensory disability.
  - Legal capacity and access to justice.
  - Accessibility and reasonable accommodation.

- Non-nationals
  - Refugees.
  - Non-citizens.
  - Stateless persons.

General provisions pertaining to discrimination in Malawi

Article 20 of the Constitution guarantees equality of all people before the law and freedom from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. The Constitution also requires the state to take positive measure to promote the rights of persons with disabilities, the elderly and children, and to promote gender equality.[124] The MPS Strategic Development Plan (2011–2016) also focuses on improving police responses to gender, HIV/Aids, and human rights more generally.[125] However, the Strategic Development Plan does not include a targeted implementation plan, and improvements against these aims are therefore difficult to measure.[126]

Children

In addition to the procedural safeguards set out above in relation to police custody and pre-trial detention, the Constitution provides additional protections for children, namely: imprisonment as a last resort and for the shortest possible time; to be held separately from adults; to be treated in a manner consistent with the promotion of the child's sense of dignity and self-worth; to maintain contact with family through correspondence and visits; and to be treated in a manner consistent with the child's age and with a view to promoting reintegration into society.[127] The courts have interpreted Malawi's obligations in relation to juvenile justice as requiring consistency, in terms of both framework and implementation, with the Convention on the Rights of the Child, with an emphasis on the best interests of the child, rehabilitation, care, protection and justice.[128]

The Child Care, Protection and Justice Act provides the juvenile-justice framework for Malawi and has been described as an innovative law,[129] particularly section 132 which establishes child justice courts to adjudicate matters involving children. The child justice courts have a range of options available in terms of diversion and alternatives to detention.[130] Determinations on diversion must be made as soon as possible after arrest in order to ensure that children spend as little time as possible in detention.[131] Where children are determined to be unsuitable for diversion, they must be referred to a preliminary inquiry within 48 hours of arrest.[132] If detention is ordered in relation to a child, the Act requires that he or she be detained in a safety home instead of police cells.[133]

However, it should be noted in this context that children are frequently held in adult facilities. Despite the constitutional requirement that juvenile detainees be held separately from adults, there are numerous and credible reports that this segregation is not adhered to in police cells or in the prison system.[134] The SALC and CHREAA report found three children held in custody at the Limbe Police Station without food for three days.[135] In 2013, the Prison Service held 1 095 young offenders (aged between 18 and 21), including 79 pre-trial detainees, and the country's two reformatory centres held 90 children (82 boys and eight girls).[136]

The Act also provides that all children have the right to access legal representation. However, the constraints on the delivery of Legal Aid (as set out above) also apply in relation to juveniles in conflict with the law.[137]

The Act defines a child as a person under 16 years of age, not 18 years as required by the Luanda Guidelines.[138] Further, observers have expressed concerns that the current age for criminal responsibility, which is set at ten years, is too low.[139]

The MPS has established victim support and child protection units, which also offer assistance to children in conflict with the law through officers who have been trained in child justice.[140] The new Act also establishes a Board of Visitors that visits prisons four times a year to assess the status of juvenile detainees and to assist them in transferring from prison to reformatory schools.[141] At the time of writing, there was no information available on the activities of the victim support and child protection units or the Board of Visitors.

There are numerous concerns that the diversion and alternatives-to-detention provisions are not fully utilised in relation to child suspects.[142] The UN Committee on the Rights of the Child has called on the government of Malawi to ensure that the implementation of the new Child Care, Protection and Justice Act meets the minimum standards for procedural safeguards and conditions of detention for children in accordance with the international normative framework for child justice.[143]

Women

There are significant concerns about the treatment of women by law enforcement officials, including women who are held in police custody. Facilities for women are not always available at police stations, and the Malawi Human Rights Commission has reportedly found women being held in the reception area of police stations on account of a lack of separate facilities or spaces in the cells.[144] There are also inadequate hygiene facilities for women who are menstruating, breastfeeding or pregnant.[145]

Female sex workers are reportedly vulnerable to police harassment. The Malawi Human Rights Commission reports that the MPS recently conducted mass arrests of female sex workers, with many reportedly assaulted and raped by police during the arrests.[146]

For women in prisons, the conditions of detention are reportedly better than for the male population, largely because women make up a small percentage of detainees, including pre-trial detainees.[147] A visit to the Maula prison in 2011 revealed that there were only 11 female pre-trial detainees, compared with 486 men.[148] Women prisoners are reportedly segregated from male prisoners and are monitored by female guards and female prison officers.[149]

Concerns have, however, been raised about the extent to which rural women can access justice owing to the inadequate resources of courts, a lack of awareness of the framework for women's rights in Malawi, and the low levels of awareness at the community level about these rights.[150]

Persons with disabilities

Persons with disabilities in Malawi are protected against discrimination in relation to a number of areas of life (including employment, housing and political life), and the government has an obligation to implement positive measures to ensure access to transport, communication and information.[151]

In the context of policing, and depending on the nature of their disability, detainees may receive special assistance and, where possible, custody officer should promote and facilitate the granting of bail. For detainees with a physical disability, the police are required to seek advice from welfare authorities on the type of special provisions that will be required – including the extent to which detainees can keep assistance devices (such as wheelchairs and canes) – and on appropriate arrangements for accessing bathing and toilet facilities.[152]

Given the resource and infrastructure constraints outlined above, prison facilities in Malawi do not have the necessary modifications (such as ramps) to assist persons with physical disabilities.

Non-nationals

In 2010, Malawi was home to approximately 270 000 immigrants, including asylum seekers and refugees.[153] No other information was available about the treatment of non-nationals in police custody or pre-trial detention in Malawi. However, based on the tone of a presentation by the Malawi Police Service's Community Policing Service Branch about the 'Stop illegal immigrants project' (which is prima facie contrary to Malawi's obligations under the Refugee Convention and in terms of general human rights norms regarding refugees and asylum seeker), it is unlikely that methods of special treatment or procedural safeguards consistent with the Luanda Guidelines are respected.[154] There are reports that the police have intimidated refugees and asylum seekers and have detained refugees found illegally outside designated refugee camps.[155]

11. Accountability architecture

The Luanda Guidelines

Part VII of the Luanda Guidelines sets out an accountability architecture that is comprised of internal and external oversight, judicial, complaints and monitoring mechanisms, as well as remedies.[156] Furthermore, the such guidelines establish procedures for serious violations of human rights in police custody and pre-trial detention, making it clear that the state has a responsibility to account for and explain any violations.[157]

Judicial oversight and habeas corpus

Detainees have the right to challenge the lawfulness of their detention,[158] and the courts have in fact awarded compensation for false imprisonment.[159] Persons who allege a rights infringement can make a civil claim against the police or prison service. However, given the enormous challenges in accessing justice in Malawi (including delays, a lack of lawyers, language barriers, costs, and capacity constraints of the judiciary), few victims pursue civil claims, and, where they do, backlogs cause significant delays in adjudication.[160]

Accountability architecture in Malawi

Despite the existence, in practice and in law, of a number of institutions with oversight and complaints mandates, there is no effective accountability for policing or prisons in Malawi. However, developments

in relation to the establishment of an independent oversight authority for the police, and the potential for independent prison oversight through the reform of the current Prisons Act, indicate that the oversight environment may be moving towards meeting the requirements of the Luanda Guidelines. In order to make a positive impact, the new oversight mechanisms will need to adhere to the requirements for effective oversight set out in the study on police oversight mechanisms by the former Special Rapporteur relating to extrajudicial, summary or arbitrary executions.[161] This requires budgetary and operational independence and enforcement powers, among other key issues.

General

The Malawi Human Rights Commission (MHRC) is established in terms of the Constitution, and in accordance with the Paris Principles, as Malawi's national human rights institution.[162] In the absence of an office of an independent complaints commission, the MHRC is the main primary recipient of complaints against law enforcement personnel.[163] It has a broad mandate to investigate human rights violations, but its effectiveness has been limited by its lack of enforcement powers and by both capacity and resource constraints.[164] There have also been concerns about the independence of the MHRC as a result of the arrest of its chairperson, John Kapito, in 2012, an arrest attributed to his 'outspoken comments on human rights violations in the country'.[165]

The MHRC has the power to make unannounced visits to any place of detention and generally reports on its visits in its annual report. However, the MHRC has no enforcement powers and therefore its recommendations are not adopted or implemented by Parliament. In 2013, the MHRC received 11 complaints about the rights of prisoners and other detainees.[166] However, no information on the status of these complaints is available.

The Office of the Ombudsman has been established in terms of section 123 of the Constitution to investigate cases of injustice where there is no other practicable alternative, including through the courts or by way of appeal from a court.[167] In 2011, the Ombudsman received 31 complaints against the police, but the government acknowledges that enforcement of the Ombudsman's findings are challenged by its lack of enforcement powers.[168]

The police

Complaints about abuse of power or human rights violations can be made directly to the MPS.[169] Deaths in custody are referred to the Criminal Investigations Department for investigation, and the Internal Affairs Department is responsible for investigating police killings.[170]

However, there is no data regarding the number of complaints received and processed by the internal complaints mechanisms, or about the extent to which police officers have been sanctioned or disciplined or have faced criminal charges.[171] In relation to Internal Affairs Department investigations, it is reported that 'perpetrators of past abuses were occasionally punished, but investigations were often delayed, abandoned, or remained inconclusive'. [172]

The Police Act establishes the Independent Police Complaints Commission with a mandate to investigate cases of death or abuse at police stations, or in relation to any police action. According to the government, the Commission will be operational during the 2013/2014 financial year.[173]

The Police Act also establishes the Lay Visitors Scheme which affords local volunteers the opportunity to monitor conditions of detention in police cells. An OSISA report found that volunteers forming part of the scheme regularly inspected police stations.[174] However, there is no information regarding their findings.

The Malawi government has cited cases in which police officers have been charged and found guilty of arbitrary deprivation of life.[175] However, based on the information available, these cases are likely to be the exception, rather than the norm, in relation to arbitrary deprivation of life and the use of force by police officers.[176]

Prisons

Every prison has a welfare officer who can receive complaints about conditions of detention, and it is reported that prisoners can generally submit complaints without censorship or reprisal.[177] However, there is no information on the number of complaints received or on the outcomes of these complaints.

Section 169 of the Constitution establishes the Inspectorate of Prisons, an independent authority with the power to monitor conditions of detention, as well as the administration and functioning of prisons, and to receive and investigate complaints from detainees. The UN Human Rights Committee has, however, expressed concern that the Inspectorate of Prisons does not have sufficient capacity to effectively carry out its mandate. As part of the review of the Prisons Act, the Committee has called on the Malawi government to strengthen the Inspectorate's capacity and to improve the system of receiving, handling and resolving complaints received from detainees.[178]

The Prisons Act also empowers High Court judges to visit and inspect prisons, or to receive, or inquire into, any complaint from a prisoner. However, there is no information available on the extent to which this mandate is exercised, or on the outcomes of any complaints or inspections conducted.

The Prisons Act provides the Malawi Prisons Service with an oversight role in respect of pre-trial detainees by requiring that the Prisons Service determine whether the pre-trial detention of persons in its care is legally sanctioned, and to liaise with the criminal justice system regarding expired remand warrants.[179]

12. Opportunities for reform

The opportunities for reform of the pre-trial detention environment in Malawi was the subject of a meeting between the ACHPR, the UNDP, APCOF, the CHREAA and stakeholders from across government, state security institutions, the judiciary and other criminal justice actors, academia and civil society on 22 September 2014 in Lilongwe, Malawi. Below are preliminary entry points for that discussion aimed at the development of a strategic plan for the implementation of the Luanda Guidelines:

- Review of the MPS Strategic Development Plan post-2015 in order to promote inclusion of Luanda Guidelines standards on arrest, police custody, and police cell complaints and monitoring.
- Review of the Prisons Act.
- Review of training for the police, prisons, the DPP and the judiciary.
- Review of the pilot phase of the Lay Visitors Scheme for police cells.
- Development of the legislative, policy and administrative framework for the Office of the Independent Complaints Commission.
- Support for CHREAA's work to promote the declassification and decriminalisation of petty offences.

Endnotes

1 African Charter on Human and Peoples' Rights (AChHPR), s 45(1)(b).

2 Ibid, s 2, 3, 5, 6, 7, 26.

3 Constitution of the Republic of Malawi, 1977, s 211(1).

4 *Transport Equipment and Other v DP Vambhia*, Civil Application No. 19/1993 CAT. See, also, *Charles Kafantayeni and Others*, Constitutional Case No. 12 of 2005; *Adoption of CJ (An Infant)* (MSCA Adoption Appeal No. 29 of 2009).

5 Constitution of the Republic of Malawi, 2010, s 16–21.

6 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1.

7 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013*. See, also, Open Society Initiative for Southern Africa (OSISA) (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 22, 34.

8 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 2.

9 Freedom House (2010), *Countries at the Crossroads: Malawi,* available at http://www.freedomhouse.org/report/countries-crossroads-2010/malawi (accessed on 12 June 2012).

10 Constitution of the Republic of Malawi, s 153; Police Act 12 of 2010, s 4(1).

11 Police Act 12 of 2010.

12 Criminal Procedure and Evidence Code (Cap. 8:01 Laws of Malawi).

13 Penal Code (Cap. 7:01 Laws of Malawi).

14 Malawi Police Service (MPS), Research and Planning Unit (2011), *Annual Report of the Malawi Police Service for the Year Ending 31 December 2010*, Lilongwe, at 1.

15 Presentation by George Kainja, Deputy Commissioner of Police, Officer in Charge, Community Policing Services Branch, 'Malawi Police Service – Its Roles and Functions', made at Malawi Defence Force Military College, Salima, 8 July 2010.

16 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [44].

17 Government of Malawi (2011), *Malawi Police Service Strategic Development Plan, 1 July 2011 to 30 June 2015*, at 1.

18 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [44]; FE Kanyongolo (2006), *Malawi: Justice Sector and the Rule of Law,* Johannesburg, OSISA, at 18; United States Department of State (2011), *Country Reports on Human Rights Practices for 2011: Malawi*, available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/ (accessed on 1 September 2014). See, also, Human Rights Watch (2012), *World Report 2012: Malawi*, at 1; United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*; OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration*, CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 2.

19 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [44].

20 Prisons Act (Cap. 9:02 Laws of Malawi), s 8.

21 Prisons Act (Cap. 9:02 Laws of Malawi), s 2.

22 Constitution of the Republic of Malawi, 2010, s 164.

23 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [38].

24 Ibid., [36].

25 OSISA (2011), *Pre-trial detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 2.

26 Constitution of the Republic of Malawi, 2010, s 9, 11(2), 42(2), 104, 108(1), 110(1),.

27 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 31.

28 Guideline 3, Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa (Luanda Guidelines), adopted by the African Commission on Human and Peoples' Rights (ACHPR) at its 55th Ordinary Session, held from 28 April to 12 May 2014 in Luanda, Angola.

29 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 3.

30 Ibid. at 40.

31 Criminal Procedure and Evidence Code (Cap 08:1 Laws of Malawi), s 36.

32 United States Department of State (2011), *Country Reports on Human Rights Practices for 2011: Malawi*.

33 Southern Africa Litigation Centre (SALC) and CHREAA*, No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrest for Nuisance-Related Offences in Blantyre, Malawi,* June 2013, at 1.

34 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

35 SALC and CHREAA, *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrest for Nuisance-Related Offences in Blantyre, Malawi,* June 2013, at 1.

36 Ibid.

37 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, 2011, at 23.

38 Government of Malawi, *Initial Reports of States Parties to the ICCPR,* CCPR/C/MWI/1, 13 July 2014, [39] – [40].

39 Constitution of the Republic of Malawi, 2010, s 42.

40 See, also, *The Republic v Lucius Chicco Banda* (Criminal Appeal No. 1 of 2007).

41 See, also, *The Republic v Leveleve* (Misc Criminal Application No. 195 of 2002, Principal Registry, unreported).

42 See, also, *Amon Zgambo v The Republic* (MSCA Criminal Appeal No. 11 of 1998, unreported).

43 See, also, Bail (Guidelines) Act.

44 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

45 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 24.

46 Ibid.

47 Government of Malawi, *Initial Reports of States Parties to the ICCPR,* CCPR/C/MWI/1, 13 July 2014, [36]. See, also, Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [78].

48 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 55.

49 Freedom House, *Freedom in the World 2014: Malawi,* available at http://www.freedomhouse.org/report/freedom-world/2014/malawi-0#.V ASNPmSSxuA (accessed on 1 September 2014). See, also, FE Kanyongolo (2006), *Malawi: Justice Sector and the Rule of Law*, Johannesburg, OSISA, at 8; United States Department of State (2011), *Country Reports on Human Rights Practices for 2011: Malawi*; United States Department of State (2013), *Malawi 2013 Human Rights Report*.

50 Police Act 12 of 2010, s 44.

51 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [13].

52 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*. See, also, Government of Malawi, *Initial Reports of States Parties to the ICCPR,* CCPR/C/MWI/1, 13 July 2014, [60].

53 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [20].

54 Government of Malawi, *Initial Reports of States Parties to the ICCPR,* CCPR/C/MWI/1, 13 July 2014, [60].

55 Ibid. [48].

56 Constitution of the Republic of Malawi, s 42.

57 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 24.

58 Constitution of the Republic of Malawi, s 42(2)(e).

59 Ibid., s 42(2)(d).

60 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

61 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 53.

62 Constitution of the Republic of Malawi, 2010, s 42.

63 Ibid.

64 Malawi Human Rights Commission (2011) *Preliminary Report: Monitoring of Human Rights Situations of Detention in the Northern and Central Regions, 23 to 28 December 2011*. Lilongwe: Malawi Human Rights Commission, para 7.2.. See also, Open Society Initiative for Southern Africa, 'Pre-trial detention in Malawi: Understanding case flow management and conditions of incarceration', CLC, CHRR, CHREAA, PASI, CCJP and OSISA, 2011, pp 3 and 55-60. See also, Irish Rule of Law Malawi, 'Pre-Trials and Tribulations', 15 May 2013, available at http://ruleoflawmalawi.blogspot.com.

65 Malawi Human Rights Commission (MHRC) (2011), *Preliminary Report: Monitoring of Human Rights Situations of Detention in the Northern and Central Regions, 23 to 28 December 2011*, Lilongwe, at para 7.3.

66 Ibid. at para 7.2.

67 Ibid. at para 7.1.

68 Centre for Development of People et al. (25 October 2011), *Non-Governmental Organizations' Shadow Report on the Implementation of the International Covenant for Civil and Political Rights (ICCPR) in Malawi*. Submission to the 103rd Session of the Human Rights Commission, Geneva. See, also, United States Department of State (2011), *Country Reports on Human Rights Practices for 2011: Malawi;* MHRC (2011), *Preliminary Report: Monitoring of Human Rights Situations of Detention in the Northern and Central Regions, 23 to 28 December 2011*, Lilongwe, at para 7.3.

69 MHRC (2011), *Preliminary Report: Monitoring of Human Rights Situations of Detention in the Northern and Central Regions*, *23 to 28 December 2011,* at para 1.8. See, also, United States Department of State (2011), *Country Reports on Human Rights Practices for 2011: Malawi*.

70 Ibid. at para 7.3. See, also, Sean Tait, *Development of a Lay Visitor's Scheme – Policy and Guidelines: Short-Term Mission No. 05 of the Technical Assistance Provision Plan,* African Policing Civilian Oversight Forum (APCOF), August 2012.

71 George Kainja, Deputy Commissioner of Police, *Malawi Police Service: Its Roles and Functions*, presentation to Malawi Defence Force Military College, Salima, 8 July 2010.

72 Sean Tait, *Development of a Lay Visitor's Scheme – Policy and Guidelines: Short-Term Mission No. 05 of the Technical Assistance Provision Plan,* APCOF, August 2012.

73 Constitution of the Republic of Malawi, 2010, s 42(2)(c),.

74 *The Republic v Lucius Chicco Banda* (Criminal Appeal No. 1 of 2007).

75 *The Republic v Chizumila* (Confirmation Case No. 316 of 1994); *Republic v Chinthiti* (Criminal Case No. 17 of 1997, unreported).

76 *The Republic v Bokhobokho and Another* (MSCA Criminal Appeal No. 10 of 2000).

77 FE Kanyongolo (2006), *Malawi: Justice Sector and the Rule of Law*, Johannesburg, OSISA, at 109.

78 Constitution of the Republic of Malawi, 2010, s 42.

79 Legal Aid Act, 2011, s 4.

80 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995– 013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [53].

81 Hillery Anderson, 'Justice Delayed in Malawi's Criminal Justice System: Paralegals vs. Lawyers', (2006) *International Journal of Criminal Justice Sciences* Vo.l 1, Issue 1, at 1.

82 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [18].

83 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Hum and Peoples' Rights on the Rights of Women 2005–2013,* [52].

84 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

85 Ibid.

86 Kersty McCourt (2012), How Malawi Put Access to Justice on the UN's Agenda, Open Society Foundations, 23 May 2012, available at http://www.opensocietyfoundations.org/voices/how-malawi-put-access-justice-un-s-agenda (accessed on 1 September 2014).

87 *Amon Zgambo v The Republic* (MSCA Criminal Appeal No. 11 of 1998, unreported).

88 Ibid.

89 *Frederick Mvahe and Others v The Republic* (MSCA Criminal Appeal No. 25 of 2005).

90 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [15].

91 Criminal Procedure and Evidence Code (Cap 8:01 Laws of Malawi), Part IVA.

92 Ibid., s 161F.

93 Ibid., s 161G.

94 Ibid., s 161H.

95 Clifford Msiska, Victor Mhango and Jean Redpath (2013), *Pre-trial Detention Custody Time Limits: Ensuring Compliance in Malawi*, Open Society Foundations, OSISA, at 2.

96 Government of Malawi, *Initial Reports of States Parties to the ICCPR,* CCPR/C/MWI/1, 13 July 2014, [36]; and OSISA (2011), *'Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 39. See, also, Freedom House, *Freedom in the World 2014: Malawi,* available at http://www.freedomhouse.org/report/freedom-world/2014/malawi-0#.V ASNPmSSxuA (accessed on 1 September 2014)(; United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*; MPS (2010), *Inspector General of the Malawi Police Service Annual Activity Report for 2010,* Lilongwe; Irish Rule of Law Malawi, *Musings from the Prosecution Side of Malawi,* 16 November 2011, available at http://ruleoflawmalawi.blogspot.com/2011/11/musings-from-prosecution-side-of-malawi.html (accessed on 1 September 2014).

97 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

98 Ibid. See, also, Irish Rule of Law Malawi, *Pre-Trials and Tribulations,* 15 May 2013, available at http://ruleoflawmalawi.blogspot.com (accessed on 1 September 2014).

99 Prisons Act Regulations, Third, Fourth and Fifth Schedule.

100 *Gable Masangano v Attorney General* (Constitutional Case No. 15 of 2007).

101 Ibid.

102 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [72]. See, also, Jimmy Kainja, 'Awful state of Malawi prisons is damning verdict on the country', *Nyasa Times*, 8 January 2014, available at http://www.nyasatimes.com/2014/01/08/awful-state-of-malawi-prisons-is-damning-verdict-on-the-country/ (accessed on 1 September 2014).

103 Ibid., [72].

104 Ibid., [39]. See, also, Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [15]; *Gable Masangano v Attorney General* (Constitutional Case No. 15 of 2007).

105 International Centre for Prison Studies, *World Prison Brief: Malawi,* available at http://www.prisonstudies.org/country/malawi (accessed on 1 September 2014).

106 Ibid.

107 *Nyasa Times,* 'Malawi prison conditions still worse: 79 inmates die due to crowding, police brutality – report', 30 April 2013, available at http://www.nyasatimes.com/2013/04/30/malawi-prison-conditions-still-worse-79-inmates-die-due-to-crowding-police-brutality-report/ (accessed on 1 September 2014). See, also, OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 46; Sean Tait, *Development of a Lay Visitor's Scheme – Policy and Guidelines: Short-Term Mission No. 05 of the Technical Assistance Provision Plan,* APCOF, August 2012; Freedom House, *Freedom in the World 2014: Malawi,* available at http://www.freedomhouse.org/report/freedom-world/2014/malawi-0#.VASNPmSSxuA (accessed on 1 September 2014); United States Department of State (2013), *Malawi 2013 Human Rights Report*.

108 Government of Malawi, *Initial Reports of States Parties to the ICCPR,* CCPR/C/MWI/1, 13 July 2014, [37]. See, also, Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [15].

109 Constitution of the Republic of Malawi, s 42.

110 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005– 2013,* [84].

111 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 31.

112 Ibid. at 4.

113 Ibid. at 54.

114 Constitution of the Republic of Malawi, 2010, s 12, 13.

115 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

116 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration*, Johannesburg, at 55–60.

117 Ibid. at 53.

118 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [12].

119 Government of Malawi (2011), *Malawi Police Service Strategic Development Plan, 1 July 2011 to 30 June 2016*, Lilongwe, at 33.

120 Chikondi Ngwira and Victor Mhango (2014), *Malawi Police Training Curriculum vis-à-vis Human Rights and Nuisance Related Offences,* CHREAA.

121 MPS (2010), *Annual Report of the Malawi Police Service for the Year Ending 31 December 2010*, Lilongwe, at 6.

122 Ibid. at 7.

123 *The Nation* (21 February 2011), 'Cop is suspected of armed robbery', Vol. 18, Issue 36, at 1.

124 Constitution of the Republic of Malawi, s 13.

125 Government of Malawi/United Nations Development Program (2011), *Malawi Justice Baseline Survey 2010*, unpublished, cited in Amanda Dissel and Cheryl Frank (eds) (2012), *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Law Enforcement Officials*, APCOF, Cape Town, at 58.

126 Amanda Dissel and Cheryl Frank (eds) (2012), *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Law Enforcement Officials*, APCOF, Cape Town, at 61.

127 Constitution of the Republic of Malawi, s 42(2)(g).

128 *Evance Moyo v Attorney General* (Constitutional Case No. 12 of 2007).

129 Irish Rule of Law Malawi, *Juvenile (In)Justice,* 21 November 2011, available at http://ruleoflawmalawi.blogspot.com/2011/11/juvenile-injustice.html (accessed on 1 September 2014).

130 Child Care, Protection and Justice Act, 2010.

131 Child Care, Protection and Justice Act, s 95(2).

132 Ibid.

133 Child Care, Protection and Justice Act, s 96(1).

134 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*. See, also, OSISA (2011*), Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 49.

135 Ibid.

136 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

137 Irish Rule of Law Malawi, *Juvenile (In)Justice,* 21 November 2011, available at http://ruleoflawmalawi.blogspot.com/2011/11/juvenile-injustice.html (accessed on 1 September 2014).

138 Child Care, Protection and Justice Act, s 2.

139 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [18].

140 Government of Malawi, *Initial Periodic Reports of States Parties Due in 1998: Malaw,* CRC/C/MWI/2, 17 July 2008, [104].

141 Ibid., [106].

142 Committee on the Rights of the Child (2009), 'Concluding observations: Malawi', CRC/C/MWI/CO/2, 27 March 2009, [76].

143 Ibid., [75].

144 MHRC (2011), *Preliminary Report: Monitoring of Human Rights Situations of Detention in the Northern and Central Regions, 23 to 28 December 2011*, Lilongwe, at para 7.3.

145 Ibid. at para 7.1. See, also, Irish Rule of Law Malawi, *Women in Prison,* 9 November 2011, available at http://ruleoflawmalawi.blogspot.com/2011/11/women-in-prison.html (accessed on 1 September 2014).

146 Centre for Development of People et al. (25 October 2011), *Non-Governmental Organisations' Shadow Report on the Implementation of the International Covenant for Civil and Political Rights (ICCPR) in Malawi*. Submission to the 103rd Session of the Human Rights Commission, Geneva; United States Department of State (2013), *Malawi 2013 Human Rights Report*; SALC and CHREAA, *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrest for Nuisance-Related Offences in Blantyre, Malawi,* June 2013.

147 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*. See, also, Irish Rule of Law Malawi, *Women in Prison,* 9 November 2011, available at http://ruleoflawmalawi.blogspot.com/2011/11/women-in-prison.html (accessed on 1 September 2014).

148 Irish Rule of Law Malawi, Women in Prison, 9 November 2011, available at http://ruleoflawmalawi.blogspot.com/2011/11/women-in-prison.html (accessed on 1 September 2014).

149 United States Department of State (2013), *Malawi 2013 Human Rights Report*.

150 Globalhand, *Access to Justice for Rural Women in Malawi*, available at http://www.globalhand.org/en/search/all/request/7727 (accessed on 1 September 2014).

151 Constitution of the Republic of Malawi, 2010, s 20. See, also, United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

152 Sean Tait, *Development of a Lay Visitor's Scheme – Policy and Guidelines: Short-Term Mission No. 05 of the Technical Assistance Provision Plan,* APCOF, August 2012.

153 George Kainja, Deputy Commissioner of Malawi, Malawi Police Service combating illegal immigration in Malawi – the community policing approach', presentation made at Lilongwe Hotel on 1 October 2010.

154 Ibid.

155 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

156 Luanda Guidelines, Part VII.

157 Ibid. Part V.

158 Constitution of the Republic of Malawi, s 42(1).

159 Wilfried Schärf, Chikosa Banda, Ricky Röntsche, Desmond Kaunda and Rosemary Shapiro (2002), *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums*, Lilongwe, available at www.ndr.mw:8080/xmlui/handle/123456789/209 (accessed on 1 September 2014).

160 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*. See, also, FE Kanyongolo (2006), *Malawi: Justice Sector and the Rule of Law*, Johannesburg, OSISA, at 24; Wilfried Schärf, Chikosa Banda, Ricky Röntsche, Desmond Kaunda and Rosemary Shapiro (2002), *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums*, Lilongwe, available at www.ndr.mw:8080/xmlui/handle/123456789/209 (accessed on 1 September 2014).

161 UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Study on Police Oversight Mechanisms,* A/HRC/14/24/Add.8, 28 May 2010.

162 Constitution of the Republic of Malawi, s 129–131.

163 Freedom House (2010), *Countries at the Crossroads*, Malawi, available at www.freedomhouse.org.

164 Human Rights Council (4 August 2010), *UPR Compilation of UN Information*, A/HRC/WG.6/9/MWI/2, [6]-[7]. See, also, United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

165 *OSISA News* (19 March 2012,) 'Malawi Human Rights Commissioner arrested', available at http://www.osisa.org/law/malawi/malawi-human-rights-commissioner-arrested.

166 United States Department of State (2013), *Malawi 2013 Human Rights Report*.

167 Republic of Malawi (2013*), Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [26].

168 Ibid., [28].

169 Amanda Dissel and Cheryl Frank (eds) (2012), *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Law Enforcement Officials*, APCOF, Cape Town, at 59.

170 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration,* CLC, CHRR, CHREAA, PASI, CCJP and OSISA, at 54.

171 Ibid.

172 United States Department of State (2013), *Malawi 2013 Human Rights Report*.

173 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 199 –2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [70].

174 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration*, Johannesburg, at 61.

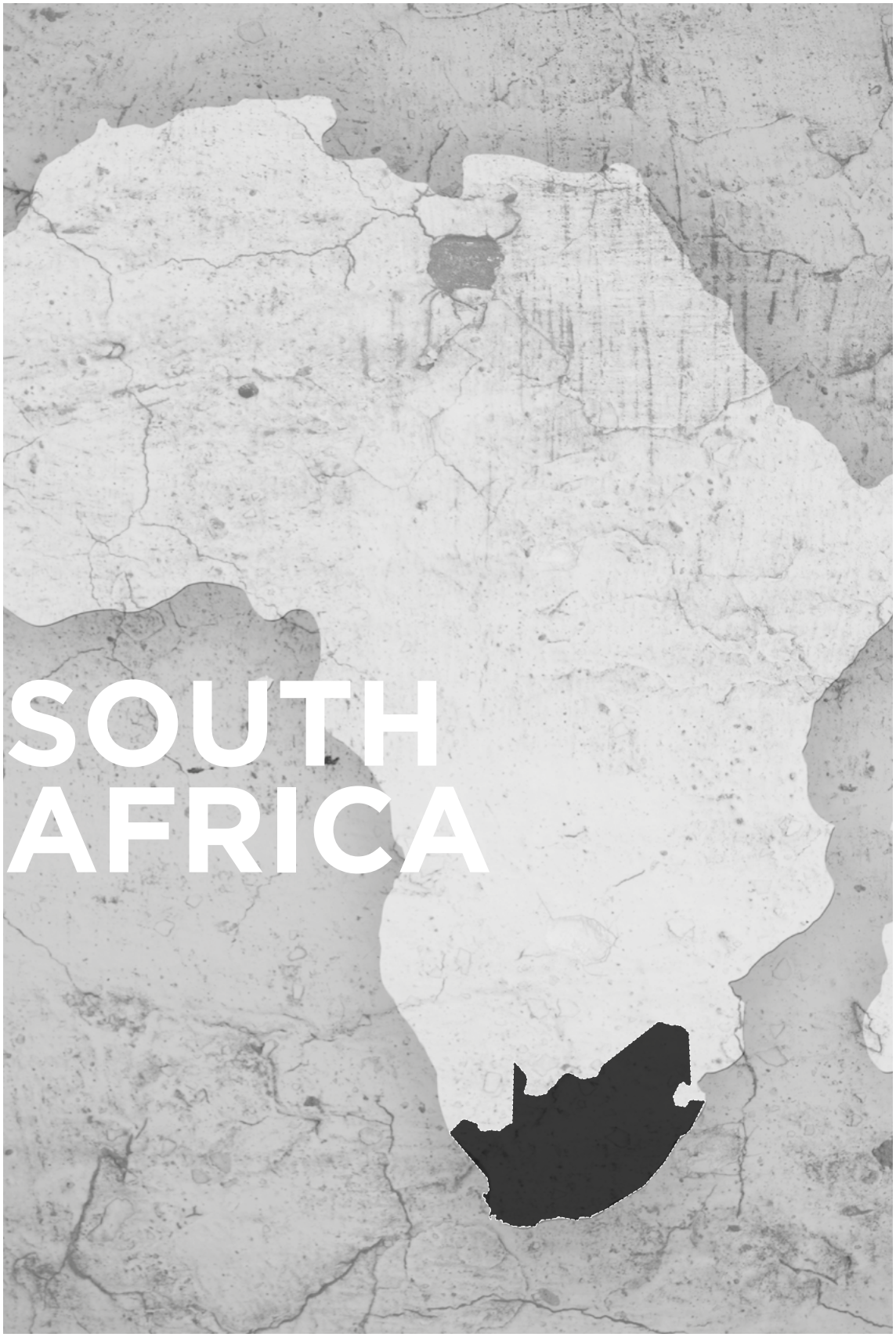
175 Republic of Malawi (2013), *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995–2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005–2013,* [64]. See, also, Government of Malawi, *Initial Reports of States Parties to the ICCPR,* CCPR/C/MWI/1, 13 July 2014, [20].

176 Freedom House (2010), *Countries at the Crossroads: Malawi*, available at http://www.freedomhouse.org/report/countries-crossroads-2010/malawi (accessed 12 June 2012)(.

177 United States Department of State, Bureau of Democracy, Human Rights and Labor (2013), *Country Reports on Human Rights Practices for 2013: Malawi*.

178 Human Rights Committee (2014), Concluding observations on the initial periodic report of Malawi, advanced unedited version, CCPR/C/MWI/CO/1/Add.1, [16].

179 OSISA (2011), *Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration, CLC*, CHRR, CHREAA, PASI, CCJP and OSISA, at 28.


SOUTH
AFRICA

CHAPTER 3

SOUTH AFRICA

Baseline assessment: The Luanda Guidelines and South Africa's framework for arrest, police custody and pre-trial detention

1. Overview

Introduction

The unnecessary and arbitrary use of arrest, police custody and pre-trial detention is a major contributing factor to prison overcrowding across Africa. It also feeds corruption, exposes detainees to the risk of human rights violations, and has significant socio-economic impacts on detainees as well as their families and communities.[1] Concerned about the impact of prison overcrowding and the consequences of arbitrary arrest and prolonged pre-trial detention, the African Commission on Human and Peoples' Rights (ACHPR)[2] adopted the Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa ('the Luanda Guidelines')[3] as part of its mandate to formulate standards, principles and rules on which state parties to the African Charter on Human and Peoples' Rights (AChHPR) can base their national legislation.[4]

The AChHPR provides all people with the rights to life, dignity, equality, security, a fair trial and an independent judiciary.[5] The Luanda Guidelines, in turn, provide an authoritative interpretation of the application of these provisions and serve as a guide to lawmakers, policymakers and criminal justice practitioners for strengthening day-to-day practices in terms of arrest, police custody and pre-trial detention. In doing so, they reinforce the importance of a criminal justice system built on core human rights principles. They aim to ensure fewer arbitrary arrests and a more rational and proportionate use of pre-trial detention in order to promote the more effective use of human and financial resources by, for example, targeting areas such as legal aid and crime prevention. The Luanda Guidelines are also a reflection of the collective aspirations of African states, national human rights institutions and civil society organisations (CSOs) in terms of normative standards for criminal justice systems in Africa.[6]

The adoption of the Luanda Guidelines by the ACHPR was an important first step in its work to promote a rights-based approach to criminal justice in Africa. The success of the Luanda Guidelines in achieving this aim will be measured by the extent to which stakeholders, including state parties to the AChHPR, implement such guidelines.

Against this backdrop, the African Policing Civilian Oversight Forum (APCOF) is providing the ACHPR Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa (the Special Rapporteur) with technical assistance so as to promote the implementation of the Luanda Guidelines in South Africa.[7] The Luanda Guidelines are relevant to South Africa as a state party to the AChHPR for two important reasons. Firstly, South Africa will be expected to reflect on the Luanda Guidelines in its state report in terms of Article 62 of the AChHPR. Secondly, owing to its status as a soft-law instrument, the Luanda Guidelines have legal relevance to the arrest and remand detention environment in South Africa in that they provide a clear, normative standard for arrest, police custody and pre-trial detention against which this review of the current legislative and policy environment for remand detention in South Africa, and future planning, can be undertaken.

The present review is divided into five sections:

- Overview
- A review of arrest, police custody and remand detention in South Africa: Coordination and institutional reform
- A review of arrest, police custody and remand detention in South Africa: Process issues
- A review of arrest, police custody and remand detention in South Africa: Vulnerable groups
- Recommendations for reform

The South African framework generally aligns to the Luanda Guidelines, with a few notable exceptions, particularly in terms of how that framework is implemented. These challenges are generally known to the key stakeholders within the criminal justice system and, in the course of conducting this review, APCOF has noted that significant efforts are already being made at a national level to address the challenges through, in particular, the Office for the Criminal Justice System Review (OCJSR) and the Intersectoral Committee on Child Justice (ISCCJ),[8] as well as the implementation of the White Paper on Remand Detention Management in South Africa by the Department of Correctional Services (DCS).[9] The present review has accordingly taken these priorities and efforts into account in terms of making recommendations and identifying the entry points for reform.

A methodological framework for the review

On 14 October and 15 December 2015, APCOF, in collaboration with the National Development Committee of the Justice, Crime Prevention and Security (JCPS) cluster (DevCom) held consultations in Pretoria on the terms of reference for this review with stakeholders from various government departments and organisations.[10] A framework for measuring the performance of South Africa's remand system was proposed by APCOF[11] and refined by participants. Six categories of measurement were proposed, which take a holistic view of measuring remand detention. This approach aligns with the purpose and scope of the Luanda Guidelines and avoids framing the remand detention challenge simply in terms of the number of remand detainees as a proportion of the total prison population. The categories are:

- Category 1: Risk to freedom of movement
- Category 2: Duration of remand detention
- Category 3: Accused persons' compliance with conditions of release
- Category 4: Effectiveness and efficiency of the criminal justice system
- Category 5: Conditions of detention
- Category 6: Community perceptions of the effectiveness and efficiency of the criminal justice system

For each category, high-level indicators were assigned, with provision made for the review and analysis of disaggregated data from identified data sources.

The scope of this review does not extend to a complete statistical analysis in terms of the categories and their corresponding indicators (provided in Annexure 1). To complete a study of this kind requires time and resources beyond those available to APCOF.

APCOF has, however, used the categories as a way to frame the collection and analysis of information available, including, but not limited to, the Constitution and relevant legislation, policies and other standing orders or instructions, jurisprudence, reports from relevant departments within the criminal justice system, and independent and evidence-based research reports from academia and civil society in South Africa.

Publicly available information was collected and analysed so as to provide an indication of the extent to which the legislative and policy framework for remand detention in South Africa is implemented in practice. During the consultations in Pretoria on 14 October and 15 December 2015, APCOF was provided with additional information by participants. Where this information was verifiable through publicly available information, an endnote is provided, and, where supporting documentation was not available, an endnote is provided indicating the source of the information (e.g. by identifying the participant's department or agency).

Summary of the international normative framework

The Luanda Guidelines were developed by the ACHPR as an authoritative interpretation of African Charter rights such as the right to life, security, non-discrimination, and freedom from torture and contribute to the development of normative standards for criminal justice at the continental and international levels. Other relevant treaties and norms that are specifically contemplated by the Luanda Guidelines include, but are not limited to: the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, the Convention on the Rights of the Child, the UN Standard Minimum Rules for the Treatment of Prisoners (the 'Nelson Mandela Rules'),[12] and the UN Standard Minimum Rules for Non-Custodial Measures.[13] In doing so, the Luanda Guidelines reinforce the importance of a criminal justice system built on core human rights principles. Such guidelines aim to ensure fewer arbitrary arrests and more rational and proportionate use of pre-trial detention. This allows for more effective use of human and financial resources by, for example, targeting areas such as legal aid and crime prevention.

The Luanda Guidelines trace the steps from the moment of arrest until trial, focusing on the decisions and actions of the police, correctional services, and other criminal justice stakeholders such as the judiciary and the prosecuting authority. They contain eight key parts covering the framework for arrest and custody, important safeguards, measures to ensure transparency and accountability, and ways to improve coordination between criminal justice institutions. Each part is discussed in turn below.

Part 1: Arrest

Arrest covers the grounds for arrest, procedural guarantees, and the rights of suspected and arrested persons, including the requirement that they be notified of their rights. The aim of Part 1 of the Luanda Guidelines is to reduce the number of unnecessary and arbitrary arrests and to protect persons who are under arrest from human rights abuses.

The rights to life and liberty are central to this part, and the grounds for arrest limit the use of arrest to exceptional circumstances and as a measure of last resort. The Luanda Guidelines promote

alternatives to arrest, where appropriate, for minor crimes and encourage state parties to the AChHPR to establish diversion systems.

The Luanda Guidelines set out in detail a range of procedural guarantees for arrest, including the requirement for officials to identify themselves, limitations on the use of force and firearms, a framework for the conduct of searches, and provision for the maintenance of arrest registers. The rights of an arrested person are set out at length in Guideline 4 and include the right to:

- Freedom from torture and other ill-treatment;
- Information on the reason for arrest and charge in a language and format understood by the arrested person, and on the necessary facilities to exercise rights;
- Silence and freedom from self-incrimination;
- Access legal assistance, a family member or other person of choice, as well as medical assistance;
- Humane conditions while in police custody;
- Information in an accessible format;
- Release on bail or bond as a presumptive right;
- Challenge the lawfulness of the arrest;
- Freely access complaints and oversight mechanisms; and
- Reasonable accommodation for persons with disabilities.

Part 2: Police custody

Part 2 of the Luanda Guidelines sets out in detail the procedural and other safeguards for persons who are deprived of their liberty in police custody. The provisions are designed to promote freedom from arbitrary detention and emphasise the use of police custody as an exceptional measure of last resort. To promote the rights of persons who are held in police custody, the Luanda Guidelines highlight the need for independent monitoring of police cells and provide safeguards for detainees who are subject to questioning and interrogation. Guideline 7 provides guidance for police agencies which have the statutory authority to grant bail and is the same as the guidelines set out in Part 3 for judicial decision-makers (see below).

Guideline 8 sets out the requirement for the provision of legal assistance for accused persons. The use of the term 'legal assistance' rather than 'lawyer' is deliberate, as it acknowledges that there are a range of legal service providers, such as paralegals, who can provide legal information and render assistance to accused persons. However, this expanded definition does not diminish the importance of access to qualified lawyers, which must remain at the centre of any national legal aid scheme.

Part 3: Pre-trial detention

Part 3 of the Luanda Guidelines establishes a detailed framework to promote a rights-based approach to decision-making in relation to remand orders, as well as safeguards for persons who are subject to such orders. As with police custody, such guidelines emphasise that remand detention should be ordered only as an exceptional measure of last resort, and encourage state parties to the AChHPR to establish and maintain alternatives to remand detention. Part 3 shifts the focus of the Luanda Guidelines from the police to the judiciary, providing guidance on the framework for decision-making in terms of judicial orders for remand and the review of remand orders. It also sets out procedures in the case of delays in investigation or judicial proceedings that may result in prolonged remand detention. Lastly, it establishes safeguards for persons who are subject to remand orders, including the provision that remand detainees be held in officially recognised places of detention and have access to a lawyer.

Part 4: Registers and access to information

Part 4 of the Luanda Guidelines sets out the requirement for registers at all stages of the arrest, custody and remand process and provides for access to registers by detainees, lawyers, family members, oversight authorities, and any other organisation with a mandate to visit places of detention. This part sets out the minimum information that must be recorded in a register, such as key identifying information (e.g. name and address), details of next of kin, and any observations concerning the physical and mental health of the person subject to arrest, police custody or remand detention.

Guidelines 39 and 40 (which are to be found in Part 8 of the Luanda Guidelines) deal specifically with data collection and access to information. These provisions require that state parties establish processes for the systematic collection of disaggregated data on the use of arrest, police custody and remand detention and ensure that there are systems and processes in place to guarantee the right of access to information for accused persons, their lawyers, family members and others.

Part 5: Procedures for serious violations of human rights in police custody and pre-trial detention

State responsibility to account for death, injury and violations of human rights in a custodial setting underpins Part 5 of the Luanda Guidelines, which set out a range of procedures for state parties to institute to ensure effective, impartial and independent investigations into deaths and human rights violations. Part 5 is premised on the requirement for states to establish independent oversight and accountability mechanisms, mechanisms that are discussed in detail in Part 8 of the Luanda Guidelines.

Part 6: Conditions of detention in police custody and pre-trial detention

Acknowledging the comprehensive framework for physical conditions of detention provided for in the recently updated UN Standard Minimum Rules for the Treatment of Prisoners ('the Nelson Mandela Rules'), the Luanda Guidelines focus on the procedural safeguards to ensure the safe custody of persons held in police cells and remand environments. The Luanda Guidelines emphasise that all fundamental rights and freedoms apply to accused persons, except those limitations that are demonstrably necessary on account of the detention itself. The safeguards promoted by the Luanda Guidelines include:

- Alternatives to detention so as to reduce overcrowding;
- Limitations on the use of force and firearms, permissible restraints, disciplinary measures and solitary confinement;
- Legislative, budgetary and other measures to ensure adequate standards of accommodation, nutrition, hygiene, clothing, bedding, exercise, physical and mental health care, contact with the community, religious observance, reading and other educational facilities, and support services;
- Health-assessment screening and harm-reduction strategies;
- Procedures for the safe transfer of accused persons;
- Provision for adequate and efficient staffing;
- Separation of categories of detainees; and
- Appropriate communication facilities, and access by accused persons to those facilities.

Part 7: Vulnerable groups

Part 7 focuses specifically on the rights of persons identified as vulnerable to rights abuses in arrest, police custody and remand detention settings. It contains general provisions that encourage state

parties to enshrine the right to freedom from discrimination in national law and outlines specific protections in relation to all categories of persons afforded protection in the AChHPR, as well as the following specific groups:

- **Children:** A child is defined as anyone aged below 18. Aspects dealt with are the primacy of the best interests of the child; laws and policies to promote diversion and alternatives to detention; safeguards for arrest, police custody and remand detention; the right to be heard and the provision of legal assistance; a framework for the conduct of officials and the establishment of specialised units; and access to third parties.
- **Women:** Aspects covered are safeguards for arrest and detention, including separation from male detainee populations; and provisions for children accompanying women.
- **Persons with disabilities:** Disability is defined to include physical, mental, intellectual or sensory disability. Other matters deal with are legal capacity and access to justice; accessibility; and reasonable accommodation.
- **Non-nationals:** Specific protections are provide for refugees and non-citizens. Furthermore, stateless persons are afforded protection in terms of access to third parties and translation services.

Part 8: Accountability and remedies

Part 8 of the Luanda Guidelines sets out an accountability architecture that is comprised of internal and external oversight, judicial oversight, complaints and monitoring mechanisms, and provision for remedies. It also sets out the minimum standards of conduct for officials and provides for a system of inquiries.

Part 9: Implementation

The final part of the Luanda Guidelines promotes implementation by state parties to the AChHPR through a range of measures, including the review of existing national frameworks, national training, and reporting against such guidelines to the ACHPR as part of the state party reporting procedures contained in the AChHPR.

Overview of South Africa's performance against the Luanda Guidelines

South Africa's constitutional and legislative framework pertaining to arrest, police custody and remand detention contains a number of strong protections that align with the Luanda Guidelines. However, there are challenges in relation to the framework for arrest[14] and bail,[15] and broader challenges concerning the implementation of the overall legislative and policy framework. Identifying entry points to address the framework and implementation challenges in South Africa is a complex exercise, given the vast array of stakeholders with responsibility for the care, management and oversight of persons in conflict with the law. However, the existence of a national coordinating mechanism, through the Department of Justice and Constitutional Development (DoJ&CD), in addition to a national development and policy focus on remand detention at the DoJ&CD and individual departmental levels, does provide a clear parameter within which this review, and the formulation of recommendations, can be undertaken.

Over the past few years, the issues arising from overcrowding in South Africa's correctional facilities have been the subject of review and policy reform. Overcrowding was identified in South Africa's National Development Plan (NDP) as a critical challenge and significant efforts have been made both to address the coordination and effectiveness of the criminal justice system in the management and treatment of remand detainees and to reduce the number of suspects held in remand detention.

The management and care of remand detainees in South Africa do not solely fall within the purview of the DCS as the department responsible for the management and administration of remand detention facilities. Rather, South Africa's remand detention system co-opts a variety of role players across the criminal justice system, which requires significant coordination, communication and cross-sectoral support. This is particularly so if a holistic view of remand detention justice is taken, in line with the Luanda Guidelines, that considers the various preconditions for remand detention, such as stop and search, arrest and police custody, in addition to ancillary factors such as court utilisation, access to legal assistance services and the rendering of prosecutorial services.

For example, the performance of the South African Police Service (SAPS) in terms of the timeous and thorough investigation of crime has a significant effect on the ability of the National Prosecuting Authority (NPA) and the courts to ensure an accused person's right to a speedy trial. Prolonged remand detention as a result of trial delays not only jeopardises the constitutional protections guaranteed to remand detainees, but can also have a deleterious effect on the administration of justice and on confidence in the criminal justice system as a whole.

The progress made in recent years in reducing the number of remand detainees in DCS facilities has been commendable and encouraging. However, the present review has identified a number of gaps that must be addressed if South Africa is to achieve a rights-based approach to remand detention that is consistent both with the Luanda Guidelines and the country's own constitutional framework.

2. A review of arrest, police custody and remand detention in South Africa: Coordination and institutional reform

Introduction

The review of South Africa's constitutional, legislative and policy framework for arrest, police custody and remand detention is conducted against the framework provided by the Luanda Guidelines. The Luanda Guidelines trace the steps from the moment of arrest until trial, focusing on the decisions and actions of the police, correctional services and other criminal justice stakeholders. They contain eight key parts covering the framework for arrest and custody, important safeguards, measures to ensure transparency and accountability, and ways to improve coordination among criminal justice institutions.

Using the parameters set by the Luanda Guidelines[16] and the categories of measurement proposed by APCOF[17] in consultation with other stakeholders, APCOF reviewed the constitutional, legislative and policy framework for arrest, police custody and remand detention in South Africa and identified a number of challenges in terms of implementation.

This section of the review considers the challenges in terms of coordination among criminal justice system institutions and the need for legislative and institutional reform.

A coordinated approach

The Luanda Guidelines promote a holistic approach to the management of pre-trial justice systems, with coordination among the main sectoral institutions responsible for the care and management of accused persons: the police, correctional services, the judiciary, the prosecution authority, legal aid, health services, and others.

South Africa's approach to remand detention management applies this key Luanda Guidelines objective.

In 2007, the South African government established a committee to review the challenges within the criminal justice system and to develop a plan to make such system more effective and efficient. The aim of the review was to enhance coordination among government departments in the JCPS cluster, namely the SAPS, the DoJ&CD, the NPA, the DCS, and the Department of Social Development (DSD). The result of the review was the 7-Point Plan, which was approved by Cabinet in 2008 and later endorsed by the NDP in 2013.[18]

Together, the 7-Point Plan and the NDP aim to establish a criminal justice system that is modernised, integrated and effectively managed under a single coordinating structure at every level of governance[19] and which is further reflected in the JCPS Delivery Agreement as Outcome 3 and in the Medium-Term Strategic Framework (MTSF) for 2014 to 2019.

Central to improving the efficiency and coordination of the criminal justice system is the role of the DoJ&CD. The implementation of the 7-Point Plan is coordinated by the OCJSR, which is located within the DoJ&CD and is supported by an intersectoral secretariat. The DoJ&CD is therefore an important coordination point for improving effectiveness and efficiency across the criminal justice chain.

The 7-Point Plan and the NDP emphasise the importance of establishing an effective and efficient criminal justice system not only to create sustainable development and build safer communities, but also to promote a culture of human rights.[20] The 7-Point Plan, in particular, sets out to modernise the systems that integrate the various players in the criminal justice system by adopting a single vision and mission and responsible structures, improving court processes and performance, modernising and integrating information and technology systems, and engaging the community in the criminal justice system.[21]

Further, since Cabinet's adoption of the NDP (which, as indicated, endorses the implementation of the 7-Point Plan), every line department is required to align its strategic and annual performance plans in order to achieve the objectives of the MTSF, which sets out a five-year strategy for the long-term achievement of the NDP.[22] In this regard, the Department of Planning, Monitoring and Evaluation (DPME) within the Office of the Presidency is mandated to monitor the performance of every department in meeting its targets under the MTSF.[23]

The coordination efforts at a national level have resulted in marked improvements in the care and management of accused persons in South Africa. For example, such efforts have seen the number of remand detainees in South Africa, including the average length of remand detention, decrease. However, challenges in terms of overall coordination as well as individual institutional challenges have hampered the implementation of the overarching policy objectives.

Key challenges are discussed below.

Resisting a 'tough on crime' approach to policing

During consultations on this review, participants noted that any discussion of the challenges experienced by criminal justice actors in the implementation of an effective and rights-based remand detention system must be viewed in the context of South Africa's high crime rates. Context is critical to ensuring that legislative and policy developments are relevant and capable of application, and, therefore, any recommendations or actions to promote the Luanda Guidelines in South Africa need to take account of the existing policy framework for safety, crime prevention and policing which was developed for the unique South African context and to provide specific responses concerning a rights-based approach to safety, security and crime prevention.

The NDP identifies six priority areas for achieving a safer South Africa, namely:[24]

1. Strengthening the criminal justice system;
2. Professionalising the police service;
3. Demilitarising the police service;
4. Increasing the rehabilitation of prisoners and reducing recidivism;
5. Building a safe environment and using an integrated approach; and
6. Increasing community participation with regard to safety.

Since the adoption of the NDP in 2012, the Civilian Secretariat for Police (CSP) has circulated two key policies for public comment: the Draft White Paper on the Police[25] and the Draft White Paper on Safety and Security.[26] Recognising the shifting nature of crime and violence in South Africa, and the consequential need to realign the 1998 White Paper on Safety and Security with the objectives of the NDP, both White Papers call on the criminal justice system to take a more integrated and developmental approach to crime and violence.[27] More specifically, the Draft White Paper on the Police aims to establish a framework for 'an accountable, professional, competent, and highly skilled police service',[28] while the Draft White Paper on Safety and Security promotes interventions to confront risk factors at individual, family, community and societal levels.[29] Accordingly, the two policy directives work together to create an intersectoral, multidisciplinary response to crime and violence in South Africa.

Further, it is imperative to note here that an explicit commitment to human rights principles, specifically the fundamental rights provided for in Chapter 2 of the Constitution, is central to both White Papers.[30] In this regard, each White Paper aims to protect and promote the rights of persons in remand detention, specifically those of arrested, detained and accused persons under section 35.[31]

Safe societies are grounded upon mutual trust and respect on the part of the police service and the communities in which it serves. Trust is earned by exhibiting an unwavering knowledge of, and commitment to, the rule of law. Respect is earned when laws are enforced in a manner that does not violate fundamental rights of the person, including the rights to dignity and freedom and security of the person, regardless of whether the individual has been suspected or accused of committing a crime. Accordingly, the approach to reform of the remand detention environment in South Africa, whether on the basis of legislative or policy review, or in terms of the performance of the criminal justice system in implementing the framework, should be grounded on a rights-based approach as articulated in the current policy framework offered by the White Paper on Policing and the White Paper on Safety and Security.

The South African Police Service Act, detective services and the impact on delays

The White Paper on Policing and the subsequent South African Police Service Amendment Act constitute an opportunity to provide a clearer policy framework for policing that is consistent with the role of the police in terms of the Constitution and the recommendations of the NDP. Legislative amendments should be framed in terms of the principles that underpin the NDP and the Constitution and should be implemented in a way that responds to the challenges and situational analyses set out in this broader framework, including the role of the police in a democratic South Africa[32] and the key components of democratic policing.[33]

Given the discussions below about the extent to which the SAPS contributes to delays within the criminal justice system, the upcoming South African Police Service Act amendments provide an opportunity to engage with the evidence-based findings and recommendations contained in the SAPS Policy Advisory Council Reports (2006/2007 and 2007/2008), Parliament's Detective Dialogue (2012), the NDP (2012), the Khayelitsha Commission of Inquiry (2014) and the SAPS National Inspectorate Report (2015), particularly in relation to the:[34]

- Effectiveness of current resource-allocation systems and its impact on operational and management choices;
- Challenges within police leadership;
- Poor internal systems of control, particularly with regard to firearm management;
- Inefficiencies in police disciplinary systems; and
- Challenges in responding to/policing certain crimes/incidents (i.e. public demonstrations, xenophobia, domestic violence, violence against children, etc.).

Amendments to the South African Police Service Act aimed at aligning the role and function of the police to South Africa's constitutional framework and to the new policy framework provided by the White Paper are a critical and urgent next step. The challenges identified above should inform the amendments so as to promote a framework for policing that is both a rights-based and an evidence-based response to the known challenges and opportunities in respect of policing in South Africa.

Remand detention management

In terms of the remand detention system, in March 2014 the DCS released the White Paper on Remand Detention Management in South Africa in an effort to cater for the needs of people awaiting trial who, at the time the White Paper was completed, comprised one-third of the total DCS inmate population.[35] The responsibility of the DCS for managing the population of remand detainees emanated from a decision by Cabinet in 2009 that resulted in the creation of a new branch within the DCS. This required an alignment of existing legislation and policies in order to meet the separate and distinct set of needs of remand detainees.[36] Implementation of the White Paper (though in its infancy) has resulted in positive developments (discussed in more detail below), such as a reduction in the overall number of remand detainees held in DCS facilities and a reduction in the average time spent in remand detention. Recently, the DCS also concluded protocols in terms of: (a) the referral of remand detainees to court for consideration of their length of detention; (b) the referral of terminally ill or severely incapacitated remand detainees to court; (c) bail; (d) the temporary release of remand detainees to the SAPS for further investigation and early arrivals in court; and (e) a protocol on placing remand detainees on electronic monitoring systems.[37]

As the White Paper notes, effective implementation requires coordination by all criminal justice stakeholders, and, accordingly, the White Paper outlines the roles and responsibilities of various stakeholders, including the SAPS, the DCS and the DSD. While the DCS has made commendable improvements with regard to both the number of remand detainees and the average length of remand detention, as set out below, coordination challenges remain, particularly with respect to trial-ready case dockets, court-utilisation time, and conditions of detention, all of which co-opt other criminal justice stakeholders (including the SAPS and the judiciary). This has resulted in fragmented implementation and impact.

As part of this review, APCOF has identified key challenge areas and will address some of the key coordination issues, with a 'whole criminal justice system' approach to measuring and monitoring performance as a first step.

Custody monitoring

Coordination

The accountability architecture in respect of South Africa's criminal justice system is the most comprehensive in Africa and largely reflects the oversight and accountability framework provided by the Luanda Guidelines. However, to improve coordination among the current accountability mechanisms, and to address the gaps in the current system, consideration should be given to

establishing a mechanism to ensure cohesion among all accountability and oversight actors, including the development of shared frameworks for inspections.

Remand

In terms of remand, monitoring of the treatment of remand detainees and their conditions of detention falls within the mandate of the Judicial Inspectorate for Correctional Services (JICS), and, in terms of the development of a National Preventative Mechanism, as required by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT), the South African Human Rights Commission may be moving towards a more comprehensive approach to monitoring all places of detention (including in relation to immigration, mental health and medical detention, where there are current accountability gaps).

The JICS is mandated to facilitate inspections of correctional service centres and remand detention facilities and to report on the treatment of inmates, conditions of detention, and any corrupt or dishonest practices within the DCS. However, in recent years, the effectiveness of the JICS has been questioned, given that its financial and administrative support comes directly from the DCS, not the National Treasury.[38] The 2006 Jali Commission recommended reform to promote the JICS's independence and to expand its mandate, and further recommended the establishment of a Prison Ombudsman with powers in line with those of the former Independent Complaints Directorate.[39] Research into the performance of the JICS indicates that the failure to implement the Jali Commission recommendations has left the JICS 'unable, due to limitations of its mandate, to hold officers accountable, to place sufficient pressure on the NPA to effect prosecutions' or to compel the DCS to provide reasons for refusing to accept its recommendations.[40] Consideration should therefore be given to promoting the financial independence of the JICS in order, in turn, to promote the broader independence and effectiveness of this key oversight institution, as well as to promote public confidence in its work and findings.

Police cell monitoring

One of the key gaps in the current monitoring system is the lack of sustained and systemic oversight of police cells. Since responsibility for cell monitoring was moved from the former Independent Complaints Directorate to the CSP, there have been limited cell inspections.

Consideration should therefore be given to the establishment of a lay-visitor scheme as part of the CSP's mandate to inspect police cells. Twenty years ago, such a scheme began to emerge and was absorbed into the Community Policing Forum (CPF) structures – however, few CPFs provide regular monitoring, and the monitoring that does occur is not carried out in terms of a comprehensive or agreed framework.

Prosecutions

The NPA plays an important role in the criminal justice system in terms of the prosecutorial discretion to elect or decline to prosecute. The Constitution provides that the NPA must exercise its functions without fear, favour or prejudice.[41] In the prosecution process, prosecutors must adhere to the prosecution policy and policy directives issued by the National Director of Prosecutions.[42] In terms of the policy directives, prosecutors should assess if, in deciding whether or not to institute criminal proceedings against an accused person, there is sufficient and admissible evidence for there to be a reasonable prospect of successful prosecution.[43] Decisions to prosecute or not to prosecute can be subjected to internal review by an escalating level of seniority, including up to the level of the National Director, at the instance of the accused person or of a person with sufficient interest in the particular matter, or as a result of a complaint. The process of representations is further supplemented by the possibility of a decision not to prosecute which is not in accordance with the law being taken on review before a judicial officer.

Some commentators have argued that the current internal accountability systems within the NPA, including reporting to Parliament and the Auditor-General, do not have the necessary independence or a sufficiently broad mandate to provide the type of oversight that will enhance public confidence and improve the efficiency and effectiveness of the NPA.[44]

Consideration should be given to establishing a dedicated oversight mechanism for the NPA in order to review the NPA's performance, particularly regarding reasons for the decision not to prosecute, practices in terms of opposing bail, and the caseload and efficiency of prosecutors.

3. A review of arrest, police custody and remand detention in South Africa: Process issues

Introduction

This section reviews the process for arrest, police custody and remand detention in South Africa against categories of measurement that are designed to track the efficiency and effectiveness of the system as a whole based on the objectives and terms of the Luanda Guidelines.

This review of arrest, police custody and remand detention in South Africa is undertaken in terms of the following categories:

- Risk to freedom of movement;
- Duration of remand detention;
- Conditions of detention;
- Accused persons' compliance with conditions of release;
- Effectiveness and efficiency of the criminal justice system; and
- Community perceptions of the effectiveness and efficiency of the criminal justice system.

Each subsection below provides an explanation of the particular category of measurement and is based on the current legislative and policy framework, available data and other research, and consultation with relevant stakeholders.

Risk to freedom of movement

Risk to freedom of movement as a category of measurement

Measuring the risk to freedom of movement provides insight into the number of people in contact with the criminal justice system[45] and the extent to which stop and search, arrest, custody or the detention of such individuals is proportionate, justifiable and necessary. The objective of the Luanda Guidelines is to reduce unnecessary and arbitrary arrest and custody and to promote alternatives to arrest and detention where persons are in conflict with the law with a view to protecting fundamental rights, reducing overcrowding, and easing the burden placed on the criminal justice system.

Measuring the risk to freedom of movement takes into account the various stages at which a person may be deprived of their freedom of movement and provides insight into the statistical relationship between arrest and remand detention. This category of measurement can also provide information on how arrest and detention levels change over time. It also presents a picture of the volume of cases entering the criminal justice system and of the commensurate implications for human and financial resources.

Statistics were available for most of the categories of proposed high-level indicators, with the exception of police custody. The data available were disaggregated to provide an accurate indication of the population groups most likely to be affected by restrictions on freedom of movement in the pre-trial justice context:

- Number of people stopped and searched: 3 049 586 stop and searches and 15 361 826 personal searches reported in 2014/2015;[46]
- Number of people arrested: 1 707 654 reported in 2014/2015;[47]
- Number of people charged: 1 660 833 persons 'arrested and charged' in 2014/2015;[48]
- Number of people detained in police custody: figures not available; and
- Number of people in remand detention: annual average of 41 717 remand detainees out of a total prison population of 159 563,[49] with the average number of remand detainees held for two years or more being 1 733 as at 21 March 2015.[50]

Review of risk to freedom of movement

The right to liberty[51] in South Africa is expressed through three distinct, yet interconnected, rights: the right to freedom and security of the person,[52] the right to privacy[53] and the right to freedom of movement.[54] Restrictions on the right to liberty in the criminal justice context are reflected in police powers to stop and search, arrest, charge and detain, as well as the imposition of remand orders by the courts.

Generally, South Africa's legislative and policy framework adequately provides for safeguards against restrictions on liberty and movement, as set out in the Luanda Guidelines. The following highlight some of the key gaps and challenges, both in terms of current law and application of the law.

Stop and search

Statistics on the use of stop and search by the police give rise to significant concerns about the extent to which these powers are used in terms of the requirements of necessity, proportionality and procedural fairness as set out in section 22 of the Criminal Procedure Act (CPA), and whether the approach is effective in deterring and detecting crime and is the best use of limited policing resources. In 2014/2015, there were 3 049 586 stop and searches (an increase of 206 128 on the previous year) and 15 361 826 personal searches,[55] whereas the number of arrests made over the same period, across all crime categories, was 1 707 654.[56]

The issue of stop and search was raised during the consultations on this review, with general support being shown for the powers of the police to engage in broad-ranging stop-and-search operations based on a perceived need to take a militant or 'tough on crime' approach to policing in the South African context. However, the nature of crime and violence has evolved in South Africa, necessitating the development of a more nuanced approach to building safer communities.[57] Although discussions concerning safety have traditionally revolved round the role of the police, the NDP and the White Papers on Policing and on Safety and Security advocate an approach that is less police-centric and focused more on addressing the underlying causes of crime and violence.[58] Support for broad-based stop-and-search operations, which yield few arrests based on the available statistics, is not found in the new policy framework for policing in South Africa. Rather, evidence-based and targeted operations conducted within the broader context of crime prevention should be part of policing policy and practice.[59]

Further concerns are apparent in the framework for the use of force in conducting searches, which permits the use of force as may be necessary to overcome resistance, without requiring proportionality or reasonableness in the exercise of that power.[60]

Arrest

There is no statutory definition of arrest in South African law. This is problematic from a rights-based perspective, as a person only becomes entitled to protections under section 35(1) of the Constitution when they assume the status of an arrested person. Those rights include the right to remain silent,[61] the right to be informed of the right to remain silent and the consequences of not remaining silent,[62] the right not to be compelled to make a confession,[63] and the right to be brought before a court within 48 hours of arrest.[64]

SAPS Standing Order 341(G) governs the procedures that SAPS officials must comply with when making an arrest and provides minimum standards for the treatment of arrested persons. Section 4 states that, as a general rule, the object of an arrest is to 'secure the attendance of such persons at his or her trial' and that an arrest cannot be used to 'punish, scare or harass' a person.[65] Exceptions to the general rule in respect of making an arrest are provided and include: (a) arrest for the purpose of further investigation; (b) arrest to verify a name and/or address; (c) arrest to prevent the commission of an offence; (d) arrest in order to protect a suspect; and (e) arrest in order to end an offence.[66]

Despite there being a statutory basis grounding Standing Order 341(G), the current framing of the grounds for arrest is problematic. An arrest constitutes a serious restriction on a person's right to personal liberty, triggering the protections under section 35(1) of the Constitution. Accordingly, arrest must be supported by 'just cause' and must be necessary and proportional for achieving the penological objectives of the state. In this regard, an arrest for the purpose of 'further investigation' and/or to verify a name and/or address arguably ignores less restrictive measures that can be used to obtain the information, such as calling the person in for questioning, obtaining a search warrant, or any number of other actions forming part of an intelligence-led approach to investigation.

The Standing Order also provides that failure to furnish a name or address is a stand-alone ground for arrest.[67] However, this is in direct contrast to the CPA, which permits the use of powers of arrest only where the person is reasonably suspected of having committed the offence and then fails to provide a name and address.[68]

Particularly in relation to minor and non-violent crimes, the SAPS should, before using its powers of arrest, consider whether there are less extreme measures for bringing a suspect before court to face charges.[69] However, serious questions are raised about the extent to which the police are both equipped and supervised to exercise their discretion to arrest in accordance with this requirement, and what alternatives (such as a warning or summons) are being used in practice. Police are reported to use arrest quotas, with performance management linked with rates of arrest by individual officers.[70] If the number of arrests made by individual officers are formally linked to police performance indicators, this requires urgent review, as arrest for non-priority and less serious crime has been identified as a factor contributing to court backlogs and overcrowding in remand detention facilities.[71] Persons subject to temporary detention are arguably more vulnerable to abuse of their rights than arrested persons, because, unlike arrested persons, persons subject to temporary detention do not, in terms of current South African law, enjoy the same safeguards.[72]

It is unsurprising that, given the problematic legislative framework, the SAPS acknowledges unlawful arrest and detention as challenges. In 2014/2015, it attributed a 21% increase (to 9 877) in the number of civil claims lodged against it in comparison with the previous year to 'a high rate [of] unlawful arrest and detention', coupled with greater community awareness of rights and the means to enforce them.[73] During the 2014/2015 financial year, the SAPS made 5 317 payments totalling R302 558 900, the majority of which were as a result of court judgements, up from 3 773 payments/ R209 926 038 in 2012/2013.[74]

Consideration should therefore be given to statutory grounds of arrest that are limited to a person's involvement or suspected involvement or attempted involvement in the commission of a criminal offence, and only when there are reasonable grounds for the arresting officer to believe that the person's arrest for this purpose is necessary. By providing a clear, statutory guideline for the grounds of arrest consistent with the provisions of the Luanda Guidelines and other normative standards for the deprivation of liberty, South African law would provide a framework for fewer arbitrary arrests.

In terms of the use of force during arrest, the wording of section 49 of the CPA,[75] which governs the use of force, provides that the arrestor may use deadly force only if the suspect poses a threat of serious violence to the arrestor or other person, or the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm, and there are no other reasonable means of effecting the arrest, whether at that time or later. However, the Luanda Guidelines, which reflect international normative standards on the use of deadly force by law enforcement personnel, limit the potential use of lethal force through resort to firearms to 'the arrest of a person presenting an imminent threat of death or serious injury, or to prevent the perpetration of a serious crime involving a grave threat to life, and only when less extreme measures are insufficient to make the arrest'. This is a higher threshold than that laid down in section 49, as it does not permit the use of firearms based on suspected involvement in a serious crime.[76]

Charge

At the first court appearance after a person is arrested, which should occur within 48 hours of the arrest, the person has the right to be released, or to be informed of the reasons for their continued detention, or to be charged with an offence.[77] If the person is charged with an offence, the right of the accused to a fair trial under section 35(3) of the Constitution takes effect, which includes the right to be informed of the charge brought against him or her,[78] and the right to have sufficient time and resources to prepare an adequate defence.[79] Chapter 14 of the CPA expands on issues relating to the charge by extending to the accused a number of rights that align with the Luanda Guidelines.[80]

Section 84 of the CPA deals with the essentials of the charge, which aim to ensure that the accused has sufficient detail about the nature of the charge(s) against him or her,[81] and section 76 deals with the detail required on a charge sheet.[82] Despite the numerous grounds upon which the accused can object to the charge, the CPA provides the state with sufficient opportunity to conduct a successful prosecution. Not all omissions or imperfections in the charge sheet will invalidate the charge,[83] and, if they do, the state can still charge the accused with commission of all or any criminal offences which may be supported by facts that can be proved, or by curing a defective charge sheet with the introduction of additional evidence.[84]

In 2014/2015, the SAPS arrested and charged 1 660 833 persons.[85] Over the same period, there were 908 364 new cases placed on the roll.[86] However, with these available statistics, persons arrested cannot be accurately compared with cases, as cases may have multiple accused persons. The SAPS should be encouraged to release disaggregated statistics on the number of persons charged, and the number of charges against a person.

Further research is therefore required to understand the trends in terms of the number of arrests compared with the number of individual persons charged so as to make findings on the number of persons charged who appeared in court, and the reason for any non-appearance. For example, the SAPS can release a person on warning who has been charged and set an admission-of-guilt amount, which, if paid, means the person need not appear in court. Such statistics may also provide insight

into the quality of police investigations and the preparation of trial-ready dockets, which have been cited as a major factor in the weak administration, and delays in justice, in South Africa.[87]

The Khayelitsha Commission of Inquiry found that detainees are often kept for longer than 48 hours, and that the 48-hour rule is commonly 'subject to abuse' by SAPS officials.[88] The Commission further found that no evidence was adduced to demonstrate that members of the SAPS were unaware of the legal principles relating to the 48-hour rule, which suggests that this practice is intentional.[89] During consultations on this draft review, stakeholders raised concerns about the targeted use of arrest on Thursdays and Fridays as a crime-prevention measure (i.e. the operation of the 48-hour rule means that persons arrested on these days will spend the weekend in police cells). In some of the examples given, the use of arrest in this context was either a punitive measure, which raises concerns about the implementation of South Africa's existing framework for the protection of rights during arrest, or, alternatively, a criminal justice response to what are essentially social problems, such as drug and alcohol abuse. Further research on this issue is recommended with a view to identifying the command and control and training issues within the SAPS, and how other stakeholders, including community social services and state services, can be engaged (and supported) in order to reduce the number of unnecessary arrests and instances of deliberate detention over weekends.

Police custody

Section 12 of the Constitution provides for the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. Section 35(2) of the Constitution provides an extensive list of the rights of detained persons, which align with the provisions of the Luanda Guidelines.[90]

As with arrest, there is an element of legal uncertainty regarding whether all persons in police custody constitute detained persons, and, therefore, whether they are entitled to the rights provided for in section 35(2) of the Constitution. The reason why this is significant is that an arrested person will always be a detained person and therefore entitled to the rights under sections 35(1) and (2), whereas a person held in police custody will not always be an arrested person. The question therefore becomes: At what point does a person held in police custody become a detained person and therefore entitled to the protections under section 35(2)?

SAPS Standing Order 361(G) defines a 'person in custody' as 'a person who has been arrested and who is in the custody of the Service [SAPS] and who has not yet been handed over or handed back to the Department of Correctional Services or any other institution for detention'. Detention facilities are defined as 'a police cell, lock-up or temporary detention facilities ('*stormsel*') which are under the control of the Service [SAPS]'.[91] According to this Standing Order, a person held in police custody is an arrested person who is waiting to be transferred to the DCS or another institution of detention. However, this does not account for persons who are held in police custody but are not arrested, and to whom the protections of section 35(2) should also be extended.

South African courts have diverged in their approach to this issue. In *S v Sebejan*,[92] Satchwell J argued for an understanding that the right to a fair trial begins at the inception of the criminal justice process, not at the commencement of the criminal trial, in order to preserve the right to the presumption of innocence and to protect the accused person's right against self-incrimination. However, the High Courts have diverged on this point, as, in *S v Langa*[93] and *S v Mthethwa*,[94] both courts ruled that the rights under sections 35(1), (2) and (3) do not apply to suspects. In the absence of a Constitutional Court ruling, there is thus much scope for argument.

There are no statistics available on the number of people held in police custody over a period of 12 months. As noted in relation to arrest, the SAPS acknowledges that both unlawful arrest and

detention are a challenge and reported a 21% increase in the number of civil claims lodged against the organisation, attributed mainly to 'a high rate of unlawful arrest and detention'.[95]

In terms of the use of police custody facilities for persons already subject to remand orders, the Correctional Services Act (CSA)[96] allows for detention of a person in police custody for not more than one month (unless otherwise authorised by a commissioner) if there is no prison in the district.

However, reports of oversight visits by members of the National Parliamentary Portfolio Committee on Police have raised the issue of detainees being held in remand detention in police custody for the reason that 'prisons are full'.[97]

As discussed Section 2, a first step in addressing some of the key challenges in the police custody context is strengthening police cell monitoring and the availability of custody statistics from the SAPS. Recommendations to this effect are made in Section 5 of this review.

Remand detention

Remand orders

The framework for making a remand order in South Africa[98] is not entirely consistent with the approach taken in the Luanda Guidelines. The normative standard provided for in such guidelines is that detention be a measure of last resort. However, the South African framework provides only that the release of persons awaiting trial depends on a relatively narrowly constructed notion of the 'interests of justice'.[99] In making a decision, the court is therefore concerned with determining whether or not there is a 'rational connection' between the deprivation of liberty (in this case, remand detention) and 'some objectively determinable purpose'. If so, the court can find that there is 'just cause' for the deprivation of liberty.[100] A rights-based approach, as proposed with the Luanda Guidelines, that accords with the framework for permissible limitations of rights in the South African Constitution[101] requires a broader analysis by judicial officers, taking into account not only issues of proportionality, justice and reasonableness, but also the availability and appropriateness of alternative measures and whether the use of remand detention is a measure of last resort.

Nonetheless, there have been marked improvements in remand detention numbers in South Africa over the past few years. In response to the White Paper on Remand Detention Management in South Africa, and amendments to the CSA, the overall number of male remand detainees has dropped, from 47 398 in 2009/2010 to 41 717 in 2014/2015.[102] In other terms, the remand detention population rate, per 100 000 of the national population, has reduced significantly from 93 in 2010 to 79 in 2015.[103]

The DCS has attributed the decline to the use of non-custodial placements as a result of bail review applications to the court in terms of section 63 of the CPA, in addition to specific remand interventions by the substructures of the JCPS cluster.[104]

These interventions are welcome. However, more information on the terms and conditions of non-custodial placements, and the extent to which they are met, is required in order to assess whether they conform to a rights-based approach and are being effectively and fairly applied.

Bail

Section 59 of the CPA authorises release on bail of certain suspects by the police. During consultations on this review, stakeholders noted both unwillingness by the police to exercise this power, and practical barriers to the granting of bail in respect of this section. Further research is required to understand these challenges and to identify how the police can be supported so as to properly exercise this function.

During 2014/2015, South African courts heard 56 340 formal bail applications.[105] The number of informal applications or instances where accused persons are released on warning are not available. In terms of judicial decisions on bail, there are a number of identifiable challenges. Firstly, the law relating to bail proceedings does not stipulate a maximum time period which, once expired, entitles the accused to be released pending trial. Secondly, the current system does not provide for a process of continuous or intermittent review of bail decisions.[106] These issues are discussed below in detail in terms of duration of remand detention.

Regarding the application of bail, the law places an obligation on the court to raise the question of the possible release of the accused person on bail should the prosecutor or the accused person not raise the issue.[107] Except in the case of certain offences specified in Schedule 5 and 6 of the CPA, the onus rests on the prosecution to persuade the court that the interests of justice do not permit the release of the accused person on bail. The reverse onus of proof in relation to bail for Schedule 5 and 6 offences[108] has been criticised on the basis that it fails to adequately protect the right to innocence until proven guilty and places a significant burden on the accused person to prove 'exceptional circumstances' in situations where the he or she may not have access to adequate legal representation.[109]

As of March 2015, 17% of remand detainees were held in detention despite having been granted bail.[110] What constitutes an unaffordable amount was given by the JICS as a threshold of R1 000, at which threshold 5 673 detainees remained in custody as a result of not being able to pay.[111] This indicates that the amount of monetary bail set by the courts is not always appropriate to the circumstances of the accused, which raises issues in relation to the right to equality for indigent persons[112] and the extent to which the courts are making sufficient inquiries into the reasonable amount of bail that the accused person can afford.[113] The NPA also reports that there are instances where the accused person declines to pay bail because of services (medical) and subsistence (accommodation and food) with which they are provided.

There have been recent developments in relation to bail, including a new bail protocol (to approach the court for the release of an accused person on warning in lieu of bail, or to amend bail conditions) and the institution of electronic monitoring of remand detainees which will be utilised by the court system.[114] The impact of these new developments will need to be measured against their impact on remand detainee numbers.

Duration of remand detention

Justification for the category of measurement

A category of indicators that measures the duration of remand detention provides an evidence base in respect of the effectiveness and efficiency of the criminal justice system in processing cases through the court system and can reveal where blockages and challenges arise within that chain.

The proposed indicators to measure the duration of remand detention take into account not only the average duration of remand detention, but also the number and proportion of remand detainees who are held in excess of norms and standards established at international and national levels.

The period of incarceration of a person that may not be exceeded without a court giving specific consideration to the continued detention of such a person is two years (and every year thereafter), with the number held for more than two years reducing to 1 660 by 30 November 2015,[115] compared with 1 971 on 3 June 2013.[116] The reduction in both the number of remand detainees and the number who remain in remand detention beyond two years is encouraging, although

further research is required to understand whether this is a result of seasonal fluctuations or of interventions by the relevant institutions. In any case, there remain a number of challenges inherent in the current remand system that have a negative impact on further and sustained reductions of remand duration.

Duration of remand detention

As of 30 November 2015, the statistics on the length of detention for persons held in remand detention in South Africa were as follows:[117]

Remand detainees as at 30 November 2015		
Period in custody	**Total**	**Percentages**
<3 months	23 312	57.00
>3–12 months	12 282	30.03
>12–24 months	3 635	8.89
>2–3 years	1 036	2.53
>3–4 years	360	0.88
>4–5 years	137	0.34
>5 years	133	0.33
Total	40 895	100.00
Longest period spent as at 30 November 2015: 8 years 8 months		
The longest period spent by a remand detainee in DCS facilities is more than 14 years according to the profile report of remand detainees based on a snapshot for 31 December 2007.		

Source: DCS *Length of Detention Report*

Since the implementation of section 49G, the number of remand detainees held for more than two years reduced, as stated above to 1 660 by 30 November 2015,[118] compared with 1 971 on 3 June 2013.[119]

There are myriad factors that contribute to the length of remand detention, including the performance of the police in terms of timeous investigations and delays within the court system. A few of the identified challenges are set out below.

Postponement of bail hearings

Courts can, informally or by order, adduce evidence needed to make a decision or order regarding bail, or postpone proceedings for the purpose of obtaining the further evidence required.[120]

There are reports that the postponement of bail hearings, which is permitted for up to seven days at a time, frequently occurs on the basis that the presiding officer does not have enough information before him or her to make a decision on bail.[121] The current identity-verification system does not utilise biometric data, and the SAPS should work with the Department of Home Affairs to modernise and update its system so as to reduce backlogs and delays as a result of such verification.[122] The CPA does provide presiding officers with alternatives if postponements are repeatedly granted, such as striking the case from the roll and requiring that investigators complete the investigation, at which time, if appropriate, the accused can be rearrested.[123]

Custody time limits

Once a remand order has been made, South African law does not provide for custody time limits or a mechanism by which remand decisions are routinely or automatically brought to the courts for review, except when a detainee has been held for more than two years, when the 'matter' must be 'brought to the attention of the court' pursuant to section 49G of the CSA. The CPA does allow an accused person to bring an application for release on bail at any time during the criminal justice process, but, as noted by Ballard, the onus is on the accused person to make an application for review and, given that the information required is not always available to the accused (including whether the prosecution and the SAPS are diligently investigating and prosecuting the case), the current system is 'unfair'.[124]

There were welcome developments in 2014/2015. In its most recent annual report, the DCS notes that, together with the Criminal Justice System Review Committee, the National Operations Committee and the Provincial Efficiency Enhancement Committees, it has established a process to track remand detainees who have been 'detained the longest in correctional facilities', which includes a review of the factors contributing to the finalisation of the accused persons' trial and steps to address those factors.[125] As a result, the number of remand detainees held for more than two years reduced to 1 660 by 30 November 2015,[126] compared with 1 971 on 3 June 2013.[127] The long-term impact of these interventions should be tracked.

However, in its latest annual report, the JICS has noted that, during its inspections, it found that 'important and substantive additional information' in relation to the detainee being referred to court pursuant to section 49G was missing, which can have a negative impact on the extent to which the court can make decisions on bail that are in the interests of justice.[128]

Court utilisation and backlog

Despite efforts to improve coordination and integration across the criminal justice system through the NDP, the 7-Point Plan[129] and the Office of the Chief Justice (OCJ) Norms and Standards for the Performance of Judicial Functions,[130] case-flow management challenges remain apparent.

In terms of court-utilisation time, in 2014/2015 the number of criminal cases finalised with a verdict was 319 149, which is 1.6% lower than the target set by the NPA, an achievement that was due in part to the reduction in court-utilisation time over the same period.[131] Average court-day utilisation decreased by 2.6% in 2014/2015. However, courts are reported to be achieving 78.1% (three hours and 31 minutes) of the four hours and 30 minutes provided for by the OCJ Norms and Standards for the Performance of Judicial Functions.

The current backlog of criminal cases, which is being addressed through the Case Backlog Reduction Project,[132] affects the efficiency of the justice system at every court level and contributes to the duration of remand detention. However, addressing court backlogs is a complex project. Factors contributing to the backlogs include human resource and infrastructure constraints, the failure by courts to utilise court hours, the poor quality of police investigations, the lack of an integrated information and communications technology (ICT) system for the criminal justice system,[133] and challenges in transporting remand detainees between DCS facilities and the courts.[134] The role of the Case Backlog Reduction Project in addressing these issues is critical, and, in Section 5 of this review, improved data collection and dissemination is recommended to allow for the analysis of these challenges, to identify further areas of intervention, and to measure the impact of those interventions.

Incomplete dockets and investigations

Incomplete trial dockets, or investigations that are not complete, are a major factor contributing to backlogs and delays in the criminal justice system, thereby adding to the duration of remand detention.

In terms of the percentage of trial-ready[135] case dockets involving serious crimes, the 2014/2015 target set by the SAPS was not met, with only 63.63% being trial-ready (237 362 out of a total of 373 037).[136] This was attributed to 'inadequate command and control in the investigative value chain', with secondary contributions as a result of resignations and subsequent skill shortages in investigative services, as well as outstanding deliverables from external service providers such as forensic reports from the Department of Health.[137] There is also evidence to suggest that the SAPS is not effectively responding to priority crimes, as indicated by increases in the murder rate over the past few years.[138]

In 2012, the Portfolio Committee on Police held a Detective Dialogue to discuss the challenges, and how to address them, in order to ensure an effective and efficient detective service within the SAPS.[139] Among the challenges identified during the dialogue were training, personnel strength and resources, career-pathing, detection and conviction rates, spending patterns, implementation of legislation, lack of response to complaints, capacity constraints at the Criminal Record Centre and Forensic Science Laboratories, and the functioning of Family Violence, Child Protection and Sexual Offences Units.[140] These challenges reflected those identified by a Public Service Commission report into detective services in 2011.[141]

As discussed earlier in this review, amendments to the South African Police Service Act designed to align the role and function of the police to South Africa's constitutional framework, and to the new policy framework provided by the White Paper, are a critical and urgent next step and will provide an opportunity to incorporate recommendations from previous reviews of detective services into SAPS legislation, regulations, standing orders and training. Furthermore, the Back to Basics and Transformation Agenda should be implemented and monitored by the CSP to determine the impact on identified challenges, such as arrest and police custody, as part of this review.

Postponement of trials

Postponements can occur when one or more key role players fail to appear in court. These include prosecutors, legal representatives, court interpreters as well as presiding officers.

The failure of remand detainees to present themselves for court appearances is of significant concern.[142] The warrant of detention (J7) for each remand detainee should include the validity of the warrant and the next court appearance date. The detention of a remand detainee except in strict compliance with the J7 is unlawful and the DCS must have a tracking system in place to ensure that all remand detainees are notified of their next court appearance and are made available to the SAPS for transportation on the day.

Use of pre-trial hearings

Pre-trial hearings have been identified by Legal Aid South Africa, the NPA and the OCJ as one solution to prevent remand in trial-ready cases. However, the NPA reports that pre-trial hearings have been slow to gain traction in the lower courts, which has been compounded by courts placing too few trial cases on court rolls, thus wasting court hours and reducing court-utilisation time.[143] Pre-trial Services[144] were trialled by the DoJ&CD in 1997, but were not integrated into the criminal justice system owing to the failure of the project to align with the department's broader strategy and to lack of planning for its integration.[145] These services sought to improve bail decision-making through a bail recommendation report containing information needed by the court to make a bail decision at an accused person's first appearance. Karth observes:[146]

> The information enabled the court to make more appropriate bail decisions. It meant that high-risk, dangerous and repeat offenders were more likely to be detained while awaiting trial, but also that low-risk, petty, first-time offenders could be released from

> custody. In order to facilitate this release, [Pre-trial Services] attempted to strengthen supervision of bail conditions as a viable alternative to money-based bail. [Pre-trial Services] offered an alternative to the money-based bail system by encouraging judicial officers to make greater use of alternative bail conditions and the supervision of accused persons who were released from custody.

Based on observations of the pre-trial Services experiment, a similar programme has the potential to promote affordable bail and the use of non-monetary conditions, as well as reduce the average length of remand detention by improving the efficiency and effectiveness of bail decision-making.[147]

Efforts should therefore be made across the criminal justice system to promote the use of pre-trial hearings, in line with the current recommendations of Legal Aid, the NPA and the OCJ.

Access to legal services

Access to legal services is particularly important given the profile of remand detainees as being, on the whole, among the most vulnerable and marginalised, who may be unaware of their legal rights, and who may be wholly dependent on legal aid lawyers with large caseloads.[148] Legal Aid has acknowledged the constraints on its ability to provide adequate service delivery in criminal matters. Primarily, the challenge is defined as one of insufficient funding.[149] In 2014/2015, Legal Aid reported that it was below target for the delivery of legal assistance services in regional courts as well as High Court matters owing to delays in investigations and repeated postponements at the request of prosecutors.[150]

Legal Aid has also reported that access to clients over the weekends and the inability of officials to locate their clients within some correctional facilities have an impact on the quality and continuity of services that its practitioners can provide.[151] However, the DCS reports that a protocol on the procedures to be followed by Legal Aid practitioners to obtain access to remand detainees for consultation purposes has been developed in order to address the challenges related to access raised by Legal Aid.[152]

Improving accused persons' access to legal services is an important component of a remand detention reform agenda. Consideration should be given to reviewing the current budget cuts to Legal Aid South Africa, and to addressing challenges in the access to clients through instructions or other means among the relevant departments.

Conditions of detention

Category of measurement

The measurement of conditions of detention can provide information on the criminal justice system's treatment of persons who are deprived of their liberty in line with the constitutional and legislative protections so afforded to remand detainees. The gaps identified by such a measurement can assist with prioritising service delivery and budget allocations based on need.

Framework in South Africa

Police custody

Although the CSP is responsible for monitoring conditions in police custody and the treatment of detainees, the number and location of SAPS stations have created challenges in conducting widespread inspections.[153] According to a report on conditions in police holding cells, persons in police custody are typically detained in communal cells which usually have shower and toilet facilities that are shared among detainees, with there being only limited privacy.[154] The report also found that

most cells are overcrowded, poorly lit and have bad ventilation, with temperatures becoming hot during the day and extremely cold at night.[155]

In 2014/2015, 244 people died and 34 people were raped while being held in police custody.[156] Causes of death in police custody range from suicides to natural causes, and from assaults prior to detention to injuries sustained during detention.[157]

To address these issues, the present review recommends a strengthening of the current police cell inspection regime, including consideration of the establishment of a lay visitor scheme as part of the CSP's mandate to inspect police cells (see earlier under 'Police cell monitoring').

Remand detention

In 2014/2015, the majority of remand detainees were held across 119 facilities, of which 15 were dedicated remand detention facilities.[158] In 2014/2015, DCS facilities were, on average, at 32% above capacity.[159] Conditions of detention in DCS facilities do not meet the minimum standards set out in the Luanda Guidelines. Factors contributing to poor conditions of detention are numerous and include inadequate infrastructure maintenance, overcrowding, and staffing levels and conditions.[160]

Overcrowding has led directly to the spread of tuberculosis (TB) and bacterial infections among detainees.[161] The DCS has acknowledged that facilities and their management have a negative impact on the ability of the DCS to safely and securely house and care for detainees, and on the ability of detainees to exercise their rights, such as access to legal counsel and health care, and to make contact with persons outside the correctional facility.[162]

The National Commissioner has noted that, in relation to health care, the DCS still requires more psychologists, social workers, medical practitioners and pharmacists to meet the demand for health services.[163] Despite the challenges, some improvements were reported in 2014/2015, with the cure rate for TB increasing from 75% in 2013/2014 to 83% in 2014/2015, and with 100% of all inmates being tested for human immunodeficiency virus (HIV) during the same period.[164]

Remand detainees are exposed to violence (from both inmates and officials),[165] to death as a result of violent assaults (which constituted 25% of all unnatural deaths in DCS facilities in 2014/2015),[166] and to communicable diseases such as HIV/Aids (acquired immune deficiency syndrome), tuberculosis and hepatitis.[167] Overcrowding – which occurs across the DCS system, with occupancy at 150% in some facilities – has been identified as the single-most pressing concern by the National Commissioner.[168] Indeed, the NDP requires that the issue of overcrowding be addressed as a matter of urgency.[169] The DCS is seeking to reduce overcrowding through a range of initiatives, including a number relevant to remand detainees, such as the introduction of electronic monitoring and a new bail protocol (to approach the court for the release of an accused person on warning in lieu of bail, or to amend bail conditions).[170]

In reports on violence in the Johannesburg Management Area, Just Detention International–South Africa identified the need for policy and training, improving the facility environment, and addressing the sources of violence, such as contraband and gangs, as critical to addressing violence in correctional service facilities.[171]

Section 63A of the CPA provides for the release of certain detainees on bail where overcrowding has resulted in conditions of detention that pose a threat to human dignity, physical health or safety. However, in the course of its inspections, the JICS has reported that its inspectors have found 'little evidence of the heads of correctional services … [using section] 63A to apply to a court for it to consider the release of an accused on warning in lieu of bail or the amendment of the bail conditions'.[172]

The DCS also promotes the use of section 63(1), which allows for either the accused or the prosecutor to approach the court for an amendment of bail.[173] The DCS conducted a retraining programme on DCS-led protocols, including the protocol on bail, from July to October 2014.[174] Between April and December 2015, 19 268 applications were submitted for bail review and, of these submissions, 10 703 were successful.[175] Court outcomes that constitute successful applications are:[176]

- Reduction of bail;
- Placement under correctional supervision;
- Release on warning; and
- Withdrawal of a case.

In terms of the separation of categories of detainees, lack of proper risk assessments, which allow the DCS to identify high-risk detainees, coupled with insufficient information on the J7 form to facilitate a risk assessment, means that remand detainees are all held together, without consideration of their risks and needs.[177] This places an additional security burden on correctional facilities and does not take into account the individual security profiles of remand detainees when assigning accommodation. In a positive development, the DCS commenced the 2015/2016 financial year with the three-year roll-out of the Continuous Risk Assessment (CRA) tool for facilities that detain remand detainees. It is envisaged that, by 2017/2018, all accused sent for detention without an option for bail will be assessed within 24 hours of admission. Remand detainees with an option for bail are considered to be in the CRA's low-risk category, on the basis that the DCS will release them when the bail amount set out in the warrant of detention is paid.

Accused persons' compliance with conditions of release

Compliance with conditions of release as a category of measurement

Measuring the extent to which accused persons comply with conditions of release provides insight into the extent to which the pre-trial practices of the court protect the administration of justice and the criminal justice process. Moreover, it can provide an important counter-narrative to the effectiveness of the bail system in reducing overcrowding without prejudicing the interests of justice or disregarding community perceptions about safety. The measurement can also provide useful information for a monitoring and evaluation framework on the risk factors associated with non-compliance with release orders, as well as identify factors that contribute to wilful compliance.

The indicator proposed for this category of measurement is the number of warrants of arrest issued for failure to appear in court, and the number of bail forfeitures (which provides a more direct correlation with bail paid). Statistical information on these indicators was, however, not available.

Framework in South Africa

Although courts have the discretion to apply non-monetary bail conditions, there are concerns that this option is underutilised. According to the NPA, the most significant barrier to the application of non- monetary bail conditions is the presumption that accused persons will abscond before their trial.[178] This is particularly so for persons with no monitorable address. Alternatives to the requirement for a monitorable address should be considered, and more use should be made of the placement of accused persons under the supervision of a probation officer or correctional official in accordance with section 62(f) of the CPA.

Since 2012, the DCS has implemented an Electronic Monitoring Pilot Project (EMPP), which, more recently, has been extended to include remand detainees. A protocol on the electronic tagging of

remand detainees was approved in December 2015 and will take effect once it is signed.[179] The effectiveness of this project should be monitored with a view to including it in the range of non-monetary options available to the court in making decisions on bail conditions. As of March 2015, 604 persons had been tagged electronically, including a 50-year-old who was previously a remand detainee, who is paraplegic, and who had been held at the Grootvlei Correctional Centre since 2011.[180] As of 1 February 2016, there were three awaiting-trial persons subject to the electronic monitoring system, with two additional high-profile cases subject to the system as a result of an application made by their legal representatives.[181]

Fewer remand detainees in DCS facilities represents a significant cost saving to the government. The opportunity cost of high rates of remand detention has an immediate impact on other resource spending. The Open Society Justice Initiative estimated that half of the DCS's total budget (R16.7 billion) could increase the national budget for basic education by approximately 60%, or represent a threefold increase in the budget for the NPA.[182] A cost-benefit analysis of alternatives to remand detention is therefore recommended.

Effectiveness and efficiency of the criminal justice system

Measuring effectiveness and efficiency in the criminal justice system

Measuring the effectiveness and efficiency of the criminal justice system aims to provide an understanding of the extent to which remand detainees enjoy procedural and substantive fairness, expressed in terms of whether their remand detention was justified. The indicators proposed for this category of measurement are:

- Number and proportion of remand detainees acquitted, and reasons for acquittal;
- Number and proportion of remand detainees who had their cases withdrawn, and the reasons for the withdrawal;
- Number and proportion of remand detainees who received non-custodial sentences; and
- Number and proportion of remand detainees who are released as a result of cases being struck off the roll, and reasons for the case being struck off.

This category of measurement will provide an understanding of the extent to which remand detainees are held with insufficient evidence to sustain the charge/s or a conviction, and can provide insight into the weakness of police investigations and prosecutions. Disaggregated data is not available in terms of remand detainees for all categories of measurement, nor are the reasons for decisions to strike or withdraw matters from the court roll. However, some observations in terms of overall statistics in South Africa are given below.

Framework in South Africa

In 2014/2015, conviction rates for serious crime stood at 79.66%, down by 0.05% on the previous year.[183] There was also a reduction in the number of cases finalised with a verdict (3% fewer than 2013/2014 at 319 149), which was attributed in part to prosecutor inefficiency, whose tasks are impacted by challenges in the screening processes to ensure quality prosecutions and the need to assist the SAPS by guiding investigations.[184] These challenges highlight the need for more effective coordination across the criminal justice chain, particularly in terms of police investigations and court-utilisation time.

At first glance, the conviction rates are impressive. However, research on the relationship between conviction rates and the number of dockets considered for prosecution by the NPA each year has raised

concerns that, as the NPA is not required to provide reasons for declining to prosecute, 'the door is thus opened to only pursue cases where there is a high probability of success with the least amount of effort involved', including in relation to prosecutions against DCS and SAPS officials.[185] The impression gained from the research by Muntingh is that 'the NPA in general declines to prosecute in a very large proportion of ordinary criminal cases'.[186] Other research suggests that decisions to decline to prosecute are not linked to lack of resources or heavy workloads but are rather a result of a permissive legislative and policy framework that does not provide for effective accountability with regard to the NPA.[187]

In a welcome development, fewer cases were withdrawn from the court roll in 2014/2015 than in the previous year, which continues the decline of 42.1% in case withdrawals over a five-year period. However, it has been noted with concern that cases struck off the court role increased by 5.3% (to 5 934 cases) over the same time period, and the NPA has called for further explanations for this.[188]

A positive development is the increased use of alternative dispute-resolution mechanisms (ADRMs). In 2014/2015, the NPA finalised 503 463 criminal court cases, including through ADRMs.[189] This represented1 879 fewer cases than the previous year, but was still 6.3% above the target set for 2014/2015.[190] The NPA attributed the success in meeting the target to the increase in accused persons successfully completing diversion programmes, and to an increase in the number of suitable cases identified for informal mediations.[191] The use of ADRMs, particularly in relation to less serious crimes, is welcome and consistent with the aims of the Luanda Guidelines to promote greater access to justice.

In terms of plea and sentence agreements, the NPA reports that there were 1 760 plea and sentence agreements concluded under section 105A of the CPA during 2014/2015, which was an increase of 33% from the previous year.[192] Plea and sentence agreements are reportedly used most frequently in relation to serious and complex cases, thus saving the court time otherwise spent on potentially lengthy trials.[193] However, without data on the type of matters in which plea agreements are offered by the NPA, an analysis on the fairness of the current system, when considered against the backdrop of challenges to accessing legal representation for remand detainees, is not possible. This type of data should be included in any review and reform of current data collection and dissemination across the criminal justice chain.

Community perceptions of the effectiveness and efficiency of the criminal justice system

Measuring community perceptions

Measuring community perceptions of the effectiveness and the efficiency of the criminal justice system represents an important data source for policymakers and lawmakers in terms of the extent to which reform of the criminal justice system is received by the community, can influence resource allocation and priority setting, as well as assist in tailoring interventions (whether reform or awareness initiatives) that respond to community safety concerns.

Framework in South Africa

Perceptions

The 2015 Victims of Crime Survey by Statistics South Africa (Stats SA) provides an overview of community perceptions of the effectiveness of the criminal justice system as a whole, as well as in terms of key departments and institutions.

Overall, more than 60% of households surveyed were generally satisfied with the work of the police and courts, and factors that influence responses were identified as the responsiveness of the

police to reports of crime, visible policing, and conviction and sentencing rates.[194] However, respondents expressed dissatisfaction with police responses to crime, with perceptions of police corruption and laziness cited as reasons for dissatisfaction.[195]

Incidents of police crime and the use of force are also a strong indicator of a broader challenge in policing systems and of the SAPS's capacity to execute its functions within the rule of law.[196] During 2014/2015, there were 244 deaths in police custody and 396 deaths as a result of police action reported and investigated by the Independent Police Investigative Directorate (IPID).[197] Further, there were 145 incidents of torture reported to the IPID, which was an 88% increase on the number of incidents reported to it in the previous year.[198] The increase in complaints to the IPID can, on the one hand, be reflective of increased community awareness about rights and the means to enforce such rights,[199] particularly since the enactment of the Prevention and Combating of Torture of Persons Act of 2013. However, the impact on community confidence and trust in the police as a result of a broad range of misconduct and criminality should not be underestimated,[200] nor should the challenges faced by the IPID and other oversight mechanisms charged with investigating incidents and complaints.

In terms of the court system, 64% of respondents were satisfied that the courts were generally achieving their mandates, with challenge areas identified as lenient sentencing, postponements, and the unconditional release of suspects being cited as reasons for dissatisfaction.[201] This final point reflects the concerns raised regarding the role and perception of the bail system in a country that experiences relatively high rates of crime, as discussed in this review. Data on the number of accused persons who comply with release orders, coupled with a review of comparative bail systems and non-monetary bail options, should be considered in order to understand and implement a bail system that is not only effective, but can also be demonstrated as effective and safe for the community.

In evaluating the DCS, 86.1% of respondents indicated that they believed that 'many people who are guilty do not go to prison', and 28.1% agreed with the statement that 'prisons violate prisoner rights'.[202] On this point, the Victims of Crime Survey provides an interesting picture of community perceptions which accords with feedback from stakeholders that the community wants a 'tough on crime' approach to managing violence and crime in South Africa. As discussed in Section 2 of this review, the law-and-order response that is favoured is not entirely consistent with the new policy framework for policing and safety in South Africa, and community consultation and education may be required to ensure support for, and an understanding of, the new policy direction.

Impact of resource allocation on community perceptions of the justice system

The inequitable distribution of police services among previously disadvantaged and advantaged areas remains an ongoing cause for concern, despite numerous requests for the urgent reallocation of resources to areas with high levels of crime and violence. Among the various recommendations included in the Khayelitsha Commission of Inquiry's report was 'revision of [the SAPS's] system for determining the theoretical human resource requirement of police stations', a practice described by the former provincial commissioner, Arno Lamoer, as 'fundamentally irrational'.[203]

Despite calls to revise a deeply problematic and illogical approach to resource allocation, no substantial changes seem to have been made. For example, during the 2013/2014 reporting period, 164 murders were reported to Harare police station in Khayelitsha, compared with six murders reported during that same period to stations located in suburbs from Camps Bay to Rondebosch.[204] Notwithstanding the disproportionate level of violence in Khayelitsha, Harare police station is staffed with one-third of the number of police officers as these suburbs, with many of its detectives being student constables.[205] Consequently, many of the officers who work at this station are 'overburdened, burnt out, uncaring, and probably unqualified' to deal with the volume of contact crimes reported to the station.[206] Further, the failure to appoint an adequate number of qualified, competent, and experienced officers

to respond to incidents of crime and violence in these areas not only violates community members' rights to equality and freedom and security of the person, but also compromises the safety and security of the individual police officers.

Community organisations in Khayelitsha, including Social Justice Coalition, Ndifuna Ukwazi and Equal Education, have called for immediate implementation of the report's recommendations as well as the development of a plan to deliver equitable and adequate police resources across all nine provinces.[207] These requests, however, appear to have gone unnoticed by the SAPS at national level, despite receiving widespread support from the SAPS at a local level.[208] As a consequence of the non-response from the SAPS, incidents of vigilante violence are on the rise, with community members taking criminal matters into their own hands, which has resulted in increased levels of crime and violence in these areas.[209]

4. A review of arrest, police custody and remand detention in South Africa: Vulnerable groups

Children in conflict with the law

The DSD plays a critical role in the provision of efficient, responsive and professional criminal justice services, specifically for children subject to remand detention. In terms of the Child Justice Act (CJA) 75 of 2008 and the National Policy Framework for Implementation of the CJA, the DSD is responsible for ensuring that all children who are charged with a criminal offence are assessed by a probation officer and are referred to the Children's Court, are recommended for counselling, or are placed in a secure care facility.[210] Additionally, the DSD is responsible for the provision of educational programmes for children awaiting trial, and for the delivery of all accredited diversion programmes.[211] Further, the DSD is also responsible for the provision and management of child and youth care centres (CYCCs) for children awaiting trial as per the Children's Act of 2005, and works with the SAPS and the DoJ&CD to ensure adequate levels of security at every CYCC.[212]

What follows is a review of the framework for child justice in South Africa relevant to the remand environment and the management of CYCCs.[213]

Constitutional framework

The framework for child justice in South Africa is subject to a specific constitutional and legal regime. The Constitution contains a number of substantive provisions aimed at protecting the rights of arrested, detained and accused persons.[214] Importantly, for present purposes, are the rights specifically afforded to children in conflict with the law.[215] In this regard, section 28(1)(g) provides that, in addition to the rights enjoyed by children under sections 12 and 35 of the Constitution, a child in conflict with the law also has: the right not to be detained, except as a measure of last resort, and then only for the shortest appropriate period of time;[216] the right to be kept separately from detained persons over the age of 18 years;[217] and the right to be treated in a manner and kept in conditions that take into account the child's age.[218] In addition, section 28(2) of the Constitution provides that the best interests of the child are to be considered of paramount importance in all matters concerning that child, including those who are subject to arrest, police custody and remand detention.[219]

Legal framework

On 1 April 2010, the CJA was promulgated into law. The CJA aims to establish a criminal justice system that has as its central feature the possibility of diverting matters away from such system. The

Act expands on, and entrenches, the principles of restorative justice while ensuring that children are held responsible and accountable for offences they commit.[220] It further recognises the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for reoffending. Moreover, it balances the interests of children and those of society with due regard to the rights of victim.[221] The CJA also creates special mechanisms, processes, or procedures for children in conflict with the law by:

- Amending the common law pertaining to criminal capacity by raising the minimum age of criminal capacity for children from seven to ten years of age;
- Ensuring that the individual needs and circumstances of all children in conflict with the law are assessed by a probation officer shortly after apprehension;
- Providing for special processes or procedures for securing attendance at court, as well as the release or detention and placement of children;
- Providing for appearance at a preliminary inquiry, which is an informal, inquisitorial, pre-trial procedure designed to facilitate the best interests of children by allowing diversion of matters involving children away from criminal proceedings in appropriate cases;
- Providing for the adjudication of matters involving children, which are not diverted, in child justice courts; and
- Providing for a wide range of appropriate sentencing options specifically suited to the needs of children.[222]

The CJA also provides a set of 'guiding principles' which frame the paradigm of child justice in a manner that accords with – and takes cognisance of – the obligations placed upon it by international and regional law instruments as well as the Constitution.[223] The CJA has ushered into the South African context a comprehensive system of dealing with children in conflict with the law that represents a decisive break with the 'traditional' criminal justice system.[224] The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain an understanding of a child caught up in behaviour that results in transgression of the law. This is achieved by: assessing his or her personality; determining whether the child is in need of care and protection; and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative justice processes and the reintegration of the child into the community.[225]

Arrest

One of the main aims of the CJA is to prevent children from being exposed to the adverse effects of the formal criminal justice system.[226] This is achieved by tightly regulating instances where arrest may be considered, and by providing alternatives to arrest. The following serves as a snapshot of what is envisaged by the CJA:

The use of a written notice.[227] A written notice may only be handed to a child who has committed a Schedule 1 offence.[228] The notice should be handed to the child in the presence of his or her parent, guardian or an appropriate adult.[229] Where this is not possible, the police officer must hand the written notice to the child and a copy must, as soon as circumstances permit, be handed to the parent, guardian or an appropriate adult.[230] The police official must, when handing the notice to a child, inform him or her of his or her rights.[231] Immediately hereafter, but no later than 24 hours, the police official must notify the probation officer concerned that a written notice has been served on a particular child.[232]

The use of a summons.[233] A summons is usually used when a period of time has elapsed since the offence was committed. This is usually the case when a charge was previously withdrawn and the prosecutor now elects to reinstate it.[234] A summons may be used to secure the attendance of a child regardless of what schedule the offence may be included in. The summons must be served on the

child in the presence of an appropriate adult.[235] Where this is not possible, the police official must serve the summons on the child and a copy must, as soon as circumstances permit, be handed to the parent, guardian or an appropriate adult.[236] The police official must notify the probation officer concerned within 24 hours that a summons has been served on a particular child.[237]

The arrest of a child.[238] A child who is suspected of committing an offence listed in Schedule 1 of the CJA may not be arrested unless there are compelling reasons justifying the arrest.[239] In all other instances, that is where a child is suspected of committing an offence listed in either Schedule 2 or Schedule 3, he or she may be arrested.[240] In instances where a child is arrested, the CJA requires the police official to: (a) inform the child of the nature of the allegation against him or her;[241] (b) inform the child of his or her rights, including the right to remain silent and the right not to be forced into making a confession;[242] (c) explain to the child the procedures to be followed in terms of the CJA;[243] and (d) notify the child's parent, guardian, caregiver or another appropriate adult that the child has been arrested.[244] Immediately following the arrest, but no later than 24 hours after making the arrest, the police official must contact the probation officer responsible for the jurisdiction in which the arrest took place in order to conduct an assessment of the child.[245] If the police officer is unable to contact the child's parents or arrange an assessment with the probation officer, the officer must submit a written report to the magistrate during the preliminary inquiry which demonstrates that a good-faith effort was made to comply with the provisions of the CJA.[246] The CJA further provides that a child must be brought before a magistrate's court having jurisdiction 'as soon as possible but not later than 48 hours after arrest'.[247]

It is clear that the CJA, insofar as its mechanisms for securing a child's attendance are concerned, both resonates with and promotes the Luanda Guidelines as well as the other international and regional law instruments on child justice.

Pre-trial assessments

The CJA makes it compulsory for all children who are alleged to have committed an offence, including those under the age of ten years, to be assessed by a probation officer prior to their appearance at a preliminary inquiry.[248] The purpose of the assessment is, among other things, to:

- Establish whether the child is in need of care and protection;
- Estimate the age of the child if this is uncertain;
- Gather information relating to any previous convictions or diversion, or pending charges in respect of the child;
- Formulate recommendations regarding the release or detention and placement of the child;
- Establish whether the child is a suitable candidate for diversion;
- Determine whether any measures should be taken against a child who is ten years or younger;
- Express a view as to whether expert evidence is needed in relation to the criminal capacity of a child ten years or older but under the age of 14;
- Consider whether the child was used by an adult to commit the offence; and
- Provide any other information regarding the child which the probation officer may regard to be in the best interests of the child or which may further any objective that the CJA seeks to achieve.[249]

In addition, probation officers are required to monitor diversion orders;[250] convene family-group conferences;[251] conduct victim–offender mediation;[252] submit pre-sentence reports in cases that are not diverted;[253] and monitor alternative sentences, especially community-based sentences.[254]

Police custody

A police official must, in respect of an offence referred to in Schedule 1, and where appropriate, release a child on written notice into the care of a parent, an appropriate adult or a guardian.[255] If a

police official does not release a child who has committed a Schedule 1 offence, he or she must set out the reasons in a written report, which must be submitted to the inquiry magistrate.[256] In instances where the police official cannot release a child, a prosecutor may authorise the release of the child on bail. The prosecutor is entitled to do so both in relation to offences listed in Schedule 1 as well as offences listed in Schedule 2.[257] It bears emphasis that 'when considering the release or detention of a child who has been arrested, preference must be given to releasing the child'.[258]

It is important to note that, where a child is not released before his or her first appearance, a police official must, where appropriate and applicable, consider the placement of a child in a suitable CYCC.[259] Whether it is appropriate and applicable to consider placement of a child, section 27 of the CJA distinguishes between three categories of children, namely a child who is:

- ten years or older but under the age of 14 years and who is charged with any offence;
- 14 years or older and who is charged with a Schedule 1 or 2 offence; and
- 14 years or older and who is charged with a Schedule 3 offence.

In respect of the first two identified categories, a police official must give due consideration to the detention of a child in an appropriate CYCC. If no such facility is available, or where the child is 14 years and older and has committed a Schedule 3 offence, the child must be detained in a police cell or lock-up.

In instances where a child is detained in police custody, he or she must: (a) be detained separately from adults, and boys must be held separately from girls; (b) be detained in conditions that consider his or her vulnerability and which reduce the risk of harm to the child and the risk of harm caused by other children; and (c) be permitted visits by parents, appropriate adults, guardians, legal representatives, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors, and any other person who is entitled to visit in terms of any law.[260] Moreover, the child must at all times be 'cared for in a manner that is consistent with the special needs of children', which includes the provision of immediate and appropriate health and medical care, as well as adequate food, water, blankets and bedding.[261]

Diversion

Diversion is the channelling of children away from the formal court system into reintegrative programmes. If a child acknowledges responsibility for wrongdoing, in certain circumstances he or she can be diverted to such a programme, thereby avoiding the often stigmatising and even brutalising effects of the mainstream criminal justice system. Diversion gives children a chance to avoid a criminal record while at the same time teaching them accountability and responsibility for their actions.[262]

It is important to note that a child may be diverted regardless of the offence he or she is alleged to have committed.[263] The legal consequences of a diversion is that, if successfully completed, the child cannot be prosecuted for the same crime.[264] Moreover, a diversion order does not constitute a criminal conviction and therefore the participation therein cannot be used against the child later.[265]

Remand detention

A child may be released at a preliminary inquiry or any subsequent appearance in one of three ways:

- The child may be released, in respect of any offence, into the care of a parent, an appropriate adult or guardian;[266]
- The child may be released, in respect of a Schedule 1 or 2 offence, on his or her own recognisances;[267] or
- The child may be released on bail.[268]

The presiding officer must, as mentioned earlier, favour the release of the child unless the circumstances are such that the child cannot be released.[269] If this is the case, a presiding officer may order that the child be either detained in a CYCC or a prison.[270] When making such a decision, the presiding officer must give preference to the least restrictive option possible in the circumstances.[271] In practice, this would mean that a child should be detained at a CYCC rather than in a prison.[272] This is reinforced by the fact that the CJA provides that a presiding officer may only order detention in a prison if an application for bail has been postponed or refused; the child is 14 years or older; the child is accused of committing a Schedule 3 offence; the detention is necessary in the interests of justice; and there is a likelihood that the child, if convicted, could be sentenced to prison.[273]

Lastly, where a child has been ordered to remain in any form of pre-trial detention, the CJA mandates that such detention be re-evaluated at each and every subsequent appearance.[274]

Success and challenges of the Criminal Justice Act

The successful implementation and administration of the CJA are largely dependent on two important conditions: firstly, that each department fulfils its mandate; and, secondly, that there is close cooperation and collaboration among implementing departments.[275] In the five years since the CJA has been in operation, a number successes and challenges have emerged. In what follows we address these challenges insofar as they relate particularly to South Africa's obligations under the Luanda Guidelines.

A need for training

The National Policy Framework for Child Justice provides that training of all personnel involved in the child justice process is essential. In fact, such training is a key priority area for the effective implementation of the CJA.

This is especially the case with regard to members of the SAPS. SAPS personnel are the gatekeepers to the child justice system, as they are often the first port of call in circumstances where children are accused of committing criminal offences. Such personnel also have the task of securing a child's attendance at his or her preliminary inquiry, in compliance with the CJA. It is therefore imperative that they receive specialised training in dealing with children in conflict with the law.[276] Unfortunately, this need for training has not been heeded by the SAPS.

In the first year of implementation (2010/2011), the SAPS provided training on the CJA for approximately 15 891 members.[277] In the second year of implementation (2011/2012), the SAPS provided training for approximately 14 060 members.[278] In the third year of implementation (2012/2013), the SAPS provided training for approximately 5 888 members.[279] In the fourth year of implementation (2013/2014), the SAPS provided training for approximately 6 927 members.[280] And, in the fifth year of implementation (2014/2015), the SAPS provided training for approximately 4 422 members.[281]

In total, the SAPS has trained approximately 50 000 members regarding the provisions of the CJA. This, when viewed against the number of members of the SAPS (157 518),[282] is but a fraction of the members of the SAPS. Furthermore, it constitutes a serious gap in the successful implementation of the CJA and may have a bearing on the decrease in number of children entering the system.

Dwindling numbers

The number of children entering the system has decreased significantly since the CJA came into operation in 2010. In the first year of implementation (2010/2011), a total of 75 435 children were 'charged'[283] by the police.[284] This translates to about 6 286 children per month, which is substantially

lower than the approximately 10 000 children arrested per month that was reported to Parliament in 2008.[285] In the second year of implementation (2011/2012), a total of 68 078 children were charged by the police.[286] This, in turn, translates to about 5 673 children per month. In the third year of implementation (2012/2013), a total of 57 721 charges were laid against children.[287] This represents approximately 4 810 children per month. Lastly, in the fourth year of implementation (2013/2014), 47 274 children were charged. This, in turn, translates to 3 939 children per month, a decrease of almost 60% from the initial statistics mooted in 2008.

The decrease in the number of children entering the system has had a profound impact on the successful implementation of the CJA. Such decrease, which anecdotal evidence suggests is due to lack of police training, has resulted in a number of diversion service providers having to close their doors due to lack of funding. This may not seem to be a major setback at present for the child justice sector, but if (or rather when) the numbers begin to increase and normalise, the system will be without the necessary services to promote a proper-functioning child justice system. In addition, the decrease in numbers also has a negative effect on children who may have benefitted from the programmes on offer. These children are, most probably, being turned away from the system at vital moments in their lives, and this may result in the laudable objectives of the CJA, namely the 'breaking of the cycle of crime', not being met.

Changes in remand detention

One of the most fundamental changes brought about by the various strategies employed by the South African government within the context of child justice is the significant decrease in the child population awaiting trial in prisons.

Average number of children held in remand detention (14 to 17 years)[288]

Calendar year	RD	Sentenced	Total
Average for 2000	2 229	1 681	3 910
Average for 2001	2 042	1 711	3 753
Average for 2002	2 255	1 796	4 051
Average for 2003	2 324	1 802	4 126
Average for 2004	1 912	1 698	3 610
Average for 2005	1 332	1 233	2 564
Average for 2006	1 144	1 095	2 239
Average for 2007	1 196	892	2 087
Average for 2008	928	870	1 799
Average for 2009	696	854	1 550
Child Justice Act (14 to below 18 years)			
Average for 2010	346	658	1 004
Average for 2011	366	552	918
Average for 2012	367	417	784
Average for 2013	241	296	537
Average for 2014	167	235	402

In 2001, the ISCCJ developed and implemented the Interim National Protocol for the Management of Children Awaiting Trial, which aimed to establish an integrated system of management to accurately assess and place children who were charged with serious crimes in residential facilities. The effect of these interventions was palpable and resulted in a steady decrease in the number of children in remand detention. This trend has continued under the auspices of the CJA. The decrease (and stabilisation) is encouraging and is testament to South Africa's commitment to utilise detention in prison environments as a measure of last resort. Statistics provided by the DCS on the number of children held in remand detention prior and post-CJA are given in the table on the previous page.

In terms of the periods of detention for children in remand detention (of which there were a total of 107 as of 30 November 2015), these were reported by the DCS as:[289]

- <1 to 3 months: 74 children (69.16% of child remand detainees);
- >3 to 6 months: 24 children (22.43% of child remand detainees);
- >6 to 12 months: 5 children (4.67% of child remand detainees); and
- >12 to 18 months: 4 children (3.74% of child remand detainees).

Child and youth care centres

Children in remand may be placed in CYCCs, which are designed to provide alternative care for children in conflict with the law. Although the intent to separate children in remand from adult detainees is progressive and in accordance with children's rights discourse, recent reports indicate that, in certain CYCCs across the country, children in need of protection are kept in the same facilities as children in remand, which raises serious concerns about the adequacy of alternative care being provided for children.[290]

Unlike other remand detention facilities (which fall under control of the DCS), CYCCs fall within the mandate of the DSD, which is obligated to conduct regular oversight of all registered CYCCs.[291] However, many functioning CYCCs are not registered, and many registered CYCCs do not receive regular visits from the DSD.[292] Further, when it comes to abuse, employees of the CYCC (including managers and youth care workers) are mandated to report such incidents to the provincial Head of Social Development, who is then required to assign a designated social worker to investigate the allegations and to report incidents of serious injury, abuse and death to the police.[293] There is, however, no mechanism to follow up on the investigations and inquire about their status or whether they are even being conducted.[294] Even though section 211 of the Children's Act provides a process for ensuring quality assurance, the practice occurs once every three years, which, it has been argued, is insufficient for ensuring adequate protection.[295] Perhaps most concerning is the lack of an independent oversight mechanism similar to the JICS,[296] which makes it difficult to make accurate assessments about the conditions in which children are being kept, and about the extent to which their rights as remand detainees are being protected.[297] Accordingly, further research is required in order to make evidence-based assessments and interventions in respect of this issue.

Other vulnerable groups

Although discourse surrounding the needs of 'vulnerable groups' has been criticised for its use of protectionist language, certain categories of persons in South Africa undoubtedly face a distinct set of challenges in the context of remand detention, which consequently require immediate and targeted interventions. The Draft White Paper on the Police calls for the police to make 'special efforts … towards supporting women, children, persons living with disabilities, older persons and the lesbian, gay, bisexual, transgender and intersex communities', including the assurance that 'all

serving officers [will acquire] the necessary skills, insights and sensitivities to respond to crimes against vulnerable and marginalised communities' and will ensure the 'implementation of community education and outreach programmes to enhance community safety'.[298] Prioritising efforts to address challenges faced by 'vulnerable groups' is a critical step towards integrating principles of the Luanda Guidelines on a domestic level.

The following discussion attempts to provide a brief overview of the challenges faced by categories of persons classified as 'vulnerable'. It is imperative to note here, however, that the list below is not exhaustive and that the issues described are not all-inclusive.

Women

Arrest and police custody

The extent and prevalence of abuse against women in police custody are largely unknown due to extremely low levels of reporting by victims. In recent years, reports have emerged about numerous women (sex workers, in particular) being raped by officers while detained in holding cells and being released only after submitting to acts of sexual coercion.[299] In addition, according to the IPID's annual report for 2014/2015, the number of reported rapes committed by members of the SAPS increased from 121 in 2013/2014 to 124 in 2014/2015, with 42 of those incidents occurring while the officer was on duty and the remaining 82 occurring while the officer was off duty.[300] One of the major incidents highlighted in the report involved the rape of a minor by six members of the SAPS at the Atemalang police station in the North West province.[301] Furthermore, the report indicated that 34 rapes were committed in police custody, 14 of which were perpetrated by police officers, which amounts to 41% of the total number of rapes reported that year.[302] The IPID's annual report also noted that there were 3 856 cases of torture and assault by police officers, which, though not disaggregated by gender, invariably includes incidents of torture and assault against women.[303] As with most reports concerning violence against women, the statistics presented here likely provide a mere glimpse into the actual number of assaults that occur in remand.

Remand detention

Challenges faced by women detainees are often overlooked in government policies and practices, given that women comprise only 2.5% of the entire inmate population in South Africa.[304] In response to the lack of information available on the experiences of women in detention, the JICS undertook a study involving site visits to the female sections of Worcester, Pollsmoor, Kgosi Mampuru II and Johannesburg Central correctional centres in order to develop stronger and more effective evidence-based programmes and interventions.[305]

According to the DCS, there were 1 028 women remand detainees as of 30 November 2015.[306] The conditions in which female remand detainees are kept were described by the JICS as being 'much less clean' than those of the sentenced inmates, a situation attributable to the high levels of overcrowding in remand facilities, which inevitably impacts the hygiene as well as the general health and well-being of inmates.[307] The study also found that women were provided with toiletries only once a month, which posed significant challenges for them, depending on their specific needs and health concerns.[308]

Although women detainees are provided with health-care services, such services seem to be centred on reproductive health, particularly in relation to mothers and children. Specific concerns were, however, raised about the lack of responsiveness on the part of some correctional service officers towards women who were pregnant, breastfeeding or accompanied by small children, with formal requests being made to install panic buttons in mother-and-baby units.[309] In addition,

questions around the ability of the DCS to provide for the needs of infants and small children were also raised, specifically in relation to compliance with the DSD's norms and standards.[310] The plight of foreign-national mothers with small children was also raised as a pertinent issue in the JICS's report, with mothers finding it difficult to register the births of their children and to tend to health-related issues, as 'DCS officials are more careless when it comes to healthcare of foreigners'.[311]

Apart from these critical issues, concerns were also raised about the lack of social workers and the general lack of access to counselling and therapeutic services. For example, the study found that, in the female section of Johannesburg Central, there was only one social worker for 956 inmates, with such social worker seeking an average of 32 to 34 women per month,[312] and roughly 400 inmates per year. In addition to having an overwhelming workload, a social worker's interventions may not be very effective, given that he or she only meets with inmates once every couple of years.

However, perhaps the most disturbing finding of the report was the invasive and degrading manner in which several women detainees described being searched by correctional service officers. For example, at the Kgosi Mampuru facility, some inmates reported that they had been subjected to invasive and degrading searches in front of groups of officials, who often mocked them while referring to specific body parts.[313] Inmates stated that they felt some searches were arbitrary and invasive and that the manner in which certain searches were conducted violated their right to privacy and human dignity.[314] The JICS identified these practices as a major concern in its report and made various recommendations to the DCS to rectify the behaviour, calling on all officials to be 'sensitised' with regard to searches and search practices and requiring all searches to be conducted in private, with prior approval being obtained from the head of the correctional centre before searches of bodily orifices were conducted.[315]

LGBTI persons and communities

Prejudicial attitudes and stereotypes concerning LGBTI persons influence the way in which police 'police' crime and violence against members of this community, as evidenced by the lack of diligence some officers display when investigating cases of sexual violence against LGBTI persons.[316]

Similarly, the same prejudicial attitudes and beliefs also influence the way in which police respond to perpetrators of crimes who identify themselves as an LGBTI person or who nonetheless 'appear' to be such a person, which often elicits harassment and other incidents of violence and abuse on the part of members of law enforcement. Further, remand detainees who identify as, or who appear to be, LGBTI are more susceptible to experiencing violence and other forms of abuse in detention given the misconception that they are weak and fragile. This makes them more vulnerable to abuse from other detainees, police officers and correctional service officials, and more likely not to receive adequate protection from actors in the criminal justice system.[317]

Migrants and refugees

The AChHPR and the Luanda Guidelines, as well as South Africa's other international obligations stemming from the Universal Declaration of Human Rights, require South Africa to respect and promote the human rights of all persons within its borders, regardless of their national or social origin. South Africa has a legal and moral obligation to take action to protect and promote the rights of all non-nationals within its territory, and this includes, in relation to the role of the police, not only responding to violence against foreigners, but also safeguarding and protecting their rights in the context of arrest, police custody and remand detention.

The presence of up to 10 000 foreign nationals in South Africa's criminal justice system has reportedly strained correctional services' resources because of the additional services required, such as translation services and the provision of adequate legal services.[318] However, the Luanda Guidelines, and other international normative standards, reaffirm that translation services should be provided as part of a rights-based approach to access to justice, and that the National Treasury should provide the DCS and the criminal justice system with an adequate budget to ensure that translation and legal services are made available.

Xenophobia is inflamed by the way that the criminal justice system and most notably the police respond in certain circumstances. For instance, the police have 'expressed ambivalence towards the rights and welfare of "outsiders" or have been actively hostile or complicit with the violence against them [i.e. foreigners]'.[319] Researchers have found that 'antiforeigner sentiments and support, or at least passive condoning, of the violence' drives the police officers' lackadaisical approach to violence prevention against foreigners[320] and the police's failure to make a serious effort to protect foreign nationals from violence, only moving into action *after* the incidents of violence have already occurred.[321]

Additionally, migrants in South Africa are often accused of causing a variety of societal problems, including draining public resources, taking economic opportunities away from local South Africans, and engaging in criminal activity,[322] which has arguably justified the 'selective and discriminatory enforcement' of laws by the police.[323] For example, the police in northern Limpopo have been accused of 'selectively targeting foreign-owned businesses, shutting them down for bylaw infringements while similar South African shops remain unscathed'.[324] A UN report also mentioned incidents of 'assault and harassment by state agents, particularly the police and immigration officials', as well as public threats and community violence.[325]

The UN has recommended that South Africa strengthen its human rights curriculum and training for immigration officials, border police, police officials and staff of detention centres, and other civil servants charged with enforcing the laws in order to prevent and reduce incidents of violence against migrants.[326]

Economically and geographically marginalised persons

People who live in economically disadvantaged and geographically isolated areas suffer a disproportionate number of challenges during the remand detention process.[327] In addition to financial difficulties that arise when trying to pay bail, access to adequate legal representation is often limited given the high volume of cases taken on by Legal Aid and the fact that most attorneys work in urban settings.[328]

Persons with mental-health disorders

Research conducted in Durban revealed a high prevalence of serious mental disorders among the prison population as compared with the general population, with the majority not being diagnosed or receiving treatment within the correctional facility.[329]

The 2013 White Paper on Remand Detention Management in South Africa states that the provision of health-related services for all remand detainees should be done in close collaboration with the Department of Health (DoH) and its provincial offices.[330] The DCS has a legal mandate to provide mental-health services for its inmates, except those referred to the DoH for mental observation or declared state patients who are held in a DCS facility until a hospital bed is available. Other detainees who become mentally ill while in detention are the responsibility of the DCS, but can be referred to

the DoH if the needs of the patient exceed the capacity of the DCS.[331] In this regard, the DoH is required to work with the DCS and the DoJ&CD to ensure the delivery of adequate health care (including mental-health care) to every remand detainee.[332] Further, the DCS has an important role to play in the conducting of risk assessments and classifications and must consider the impact of incarceration on the mental and medical condition of the remand detainee, which must be featured in ongoing case management.[333]

During consultations on this review of South Africa's remand system, both the DCS and the DoH noted that there are not enough beds available to ensure that remand detainees needing mental-health assessments can be accommodated, with the DCS noting that the presence of mentally ill remand detainees places a significant resource and security burden on the department. Further complicating the system is the legal mandate of the SAPS to transport detainees from the remand facilities to DoH facilities for assessment and treatment, and the need for the SAPS to provide additional security for the DoH facility. A draft protocol on mental observations in respect of state patients, which outlines the responsibilities of all stakeholders in this regard, including the DoJ&CD, NPA, SAPS, DoH and the DCS, is in the process of development.[334]

5. Recommendations for reform

This review of South Africa's remand detention system against the requirements of the AChHPR, as expressed through the Luanda Guidelines, has focused on the legislative, policy and implementation gaps and challenges. As noted in Section 1 of this review, the South African framework generally aligns to the Luanda Guidelines, with a few notable exceptions, particularly with regard to how that framework is implemented. These challenges are generally known to the key stakeholders within the criminal justice system, and, in the course of this review, APCOF has noted that significant efforts are already being made at national level to address the challenges through, in particular, the OCJSR, the ISCCJ, and implementation of the White Paper on Remand Detention Management in South Africa by the DCS and other stakeholders.[335] This review, and its recommendations, has taken these priorities and efforts into account, and what follows are a number of key recommendations to address evidence-based challenge areas that will either supplement or complement existing efforts or are linked to upcoming reform discussions.

Measuring and tracking remand justice in South Africa

In the course of this review, and during stakeholder discussions in 2015, the issues of data collection and dissemination were clearly apparent. To address these issues, the following recommendations are made:

To the Office for the Criminal Justice System Review:

Consultation and development of a comprehensive set of indicators to guide data collection, dissemination and analysis across the criminal justice chain in terms of arrest, police custody and remand detention, with a view to identifying challenge areas, potential interventions, and tracking progress made. The high-level indicators used to inform the review of process issues in Section 2 of this review could form the basis of further work to develop second- and third-tier indicators for measurement:

- Risk to freedom of movement;
- Duration of remand detention;
- Compliance with conditions of release;
- Effectiveness and efficiency of the criminal justice system;

- Conditions of detention; and
- Community perceptions of the effectiveness and efficiency of the criminal justice system.

For all criminal justice sector institutions, the release of data should include data that is disaggregated by age, gender, race, nationality, location (national and provincial), and, where relevant, level of court and type of offence.

To the South African Police Service:

Facilitate the regular release of police custody statistics, disaggregated by age, gender, race, nationality, location (national and provincial), including average length of time spent in police custody.

To the Department of Correctional Services:

Regular release of statistics in terms of the number of persons held in remand detention, disaggregated by age, gender, race, nationality, location (national and provincial), and duration in three-month intervals, up to 24 months.

Police law reform

In this review, it was noted that the White Paper on Policing and the subsequent South African Police Service Amendment Act constitute an opportunity to provide a clearer policy framework for policing that is consistent with the role of the police in terms of the Constitution and the recommendations in the NDP. The challenges identified in terms of policing in this review, such as those within detective services, and the use of arbitrary arrest could be addressed by way of a new legal framework that is consistent with the emerging policy priorities.

To the SAPS:

Align the role and function of the police with the constitutional framework, the White Paper on Policing, the Luanda Guidelines, and evidence-based findings and recommendations contained in the SAPS Policy Advisory Council Reports (2006/2007 and 2007/2008), Parliament's Detective Dialogue (2012), the NDP (2012), the Khayelitsha Commission of Inquiry (2014) and the SAPS National Inspectorate Report (2015).

In conjunction with legislative amendments, give consideration to a review of police distribution models and allocations of policing resources in terms of the challenges identified in Section 3 of this review.

Oversight and monitoring

South Africa's oversight architecture for the criminal justice system is, on paper, consistent with the requirements of the Luanda Guidelines and represents one of the strongest accountability frameworks in Africa. However, to address the gaps and challenges in terms of implementation of that framework, the following recommendations are made:

To the Office for the Criminal Justice System Review:

Establish a mechanism to promote cohesion among all accountability and oversight actors, including a *shared framework for inspections and reporting*. The establishment of a shared framework will also support the systematic monitoring of the remand detention system, as proposed in the recommendation above.

To the South African Police Service and the Civilian Secretariat for Police:

One of the key gaps in the current monitoring system is the lack of sustained and systemic oversight of police cells. Since responsibility for cell monitoring was moved from the former ICD to the CSP, there have been limited cell inspections. Consideration should therefore be given to the establishment of a lay visitor scheme as part of the CSP's mandate to inspect police cells.

To the National Prosecuting Authority:

Some commentators have argued that the current internal accountability systems within the NPA, including reporting to Parliament and the Auditor-General, do not have the necessary independence or a sufficiently broad mandate to provide the type of oversight that will enhance public confidence and improve the efficiency and effectiveness of the NPA.[336] This review recommends research and consultations into the need, and scope, of an independent oversight mechanism for the NPA.

To the Department of Social Development and the South African Human Rights Commission:

Scoping study on the establishment of an independent oversight mechanism for CYCCs, whether as part of a New Public Management (NPM) agreement or as a separate institutional arrangement.

Use of force during arrest

To promote alignment between section 49 of the CPA and the Luanda Guidelines (as well as other international standards on the use of force by law enforcement personnel), this review recommends that section 49 be amended to limit the use of force during arrest to the imminent-threat requirement, rather than permitting the use of force on the basis of the accused person's offence.

Bail

The challenges inherent in the current bail system in South Africa have been set out in detail in this review. To address these challenges, this review recommends:

- The review of section 60(4) of the CPA to require a broader analysis that takes into account not only issues of proportionality and justice, but also the availability and appropriateness of alternative measures (such as ADRMs), and whether the use of remand detention is a measure of last resort;
- Research to understand and address the barriers to the use of police bail as per section 59 of the CPA;
- The review of the use of electronic monitoring of remand detainees at regional magistrate's court level after 12 months of operation in order to understand the profile of detainees, the number of persons complying with conditions, the reasons for the failure to comply, and the impact on remand detainee numbers;
- The review of the new bail protocol after 12 months of operation in order to understand the extent to which it is used, the trends in terms of release and amendment to conditions, the profile of detainees to whom the protocol applies, the number of persons complying with conditions, and the impact on remand detainee numbers; and
- A scoping study that identifies global trends in alternatives to remand detention with a view to identifying additional measures that could be put in place in South Africa to reduce remand detention numbers.

Court utilisation and backlogs

This review has noted the operation of the Case Backlog Reduction Project. Accordingly, the review makes recommendations to supplement or complement the current efforts to reduce backlogs and delays.

To the Office of the Chief Justice:

Review the current use of ADRMs with a view to promoting their increased use, including a cost-benefit analysis of ADRMs as opposed to trial.

Promote the comprehensive and systematic use of pre-trial hearings, identified by the OCJ, Legal Aid and the NPA, as a key to increasing the number of trial-ready cases.

To the South African Police Service:

Implementation of recommendations to improve SAPS investigation and preparation of trial-ready dockets, including those set out in Parliament's Detective Dialogue (2012).

To the Office of the Chief Justice and the National Prosecuting Authority:

Research to understand and address the reasons for withdrawal of cases from the court roll.

Conditions of detention

Noting that there have been improvements to conditions of detention since efforts to promote the implementation of the White Paper on Remand Detention Management, this review makes the following recommendations:

To the Department of Correctional Services:

Research, policy and training on the causes of violence within DCS facilities, and the appropriate care and management of vulnerable detainees.

To the Department of Justice and Constitutional Development:

If adopted, review the implementation of the protocol to deal with backlogs in terms of state mental-health patients and state-observation patients after 12 months of operation.

If approved for use, explore the use of telepsychiatry in general psychiatric services, and roll it over to forensic medical health once approved.

Community perceptions of the criminal justice system

This review, drawing on stakeholder consultations, recommends community education and awareness-raising regarding the use of bail and ADRMs as part of an effective and cost-efficient criminal justice system.

Annexure 1: Proposed categories and indicators for measuring remand detention in South Africa

Category 1: Risk to freedom of movement
Key issue: Determination of arbitrariness/validity of violation of right to freedom of movement (stop and search) and/or arbitrary arrest

Indicator	Disaggregation	Data sources
1. Number of people stopped and searched	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, police station • Type of offence	SAPS National Inspectorate, visible policing SAPS dockets SAPS charge sheets SAPS annual reports to Parliament
2. Number of people arrested	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, police station • Type of offence	SAPS National Inspectorate, visible policing SAPS dockets SAPS charge sheets SAPS annual reports to Parliament SAPS legal services: Civil claims against National Inspectorate: Disciplinary proceedings Parliamentary reports
3. Number of people charged	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, police station • Type of offence	SAPS dockets Charge sheets Annual reports Reports to Parliament
4. Number of people detained in police custody	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, police station • Type of offence	SAPS dockets Charge sheets Annual reports Reports to Parliament
5. Number of people in remand detention	Number of people held in custody on remand orders Number of matters heard in terms of s 63[1] of the CPA Court outcomes for CPA s 63A[2] applications: • Reduction of bail; • Placement under correctional supervision; • Release on warning; and • Withdrawal of cases. Number of people with bail held in remand detention Number of people placed in community corrections in terms of s 62(f)[3] of the CPA • Demographic data: Age, gender, race and nationality • Geographical: National, provincial, DCS facility • Type of offence	DCS (remand detention) DSD (social integration) DoJ&CD OCJ NPA Annual reports Reports to Parliament Record of court proceedings in terms of s 62[4] of the CPA

1 S 63 – Amendment of bail conditions.'
2 S 63A – Release or amendment of bail conditions of accused on account of prison conditions.
3 'Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail – … (f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional officer.'
4 S 64 – Proceedings with regard to bail and conditions to be recorded in full.

Category 2: Duration of remand detention		
Indicator	**Disaggregation**	**Data sources**
1. Duration of remand detention	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, police station • Type of offence	DoJ&CD – court records DCS (length-of-detention reports and other OCJSR reports) JICS Annual reports Reports to Parliaments
2. Number and proportion of defendants in remand detention in excess of norms and standards/ legal requirements	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, DCS facility • Type of offence • Court (district, regional, etc.) Number of RDs held for following durations: • 0–3 months • 3–6 months • 6–12 months • 12–18 months • 18–24 months • More than 24 months Number of remand cases reviewed in terms of section 49G of the Correctional Services Act	DoJ&CD DCS and OCJSR reports OCJ NPA JICS Annual reports Reports to Parliament

Category 3: Defendants' compliance with conditions of release Key issue: Alternatives to remand detention – frequency of use and effectiveness		
Indicator	**Disaggregation**	**Data sources**
1. Number and proportion of defendants complying with bail/conditions of release from remand detention	Number and proportion of defendants who have failed to comply with conditions imposed in terms of s 62 of the CPA Social integration figures in terms of s 62(f) of the CPA Number and proportion of defendants who fail to appear in court	DoJ&CD DCS OCJ NPA DCS (s 62(f)) Annual reports Reports to Parliament Record of court proceedings in terms of s 62[1] of the CPA

1 S 64 – Proceedings with regard to bail and conditions to be recorded in full.

Category 4: Effectiveness and efficiency of the criminal justice system
Key issue: Determination of effectiveness and efficiency of the criminal justice system in terms of procedural and substantive fairness – i.e. was detention justified in the first place; did it result in a conviction?

Indicator	Disaggregation	Data sources
1. Number and proportion of remand detainees acquitted, and reasons for acquittal	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, • Level of court • Type of offence	OCJ NPA DoJ&CD Annual reports Reports to Parliament SAPS dockets
2. Number and proportion of remand detainees' matters withdrawn, and reasons for withdrawal	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial • Level of court • Type of offence	OCJ NPA DoJ&CD Annual reports Reports to Parliament SAPS dockets
3. Number and proportion of remand detainees who received a non-custodial sentence	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial • Level of court • Type of offence	OCJ NPA DCS (social reintegration) DoJ&CD Annual reports Reports to Parliament
4. Number and proportion of remand detainees who received a custodial sentence shorter than the duration of remand detention	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial • Level of court • Type of offence	OCJ NPA Annual reports Reports to Parliament
5. Number and proportion of remand detainees who are released as a result of cases being struck off the court roll, and reasons for the case being struck off	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, police station • Level of court • Type of offence Number of matters struck off the court roll and reasons for the striking off	OCJ NPA Annual reports Reports to Parliament

Category 5: Conditions of detention Key issue: Determine the conditions of detention in remand facilities both in terms of the physical conditions of custody and the extent to which detainees are afforded their procedural rights (e.g. access to legal services, health services, risk assessments, etc.)		
Indicator	**Disaggregation**	**Data sources**
1. Conditions of detention for remand detainees meet the requirements in terms of Chapter II of the Correctional Services Act	Procedures and safeguards set out in relation to admissions to prison in terms of s 2 of the Correctional Services Act are met Accommodation, nutrition, clothing and bedding, exercise, health care, community contact, procedures for death in prisons, recreation, access to legal services, reading materials, discipline, safe custody, searches, identification requirements, and use of mechanical restraints requirements in terms of the Correctional Services Act are met	DCS J ICS DoJ&CD

Category 6: Community perceptions of the effectiveness and efficiency of the criminal justice system		
Indicator	**Disaggregation**	**Data sources**
1. Community perceptions of the effectiveness and efficiency of the criminal justice system Experience of CJS – inmates' perceptions of criminal justice system	• Demographic data: Age, gender, race and nationality • Geographical: National, provincial, local level (police station, magisterial district/ police station) A reduction in the number of reported contact crimes An increased proportion of citizens feel safe walking alone, during the day or at night, as measured in official surveys An increase in the proportion of households that are satisfied with police services in their area, and with the way courts deal with the perpetrators of crime Improvements in citizens' perceptions of levels of crime and progress in reducing crime, as measured in official surveys An improvement in South Africa's ranking on the Transparency International Corruption Perception Index	DoJ&CD IPID JICS Public-perception surveys OCJ DCS NPA LASA SAHRC Public Protector Annual reports Reports to Parliament Research reports

Endnotes

1 Preamble, Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa, adopted by the African Commission on Human and Peoples' Rights (ACHPR) during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014. See, also, Louise Edwards, *Pre-trial Justice in Africa: An Overview of the Use of Arrest and Detention, and Conditions of Detention*, APCOF Policy Paper No. 7, February 2013, available at http://www.apcof. org/files/8412_Pre-trial_TrialJustice_Overview_in_Africa.pdf (accessed on 1 October 2015); Martin Schönteich, *Presumption of Guilt: The Global Overuse of Pre-trial Detention*, Open Society Justice Initiative, 2014, available at https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf (accessed on 1 October 2015); L. Muntingh and K. Petersen, *Punished for Being Poor: Evidence and Arguments for the Decriminalisation of Petty Offences*, Civil Society Prison Reform Initiative, 2015; and L Muntingh and J Redpath, *The Socio-Economic Impact of Pre-trial Detention* (forthcoming), Johannesburg, Open Society Institute.

2 The ACHPR is an organ of the African Union, established by the African Charter on Human and Peoples' Rights (AChHPR), to ensure the promotion and protection of human and peoples' rights throughout the African continent. For more information, see http://www.achpr.org/ (accessed on 1 October 2015).

3 Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa, adopted by the ACHPR during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014.

4 AChHPR, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), article 45(1)(b).

5 Ibid., s 2, 3, 5, 6, 7 and 26.

6 The Luanda Guidelines were a result of extensive consultations during the drafting phase from to 2012 to 2013, including two reviews by Commissioners of the ACHPR, expert reviews on the margins of the 53rd and 54th Ordinary Sessions of the ACHPR, and four regional consultations held in Nairobi (Kenya), Johannesburg (South Africa), Dakar (Senegal) and Tunis (Tunisia) which were attended by representatives of national ministries, police agencies, prosecuting authorities, prison services, legal aid providers, national human rights institutions, and civil society.

7 The African Policing Civilian Oversight Forum (APCOF) is also rendering technical assistance to the ACHPR in respect of implementation projects, which follow a similar methodology to the South African project (review and consultation), in the following countries: Malawi, Tanzania, Ghana, Tunisia, Côte d'Ivoire, Sierra Leone and Uganda.

8 The Intersectoral Committee on Child Justice (ISCCJ) was established in terms of section 94 of the Child Justice Act (CJA) 75 of 2008 to oversee the implementation of the Act and the national policy framework. Information received by APCOF from the Department of Correctional Services (DCS) on 16 February 2016.

9 Republic of South Africa, DCS, White Paper on Remand Detention Management in South Africa, March 2014, at 10 (hereafter '2014 White Paper on Remand Detention Management in South Africa').

10 Representatives from the following organisations and government departments attended the workshop: South African Police Service (SAPS), DCS, Department of Justice and Constitutional Development (DoJ&CD), Legal Aid South Africa, South African Human Rights Commission, Judicial Inspectorate for Correctional Services (JICS), Civil Society Prison Reform Initiative, Centre for the Study of Violence and Reconciliation, University of the Witwatersrand's African Centre for Migration and Society, Social Justice Coalition, University of the Witwatersrand's School of Governance, Western Cape Department of Community Safety, Southern Africa Litigation Centre, Integrated Justice System Development Committee, and the Civilian Secretariat for Police (CSP).

11 The categories of indicators for measuring remand detention were based on the work of APCOF's partners at the Latin America Network for Pre-trial Justice who developed a basket of indicators through country studies and a series of regional expert meetings. In the Latin American context, a 2014 report of the Inter-American Commission on Human Rights on the Use of Pre-trial Detention in the Americas (OEA/Ser.L/V/II. Doc 46/13, 30 December 2013) recommended, among other actions, that states: establish indicators that fix measurable benchmarks related to the reasonable use of pre-trial detention; and ensure that this information is used to implement public policies aimed at guaranteeing the application of international standards pertaining to the use of pre-trial detention, as well as reducing the financial and human costs related to its use. That report is available at https://www.oas.org/en/iachr/ pdl/reports/pdfs/Report-PD-2013-en.pdf (accessed on 17 October 2015).

12 The revised United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners were adopted unanimously in December 2015 by the UN General Assembly and set out the minimum standards for good prison management, including ensuring that the rights of prisoners are respected.

13 Preamble, Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa, adopted by the ACHPR during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014.

14 See, for example, *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB) and H Benade (2014) 'Different arresting worldviews', *The Advocate*, August 2014.

15 See, for example, JICS, *Annual Report for the Period 1 April 2014 to 31 March 2015*, at 43.

16 See Section 1 of this review for a detailed description of each part of the Luanda Guidelines.

17 The categories of measurement are based on work done by APCOF's partners within the Global Campaign for pre-trial Justice, specifically the Open Society Foundations and the Latin America Network for pre-trial Justice. The methodology for the indicator development by these partners included country studies, analysis from past experiences, and a series of regional expert meetings in the Latin America region. A full guide on the use of the Latin American indicators was published by the Open Society Justice Initiative in 2015: Martin Schönteich, *Strengthening Pre-trial Justice: A Guide to the Effective Use of Indicators*, Open Society Foundations, New York, 2015, available at https://www.opensocietyfoundations.org/sites/default/files/strengthening-pre-trial-justice-guide-indicators-20151119.pdf (accessed on 20 December 2015).

18 Republic of South Africa, National Planning Commission (2012), *National Development Plan 2030: Our Future – Make It Work,* Office of the Presidency, Pretoria, at 393 (hereafter '*National Development Plan*').

19 *National Development Plan,* at 388–389.

20 Ibid.

21 Ibid. at 388–389.

22 Republic of South Africa, Department of Planning, Monitoring and Evaluation (2014), *Medium-Term Strategic Framework 2014–2019,* at 15.

23 Ibid.

24 *National Development Plan*, at 387–388.

25 CSP (2015), Draft White Paper on the Police, *Government Gazette,* General Notice 179 of 2015 (hereafter '2015 Draft White Paper on the Police').

26 Ibid.

27 2015 Draft White Paper on the Police, at 6–7.

28 Ibid at 7.

29 CSP (2015), Draft White Paper on Safety and Security, *Government Gazette,* General Notice 179 of 2015 (hereafter '2015 Draft White Paper on Safety and Security'), at 11.

30 2015 Draft White Paper on the Police, at 16.

31 Constitution of the Republic of South Africa, 1996, s 35.

32 The role of the police in a democratic South Africa includes: (a) the promotion of safety in the community; (b) the promotion of trust between the police and the community; (c) the improvement of accountability, which increases respect for the police; and (d) indicating a willingness to support police reviews and reform. See APCOF, *Submission on the White Paper on Policing*, 30 March 2015, at 2.

33 The key components of democratic policing: (a) adherence to the rule of law; (b) compliance with human rights standards and obligations; (c) accountability – internal and external; (d) equality in resource provision and service; (e) transparency; (f) responsiveness – including imperatives for community participation; (g) effectiveness in performance; (h) efficiency – improved coordination with other state actors, particularly in the Justice, Crime Prevention and Security (JCPS) cluster; and (i) partnerships – collaborations, including the role of non-state actors such as private security, business and civil society. See APCOF, *Submission on the White Paper on Policing*, at 2–3.

34 See APCOF, *Submission on the White Paper on Policing*, Part 4; and Institute for Security Studies, *ISS Submission: White Paper on the Police*, April 2015.

35 2014 White Paper on Remand Detention Management in South Africa, at 10.

36 2014 White Paper on Remand Detention Management in South Africa.

37 DCS, *Annual Report 2014–2015*, at 8–9, 51.

38 JICS, *Annual Report for the Period 1 April 2014 to 31 March 2015*, at 118.

39 Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services, 2006, at 590, 614.

40 Lukas Muntingh and Gwenaëlle Dereymaeker, *Understanding Impunity in the South African Law Enforcement Agencies*, Civil Society Prison Reform Initiative, University of the Western Cape, 2013, at 40.

41 S 179(4) of the Constitution.

42 S 179(5)(a) and (b) of the Constitution.

43 See Part 4(a) of the Policy Directives.

44 See Martin Schönteich, 'Strengthening prosecutorial accountability in South Africa', *ISS Paper 255*, Institute for Security Studies, Pretoria, April 2014.

45 Stop-and-search statistics available in South Africa are for police operations and not for specific individuals or groups of individuals. Thus, for example, a festive season crime combatting operation may involve stop and search of all vehicles travelling along a particular road. The vast majority of these persons will not be persons 'who are in conflict with the law'.

46 SAPS, *Annual Report 2014/2015*, at 140.

47 SAPS, *Annual Report 2014/2015*, at 16: Most of the arrests were made in Gauteng, with 453 982 (26.6%), followed by the Western Cape with 396 929 (23.2%) and KwaZulu-Natal with 257 500 (15%).'

48 SAPS, *Annual Report 2014/2015*, at 150.

49 DCS, *Annual Report 2014–2015*, 8–9, 28.

50 Ibid. at 15.

51 *Ferreira v Levin* 1996(1) SA 984 (CC) 54.

52 Constitution, s 12.

53 Ibid., s 14.

54 Ibid., s 21.

55 SAPS, *Annual Report 2014/2015*, at 140.

56 Ibid. at 16: Most of the arrests were made in Gauteng, with 453 982 (26.6%), followed by the Western Cape with 396 929 (23.2%) and KwaZulu-Natal with 257 500 (15%).

57 2015 Draft White Paper on the Police, at 6.

58 *National Development Plan,* at 393.

59 2015 Draft White Paper on the Police, at 14–15.

60 Criminal Procedure Act of 1977 (CPA), s 27.

61 Constitution, s 35(1)(a).

62 Ibid., s 35(1)(b).

63 Ibid., s 35(1)(c).

64 Ibid., s 35(1)(d).

65 SAPS, Standing Order 341(G).

66 Ibid.

67 Ibid., s 5(a).

68 CPA, s 6(2).

69 See *Louw and Another v Minister of Safety and Security and Others* [2004] ZAGPHC 9 (6 December 2004).

70 Katherine Wilkinson, 'Knysna police ordered to meet arrest quotas', *West Cape News*, 17 May 2010, available at http://westcapenews.com?p=1454 (accessed on 5 October 2015).

71 See, for example, Lukas Muntingh, *Race, Gender and Socio-Economic Status in Law Enforcement in South Africa – Are There Worrying Signs?*, Civil Society Prison Reform Initiative, 2013; Centre for Applied Legal Studies, *A Measure of Last Resort: Research Report on Remand Detention in South Africa*, January 2013, at 24–25; National Prosecuting Authority (NPA), *Awaiting Trial Detainee Guidelines*, undated, at 66; Vanja Karth, *Between a Rock and a Hard Place: Bail Decisions in Three South African Courts*, Open Society Foundation for South Africa, Cape Town, 2008, at 17–18; Campaign for Safer Communities, *Police Custody & pre-trial Detention – Discussion Report*, Cape Town, 16 April 2013; and US State Department, *South Africa 2014 Human Rights Report*, available at http:// www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236406 (accessed on 9 October 2015).

72 I Currie and J de Waal, *The Bill of Rights Handbook*, 5th ed., Juta, Cape Town, 2005, at 279.

73 SAPS, *Annual Report 2014/2015*, at 122. See, also, Parliament of the Republic of South Africa, Portfolio Committee on Police, *Report of Meeting between the Portfolio Committee on Police, the Minister, Deputy Minister, Acting National Commissioner and Senior Management of SAPS*, 18 November 2015, available at https://pmg.org.za/committee-meeting/21851 (accessed on 27 November 2015).

74 SAPS, *Briefing to Portfolio Committee on Police Legal Expenditure*, 18 November 2015, at 4.

75 S 49 of the CPA permits the use of force when making a lawful arrest, but limits its use to situations where physical force is 'reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing'. The use of deadly force is allowed only in situations where: '(a) the suspect poses a serious threat of violence to the arrestor or another individual; or (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at this time or later'.

76 Luanda Guidelines, Guideline 3(c)(ii).

77 Constitution, s 35(1)(e).

78 Ibid., s 35(3)(a).

79 Ibid., s 35(3)(b).

80 The rights of the accused include: the right to examine the charge at any stage of the proceedings (s 80); the right to be provided with the essentials of the charge (s 84); and the right to object to the charge on grounds which include failure to set out an essential element of the offence, failure to disclose an offence, lack of sufficient detail relating to the charge, or lack of sufficient information relating to the accused (s 85).

81 CPA, s 84: The charge must contain the following: (a) the time of the offence; (b) the place of the offence; (c) the person against whom the offence was committed (if appropriate); and (d) the property in respect of which the offence was committed (if appropriate).

82 CPA, s 76: The charge sheet must include the name, and, where known and applicable, the address and a description of the accused in terms of his or her gender, nationality and age. If any of these details are unknown to the prosecutor, it will be sufficient to state that fact in the charge sheet in terms of s 84(2) of the CPA.

83 CPA, s 91: Certain omissions or imperfections in the charge sheet do not, however, invalidate the charge, including: (1) lack of a formal statement or allegation regarding a matter/issue which is not material to the charge; (b) referring to a person mentioned in the charge by his/her office or other designation instead of by his/her proper name; (c) omission of the time of an offence where the time is not material to the charge; (d) inaccuracies relating to the day on which the alleged offence occurred; (e) errors relating to the addition of an accused or another person; (f) lack of a formal statement about the value or price of a matter or subject, or the monetary value of 'damage, injury or spoil' in a case where such information is not 'of the essence' to the alleged offence.

84 CPA, s 83, s 88.

85 SAPS, *Annual Report 2014/2015*, at 150.

86 National Director of Public Prosecutions, *Annual Report 2014/2015*, National Prosecuting Authority, at 8.

87 See APCOF, *Submission on the White Paper on Policing*, 30 March 2015, Part 4; and Institute for Security Studies, *ISS Submission: White Paper on the Police*, April 2015.

88 *Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha*, August 2014, at para 108.

89 Ibid. at para 110.

90 The rights provided for by s 35(2) of the Constitution include the right: (a) to be informed of the reason for being detained; (b) to choose or to consult with a legal practitioner and to be informed of this right promptly; (c) to have a legal practitioner assigned to the detained person by the state and at the state expense; (d) to challenge the lawfulness of detention in person before a court and, if the detention is unlawful, to be released; (e) to conditions of detention that are consistent with human dignity; and (f) to community with, and be visited by, that person's spouse or partner, next of kin, chosen religious counsellor, and chosen medical practitioner.

91 SAPS, Standing Order 361(G), at 2.

92 *S v Sebejan and Others* 1997 (1) SACR 626.

93 *S v Langa* 1998 (1) SACR 21 (T).

94 *S v Mthethwa* 2004 (1) (SACR 449 (E).

95 SAPS, *Annual Report 2014/2015*, at 122.

96 S 5(2)(b) of the CPA.

97 See Parliament of the Republic of South Africa, *Report of the Portfolio Committee on Police on Its Oversight Visits from 26–30 March 2012 to the Following Police Stations in North West Province*, 2012.

98 CPA, s 60(4).

99 In considering whether it is 'in the interests of justice' to deprive the accused of his or her personal freedom, the court must consider the prejudice the accused is likely to suffer if detained in custody, by considering the following: (a) the period for which the accused has already been in custody since his or her arrest; (b) the probable period of detention until the conclusion of the trial; (c) the reason for any delay in the conclusion of the trial and any fault on the part of the accused with regard to such delay; (d) any financial loss the accused may suffer as a result of his or her detention; (e) any impairment to the preparation of the accused's defence or any delay in accessing legal representation resulting from the detention of the accused; (f) the state of health of the accused; (g) or any other factor that should be considered by the court – CPA, s 60(9). See, also, s 62 of the CPA.

100 *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at 23. See, also, Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, Cape Town, at 9.

101 Constitution, s 36(1).

102 DCS, *Annual Report 2014–2015*, at 9.

103 Institute for Criminal Policy Research, *World Prison Brief 2015: South Africa*, available at http://www.prisonstudies.org/country/south-africa (accessed on 11 January 2016).

104 DCS, *Annual Report 2014–2015*, at 9.

105 National Director of Public Prosecutions, *Annual Report 2014/2015*, at 45.

106 Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, Cape Town, at 6.

107 CPA, s 60(1)(c).

108 CPA, s 60(11)(b). See, also, *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC); 1999 (4) SA 623 (CC).

109 Jean Redpath, 'Unsustainable and unjust: Criminal justice policy and remand detention since 1994', *SA Crime Quarterly* No. 48, June 2014, at 26.

110 JICS, *Annual Report for the Period 1 April 2014 to 31 March 2015*, at 43.

111 Ibid. at 46.

112 Centre for Applied Legal Studies, *A Measure of Last Resort: Research Report on Remand Detention in South Africa*, January 2013, at 22.

113 Ibid. at 22.

114 DCS, *Annual Report 2014–2015*, at 16.

115 Statistics furnished to APCOF by the DCS on 16 February 2016.

116 DCS, *Annual Report 2014–2015*, at 15.

117 Information furnished to APCOF by the DCS on 16 February 2016.

118 Ibid.

119 DCS, *Annual Report 2014–2015*, at 15.

120 CPA, s 60(2): In bail proceedings, the court – (a) may postpone any such proceedings as contemplated in s 50(6) of the CPA; (b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail; (c) may, in respect of matters that are in dispute between the accused and the prosecutor, require the prosecutor or the accused, as the case may be, to adduce evidence; (d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection 11(a) and (b), require the prosecutor to place on record the reasons for not opposing the bail application.

121 Centre for Applied Legal Studies, *A Measure of Last Resort: Research Report on Remand Detention in South Africa*, January 2013, at 22. See, also, Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, Cape Town, at 9.

122 March 2014, at 4.3.2.10.

123 See, for example, Wits Justice Project, *Innocent but Incarcerated: An Analysis of Remand Detention in South Africa*, Department of Journalism, University of Witwatersrand, at 15.

124 Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, at 21.

125 DCS, *Annual Report 2014–2015*, at 8, 39.

126 Information received by APCOF from the DCS on 16 February 2016.

127 DCS, *Annual Report 2014–2015*, at 15.

128 JICS, *Annual Report for the Period 1 April 2014 to 31 March 2015*, at 43.

129 *National Development Plan,* at 386-390.

130 Republic of South Africa, *Government Gazette* No. 37390, Office of the Chief Justice: Norms and Standards for the Performance of Judicial Functions, GN 147, 28 February 2014, at 5.1.

131 National Director of Public Prosecutions, *Annual Report 2015/2015*, at 37.

132 Ibid. at 8.

133 Republic of South Africa, Public Service Commission, *Report on the Inspections of Regional Courts: Department of Justice and Constitutional Development*, November 2011, at 7–13. See, also, Centre for Applied Legal Studies, *A Measure of Last Resort: Research Report on Remand Detention in South Africa*, January 2013, at 23.

134 National Director of Public Prosecutions, *Annual Report 2015/2015*, at 39.

135 The SAPS *Annual Report* describes 'trial-ready' as a fully investigated and completed case docket that is ready for trial.

136 SAPS, *Annual Report 2014/2015*, Table 41.

137 Ibid.

138 Institute for Security Studies, *ISS Submission: White Paper on the Police*, April 2015, at 13.

139 Parliament of the Republic of South Africa, Portfolio Committee on Police, *Detective Dialogue*: *Report on Proceedings*, 5 September 2012.

140 Ibid. at 4–5.

141 Republic of South Africa, Public Service Commission, *Consolidated Report on Inspections of Detective Services: Department of Police*, September 2011, at ix–xi, available at http://www.psc.gov.za/documents/2012/Police%20Report%20Complete.pdf (accessed on 9 October 2015).

142 2014 White Paper on Remand Detention Management in South Africa, 2014, at 24.

143 National Director of Public Prosecutions, *Annual Report 2014/2015*, at 49.

144 Pre-trial Services was a project that was commenced in 1997 by the Bureau of Justice Assistance and the DoJ&CD to assist judicial officers to make more informed decisions on bail. See Vanja Karth, *Between a Rock and a Hard Place: Bail Decisions in Three South African Courts*, Open Society Foundations for South Africa, 2008, at 11.

145 Louise Ehlers, 'Frustrated potential: The short- and long-term Impact of pre-trial services in South Africa', in *Justice Initiatives: Pretrial Detention*, Open Society Justice Initiative, at 121.

146 Vanja Karth, *Between a Rock and a Hard Place: Bail Decisions in Three South African Courts*, Open Society Foundations for South Africa, 2008, at 11.

147 Martin Schönteich, 'Making courts work: A review of the IJS Court Centre in Port Elizabeth, *ISS Monograph No. 75*, Institute for Security Studies, Pretoria, 2002. See, also, Vanja Karth, *Between a Rock and a Hard Place: Bail Decisions in Three South African Courts*, Open Society Foundations for South Africa, 2008, at 12–13.

148 Jeremy Gordin and Ingrid Cloete, 'Imprisoned before being found guilty: Remand detention in South Africa', 80 *U. Cin. L. Rev.* (2012), at 1168–1169.

149 Legal Aid South Africa, *Annual Report 2014/2015*, at 24.

150 Ibid. at 39.

151 Parliament of South Africa, *Report of the Portfolio Committee on Correctional Services on Its Oversight Visit to the Johannesburg Correctional Centre to Assess Remand Detention Facilities and Services*, 21 November 2012, available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2013/comreports/130207pccorrectrepor t2.htm (accessed on 12 January 2016).

152 Information furnished to APCOF by the DCS on 16 February 2016.

153 CSP, *Annual Performance Plan 2014/2015,* at 2.

154 A Dissel and K Ngubeni. (2000), *The Conditions of Custody: Police Holding Cells,* Cape Town, Centre for the Study of Crime and Violence Prevention, at 32.

155 Ibid.

156 IPID, *Annual Report 2014/2015,* at 43.

157 Ibid. at 49.

158 DCS, *Annual Report 2014– 2015*, at 9.

159 Ibid. at 15.

160 JICS, *Annual Report for the Period 1 April 2014 to 31 March 2015.*

161 *Lee v Minister of Correctional Services* 2013 (2) SA 144(CC).

162 2014 White Paper on Remand Detention Management in South Africa, 1.4.5.1.

163 DCS, *Annual Report 2014– 2015*, at 16.

164 Ibid. at 15–16.

165 Ibid. at 48. See also: JICS, *Annual Report for the Period 1 April 2014 to 31 March 2015*, at 87; Just Detention International–South Africa, *In Their Boots: Staff Perspectives on Violence behind Bars in Johannesburg*, January 2015.

166 DCS, *Annual Report 2014–2015*, at 48.

167 Centre for Applied Legal Studies, *A Measure of Last Resort: Research Report on Remand Detention in South Africa*, January 2013, at 4.

168 DCS, *Annual Report 2014–2015*, at 15.

169 *National Development Plan,* at 402–403.

170 DCS, *Annual Report 2014–2015*, at 16.

171 Just Detention International–South Africa, *In Their Boots: Staff Perspectives on Violence behind Bars in Johannesburg*, January 2015, available at http://southafrica.justdetention.org/wp-content/uploads/2015/11/ In-their-boots-report.pdf (accessed on 12 January 2015).

172 JICS, *Annual Report for the Period 1 April 2014 to 31 March 2015*, at 43.

173 Information received by APCOF from the DCS on 16 February 2016.

174 Ibid.

175 Ibid.

176 Ibid.

177 2014 White Paper on Remand Detention Management in South Africa, 1.4.5.1.

178 Wits Justice Project, *Innocent but Incarcerated: An Analysis of Remand Detention in South Africa*, Department of Journalism, University of Witwatersrand, at 14.

179 DCS, *Annual Report 2014–2015*, at 9.

180 DCS, *Annual Report 2014– 2015*, at 9.

181 Information furnished to APCOF by the DCS on 16 February 2016.

182 Martin Schönteich, *Presumption of Guilt: The Global Overuse of pre-trial Detention*, Open Society Justice Initiative, New York, 2014, at 28.

183 SAPS, *Annual Report 2014/2015*, at 206.

184 National Director of Public Prosecutions, *Annual Report 2015/2015*, at 38.

185 Lukas Muntingh and Gwenaëlle Dereymaeker, *Understanding Impunity in the South African Law Enforcement Agencies*, Civil Society Prison Reform Initiative, University of the Western Cape, 2013, at 31.

186 Ibid. at 32.

187 Jean Redpath, 'Failing to prosecute?: Assessing the state of the National Prosecuting Authority in South Africa', *ISS Monograph No. 186*, Institute for Security Studies, Pretoria, 2012.

188 National Director of Public Prosecutions, *Annual Report 2015/2015*, at 36.

189 Ibid. at 39: An ADRM is a diversion and informal mediation method for resolving disputes between parties.

190 National Director of Public Prosecutions, *Annual Report 2015/2015*, at 8.

191 Ibid.

192 Ibid. at 39.

193 Ibid.

194 Stats SA, *Victims of Crime Survey 2015*, at 2.

195 Ibid. at 34.

196 See Working Group on Arbitrary Detention, *Report of a Mission to South Africa* (addendum), 2005, UN Doc E/ CN/4/2006/7/Add.3. See, also, Louise Edwards, 'Spike in claims of police torture is worrying', *Business Day*, 15 October 2014, available at http://www.bdlive.co.za/opinion/columnists/2014/10/15/spike-in-claims-of-police-torture- is-worrying (accessed on 4 October 2015).

197 Independent Police Investigative Directorate (IPID), *Annual Report 2014–2015*.

198 Ibid.

199 See, for example, SAPS, *Annual Report 2014/2015*, at 122, where the SAPS has attributed an increase in the number of civil claims against it to an increase in community awareness of rights, and the means to enforce those rights.

200 IPID, *Annual Report 2014–2015*: IPID reports that incidents of rape in police custody were up 79% from the previous reporting year, with smaller increases in relation to rape by a police officer (2%) and deaths in police custody (4%). In addition, complaints of the discharge of an official firearm were up 119% on the previous reporting period, to 940 incidents.

201 Stats SA, *Victims of Crime Survey 2015*, at 38.

202 Ibid. at 40.

203 Social Justice Coalition, Equal Education and Ndifuna Ukwazi (25 August 2015), *Memorandum to the Minister of Police, Chairperson of the Portfolio Committee on Police, and Chairperson of the Portfolio Committee on Security and Justice: Khayelitsha Demands a Fair Share of Quality SAPS Resources*, at para 11 (hereafter referred to as '2015 Memorandum').

204 2015 Memorandum, at para 6.

205 Ibid. at para 6.

206 Ibid.

207 Ibid. at para 23.

208 Ibid at para 18–21.

209 Ibid. at para 16–17.

210 *National Policy Framework for Implementation of the Child Justice Act 2010*, at 15–16.

211 Ibid. See, also, *National Crime Prevention Strategy of 1996*, at 9.

212 *National Policy Framework for Implementation of the Child Justice Act 2010*, at 16.

213 This section, insofar as it relates to the overview of the legal framework of the CJA, has been adapted from A Skelton and RM Courtenay, 'The Child Justice Act: Practice and procedure' in C Bezuidenhout (ed.) (2013), *Child and Youth Misbehaviour in South Africa: A Holistic Approach*. Pretoria: Van Schaik Publishers (with the author's permission).

214 See s 12 ('Freedom and security of the person'), s 35 ('Arrested, detained and accused persons') and s 28 ('Children') of the Constitution of the Republic of South Africa, 1996.

215 In terms of s 28(3) of the Constitution, a 'child' is defined as a person under the age of 18 years.

216 Ibid., s 28(1)(g).

217 Ibid., s 28(1)(g)(i).

218 Ibid., s 28(1)(g)(ii).

219 Ibid., s 28(2).

220 CJA, the Preamble.

221 Ibid.

222 C Badenhorst (2011), *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good intentions, Questionable Outcomes.* Pinelands: Open Society Foundation for South Africa.

223 CJA, s 3.

224 RM Courtenay and Z Hansungule, 'Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act' in P Proudlock (ed.) (2014), *South Africa's Progress in Realizing Children's Rights: A Law Review,* Cape Town, Children's Institute, University of Cape Town & Save the Children South Africa, at 156.

225 Ibid.

226 CJA, s 2(c).

227 Ibid., s 18.

228 Ibid., s 18(1). A Schedule 1 offence includes: theft, common assault, *crimen injuria*, and public indecency.

229 Ibid., s 18(3)(a).

230 Ibid., s 18(3)(b).

231 Ibid., s18(4)(a).

232 Ibid., s 18(4)(b).

233 Ibid., s 19.

234 J Gallinetti (2009), *Getting to Know the Child Justice Act,* Cape Town, University of the Western Cape, at 23.

235 CJA, s 19(2)(a).

236 Ibid., s 19(2)(b).

237 Ibid., s 19(3)(b).

238 Ibid., s 20.

239 Ibid., s 20(1). The circumstances that may warrant arrest include a reasonable belief that the child will continue committing offences if not arrested (CJA, s 20(1)(b)), a reasonable belief that the child poses a danger to any person (CJA, s 20(1)(c)), and where the offence is in the process of being committed (CJA, s 20(1)(d)).

240 The offences listed in Schedule 2 of the CJA include: robbery, assault with the intention to inflect serious bodily harm and arson. The offences listed in Schedule 3 of the CJA include: murder, rape and armed robbery.

241 CJA, s 20(3)(a).

242 Ibid., s 20(3)(b).

243 Ibid., s 20(3)(c).

244 Ibid, s 20(3) (d).

245 Ibid., s 20(4)(a).

246 Ibid., s 20(4)(b).

247 Ibid., s 20(5).

248 Ibid., s 34.

249 Ibid., s 35.

250 Ibid., s 57.

251 Ibid., s 61.

252 Ibid., s 62.

253 Ibid., s 71.

254 Ibid., s 72. See, also, C Badenhorst (2011), *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good intentions, Questionable Outcomes,* at 17.

255 Ibid., s 21(2)(a). See s 22(1) of the CJA for the basis of denying a child the right to be released in instances where he or she has committed a Schedule 1 offence.

256 Ibid., s 22(2).

257 Ibid., s 21(2)(b).

258 Ibid., s 21(1).

259 Ibid., s 26(2)(a).

260 CJA, s 28.

261 Ibid.

262 C Badenhorst (2011), *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good intentions, Questionable Outcomes,* at 5.

263 CJA, s 52(2), s 52(3).

264 Ibid., s 59(1)(a).

265 Ibid., s 59(1)(b).

266 Ibid., s 21(3)(a).

267 Ibid., s 21(3)(b).

268 Ibid., s 21(3)(c).

269 Ibid., s 21(1).

270 Ibid., s 26(3).

271 Ibid., s 26(1).

272 See J Gallinetti (2009), *Getting to Know the Child Justice Act,* Cape Town, University of the Western Cape, at 29.

273 CJA, s 30(1).

274 Ibid., s 32.

275 DoJ&CD (2010), *National Policy Framework for Child Justice,* Pretoria, at 8.

276 RM Courtenay and Z Hansungule, 'Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act' in P Proudlock (ed.) (2014), *South Africa's Progress in Realizing Children's Rights: A Law Review,* at 159.

277 DoJ&CD (2011), at 23.

278 Police Oversight Committee (2012), *Implementation of the Child Justice Act: Second Annual Report.* Presentation to the Portfolio Committee on Police, National Assembly, Parliament of South Africa, 12 September 2012.

279 ISCCJ (2013), *The Intersectoral Implementation of the Child Justice Act.* Presentation to the Select Committee on Security and Constitutional Development, National Council of Provinces, Parliament of South Africa, 23 October 2013.

280 Police Oversight Committee (2015), *Implementation of the Child Justice Act.* Presentation to the Portfolio Committee on Police, National Assembly, Parliament of South Africa, 20 May 2015.

281 Ibid.

282 This figure is representative of the number of SAPS officials as at April 2013. See RM Courtenay and Z Hansungule, 'Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act' in P Proudlock (ed.) (2014), *South Africa's Progress in Realizing Children's Rights: A Law Review,* at 159.

283 The term 'charged' is used interchangeably by the SAPS to indicate both the number of children entering the system and the total number of charges levelled against children (which may include a child having several charges laid against him or her). The numbers reflected should therefore be seen as an approximation rather than a definitive number.

284 DoJ&CD (2011), at 46.

285 C Badenhorst (2011), *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good intentions, Questionable Outcomes,* at 16.

286 Police Oversight Committee (2015). This number should be viewed against that detailed in DoJ&CD (2013), at 41. It is evident that there is a serious need for accurate reporting, since in the Department of Justice report, 57 592 children were reportedly charged rather than the figure provided by the SAPS.

287 Ibid.

288 Information received by APCOF from the DCS on 16 February 2016, based on an extract from the *Mid-Term Report of the Implementation of the Child Justice A*ct by the DCS.

289 Information received by APCOF from the DCS on 16 February 2016.

290 *Justice Alliance of South African and Another v Minister of Social Development, Western Cape and Others* (20806/2013) [2015] ZAWCHC [6-9].

291 Children's Act 5 of 2005, s 197.

292 L Jaimeson (2014), 'Children's rights to appropriate alternative care when removed from the family environment: A review of South Africa's child and youth care centres', in P Proudlock (ed.), *South Africa's Progress in Realising Children's Rights: A Law Review*, University of Cape Town, Children's Institute, at 216.

293 Children's Act 5 of 2005, s 178.

294 L Muntingh (2012), 'Children deprived of their liberty: Protection from torture and-ill treatment', in A van Niekerk, S Suffla and M Seedat (eds), *Crime, Violence and Injury in South Africa: 21st Century Solutions for Child Safety*, Houghton, PsySSA at 166.

295 Ibid.

296 Ibid.

297 Ibid.

298 2015 Draft White Paper on the Police, at 15.

299 N Fick (2006), 'Enforcing fear: Police abuse of sex workers when making arrests', *SA Crime Quarterly*, No. 16, at 27–28, available at: https://www.issafrica.org/uploads/CQ16Fick.pdf (accessed on 26 January 2016).

300 IPID (2015), *Annual Report for the 2014/2015 Financial Year Vote 20*, at 55, available at: http://www.icd.gov.za/sites/default/files/documents/IPID_Annual_Report%20_2014-15.pdf (accessed on 26 January 2016).

301 Ibid.

302 Ibid.

303 Ibid.

304 JICS (2015), *Treatment of Inmates and Conditions in Correctional Centres: Annual Report 2014/2015*, at 109. According to a study conducted by the JICS during the reporting period, 22 of the 243 active correctional centres in South Africa accommodate women.

305 The findings presented in the study were based on site visits to females at the Worcester correctional centre and Pollsmoor (mother and baby, pregnant females, and child female sections) correctional centre, as well as inspection reports coming from Kgosi Mampuru II and Johannesburg Central correctional centres.

306 Information furnished to APCOF by the DCS on 16 February 2016.

307 JICS (2015), *Treatment of Inmates and Conditions in Correctional Centres: Annual Report 2014/2015*, at 112.

308 Ibid.

309 Ibid. at 114.

310 Ibid.

311 Ibid. at 115–116.

312 Ibid. at 114.

313 Ibid. at 112–113.

314 Ibid. at 112.

315 JICS (2015), *Treatment of Inmates and Conditions in Correctional Centres: Annual Report 2014/2015*, at 114.

316 G Underhill (31 January 2014),*Khayelitsha Police Incapable of Helping LGBT Residents,* available at: http://mg.co. za/article/2014-01-30-khayelitsha-police-incapable-of-helping-lgbt-residents (accessed on 1 February 2016).

317 National Commission on Correctional Health (2015*), Transgender, Transsexual and Gender Non-Conforming Health Care in Correctional Settings,* National Institute of Corrections, available at: http://nicic.gov/library/029934 (accessed on 1 February 2016).

318 Parliament of South Africa, *Report of the Portfolio Committee on Correctional Services on Its Oversight Visit to the Johannesburg Correctional Centre to Assess Remand Detention Facilities and Services*, 21 November 2012, available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2013/comreports/130207pccorrectrepor t2.htm (accessed on 12 January 2016).

319 United Nations High Commission on Refugees (2015), *Protection from Xenophobia: Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes,* at 22, quoting Amnesty International, 2010, and Landau and Haithar, 2007.

320 United Nations High Commission on Refugees (2015), *Protection from Xenophobia: Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes,* at 22, citing Misago et al., 2009.

321 Ibid. at 3.

322 Ibid. at 22.

323 Ibid. at 12.

324 Ibid. at 21.

325 Ibid. at 12.

326 Ibid. at 102.

327 C Ballard (2014), *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposal for Reform*, Civil Society Prison Reform Initiative, University of the Western Cape, Cape Town, at 4, Available at: http://cspri.org.za/publications/research-reports/Remand%20detention%20in%20South%20 Africa.pdf (accessed on 1 February 2016).

328 Ibid.

329 S Naidoo and DL Mkize, 'Prevalence of mental disorders in prison population in Durban, South Africa, *Afr J Psychiatry (Johannesburg)* 2012 Jan 15(1): 30–35.

330 2014 White Paper on Remand Detention Management in South Africa, at 70.

331 Information furnished to APCOF by the DoH on 22 February 2016.

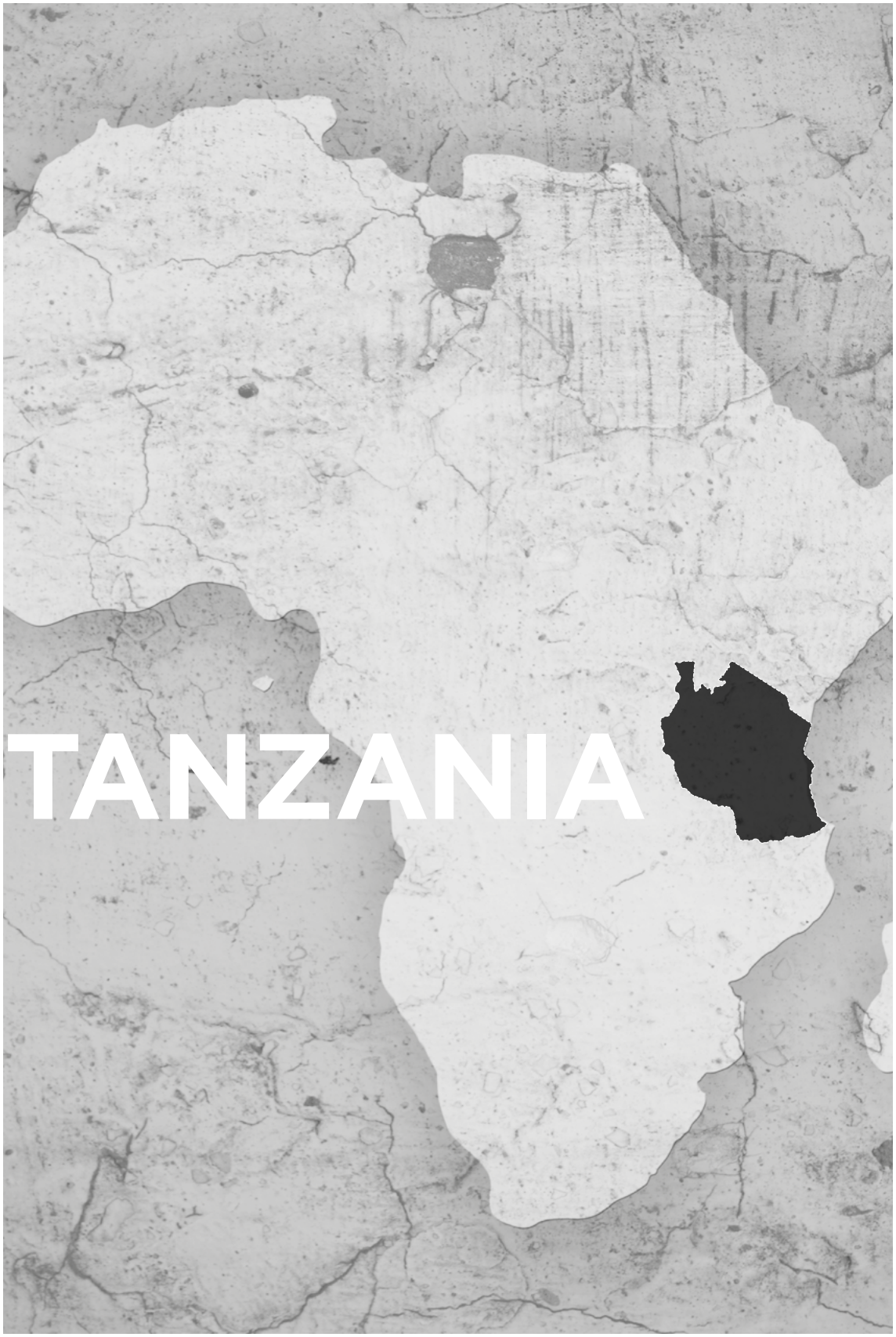
332 2014 White Paper on Remand Detention Management in South Africa, 5.2.10.

333 Ibid, 7.4.1.6

334 Information furnished to APCOF by the DoH on 22 February 2016.

335 2014 White Paper on Remand Detention Management in South Africa, at 10.

336 See Martin Schönteich, 'Strengthening prosecutorial accountability in South Africa', *ISS Paper 255*, Institute for Security Studies, Pretoria, April 2014.


TANZANIA

CHAPTER 4

TANZANIA

Baseline assessment: The Luanda Guidelines and Tanzania's framework for arrest, police custody and pre-trial detention

1. Introduction

During its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014, the African Commission on Human and Peoples' Rights (ACHPR) adopted Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa ('the Luanda Guidelines'). The adoption of such guidelines forms part of the ACHPR's mandate to formulate standards, principles and rules on which African governments can base their legislation.[1] The African Charter on Human and Peoples' Rights (AChHPR) provides all people with the rights to life, dignity, equality, security, a fair trial, and an independent judiciary.[2] The Luanda Guidelines will assist states to implement these obligations in the specific context of arrest, police custody and pre-trial detention.

The ACHPR has acknowledged that the pre-trial justice environment presents significant and concerning human rights challenges in Africa. It has specifically pointed to arbitrary arrest and detention, the risk of torture and other ill-treatment, corruption, high rates of overcrowding in police cells and prisons, conditions of detention that do not meet minimum agreed standards, and the denial of procedural safeguards as being of particular concern.[3] According to the ACHPR, the consequences of the systematic violation of human rights in the pre-trial context contribute significantly to rights abuses and inefficiencies in the rest of the criminal justice chain, undermine the rule of law, and delay or deny fair criminal justice outcomes.

The Luanda Guidelines reflect the collective aspirations of African states, national human rights institutions and civil society organisations to achieve a rights-based approach to pre-trial matters. While the adoption of such guidelines is a significant step towards this objective, reform will be achieved only through sustained commitment by all stakeholders to implement the Luanda Guidelines at the national level.

The ACHPR Special Rapporteur on Prisons and Conditions of Detention, Commissioner Med Kaggwa (Special Rapporteur) led the development of the Luanda Guidelines and is now engaging stakeholders on an implementation strategy at national level. With funding support from the United Nations (UN) Development Programme's Regional Service Centre for Africa, and technical support from the African Policing Civilian Oversight Forum (APCOF), the Special Rapporteur will present and invite discussion

on this present review with a view to identifying the gaps between Tanzania's current legislative and policy framework for arrest, police custody and pre-trial detention, on the one hand, and the opportunities for strategic interventions to promote reform, on the other.

2. Overview of this review

This review has been drafted by APCOF and has been reviewed by the Commission for Human Rights and Good Governance (CHRAGG).

The review is based on desktop research of the current legislative and policy framework pertaining to police arrest, police custody and pre-trial detention in Tanzania and analyses such framework against the requirements of the Luanda Guidelines. The review then sets out the key gaps and challenge areas and makes a number of suggested interventions for reform.

This review will be the subject of a discussion with stakeholders from across government, CHRAGG and civil society in order to promote consensus on the type of interventions, as well as to coordinate efforts among stakeholders.

3. Application of the international normative framework for human rights in Tanzania

Tanzania has a dualist approach to the incorporation of international norms into the domestic legal framework, with the Constitution requiring that legislation to implement international conventions be passed by the legislature before such legislation has direct application in Tanzania.[4] However, the Court of Appeal has ruled that the state is nonetheless bound by the provisions of international conventions even if enabling legislation has not been enacted.[5]

Tanzania has ratified, or is a party to, most of the international treaties relevant to arrest, police custody and pre-trial detention. A notable exception is Tanzania's failure to date to ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Tanzania's failure to ratify the UNCAT raises significant concerns in the pre-trial context. There is strong evidence that torture and ill-treatment are systematic in the context of police custody and pre-trial detention, and that the current legislative and policy framework does not do enough to detect, prevent and punish torture in what has been described as a culture of impunity in law enforcement.

4. Domestic framework for arrest, police custody and pre-trial detention in Tanzania

Human rights generally

The Constitution of the United Republic of Tanzania, 1977, is the primary source of law for Mainland Tanzania. The Constitution of Zanzibar, 1984, is the primary source for all non-union matters on the island. Both constitutions contain a Bill of Rights and respectively deal with the same subject matter and are construed together.

The 1977 Constitution provides for 'basic rights and duties', including equality, recognition before the law, and dignity.[6] The Bill of Rights does not, however, guarantee the full range of rights contained in the international conventions to which Tanzania is a party (including, notably, the International

Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), nor does it adequately reflect the provisions of the AChHPR.

Since 2012, constitutional reform has been a focal point for law reform discussions in Tanzania, and, based on the content of the consultative draft, does improve the alignment of human rights to the international normative framework. If the Constitution is adopted in its current form, there will need to be commensurate reform with regard to the legislative framework governing the police and prison services so as to ensure consistency with the new Constitution. This will provide stakeholders with an opportunity to review and make recommendations on strengthened legislative protections in respect of human rights in the context of policing and pre-trial detention. There are precedents and lessons to be learnt from similar processes that were undertaken in South Africa (1994), Kenya (2008) and Tunisia (2013).

Policing

The Mainland Constitution does not establish a police service, but does impose an obligation on all able-bodied people to prevent crime and maintain peace and security.[7] It also establishes a Local Government Authority with a law enforcement mandate.[8] According to the Commonwealth Human Rights Initiative (CHRI) (2006), this constitutional framework means that, in practice, the Tanzania Police Force (TPF) often deals with security issues in collaboration with local government.[9]

This gap is addressed in the new draft Constitution, which requires the police to maintain a community-service focus, a high level of professionalism, transparency, and accountability, and, importantly, to protect and promote human rights.[10]

The Police Force and Auxiliary Services Act of 2002 ('the Police Act') establishes the TPF with the mandate to detect and prevent crime and to maintain security on both the Mainland and in Zanzibar. The Police Act creates challenges for the implementation of the Luanda Guidelines in relation to arrest and detention, as it frames the role of the police narrowly in terms of combating crime and maintaining security without imposing any obligation on the police to uphold and respect human rights or maintain a community-service focus.

TPF appointments, dismissals and salary/pensions are dealt with in the Police Force Service Regulations of 1995, and the Police General Orders provide for a code of conduct and disciplinary procedures.

The TPF is led by the Inspector-General of Police (IGP) and has 43 000 staff that work in various divisions (including specialist divisions) across 28 regions.[11] Attempts at a police reform agenda have stalled as a result of lack of resources and political will to change,[12] and reports of systemic corruption, excessive force and impunity persist.[13] Public confidence in the police is low, and there are numerous and credible reports of an increase in 'mob justice'.[14]

Prisons

The Prisons Act of 1967 establishes and governs the Tanzania Prisons Service (TPS).

Reports of detention in Tanzania's prisons that are incompatible with the rights to life and dignity, and allegations of mistreatment of detainees by prison officials, persist.[15]

Other relevant sectors

The criminal justice framework includes the Penal Code, the Zanzibar Penal Act, the Criminal Procedure Act of 1985 and the Evidence Act.

5. Arrest

The Luanda Guidelines

Part I of the Luanda Guidelines sets out the framework for arrest that accords with the AChHPR and other relevant international norms. The rights to liberty and security of the person are central to this part, and the grounds for arrest in Guideline 2 are designed to address issues of arbitrary arrest and to limit the use of arrest to exceptional circumstances as a measure of last resort. The Luanda Guidelines also promote alternatives to arrest, where appropriate, for minor crimes, and encourages states to establish diversion systems.

The Luanda Guidelines set out in detail a range of procedural guarantees for arrest, including the grounds for arrest, requirements for officials to identify themselves, limitations on the use of force and firearms, a framework for the conduct of searches, and provision for maintenance of an arrest register.[16] The rights of an arrested person are set out at length in Guideline 4 and include the right to:

- Freedom from torture and other ill-treatment;
- Be informed of the reason for arrest and any charges;
- Silence and freedom from self-incrimination;
- Access legal assistance, a family member or other person of choice and medical assistance;
- Humane conditions in police custody;
- Information in an accessible format;
- Release on bail or bond;
- Challenge the lawfulness of arrest;
- Freely access complaints and oversight mechanisms; and
- Reasonable accommodation for persons with disabilities.

Guideline 5 requires that arrested persons be informed of the above rights in a language and format that are accessible and understood, and that such persons be afforded the right to the necessary facilities in order to exercise these rights.

Ultimately, the Luanda Guidelines seek to reduce the number of unnecessary and arbitrary arrests, and to protect persons subject to arrest from human rights abuses. To determine the extent to which this is realised by the current framework in Tanzania, this review considers the following issues:

- The legal basis for arrest, information on the number and profile of persons who are subject to arrest, and the grounds for arrest; and
- Procedural safeguards in respect of arrest and the rights of persons subject to arrest.

Tanzania's performance against these provisions is discussed below.

Legal basis for arrest in Tanzania

The Constitution of the United Republic of Tanzania limits the use of arrest to circumstances and procedures that accord with the law or a judicial order.[17] The Police Act permits arrest where there is a legal basis for the arrest, supported by a warrant issued because sufficient grounds for an arrest exist.[18]

There is general compliance with this requirement.[19] However, the legal framework presents a number of challenges with regard to compliance with the Luanda Guidelines. Further, there is apparent discriminatory application of arrest powers.

Regarding the legal framework, Tanzanian criminal procedure law permits arrest for failure to pay a debt. This is contrary to both the Luanda Guidelines and Article 11 of the International Covenant on Civil and Political Rights (ICCPR), both of which prohibit the use of arrest for civil debt.[20] This provision has been reviewed by the UN Human Rights Committee, which has called on Tanzania to amend the legislation to prohibit imprisonment for failure to pay a debt.[21]

Also of concern is the provision that permits the President to order the arrest (and indefinite detention) without bail of persons considered to be a threat to public order, thereby enshrining in law the political interference in law enforcement powers. Political interference was also cited as a concern in respect of the arrests, interrogation and eventual release without charge of striking doctors outside the Muhimbili National Hospital in 2012,[22] and the Legal and uman Rights Centre (LHRC) has expressed concern about the use of arrest in relation to political activity.[23]

There are numerous and credible reports that discriminatory application of powers of arrest has a disproportionate impact on minority groups and other marginalised people, who are reported to be arrested for allegedly committing petty offences and then held in police custody for days or weeks.[24] Additionally, regional and district commissioners on the Mainland have the power to arrest and detain a person for 24 hours if they 'disturb public tranquillity'.

There are also reports that the 'fabrication' of cases is rife, with police making arrests without evidence of a crime taking place and then later demanding money and other gifts or favours to secure detainees' release.[25] The fabrication of cases reportedly has a disproportionate impact on minority groups, including sex workers, gender and sexual minorities, and drug users.[26] Corruption and intimidation are also reported to be motivations for arbitrary and illegal arrest, with corruption taking the form of payment of money and other 'favours'.[27]

Article 30 of the Constitution of the United Republic of Tanzania limits application of constitutional rights and freedoms in a number of circumstances, including in relation to the execution of a judgment or court order made in any civil or criminal matter. This concern is, however, addressed in Article 55(1) of the Second Draft Constitution Bill of 2013.

Procedural safeguards in respect of arrest and the rights of an arrested person in Tanzania

The Constitution of the United Republic of Tanzania upholds the rights to life and privacy as well as the presumption of innocence, prohibits torture and inhuman or degrading treatment or punishment, and requires that all criminal investigations and processes be carried out in a manner consistent with human rights and dignity.[28] Arrested persons have the right to remain silent and to contact a lawyer or family member, but there are reports that this right is often denied.[29] There are also reports that arrested persons are not informed of the reason for their arrest, despite a requirement in the Police Act that this information be provided.[30]

The arbitrary use of arrest described above is unsurprising given the lack of capacity on the part of the TPF to undertake evidence-based investigations. The CHRAGG has expressed its concern that police stations lack the necessary means of transport, which inhibits their ability to attend call-outs and investigate crimes.[31]

Police bail is provided for in section 31 of the Police Act, and written reasons for refusal to grant bail must be provided. However, the Act is silent on the issue of reasonable and proportionate police bail conditions.

The use of force is regulated by the Police Act, which provides police with the power to use arms against persons attempting or aiding an escape from custody where there are reasonable grounds to believe that other methods to effect an arrest or prevent an escape will be ineffective, and there is a danger of grievous bodily harm.[32] However, there are numerous and credible reports that the police routinely resort to excessive force, with the LHRC documenting a number of cases of beatings and extrajudicial killings and estimating that 246 people were killed by the police between 2003 and 2012.[33] Civil society organisations have expressed their concern at the increase in extrajudicial executions, citing impunity as a major cause, and have documented a number of such cases, including those of Daud Mwangosi in Iringa and the death of a child in Tageta, Dar es Salaam.[34]

6. Police custody

The Luanda Guidelines

Part II of the Luanda Guidelines sets out procedural and other safeguards in respect of persons who are deprived of their liberty as a result of police custody. The provisions are all designed to promote freedom from arbitrary detention and emphasise the use of police custody as an exceptional measure of last resort. To promote the rights of persons in police custody, the Luanda Guidelines highlight the need for independent monitoring of police cells and provide for safeguards during questioning and interrogation. Guideline 7 includes guidance on decisions to grant police bail.

Procedural safeguards in Tanzania

The Police Act and the Criminal Procedure Act of 1985 require that an arrested person be held in an authorised place, be informed of the reason for their arrest and of their right to legal assistance services, and be taken before a judicial officer within 24 hours.[35] In practice, there are numerous and credible reports that suspects are not generally brought before a judicial officer within the prescribed time period.[36] In some cases, police reportedly release and immediate rearrest suspects to 'restart the clock' on the requirement to bring suspects before a judicial authority.[37]

The Constitution of the United Republic of Tanzania prohibits arbitrary interference with privacy without a search warrant, and the Police Act regulates the conduct of searches, as well as the taking of fingerprints and photographs, all of which can be undertaken only on certain grounds.[38] However, adherence to these rights and procedural safeguards is inconsistent.[39]

The Police Act also provides for medical examinations, but the provision is limited to the collection of evidence relating to an offence and is not framed in relation to the right of an arrested person to receive medical attention.[40]

Conditions of detention in police cells in Tanzania

Conditions of detention in police custody constitute a violation of the right to freedom from ill-treatment. The CHRAGG inspections of 225 police stations between 2002 and 2012 revealed overcrowding in cells, poor ventilation and inadequate lighting, lack of access to drinking water, and the use of buckets as toilets.[41] Failure to adequately provide for the protection of persons in police custody is further compounded by the lack of sufficient equipment and by police staff shortages. [42]

Allegations of torture by the police persist, both on the Mainland and in Zanzibar.[43] Although freedom from torture and other ill-treatment is guaranteed by the Constitution, torture is not a

criminal offence in Tanzania. There are reports that the use of torture by police during arrest and in police custody is a systemic problem.[44] The LHRC has documented a number of cases of torture, including that of John Shauri who was allegedly tortured by police officers in Mwanza. According to the LHRC, Shauri was mistakenly arrested and thereafter taken to a 'torture chamber' by police officers where makeshift weapons such as iron bars were used to extract a confession.[45]

The Criminal Procedure Act provides that any confession extracted as a result of torture will not be 'credible' before the courts. However, there is no information on the extent to which this norm is invoked to strike down confessions.[46]

Questioning and confessions in Tanzania

Interrogations are regulated by section 33 of the Police Act, which provides that interviews are to be recorded. However this provision is silent on issues such as medical examinations and the right to have a lawyer or other third person present. Moreover, confessions can be taken and recorded by investigating officers without the requirement that a judicial officer be present.

On both the Mainland and in Zanzibar, there are numerous and credible reports of the use of torture to force a confession or to intimidate suspects during interrogations and interviews.[47]

7. Access to legal assistance services

The Luanda Guidelines

Guideline 8 of the Luanda Guidelines sets out the requirements for the rendering of legal assistance services to persons in conflict with the law. The use of the term 'legal assistance services' instead of 'lawyer' is deliberate, as it acknowledges that there is a range of legal service providers, such as paralegals, who can provide legal information and assistance for persons who are deprived of their liberty. However, this expanded definition does not detract from the importance of access to lawyers, which access must remain at the centre of any legal aid programme.

Access to legal assistance services in Tanzania

There is a shortage of lawyers, paralegals and legal aid providers in Tanzania, particularly in rural areas. Of the approximately 2 300 lawyers in Tanzania, only two are stationed in what the LHRC describes as marginal regions (Kigoma, Rukwa, Ruvuma, Mtwara and Lindi).[48]

There is no comprehensive legal aid system to render legal assistance services to suspects who are unable to afford a private lawyer. This has created inequalities in terms of the right to a fair trial.[49] The Legal Sector Reform Programme has established a Legal Aid Unit within the Ministry of Justice and Constitutional Affairs which operates on the Mainland and in Zanzibar. However, access to a lawyer under this scheme is generally limited to capital-offence cases due to scarce resources, despite the scheme making provision for access to legal aid for suspects with limited or no income.[50]

Non-governmental organisations, such as the Tanzania Women Lawyers Association and the National Organization for Legal Assistance can and do provide free legal assistance services for suspects in criminal matters who are unable to afford a lawyer.[51] However, the LHRC reports that these organisations do not receive government assistance to provide these services, despite the government

describing the role of these non-government organisations as being necessarily complementary to the provision of government-sponsored legal aid.[52]

The shortage of private lawyers, coupled with the limited reach of legal aid through government and non-governmental organisations, means that most defendants who are unable to afford a lawyer represent themselves in court. This results in significant challenges in relation to equality before the law and the right to a fair trial.[53]

8. Pre-trial detention

The Luanda Guidelines

Part III of the Luanda Guidelines establishes a detailed framework for promoting a rights-based approach to making pre-trial detention orders, and for safeguarding the rights of persons who are subject to such orders. As with police custody, the Luanda Guidelines emphasise that pre-trial detention should be ordered only as an exceptional measure of last resort and that states should have in place alternatives to detention. This part shifts the focus of the Luanda Guidelines from the police to the judiciary, providing guidance on the type of considerations that should be included in judicial decisions to order and review pre-trial detention and setting out procedures in the case of delays in investigation or judicial proceedings that may result in prolonged pre-trial detention. Lastly, it establishes safeguards for persons who are subject to pre-trial orders, including that pre-trial detainees be held in officially recognised places of detention and have access to a lawyer.

Framework for making pre-trial detention orders in Tanzania

There are numerous and profound challenges to a rights-based approach to judicial remand orders in Tanzania. These must be examined in the context of the broader criminal justice and judicial challenges. The justice system has been characterised as 'weak', and, despite constitutional guarantees of judicial independence and resource allocation, there are reports of systemic corruption, underfunding, poor infrastructure, personnel shortages (particularly in rural areas), and inefficiencies across all areas of the system, including investigations and prosecutions.[54] Despite recent increased staffing levels in the judicial system, there are still significant concerns about delays, particularly as there are reports of an increase in criminal cases being reported and lodged.[55] Compounding these challenges are the numerous and credible allegations of bribery in exchange for the favourable determination of cases, particularly in the lower courts.[56]

The Tanzanian government has taken steps to improve the judiciary through the Legal Sector Reform Programme, which includes infrastructure redevelopment for the courts and an increase in staffing levels. However, the CHRAGG reports that there has been an increase in complaints about the court system, including in relation to corruption.[57]

The Ministry of Home Affairs reports that approximately 50% of the prison population comprise detainees who are awaiting trial.[58] What is of concern is that pre-trial detainees can wait up to 3 to 4 years for a trial because of the shortage of judges, budget constraints, and delays in police investigations.[59]

If a suspect is charged with murder, treason, a drug offence, armed robbery or human trafficking, or is alleged to have committed a violent offence and is considered to be a risk to public safety, bail is not permitted.[60] Where suspects are eligible for remand, there are reports that bribes may be demanded in exchange for remand orders in the primary and district courts.[61]

Since there are limited alternatives to remand, the UN Human Rights Committee has called on Tanzania to promote and implement alternatives to detention.[62] The government reports that the options available include the imposition of fines and community service, but there is no data on the scale of implementation of these alternatives.[63]

The Luanda Guidelines provide that the prosecutorial authorities should be separate from the investigation authorities, and, with the establishment of the National Prosecution Services, the practice of police officers acting as prosecutors in Tanzania is being phased out. However, police officers still act as prosecutors in nine of the 30 regions.[64] Experts have expressed their concern about this practice owing to 'the risk that [the] police might manipulate evidence in criminal cases'.[65]

Conditions of detention in remand facilities in Tanzania

Multiple international experts and Tanzanian stakeholders have described the conditions of detention in Tanzania's prison system as overcrowded, with poor sanitation, inadequate food, and inadequate resources for detainees and prisoners.[66] Lack of resources also impacts on prison officials, who complain of shortages of water, electricity and medical supplies and report that, in many detention facilities, the lack of transport makes it difficult for prisoners to be transported to hospital and clinics when they are ill.[67] There are also allegations that detainees are subject to ill-treatment if they fail to pay a bribe.[68]

Currently, Tanzania's prisons are at 16% above the total capacity of 29 552, and there are as many as 17 224 pre-trial detainees.[69] Overcrowding in Tanzania's prisons has been attributed to the high number of pre-trial detainees,[70] which is compounded by delays in cases, allegations of fabrication of cases, and minimal use of alternatives to imprisonment. The LHRC reports that there are a large number of people held in pre-trial detention for petty offences.[71]

The result of overcrowding is to deny all detainees their rights to access food and water, adequate health services, and sanitation facilities. In its 2011 Universal Periodic Review, the government of Tanzania identified the reduction of overcrowding in prisons as a key national priority.[72] However, the means to achieving this is through infrastructure development rather than addressing the underlying causes of overcrowding, such as large numbers of remand detainees and the lack of alternatives to remand orders.

The health conditions in Tanzania's prisons give rise to significant human rights concerns, with detainees commonly contracting malaria, tuberculosis, HIV/Aids, and other diseases and infections caused by poor sanitation. Medications are often provided by family or friends, and limited transport results in sick detainees being unable to visit health clinics or hospitals outside of the prison environment.[73] In Zanzibar, there are reports that persons held in remand have been denied their right to attend workshops, are kept in solitary confinement, and are not permitted to change their clothes.[74]

There are persistent allegations of the use of excessive force against detainees by prison officials and of the ill-treatment of detainees by such officials.[75] Moreover, corporal punishment is still permitted as part of judicial sentencing.[76] The Prisons Act affords officials broad scope to use punishment and force, and there are no controls over the trading and use of equipment that has no purpose other than that of being used for torture and ill-treatment.[77] There are also numerous and credible reports of torture and ill-treatment in Tanzania's prisons.[78]

In some prisons, such as Ruanda Central Prison, sentenced and pre-trial persons are held together.[79]

9. Data collection and access to information

The Luanda Guidelines

Part IV of the Luanda Guidelines sets out the requirement for registers at all stages of the pre-trial process – from arrest, to police custody and pre-trial detention – and provides for access to registers by detainees, lawyers, family members, oversight authorities, and any other organisation with a mandate to visit places of detention. This part further sets out the minimum information required to be recorded in a register and will eventually be supplemented by a Model Custody Register to be developed by the ACHPR.

Guidelines 39 and 40 of the Luanda Guidelines deal specifically with data collection and access to information, respectively. These provisions require that states establish processes for the systematic collection of disaggregated data on the use of arrest, police custody and pre-trial detention and ensure that there are systems and processes to guarantee the right of access to information for persons in police custody and pre-trial detention, as well as for their lawyers, family members and others.

Data collection and access to information in Tanzania

Article 18 of the Mainland Constitution enshrines the right to seek and receive information. However, there are reports that, across the pre-trial detention environments, including police stations and prisons, record-keeping is inaccurate and that there are multiple discrepancies in official reporting.[80] In a survey of eight government institutions, the Ministry of Constitutional Affairs and Justice was found to be among the most secretive, with inconsistent and unreliable information, thereby posing a major problem in accessing information and understanding the causes of pre-trial detention issues.[81]

Access to information is not guaranteed by law in Tanzania, and efforts to enact a Freedom of Information Bill have stalled.[82] A further problem is that access to information is characterised by high levels of corruption and by low levels of community awareness and access to infrastructure that could assist communities and individuals to exercise their rights.[83] There are also reports that government officials routinely refuse to make information available.[84]

10. Standards of conduct and training for law enforcement officials

The Luanda Guidelines

Guideline 36 of the Luanda Guidelines provides that states must establish enforceable standards of conduct for law enforcement officials which are commensurate with internationally recognised standards of conduct, and must furthermore establish disciplinary processes for non-compliance. Reference in this section should be made to the UN Code of Conduct for Law Enforcement Officials in terms of the minimum standards to be included in national codes of conduct.

Standards of conduct and training for law enforcement officials in Tanzania

According to the government, all law enforcement officers undergo human rights training as part of their induction and promotion training.[85] It is not clear whether the training includes consideration of the UN Standard Minimum Rules for the Treatment of Prisoners or the Bangkok Rules.[86] The

CHRAGG and others have called on the government to improve the current curriculum, and others have noted that, although officials do receive training, there are still significant concerns about the human rights performance of such officials on the ground.[87]

The pay and working conditions of the police have been subject to much criticism and the CHRAGG has recommended that the government review working conditions with a view to improving the professionalism of the TPF.[88]

The Police Act and Prisons Act set out the procedures for conduct and discipline. However, given the persistent and widespread complaints of human rights violations and corruption in both the prison and police services, the internal disciplinary procedures do not appear to be working in terms of combating impunity and deterring officers from future offences. In terms of the police, it is reported that the Complaints Unit lacks sufficient resources to investigate complaints of police misconduct and relies on the Criminal Investigation Department to assist with investigations.[89] If the disciplinary procedures reveal evidence of a criminal offence, the matter should be referred to the Directorate of Public Prosecutions. But it is not clear whether this procedure is in fact followed.[90]

11. Vulnerable groups

The Luanda Guidelines

Part VII of the Luanda Guidelines focuses specifically on the rights of vulnerable persons in pre-trial detention. It contains general provisions requiring states to enshrine the right to freedom from discrimination in law, and then lays down specific protections in relation to the following categories of persons:

- Children
  - Definition of a child as anyone aged below 18 years.
  - Laws and policies to promote diversion and alternatives to pre-trial detention.
  - Safeguards for arrest, police custody and pre-trial detention.
  - Right to be heard and provision of legal assistance services.
  - A framework for the conduct of officials and the establishment of specialised units.
  - Access to third parties.

- Women
  - Safeguards for arrest and detention, including that women be held separately from male detainees.
  - Provisions in respect of children who accompany women.

- Persons with disabilities
  - Definition of disability, which includes physical, mental, intellectual or sensory disability.
  - Legal capacity and access to justice.
  - Accessibility and reasonable accommodation.

- Non-nationals
  - Refugees.
  - Non-citizens.
  - Stateless persons.

General provisions pertaining to discrimination in Tanzania

Equality before the law, without discrimination, is enshrined in the Constitution, and state officials are under a positive obligation not to discriminate against any person on the basis of their gender, disability, nationality, tribe, place of origin, political opinion, colour, religion, sex, station in life or other status.[91] Efforts to improve the policing, prison and judicial environments have not significantly addressed access-to-justice issues for members of minority groups and other marginalised or disadvantaged persons.[92]

Women

In 2011, there were 1 206 female detainees in Tanzanian prisons, including 110 female pre-trial detainees in Zanzibar.[93]

Conditions of detention for women in prison facilities have been described as better than those for the male prison population. Women are generally held separately from the male population, and, in a 2011 report published by the Tanganyika Law Society, it was reported that female detainees each had one bed and two blankets, a mosquito net and a sweater.[94]

However, there are concerns that women are not afforded special treatment in line with the requirements of the Luanda Guidelines, including the failure by the state to provide adequate hygiene facilities and sanitary pads. The LHRC reports that, in Kingolwira, for example, sanitary pads and related items are provided by charitable organisations.[95]

Children

The Law of the Child Act (in respect of the Mainland) and the Children's Act (in respect of Zanzibar) define a child as any person below the age of 18 years.[96] The Law of the Child Act requires that children who are in conflict with the law and deprived of their liberty should receive an adequate diet, nutrition and health care.[97] Both Acts promote alternatives to detention for children, including diversion, release of a child into the care of a parent, guardian or other fit person, compensation and damages, and community service.[98] In Zanzibar, diversion can be applied at any stage in the criminal justice process.[99]

In Zanzibar, there is a separate criminal justice process for children, and there are children's courts in every region that hear matters involving children in conflict with the law. On the Mainland, there are some juvenile courts, and the Chief Justice can designate any court as a juvenile court if so required.[100]

In 2011, the CHRAGG conducted monitoring visits in order to review the conditions of detention for children in Tanzania. It found that approximately 1 400 children were being held in adult detention facilities, and 80 children in pre-trial detention in remand homes. No information was available about children held in police custody.[101]

Similarly, the Ministry of Justice and Constitutional Affairs made an assessment of juvenile justice in Tanzania. It was able to collect qualitative data from police logbooks in ten regions (Dar es Salaam, Arusha, Dodoma, Kigoma, Kilimanjaro, Lindi, Mbeya, Mtwara, Mwanza and Tanga) and found that 50% of children were arrested for theft and minor property offences.[102] This gives rise to significant issues about the appropriateness of arrest and police custody for children, particularly given that the majority are held for what constitute petty offences.

The ministry's assessment revealed a number of challenges, including lack of access to legal aid services, few law enforcement and judicial personnel with specialised training, lack of equipment and facilities for the administration of juvenile justice, and too few social-welfare officers.[103]

The presence of children in adult detention facilities raises significant concerns. Both the ministry and CHRAGG reports identified widespread human rights abuses against children in detention. In the CHRAGG study, 31% of children reported ill-treatment by the police, which most often occurred in detention facilities, ranging from non-violent ill-treatment to sexual violence and torture.[104] The ministry's report identified among key human rights concerns:

> ill-treatment (including violence that led to hospitalisation) and abuse for purpose of extracting a confession from 54 percent of respondents, forced or attempted forced confessions, fabrications of allegations, poor conditions of police detention damaging health and well-being, [and] not being informed of procedural rights.[105]

Others have raised concerns about high rates of sexual abuse against children held in adult facilities,[106] with widespread sexual abuse of children held in detention at Segrea Prison being reported.[107]

In response, the government piloted the establishment of children's desks at police stations, with plans to roll out the scheme to all regions. Further, the government reported that it was working with the United Nations Children's Fund (UNICEF) on the establishment of community rehabilitation schemes for children who have offended or are at risk of offending.[108] A Child Justice Forum, established in 2011 by the Ministry of Justice and Constitutional Affairs, has a mandate to identify gaps in the administration of juvenile justice and to develop a strategy for reform of the juvenile justice system.[109]

Despite these developments, it is reported that children are still largely dealt with by the mainstream justice system.[110] Non-government organisations report that the Law of the Child Act has not been properly implemented because of the lack of rules and regulations, as well as the lack of a monitoring framework.[111] In its Universal Periodic Review report, the government acknowledged that there is only one juvenile court, based in Dar es Salaam, and only five remand homes spread across the country.[112] Failure to provide enough facilities for children, and to implement diversion and other non-custodial measures, has been attributed to lack of resources and a lack of coordination among the key institutions responsible for juvenile justice, including the police, prisons and judiciary.[113]

There are reports that juvenile suspects who are unable to afford a lawyer are often left without legal assistance, and that prison and police officials do not have sufficient training to provide specialist services for children in their care.[114] However, the five-year Child Justice Strategy for Progressive Reform has reportedly resulted in all children appearing before the juvenile court in Dar es Salaam and receiving legal representation, with all children held at Segerea and Keko prisons and the Upanga detention home receiving legal information.[115]

Persons with disabilities

The Persons with Disabilities Act of 2010 (in respect of the Mainland) and the Persons with Disabilities (Rights and Privileges) Act of 2006 (in respect of Tanzania as a whole) set out the framework for promoting and protecting the rights of persons with disabilities. The legal framework enshrines the right to equality for persons with disabilities and the right to equal protection under the law, including a positive requirement that all government institutions take appropriate measures to ensure reasonable changes are made for persons with disabilities.[116]

Non-nationals

Although the Constitution prohibits discrimination on the basis of race, there is no specific legislation on racial discrimination in Tanzania.[117]

There are reports that refugees are subject to arbitrary arrest and detention, to excessive use of force and to ill-treatment by law enforcement officials. Female refugees are disproportionately impacted by these human rights abuses.[118]

Asylum Access reports that refugees are often treated as undocumented immigrants and, when they are arrested on suspicion of committing a criminal offence, are often deported or imprisoned without recourse to judicial review or the opportunity to demonstrate their need for protection.[119] Prison visits conducted by Asylum Access in Arusha, Tanga, Morogoro, Pwani, Lindi, Dar es Salaam, Mbeya, Ruvuma, and Mtwara revealed a number of potential refugees and asylum seekers who were being arbitrarily detained by law enforcement officials.[120]

12. Accountability architecture

The Luanda Guidelines

Part VII of the Luanda Guidelines sets out an accountability architecture that is comprised of internal and external oversight, judicial, complaints and monitoring mechanisms, in addition to providing for remedies.[121] Furthermore, the Luanda Guidelines establish procedures for serious violations of human rights in police custody and pre-trial detention, making it clear that the state has a responsibility to account for and explain any violations.[122]

Accountability architecture in Tanzania – general observations

Tanzania has ratified most of the relevant international treaties and is a state party to the AChHPR. Accordingly, it has an obligation to guarantee the right to an effective remedy. The first aspect of that obligation is the existence of an accountability architecture, both internal and external, that is comprised of complaints, oversight and monitoring mechanisms. The second aspect is to ensure that victims of human rights violations have the right to an effective redress guaranteed in law and practice.

Tanzania has established judicial bodies, such as courts, a national human rights institution and quasi-judicial tribunals with competency to hear and decide on complaints of human rights violations.[123] However, the effectiveness of these mechanisms is the subject of serious concerns in relation to the right to a remedy.

Overall, Tanzania fails to conduct prompt, independent and impartial investigations into all allegations of human rights abuses against persons who are in conflict with the law and are deprived of their liberty in the pre-trial context. The lack of accountability for both police and prison officials has resulted in significant impunity.[124]

The CHRAGG

The CHRAGG was established by Article 130(1) of the Constitution and is subject to its own enabling legislation. It has four mandates, namely the protection and promotion of human rights (through the investigation of complaints, the conducting of enquires, and community education),

as well as advisory and mediatory/conciliatory functions.[125] The CHRAGG has dealt with 27 434 complaints since being established.[126]

The CHRAGG's findings and decisions are only recommendatory in nature.[127] However, if no response is received from government in relation to a recommendation, the CHRAGG has the power to institute court proceedings to enforce the recommendation. Failure to comply with such court order is an offence.[128]

The CHRAGG's capacity to work effectively based on its mandate is hampered by budgetary constraints and a lack of adequate resources.[129]

Judicial oversight and habeas corpus

Persons deprived of their liberty in remand detention have the right to submit complaints to the judicial authorities. However, there are reports that correspondence from detainees to judicial authorities is often censored. Detainees can also make complaints in person to the CHRAGG officers during prison visits.[130]

Complaints mechanisms

Internal

The Complaints Department of the Ministry of Home Affairs and the Prison Service Public Relations Unit receive and respond to public complaints forwarded to them directly or via the media about conditions of detention in the prison environment.[131]

The TPF has an internal complaints system that can receive complaints from police officers and members of the public at each police station, some of which have a dedicated 'complaints desk'. Complaints must then be recorded in the station diary and reported to the regional commander.[132] This raises issues of independence and effectiveness, as it is in essence a case of the police investigating themselves. Transparency is a problem, as the procedures do not provide for information to be relayed to complainants on the status of their complaints or the progress made with any investigation. The system of internal complaints directed to the TPF has been described as 'complicated, uncoordinated and inefficient'.[133]

External

The CHRAGG has a mandate to receive complaints into human rights violations against law enforcement officials, and to conduct investigations into such complaints.[134] The CHRAGG has a computerised complaints management system to track the process of complaints and its personnel have recently undergone investigations training.[135]

The Prevention and Combating of Corruption Bureau has a mandate to investigate complaints of corruption.[136] It received 5 340 complaints of corruption in 2013, many of which concerned the police.[137]

Monitoring mechanisms

The CHRAGG has the power to conduct monitoring visits to police and prison facilities.[138] Between 2002 and 2012, the CHRAGG inspected 225 police stations and made reports on the conditions

of detention, the equipment and resources available, and any concerns reported to it by officers or persons held in the cells.[139]

During 2013, the Probation and Community Service Division of the Ministry of Home Affairs, including officials from the Ministry of Justice and Constitutional Affairs and the Office of the Director of Public Prosecutions, conducted prison visits.[140]

Senior police officials and justices of the peace also have access to detention facilities, including police cells and prisons.[141]

However, these are all ad hoc monitoring mechanisms and there is no information available about regular systems of monitoring of police cells or remand detention facilities.

Independent oversight mechanisms

The draft Constitution contains a provision to establish a Commission for the Service of the Police Force in order to address issues of oversight, accountability, discipline and professionalism in the TPF.[142] The Reform Plans of the TPF include strengthening the capacity of police oversight and complaints institutions.[143] At the time of writing in August 2014, there was no dedicated independent oversight mechanism for the police or prison services, and external oversight was provided by the CHRAGG, to the extent possible in the context of the budgetary and human resource constraints.

The current external oversight structure for the TPF includes the Police and Prison Commission, the Ministry of Home Affairs (which has established a department to deal with complaints from the public against the police[144]) the Prevention and Combating of Corruption Bureau, the CHRAGG, the Office of the Ombudsman, and Parliament and the judiciary. However, there is no information available on the extent to which they have effectively performed this role.

There are also concerns about the independence of the Complaints Division of the Ministry of Home Affairs. Although this division is technically independent of the TPF, it refers complaints back to the TPF for investigation.[145]

Encouragingly, the Parliamentary Committee for Constitutional, Legal and Public Administration reports and makes recommendations on human rights and has worked closely with the CHRAGG.[146] However, there is still a need for an independent police oversight institution in Tanzania to provide essential independent monitoring of police conduct that is perceived as being relatively unbiased in terms of its reports and recommendations.

Inquests and inquiries

The CHRAGG performs an inquiry role and has a mandate to make recommendations in relation to any inquiry it initiates of its own motion or at the direction of the government.

The Inquests Act of 1980 provides for coronial inquests to be undertaken into violent, sudden or otherwise unexplained deaths. According to the LHRC, this Act has never been invoked to investigate or determine a cause of death as a result of law enforcement officers' actions.[147] The Act also gives the President the power to establish a committee in order to conduct investigations into serious complaints relating to the police.

13. Opportunities for reform

- Implementation of the new constitutional framework will provide an opportunity for all stakeholders to discuss how to strengthen current policing and prisons laws to align these with the new Constitution, and to promote the adoption of other legislation for strengthening rights protections in the pre-trial context (including in relation to the criminalisation of torture, to the provision of legal aid, to juvenile justice, and to the rights of persons with disabilities). There are precedents and lessons to be learnt from similar processes that were undertaken in South Africa (1994), Kenya (2008) and Tunisia (2013).
- In the light of the constitutional reform, advocacy and technical assistance with respect to the development of new policing legislation that will reflect the new obligations imposed on the police in the proposed Constitution in relation to upholding and respecting human rights and the adoption of a community-service focus.
- Advocacy to encourage the ratification of the UNCAT, and its Optional Protocol, with a view to criminalising torture in Tanzania.
- Disproportionate impact on arrest powers for marginalised and disadvantaged people could be addressed through training of law enforcement personnel and the consideration of the declassification and decriminalisation of petty offences. This will significantly contribute to the decrease in overcrowding in police and prison cells. Declassification and decriminalisation will require community consultation and sensitisation, as the correct use of police bail may not be understood and may be perceived as a failure by the police and the criminal justice system to deal with suspects in criminal matters. Work being done by the Pan-African Lawyers Union (PALU) on this issue will provide data and research. Concurrently, work will need to be done on strengthening the provisions for diversion, particularly for juvenile offenders. While diversion may exist in law and policy, there is clear evidence that diversion is not being applied in practice. Consideration should also be given to a review of police bail practices to ensure that bail conditions are proportionate to the offence and to any risk posed by the suspect in relation to public safety and failing to return to court for hearings.
- Police training on the rights of an arrested person and the treatment of persons in police custody.
- Review of the Police Human Rights Curriculum.
- A study on the 24-hour rule to understand why it is not implemented in practice, and the development of a strategic reform plan to support the application of this rule based on the gaps identified by the study.
- Review of interrogation procedures with a view to developing a strategic plan (to include training on and revision of the procedures) so as to promote the rights of suspects and address widespread use of torture and other ill-treatment to extract confessions. This review will also need to include an examination of police capacity and training in relation to evidence-based investigations, as reliance on confessions as the primary evidence in criminal matters contributes significantly to the use of torture and other ill-treatment.
- A needs-based analysis for the provision of legal assistance services, and improved funding for organisations providing services where government legal aid assistance services are inadequate.
- A review of the Legal Sector Reform Programme strategy against the Luanda Guidelines, and recommendations for improved service delivery and reform strategies in the programme's agenda. Specifically, the programme should include provision for regular monitoring of places of detention and the establishment of independent oversight authorities for the police (similar to the Independent Police Investigative Directorate (IPID) in South Africa or the Independent Policing Oversight Authority (IPOA) in Kenya) and prisons (similar to Judicial Inspectorate for Correctional Services (JICS) in South Africa).

- Expert review of, and recommendations on, the effective establishment and implementation of protection frameworks for vulnerable and marginalised groups, such as women, children, persons with disabilities, and human rights defenders.
- Training and capacity-building with the judiciary to promote the use of alternatives to pre-trial detention.
- A review of standards of conduct for law enforcement officials and of internal disciplinary procedures.
- Public-awareness campaigns on pre-trial rights and criminal justice-related rights.
- Continue to build capacity in respect of CHRAGG's skills.

Endnotes

1 African Charter on Human and Peoples' Rights (AChHPR), Article 45(1)(b).

2 AChHPR, Articles 2, 3, 5, 6, 7 and 26.

3 Preamble, Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa ('Luanda Guidelines'), adopted by the African Commission on Human and Peoples' Rights (ACHPR), 55th Ordinary Session, 28 April–12 May 2014, Luanda, Angola.

4 Constitution of the United Republic of Tanzania, 1977, Article 15.

5 *Transport Equipment and Other v DP Vambhia,* Civil Application No. 19/1993 CAT.

6 Constitution of the United Republic of Tanzania, 1977, Article 12.

7 Ibid., Article 27(1).

8 Ibid., Article 146(2)(b).

9 Commonwealth Human Rights Initiative (CHRI) (2006), *The Police, The People, The Politics: Police Accountability in Tanzania,* New Delhi, at 7.

10 Draft Constitution of the United Republic of Tanzania, 2013, Article 244(1).

11 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

12 Legal and Human Rights Centre (LHRC) and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report,* Dar es Salaam, at 221.

13 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014. See, also, LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report,* Dar es Salaam, at 24; and CHRI (2014), *A Force for Good? Improving the Police in Kenya, Tanzania and Uganda,* New Delhi, at 44–45.

14 UN General Assembly, Human Rights Council, 'Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [15].

15 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 223.

16 Luanda Guidelines, Guideline 3.

17 Constitution of the United Republic of Tanzania, 1977, Article 15(2).

18 Police Force and Auxiliary Services Act, 2002, s 27(3).

19 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

20 Luanda Guidelines, Guideline 2(b).

21 United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Republic of Tanzania,* UN Doc CCPR/C/TZA/CO/4, 6 August 2009, [20].

22 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 73.

23 Ibid. at 226.

24 Ibid. The petty offences include 'using abusive language, failure to participate in public activities, failure to pay community contributions, possession of illicit liquor … operating a small business in prohibited places'.

25 Ibid. at 223.

26 Human Rights Watch and WASO, *Treat Us Like Human beings: Discrimination against Sex Workers, Sexual and Gender Minorities, and People Who Use Drugs in Tanzania,* at 44.

27 CHRI (2014), *A Force for Good? Improving the Police in Kenya, Tanzania and Uganda,* New Delhi, at 44.

28 Articles 13(6), 14, 15(2) and 16.

29 Police Act, s 32, 34. See, also, United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

30 United States Bureau of Democracy, Human Rights and Labour, *Country Report on Human Rights Practices for 2012: Tanzania,* cited in CHRI (2014), *A Force for Good? Improving the Police in Kenya, Tanzania and Uganda,* New Delhi, at 44. See, also, UN General Assembly, Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/2, 25 July 2011, [41].

31 Commission for Human Rights and Good Governance, Tanzania (2012), *Ten Years of the Commission for Human Rights and Good Governance: Reflection of a Journey 2002–2012*.

32 Police Force and Auxiliary Services Act, 2002, s 29.

33 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 20. See, also, United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

34 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at xxxii.

35 Criminal Procedure Act, 1985, s 32.

36 Human Rights Committee (2010), Concluding observations of the Human Rights Committee: United Republic of Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, [21].

37 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

38 Police Force and Auxiliary Services Act, 2002, s 35, 36.

39 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

40 Police Force and Auxiliary Services Act, 2002, s 37.

41 Commission for Human Rights and Good Governance (CHRAGG), Tanzania (2012), *Ten Years of the Commission for Human Rights and Good Governance: Reflection of a Journey 2002–2012,* at xx.

42 Ibid.

43 CHRI (2014), A Force for Good? Improving the Police in Kenya, Tanzania and Uganda, New Delhi, at 44.

44 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 57.

45 Ibid. at 59–60.

46 Criminal Procedure Act 9 of 1985 (Mainland) and Criminal Procedure Act 7 of 2004 (Zanzibar).

47 LHRC and Zanzibar Legal Services Centre (2013), *Tanzania Human Rights Report 2012,* at 317, cited in CHRI (2014), *A Force for Good? Improving the Police in Kenya, Tanzania and Uganda,* New Delhi, at 44. See, also, UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [17].

48 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 45–46.

49 Human Rights Committee (2010), Concluding observations of the Human Rights Committee: United Republic of Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, [21]. See, also, UN General Assembly, Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/2, 25 July 2011, [41].

50 Legal Aid (Criminal Proceedings), 1969, for the Tanzania Mainland, and Criminal Procedure Act, 2004, for Zanzibar. See, also, LHRC and Zanzibar Legal Services Centre (2012), Tanzania Human Rights Report 2012, Dar es Salaam, at 45.

51 Non-Governmental Organizations Act 24 of 2002. See, also, United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

52 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 46; and The United Republic of Tanzania, 'National report submitted in accordance with paragraph 15(a) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/1, 19 July 2011, [40].

53 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014. See, also, LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 45.

54 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 18, 44–43. See, also, United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

55 UN General Assembly, Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/2, 25 July 2011, [39].

56 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

57 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic

of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [30]. See, also, United Republic of Tanzania, Working Group on the Universal Periodic Review, 'National report submitted in accordance with paragraph 15(a) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/1, 19 July 2011, [40].

58 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

59 Ibid.

60 Ibid.

61 Ibid.

62 Human Rights Committee (2010), Concluding observations of the Human Rights Committee: United Republic of Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, [19].

63 UN General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United Republic of Tanzania,* A/HRC/C/19/4, 8 December 2011, [21].

64 United States Department of State, 2013 Country Reports on Human Rights Practices – Tanzania, 27 February 2014.

65 Ibid.

66 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 226. See, also, http://www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, at 9–10; http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TZ/CHRAGG-CommissionHumanRightsGoodGovernance-eng.pdf, at 3–4; Human Rights Committee (2010), Concluding observations of the Human Rights Committee: United Republic of Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, [19].

67 http://www.state.gov/documents/organization/204386.pdf, at 5–6.

68 Ibid.

69 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

70 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [21].

71 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 225.

72 UN General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, 'National report submitted in accordance with paragraph 15(a) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/1, 19 July 2011, [81].

73 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

74 LHRC and Zanzibar Legal Services Centre (2013), *Tanzania Human Rights Report 2012,* at 317.

75 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [17].

76 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [17]. See, also, Human Rights Committee (2010), Concluding observations of the Human Rights Committee: United Republic of Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, [16]; United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

77 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [16].

78 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 57.

79 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014. See, also, UN General Assembly, Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/2, 25 July 2011, [39].

80 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

81 MISA-Tan (2012), *A Report on the Most Secretive Government Institutions in Tanzania,* at 3.

82 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 47.

83 Ibid.

84 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

85 United Republic of Tanzania, Working Group on the Universal Periodic Review, 'National report submitted in accordance with paragraph 15(a) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/1, 19 July 2011, [33].

86 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [19].

87 Ibid. See, also, United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014; Human Rights Committee (2010), Concluding observations of the Human Rights Committee: United Republic of Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, [18].

88 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [19].

89 CHRI (2014), *A Force for Good? Improving the Police in Kenya, Tanzania and Uganda,* New Delhi, at 46.

90 Ibid.

91 Constitution of the United Republic of Tanzania, Article 13. See, also, *Julius Ishengoma Francis Ndyanabo v. A.G.* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 64 of 2001 (Unreported); *Legal and Human Rights Centre, Lawyers Environmental Action Team & National Organisation for Legal Assistance v. A.G.* High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 77 of 2005.

92 Committee on the Elimination of Racial Discrimination (2007), Concluding observations of the Committee on the Elimination of Racial Discrimination: United Republic of Tanzania, CERD/C/TZA/CO/16, 27 March 2007, [19].

93 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

94 http://www.state.gov/documents/organization/204386.pdf, at 5–6.

95 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 227.

96 Law of the Child Act, 2009, s 4(1); Children's Act, 2011, s 2.

97 Law of the Child Act, s 144(1).

98 Law of the Child Act, Part IX; Children's Act, Part V.

99 United Republic of Tanzania, Third to fifth periodic reports of States parties due in 2012: United Republic of Tanzania, CRC/C/TZA/3-5*, 4 November 2013, [303].

100 Ibid., [299].

101 CHRAGG, *Inspection Report for Children in Detention Facilities in Tanzania, 2011*.

102 United Republic of Tanzania, *An Analysis of the Situation for Children in Conflict with the Law in Tanzania,* Dar es Salaam, Ministry of Constitutional and Legal Affairs (MoCLA)/UNICEF, July 2011.

103 Ibid.

104 Penal Reform International (2012), *A Review of Law and Policy to Prevent and Remedy Violence against Children in Police and pre-trial Detention in Tanzania,* London, at 13.

105 Ministry of Justice and Constitutional Affairs/UNICEF, *Analysis of the Situation for Children in Conflict with the Law,* July 2011. See, also, Penal Reform International (2012), *A Review of Law and Policy to Prevent and Remedy Violence against Children in Police and pre-trial detention in Tanzania,* London, at 13–14.

106 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [32].

107 LHRC and Zanzibar Legal Services Centre (2012), *Tanzania Human Rights Report 2012,* Dar es Salaam, at 227.

108 United Republic of Tanzania, Third to fifth periodic reports of states parties due in 2012: United Republic of Tanzania, CRC/C/TZA/3-5*, 4 November 2013, [303].

109 Ibid., [303].

110 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [32].

111 Ibid., [4].

112 United Republic of Tanzania, Working Group on the Universal Periodic Review, 'National report submitted in accordance with paragraph 15(a) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/1, 19 July 2011, [74].

113 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

114 UN General Assembly, Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/2, 25 July 2011, [42].

115 United Nations, Tanzania (2013), *Annual Report 2012–2013,* Dar es Salaam, at 39.

116 Persons with Disabilities Act, 2010, s 6.

117 Committee on the Elimination of Racial Discrimination (2007), Concluding observations of the Committee on the Elimination of Racial Discrimination: United Republic of Tanzania, CERD/C/TZA/CO/16, 27 March 2007, [10].

118 Ibid., [18].

119 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

120 Ibid.

121 Luanda Guidelines, Part VII.

122 Luanda Guidelines, Part V.

123 Common core document forming part of the reports of states parties: United Republic of Tanzania, HRI/CORE/TZA/2012/Add.1, 16 December 2013, [70].

124 UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [17].

125 CHRAGG Act, s 28(4). See, also, CHRAGG (Complaints Procedure) Regulations, 2003, which are made under s 38 of the CHRAGG Act 7 of 2001.

126 United Republic of Tanzania, 'National report submitted in accordance with paragraph 15(a) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/1, 19 July 2011, [13].s.

127 Common core document forming part of the reports of states parties: United Republic of Tanzania, HRI/CORE/TZA/2012/Add.1, 16 December 2013, [93].

128 CHRAGG Act, s 26, 37.

129 Committee on the Elimination of Racial Discrimination (2007), Concluding observations of the Committee on the Elimination of Racial Discrimination: United Republic of Tanzania, CERD/C/TZA/CO/16, 27 March 2007, [21]. See, also, UN General Assembly, Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/3, 22 July 2011, [6]; UN General Assembly, Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to the Human Rights Council resolution 5/1: United Republic of Tanzania', A/HRC/WG.6/12/TZA/2, 25 July 2011, [12].

130 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

131 Ibid.

132 Police General Order 103.

133 CHRI (2014), A Force for Good? Improving the Police in Kenya, Tanzania and Uganda, New Delhi, at 47.

134 Committee on the Elimination of Racial Discrimination (2007), Concluding observations of the Committee on the Elimination of Racial Discrimination: United Republic of Tanzania, CERD/C/TZA/CO/16, 27 March 2007, [7].

135 CHRAGG, Tanzania (2012), Ten Years of the Commission for Human Rights and Good Governance: Reflection of a Journey 2002–2012, at xx.

136 Prevention and Combating of Corruption Act 11 of 2007.

137 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

138 CHRAGG Act, s 6(1).

139 CHRAGG, Tanzania (2012), Ten Years of the Commission for Human Rights and Good Governance: Reflection of a Journey 2002–2012, at xx.

140 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

141 Human Rights Committee (2010), Concluding observations of the Human Rights Committee: United Republic of Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, [18].

142 Draft Constitution of the United Republic of Tanzania, 2013, Articles 246, 247.

143 CHRI (2014), *A Force for Good? Improving the Police in Kenya, Tanzania and Uganda,* New Delhi, at 56.

144 UN General Assembly, Human Rights Council, Report of the Working Group on the Universal Periodic Review: United Republic of Tanzania', A/HRC/C/19/4, 8 December 2011, [20].

145 CHRI (2014), A Force for Good? Improving the Police in Kenya, Tanzania and Uganda, New Delhi, at 48–49.

146 United States Department of State, *2013 Country Reports on Human Rights Practices – Tanzania,* 27 February 2014.

147 LHRC and Zanzibar Legal Services Centre (2013), Tanzania Human Rights Report 2012, at 24.


UGANDA

CHAPTER 5

UGANDA

Baseline assessment: The Luanda Guidelines and Uganda's framework for arrest, police custody and pre-trial detention

1. Introduction

'Pre-trial detention' refers to the incarceration of a suspect or an accused person on criminal charges in police cells or prison before the completion of their trial. Although detention pending trial should be the exception rather than the rule, the use of pre-trial detention is prevalent in Uganda. Indeed, pre-trial detainees constitute a large proportion of the inmates, thereby causing overcrowding at police stations and in prisons. Currently, more than half of the prisoners in prisons are on remand awaiting trial.[1]

The large number of detainees on remand is caused by slow investigation, corruption, a backlog of cases in courts, and too few judges, among others.[2] Delays in respect of remand have adverse effects on the rights of detainees to a fair and speedy trial. At police stations, suspects are detained beyond the constitutionally prescribed 48 hours without being granted police bond. It is still police practice to arrest perceived suspects before concluding investigations and to carry on investigations while the suspect is in police detention.[3] Detainees are often held in overcrowded facilities, which may have an impact on their health and also increases the risk of them being subjected to torture and other cruel, inhuman or degrading treatment or punishment.

In May 2014, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Guidelines on the Conditions of Arrest, Police Custody and pre-trial Detention in Africa (the Luanda Guidelines). The present review discusses the status of implementation of the Luanda Guidelines within the Ugandan context and makes appropriate recommendations.

2. Methodology

The research methodology for this study included an extensive literature review of relevant materials and documents available on pre-trial detention in Uganda. These included laws such as the Constitution of the Republic of Uganda and other relevant domestic legislation, as well as ratified international instruments. Other documents that were reviewed comprised documents from the United Nations (UN), including: the UN Universal Periodic Review; relevant reports of UN treaty bodies

and reports on special procedures; documents of the ACHPR; reports of the Uganda Human Rights Commission; reports produced by national and international civil society organisations; and media reports.

3. Legislative framework

Uganda is subject to various laws at the international, regional and national level in relation to pre-trial detention. At the international level, the law applicable includes the universal human rights treaties which Uganda has ratified. This is in addition to the regional instruments, including the African Charter on Human and People's Rights (AChHPR). Uganda is also subject to human rights standards contained in such instruments as: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); the UN Convention on the Rights of the Child (UNCRC); the Convention on the Rights of Persons with Disabilities (CRPD); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), among others. At the African regional level, Uganda is subject to: the AChHPR; the Protocol to the AChHPR on the Rights of Women in Africa; the Protocol to the AChHPR on the Establishment of the African Court on Human and Peoples' Rights; and the African Charter on the Rights and Welfare of the Child (ACRWC), among others.

At the national level, the law applicable includes the Constitution of the Republic of Uganda, which contains a Bill of Rights in Chapter 4. The Constitution further provides that the rights, duties, declarations and guarantees relating to fundamental and human rights and freedoms go beyond those specifically included in Chapter 4 to include rights which are not specifically mentioned[4] in the Constitution. Such rights could include rights embodied in ratified international and regional human rights instruments. Other relevant legislation includes: the Penal Code Act; the Trial on Indictments Act; the Criminal Procedure Code Act; the Police Act; the Prisons Act; the Uganda Peoples' Defence Forces Act; the Prevention and Prohibition of Torture Act; and the Children Act, among others. These all prescribe rules for the treatment of detainees.

4. The Luanda Guidelines

The Luanda Guidelines consider the criminal justice process from the moment of arrest until the conclusion of the trial process. In doing so, they focus on the actions and decisions of arresting bodies such as the police, correctional services (e.g. the prison authorities), and other criminal justice professionals such as prosecutors, magistrates and judges. The Luanda Guidelines also contain nine key parts covering the framework for arrest and custody, important safeguards, measures to ensure transparency and accountability, and ways to improve coordination between criminal justice institutions. The Luanda Guidelines further provide useful guidance on issues pertaining to: legal assistance; data collection; complaints and oversight mechanisms; and treatment of vulnerable groups. Below is an analysis of Uganda's context in relation to the Luanda Guidelines.

Arrest

In Uganda, arrests can be made by the Uganda Police Force (UPF),[5] the Uganda Peoples' Defence Forces (UPDF)[6] and a private person.[7] The UPDF deals with military personnel and other individuals who are subject to the UPDF Act, for example those illegally possessing firearms.[8] The law allows the UPDF to assist and collaborate with the police in the case of riots or disturbances of the peace which they (the police) cannot suppress or prevent.[9]

The 1995 Constitution of the Republic of Uganda ('the Constitution') provides that 'no person shall be deprived of personal liberty', except in certain cases such as: the execution of a sentence or order of court; preventing the spread of an infectious or contagious disease; an instance where a person is of unsound mind; preventing unlawful entry into the country; and where there is a reasonable suspicion that a person has committed, or is about to commit, a criminal offence under the laws of Uganda, among others.[10]

An arrested person can be searched by a police officer, who is required to place all articles, other than the clothes worn by the detainee, in custody.[11] A police officer is allowed to take possession of any article that will be used as evidence in criminal proceedings.[12] Women under arrest have to be searched by another woman, with strict regard to decency.[13] If a person being arrested resists arrest, the arresting officer may use all the means necessary to effect the rest.[14] However, the force used must not be greater than is reasonable or necessary for the apprehension of the person in the particular circumstances.[15]

Persons arrested under Ugandan law have the following rights, and, where these rights are violated, redress can be sought from the courts of law or the Uganda Human Rights Commission (UHRC):[16]

- The right to be kept in a place sanctioned by law;[17]
- The right to be informed, in a language that they understand, of the reasons for the arrest, restriction or detention and of their right to a lawyer of their choice;[18]
- The right to be brought to court as soon as possible, but not later than 48 hours after arrest;[19]
- The right to have their next of kin informed, at their request and as soon as practicable, of the restriction or detention;[20]
- The right to have access to their next of kin, lawyer and personal doctor;[21]
- The right to access medical treatment, including, at the request and at the cost of that person, access to private medical treatment;[22]
- The right to bail;[23]
- The right to compensation for unlawful arrest, restriction or detention;[24]
- The right to have deducted from their sentence the days spent in custody before the completion of the trial;[25]
- The right of habeas corpus;[26]
- The right to protection from torture and other cruel, inhuman or degrading treatment or punishment;[27]
- The right to a fair trial;[28] and
- The right to a lawyer at the expense of the state for offences that carry the death penalty or life imprisonment.[29]

Ugandan law on arrest by and large complies with the Luanda Guidelines, with some exceptions, which are discussed below.

Arrests must be a measure of last resort

Unlike Ugandan law, the Luanda Guidelines also specifically emphasise: that arrests must be a measure of last resort;[30] that minor crimes should be diverted away from the criminal justice system;[31] that alternatives to arrest should be promoted, with reasonable accommodation for persons with disabilities; and that the best interests of children in conflict with the law should be considered.[32] Arrests have not been specifically prescribed as a measure of last resort in Ugandan law and practice, except in the case of children in conflict with the law,[33] and, even then, the law is not as specific and is not implemented, as there are still a large number of children caught up in the criminal justice system who could have been diverted away from such system.[34] The Luanda Guidelines assert that minor crimes, and not just those committed by children, should be diverted away from the criminal justice system.

Searches

With regard to searches, the Luanda Guidelines go further than Ugandan law by requiring that: searches must be lawful and done in a manner consistent with the inherent dignity of the person concerned and their right to privacy;[35] must be done after informing suspects of the reason for the search;[36] must be followed by a record and receipt of items confiscated during the search which are accessible to the suspect, to his or her lawyer, and to his or her family members or to organisations with an oversight mandate regarding the treatment of persons in places of detention;[37] must be done in private if a strip or internal body search is involved;[38] and that internal body searches must only be conducted by a medical professional, and then only with informed consent or in terms of a court order.[39] In practice, searches are often conducted without much regard for the dignity of the person and the right to privacy, and suspects are never informed of the reason for the search. Furthermore, even though there may a record of items confiscated, this is not readily accessible to the suspect, his or her lawyer, his or her family, or the relevant organisations.

Register

The Luanda Guidelines also require all arresting authorities to maintain, and provide access to, an official custody register.[40] Although this is a practice in most places of detention, it is not specifically provided for, except in the Prisons Act.[41] However, even then, the law only requires the keeping of a register, without emphasising that it should be made accessible as required by the Luanda Guidelines, except for the register on punishments.[42] Although, the UHRC has access to these registers,[43] it is important that this access be provided for in legislation. This would require the amendment of laws such as the Criminal Procedure Code Act and the Police Act in order to comply with the Luanda Guidelines.

Rights of arrested persons

The Luanda Guidelines provide that all arrested persons should be informed of all their rights orally and in writing, and in a language and format that are accessible and are understood by them, and that authorities must provide them with the necessary facilities to exercise their rights.[44] Furthermore, the Luanda Guidelines contain additional specific rights to the ones in Ugandan law, such as: the right to silence and freedom from self-incrimination;[45] the right to humane and hygienic conditions during the arrest period, including adequate water, food, sanitation, accommodation and rest, as appropriate considering the time spent in police custody;[46] and the right to reasonable accommodation that ensures equal access to substantive and procedural rights for persons with disabilities,[47] which are not specifically provided for, particularly for those in police custody.

Although the right to humane and hygienic conditions, including adequate water, food, sanitation, and reasonable accommodation which caters for vulnerable persons, and rest is provided for under the Prisons Act,[48] implementation of such right is still a challenge in view of the limited resources available to the Uganda Prisons Service.[49] Of the population of prisoners in Uganda, 54 to 55% comprises pre-trial detainees who are on remand awaiting the completion of their trials.[50] The occupancy level of prisons based on official capacity as of August 2015 stood at 237%.[51]

Police custody

According to the Luanda Guidelines, detention in police custody should be an exceptional measure, and the use of alternatives, including court summons or police bail or bond, is encouraged.[52] States are required to promote transparency with regard to police custody, including inspections by: judicial authorities; an independent body; local community representatives; and legal and health personnel.[53]

The Luanda Guidelines specifically provide that all persons detained in police custody have a presumptive right to police bail or bond.[54] Furthermore, if detention in police custody is determined to be absolutely necessary: all persons arrested and detained have the right to prompt access to a judicial authority in order to review, renew or appeal decisions to deny police bail or bond;[55] the maximum duration of police custody must be no more than 48 hours, which can only be extended in certain circumstances by a competent judicial authority;[56] and persons in police custody must have access to confidential and independent complaints mechanisms while in such custody.[57]

The Constitution, which is in line with the Luanda Guidelines,[58] provides that suspects, if not released earlier, must be brought to court within 48 hours.[59] However, this requirement is often ignored, deliberately circumvented or difficult to fulfil because of the inadequacies and limitations of the UPF. Violation of the right to liberty, particularly pre-trial detention by the police beyond the 48 hours without suspects being taken to court often tops the list of complaints received by the UHRC.[60] In 2014, almost 35% of the complaints received by the UHRC were violations relating to detention in police custody for more than 48 hours.[61] Apart from slow investigations caused by lack of training in professional investigative procedures, inadequate provision of equipment for efficient and quick investigations, overreliance on confessions, delays by resident state attorneys, corruption, a backlog of court cases, too few judges, inadequate legal aid services, and the detention of suspects beyond 48 hours, the situation is also compounded by the common practice on the part of the police of arresting perceived suspects before concluding investigations.[62]

In several cases, the UHRC has found the Attorney General to have violated the right to liberty where suspects have been detained for longer than 48 hours and has accordingly ordered compensation for the victims.[63] Courts have affirmed the right to liberty and to be brought before court within 48 hours. For example, in *Kidega Alfonsio v Attorney General*,[64] the court found that detention of the plaintiff for nine days before being produced in court on a murder charge was unlawful. Those suspected of terrorism and other capital offences are commonly detained for longer than the requisite 48 hours before being brought to court. However, there are also cases where suspects in minor cases are detained for long periods without being brought to court. Such long detention often creates an environment where torture and other ill-treatment are likely to occur. Moreover, police detention facilities are not suitable for long stays and suspects often face challenges in relation to the provision of food, water and other basic necessities such as hygiene, sanitation and bedding.[65]

Accused persons are also entitled to apply to court to be released on bail, and the court may grant bail on such conditions as it considers reasonable.[66] The Constitution further provides that persons must be released on bail in cases which are tried by the High Court as well as other subordinate courts if they have been remanded in custody for 60 days,[67] and in cases which are tried by the High Court only if they have been remanded in custody for 180 days.[68] However, in practice, there are many cases of persons remaining in detention for long periods before trial.[69] If bail were to be used appropriately, the number of pre-trial detainees in Uganda would be significantly reduced.

Nevertheless, there are challenges regarding bail in Uganda. These challenges include lack of acceptability by members of the public, who often prefer the incarceration of suspects and accused persons until the trial is over, political interference, individuals failing to present themselves for trial after their release, and the onerous bail requirements for some individuals, for instance in relation to sureties (persons who will ensure that the suspect does not abscond from court proceedings) and money which has to be paid as security.[70] Furthermore, the Constitutional Court has refused to acknowledge bail as an automatic right. In *Foundation for Human Rights Initiative v Attorney General*,[71] the Constitutional Court held that the objective and effect of bail are well settled. They are to ensure that an accused person appears in order to stand trial without the necessity of being

detained in custody. The court further noted that an accused person charged with a criminal offence is presumed innocent until proven guilty or pleads guilty, and that, if an accused person is remanded in custody but is subsequently acquitted, they could suffer gross injustice. According to the court, however, this does not make bail automatic; its effect is merely to release the accused from physical custody while he or she remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him.

Although the Luanda Guidelines can be implied in current Ugandan law relating to police custody, the law and practice relating to such custody have not yet been sufficiently adopted by the police. In particular, the law and practice has not adequately adopted: police bail or bond as a presumptive right; the prompt access to a judicial authority to review, renew and appeal decisions on police bail or bond; and the maximum of 48 hours' duration in police custody, which can only be extended by a competent authority in line with international law. Moreover, persons in custody do not have adequate access to confidential and independent complaints mechanisms while in custody.

Legal assistance services

The Luanda Guidelines require states to establish a legal aid service that guarantees legal services for persons in police custody and pre-trial detention.[72] Furthermore, legal services may be provided by a number of service providers, including lawyers, paralegals and legal clinics, depending on the nature of the work and the requisite skills and qualifications. States should also take steps to ensure sufficient access to quality legal services and, in particular, that sufficient lawyers are trained and available.[73] The Luanda Guidelines also provide that all persons detained in police custody should enjoy the following rights in relation to legal assistance: access to lawyers and legal service providers prior to and during any questioning by an authority and throughout the criminal justice process;[74] confidentiality of communication, and, if such confidentiality is breached, any information obtained be inadmissible as evidence;[75] access to state legal assistance where the detainee does not have sufficient means or it is in the interest of justice given the gravity, urgency and complexity of the case, and bearing in mind the severity of the potential penalty and the status of detainee who is vulnerable;[76] access to case files and adequate time and facilities to prepare a defence;[77] and remedies where access to legal services is delayed or denied.[78] In addition, legal service providers should possess the requisite skills and training as required under national law for the provision of legal assistance and services.[79]

With regard to questioning and confessions, the Luanda Guidelines require that, prior to the commencement of each questioning session, all persons detained in police custody, and other persons subject to police questioning, be afforded the following rights: the right to be informed of the right to the presence and assistance of a lawyer or other legal service provider during questioning;[80] the right to the presence and assistance of a lawyer or other legal service provider during questioning;[81] the right to a medical examination and confidentiality;[82] the right to the presence and services of an interpreter and of access to accessible formats of information, where necessary;[83] the right to silence;[84] the right to freedom from torture and ill-treatment;[85] and the right to make a confession before a judicial officer or other officer of the court. In the latter case, it should also include a parent, guardian or independent advocate, lawyer or other legal services provider where a child is involved.[86]

The Luanda Guidelines also require that information pertaining to every questioning session be recorded by those in charge, including: the duration of the session;[87] intervals occurring during the session;[88] the identity of officials who conducted the questioning and of any other persons present;[89] confirmation that the detained person was afforded the opportunity to seek legal services prior to the questioning, was allowed to undergo a medical examination, and had access

to an interpreter during questioning, and that the necessary steps were taken to ensure that the detainee understood and participated in the process;[90] and details of any statements provided by the detained person, with verification from the detained person that the record accurately reflects the statement he or she provided.[91] Furthermore, the Luanda Guidelines require that detaining authorities maintain, and provide access to, an official custody register,[92] and that states make provision for audio and audiovisual recording of questioning sessions and the taking down of confessions.[93]

Access to legal services in accordance with the Luanda Guidelines has not yet been achieved in Uganda. Although legal aid service provision, especially by civil society organisations, has increased in Uganda, legal services are not guaranteed to all pre-trial detainees. Currently, legal aid in Uganda is still limited and inadequate.[94] The majority of suspects in pre-trial detention are usually illiterate and poor, which affects their ability to defend themselves even when they have the services of an interpreter. Moreover, the courts often use alien and unusual language, even for those who speak and understand the English language.

Suspects often cannot afford to engage lawyers, because they are very expensive. Moreover, suspects are not guaranteed state legal representation, except in cases that carry the death penalty or life imprisonment.[95] Despite the provisions of the Poor Persons Defence Act, the legal aid services provided by the state do not match the needs of the citizenry and exclude the majority of individuals, especially the poor and the vulnerable.[96] Legal services are mainly limited to urban areas, with only a few lawyers working in the rural areas. Moreover, even in cases of a capital nature and life imprisonment where legal representation is provided, the service are found wanting.[97] The Luanda Guidelines require a state to have a comprehensive system for the provision of legal services for all pre-trial detainees. This has budgetary implications for the state, but is necessary in order to effectively implement not only the right to legal representation for offenders who are likely to face the death penalty, but also the right to a fair trial for all detainees in general.

Fortunately, the National Legal Aid Policy, which is awaiting approval by Cabinet, recognises legal aid as a right of every Ugandan citizen, especially the poor and vulnerable.[98] It is expected that, once the policy is approved, a Bill will be tabled before Parliament which establishes an independent legal aid body with a mandate to provide legal aid across all areas of the law.

The practice is presently such that: detainees are rarely informed of their rights and do not have legal representation during questioning;[99] for those who can afford or have legal aid, access to lawyers is sometimes denied to them during questioning;[100] it is difficult to maintain confidentiality of communication because of the small and closed spaces in police stations;[101] and access to case files and facilities in order to prepare a defence is often not available for most pre-trial detainees.[102] What is important to note is that the right to silence is often not properly understood, especially during investigations, and that the silence of detainees could consequently lead to their torture and ill-treatment, as is illustrated by the large number of cases of torture, especially during pre-trial detention.[103] For confessions to be admitted in court, they must be made in the presence of a police officer of or above the rank of Assistant Inspector or to a magistrate.[104] In this regard, and contrary to the Luanda Guidelines, the law allows confessions to be made in the absence of a judicial officer. Although records are kept, these are usually written statements by detainees, who also have to state that the said statements were voluntarily made. In addition, such records include the names of the officers who took down the statements, but may not contain information on the opportunities afforded to seek legal services. Furthermore, audio and audiovisual recording is not a common practice. Most police stations record their statements in writing.

Access to an official custody register is also limited.

Pre-trial detention

The Luanda Guidelines emphasise that detention may only be ordered by a judicial authority as a measure of last resort,[105] but this has not yet been well articulated in Ugandan law. The Luanda Guidelines affirm the right to a trial as provided for in the Constitution and international instruments, but also further require information on court sessions to be made available.[106] The Luanda Guidelines also prohibit detention in unauthorised places, as is the case in Ugandan law.[107] They also emphasise the need for detention to be in proximity to the community of the arrested person, with due regard being had to the care of the detained person or to other responsibilities, matters which are not necessarily considered during arrest.[108]

Detention in unauthorised places was an issue some years ago. Since 2012, however, there have not been many complaints of detention in such places. Previously, there were reports of the use of 'safe houses' or of unauthorised places of detention.[109] Those placed in safe houses included terror and treason suspects, civil debtors, and persons involved in purely personal disputes.[110] The detention of suspects in unauthorised places of detention exposed them to torture and other cruel, inhuman or degrading treatment or punishment.[111] Moreover, most detainees in such unauthorised places were often not brought to court within the requisite 48 hours. In 2010, the UHRC received nine complaints of people being detained in unauthorised places or safe houses.[112] Allegations regarding detention in unofficial places of detention were also raised during Uganda's Periodic Review in October 2011, although these allegations were denied by the Ugandan state representatives.[113] Detention in unauthorised places of detention was especially used by the Joint Anti-Terrorism Task Force (JATT).[114]

In terms of the Luanda Guidelines, a judicial authority may only order pre-trial detention: on legal grounds which are not based on discrimination of any kind;[115] and where there is a danger that the accused person will abscond, commit further serious offences, or his or her release may not be in the interests of justice.[116] Where pre-trial detention is ordered, judicial authorities must ensure: that the least restrictive conditions are imposed in order to ensure the appearance of the accused at all court proceedings and protect victims, witnesses, the community and any other person; that they have considered the alternatives; and that written reasons for their decisions are provided.[117] Under Ugandan law, judicial officers must execute their duties without discrimination so as to ensure justice and to protect the victims, witnesses and the community, and their decisions must be in writing. Moreover, they will have to indicate what alternatives to detention were considered and must justify their decisions in this regard.

Like the Constitution,[118] the Luanda Guidelines give arrested persons, including those in pre-trial detention, the right to challenge the lawfulness of their detention at any time and to seek immediate release in the case of unlawful or arbitrary detention, as well as compensation and/or other remedies.[119] The Luanda Guidelines also require that, at all hearings to determine the legality of an initial detention order, or of an order extending or renewing pre-trial detention, detainees have the right: to be present; to the assistance of a lawyer or other legal service provider; to access all relevant documents; to be heard; and to reasonable accommodation to ensure equal enjoyment of rights by persons with disabilities.[120] Furthermore, such guidelines provide that the burden of proof as regards the lawfulness of initial detention orders, and the lawfulness and necessity of extended or continued pre-trial detention, lies with the state.[121]

Judicial authorities, according to the Luanda Guidelines, are also required to investigate any delay in the completion of proceedings, as well as whether any delay is reasonable, by considering the following factors: the duration of the delay; the reasons advanced for the delay; whether any person or authority is responsible for the delay; the effect of the delay on the personal circumstances of the

detained person and witnesses; the effect of the delay on the administration of justice; the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; and any other factor that ought to be taken into account in their opinion.[122] If the judicial authority finds that the completion of the proceedings is being unreasonably delayed, it may issue any such order as it deems fit.[123]

The Luanda Guidelines, like Ugandan law, assign responsibility to the state to account for death or serious injury in police custody and pre-trial detention.[124] Furthermore, torture and ill-treatment are prohibited, and detainees have the right to lodge complaints seeking redress from independent authorities and to have a prompt investigation.[125] However, these guidelines go beyond Ugandan law to affirm that persons deprived of their liberty are entitled to enjoy all fundamental rights and freedoms, except where limitations are demonstrably necessary by the fact of detention itself.[126] The Luanda Guidelines further prescribe that, in all pre-detention facilities, states have the obligation to: reduce overcrowding;[127] limit the use of force[128] and firearms;[129] limit the use of restraints;[130] and set out the use of disciplinary measures, including the use of solitary confinement.[131] Most of these are already covered in Ugandan law,[132] save for the obligation to reduce overcrowding.

Unlike Ugandan law, the Luanda Guidelines specifically require states to take budgetary and other measures to ensure adequate standards in respect of reasonable accommodation, nutrition, hygiene, clothing, bedding, exercise, physical and mental health care, contact with the community, religious observances, reading and other educational facilities, and support services in accordance with international law and standards for pre-trial detainees, including those in police custody.[133] States are also required to put in place measures for health assessments, the transfer of detainees, and adequate staffing,[134] matters which are not adequately covered in Ugandan law.

Most of the police and prison detention facilities in Uganda are dilapidated and overcrowded and have inadequate space, lighting and ventilation.[135] The majority of inmates also do not have access to adequate food and water.[136] They also lack clothing and bedding.[137] Moreover, access to health services and to facilities for personal hygiene and exercise is a challenge.[138]

The Luanda Guidelines, like Ugandan law, provide that detainees must be separated according to categories, including: pre-trial detainees from convicts; males from females; and children from adults. In addition, the special needs of vulnerable groups must be catered for.[139] However, such prescriptions are largely not complied with. Most suspects are detained with convicts in Ugandan prisons.[140] There is thus not much distinction, if any, between suspects and those who have been convicted, as they all live in the same deplorable conditions.

Usually, males are separated from females and children are separated from adults. However, there have been cases documented by the UHRC where children were detained with adults, even in the recent past.[141]

Detainees in police custody and pre-trial detention have to be provided with appropriate facilities to communicate with, and receive visits from, their families at regular intervals, and such contact should not be denied for more than a few days.[142] States have to ensure that persons in police custody and pre-trial detainees have access to adequate recreational, vocational, rehabilitation and treatment services.[143] Generally, in practice, inmates are given access to the outside world, especially in terms of access to visitors. However, some detainees are denied access to family members, especially in military detention facilities.[144] Moreover, most places of detention in Uganda do not have adequate recreational, vocational, rehabilitation and treatment services. Such services are varied across the various places of detention, with some central prisons doing better than upcountry ones.[145] Usually, police units do not have recreational, vocational and rehabilitation services.

Data collection

The Luanda Guidelines require states to establish processes for the systematic collection of disaggregated data on the use of arrest, police custody and pre-trial detention in order to identify and address the overuse or inadequate conditions of police custody and pre-trial detention.[146] Furthermore, states are required to establish, and make known, systems and processes to guarantee the right of access to information for persons in police custody and pre-trial detention, their families, lawyers and other legal service providers. These are particularly new obligations regarding the collection of data and its accessibility. As a result, sensitisation, training and the provision of resources will be required so as to comply with such requirements, as such activities were not specifically undertaken previously.

Complaints and oversight

States have a duty to establish, and make known, internal and independent complaints mechanisms for persons in police custody and pre-trial detention.[147] Furthermore, access to, and the right to consult freely with, such mechanisms should be guaranteed for all persons in police custody and pre-trial detention, without fear of reprisals or punishment.[148] The Luanda Guidelines require thorough, prompt and impartial investigation of all complaints as well as appropriate remedial action without delay.[149] Victims of violations, illegal or arbitrary arrest and detention, torture or ill-treatment during police custody or pre-trial detention, and their immediate families or dependants, have the right to seek and obtain effective remedies such as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[150]

States also have a duty to establish, and make known, oversight mechanisms for authorities responsible for arrest and detention, with a legal mandate, independence, resources and safeguards to ensure transparency and reporting, as well as ensure the thorough, prompt, impartial and fair exercise of their mandate.[151] Moreover, states are required to ensure access to detainees and places of detention for: independent monitoring bodies or other neutral, independent humanitarian organisations; lawyers and other legal service providers; judicial authorities; and national human rights institutions.[152] Detained persons have the right to communicate freely and with full confidentiality with the persons who visit the places of detention or imprisonment.[153] States further have to establish mechanisms, including within existing independent oversight and monitoring mechanisms, for the prompt, impartial and independent investigation of disappearances, extrajudicial executions, deaths in custody, torture and other cruel, inhuman or degrading treatment or punishment, and other serious violations of detainees' human rights.[154]

In the context of Uganda, there are both internal and external oversight and accountability mechanisms. The external oversight and accountability mechanisms are available at both the national and international level and are discussed below.

Internal oversight and accountability mechanisms

Internal oversight and accountability mechanisms exist within the Uganda Police Force, the Uganda Prison Service and the Uganda Peoples' Defence Forces.

Uganda Police Force

The Uganda Police Force (UPF) has disciplinary courts which hear complaints against officers. The disciplinary court is instituted by the Inspector General of Police and has the power to decide whether perpetrators are to be discharged, dismissed, cautioned, fined or demoted in rank. The sentence is confirmed by the disciplinary committee before execution. Furthermore, there is a provision for a

public complaints system in terms of which individuals can make a written complaint relating to police misconduct to the District Police Commander or the Inspector General of Police.[155]

The police also have a Directorate of Human Rights and Legal Services which is headed by Assistant Inspector General of Police, Erasmus Twarukuhwa. The directorate is responsible for: advising police management and other officers on legal issues; initiating police-related legislation; guiding the police disciplinary process; and assisting with the drafting of Bills and other statutory instruments for the UPF, which are then forwarded to the Solicitor General. The directorate recently initiated a process for drafting a human rights policy that will guide police operations.

The police also have a Professional Standards Unit (PSU) which investigates all complaints against the police, especially those relating to unprofessional conduct and violations of human rights. The PSU is based in Kampala and has a few regional offices in Mbale, Masaka, Hoima, Gulu, Arua, Jinja and Mbarara. The unit intends to establish more offices in Kabale and Fort Portal in the near future. It is composed of about 94 staff. Appointments to the unit are made on the basis of criteria such as a good professional record. The PSU's headquarters are based in Bukoto, Kampala, in a residential environment away from ordinary police premises, thus making it more accessible to the public. However, in the regions, the PSU is based at police stations and police posts. Since 2007, the PSU has received over 10 000 complaints. Although the unit has powers of access to detainees, it is not immune to the challenges faced by the police, such as funding and logistics challenges.

The internal oversight and accountability mechanisms of the police, including the disciplinary courts, Directorate of Human Rights and Legal Services and the PSU need to be strengthened. Human rights violations by the police are rife[156] and it is therefore necessary to strengthen the internal oversight and accountability mechanisms to effectively fulfil their mandates and improve the police human rights record.

Uganda Prison Service

The Uganda Prison Service has established human rights committees to ensure compliance with human rights obligations. Although the committees are a recent development, they have been acclaimed as playing an important role in the protection of the rights of inmates, as they address human rights complaints in prisons. The human rights committees undertake human rights education and peer reviews, as well as monitoring compliance with human rights standards in prisons.[157] Nevertheless, these committees need to be strengthened, because the conditions in prison are still deplorable.[158]

Uganda Peoples' Defence Forces

The Uganda Peoples' Defence Forces (UPDF) has a Directorate of Human Rights whose aim is enhance adherence to human rights standards within the forces. Furthermore, there is a Human Rights Desk at the Chieftaincy of Military Intelligence. The directorate and the desk play an important role in resolving human rights complaints against the UPDF. However, both the directorate and the desk need strengthening.

External oversight and accountability mechanisms

These comprise both national and international mechanisms. External oversight and accountability mechanisms are important because they complement the internal mechanisms. Both external and internal mechanisms are crucial in improving the conditions of detention.

National mechanisms

At the national level, the mechanisms include the Inspectorate of Government, the Uganda Human Rights Commission, the judiciary, Parliament, visiting justices and civil society organisations.

Inspectorate of Government

The Inspectorate of Government (IGG), which is the Ombudsman of Uganda, is engaged in the investigation of corruption and abuses of office and can provide some form of accountability in respect of those in detention.[159] The IGG is guaranteed independence under the Constitution. However, it does not appear to have dealt with many, if any, cases involving accountability in places of detention or cases of torture or other ill- treatment. Despite this, the IGG has noted that corruption is rampant among the police.[160]

Uganda Human Rights Commission

The Uganda Human Rights Commission (UHRC) is the main external body with a mandate to investigate complaints of human rights violations, including those relating to pre-trial detention. The UHRC was established under the Constitution as an independent body with a mandate to promote and protect human rights, including investigating complaints of torture and other ill-treatment.[161] It currently has six members, including the chairperson, who are appointed by the President with the approval of Parliament. Staff of the UHRC are appointed by the members of the UHRC in consultation with the Ministry of Public Service. The UHRC presently has about 208 staff spread across ten regional offices, ten field offices and its Kampala headquarters.[162] The UHRC has a broad investigatory mandate and does not require a complaint to be lodged before it can investigate; in other words, it can itself undertake investigations.[163] It also has broad powers and a quasi-judicial function.[164] If satisfied that there has been an infringement of a human right, the UHRC may order: the release of a detained or restricted person; the payment of compensation; or any other legal remedy or redress. A person or authority dissatisfied with an order made by the UHRC has a right of appeal to the High Court.

The process of complaints investigation can take, on average, from one to four years to complete, depending on the particular circumstances of a case.[165] There have been instances where delays of more than four years have occurred because there were no commissioners to hear cases.[166] From April 2015 to February 2016, the UHRC did not have enough members to hear cases because the contracts of some of the serving members had expired.[167] The UHRC is fairly accessible, as the services are offered free of charge. It has established ten regional offices across the country, namely in Arua, Central Kampala, Fort Portal, Gulu, Hoima, Jinja, Masaka, Mbarara, Moroto and Soroti, together with ten field offices in the districts of Kapchorwa, Kaberamaido, Kalangala, Kitigum, Kotido, Lira, Moyo, Nakapiripirit, and Pader, and on the Buvuma Islands. Since its establishment, the UHRC has handled thousands of complaints and some victims have been awarded compensation.

However, the UHRC cannot investigate: matters which are pending before a court or judicial tribunal; a matter involving relations or dealings between the government of Uganda and the government of any foreign state or international organisation; or a matter relating to the exercise of the prerogative of mercy.[168] The UHRC faces a number of challenges, including: lack of compliance with its orders, such as the payment of UHRC tribunal awards, especially by the Attorney General; limited capacity and resources; and the lack of a victim- and witness-protection law, which makes it difficult for some victims to follow their cases.[169]

In spite of the challenges, the UHRC has been accredited with an A status by the International Coordinating Committee of National Human Rights Institutions, an organisation which monitors compliance by national institutions with the Paris Principles. What this in effect means is that, on the whole, the UHRC is perceived to be effective.

Moreover, the UHRC also won an award as the Best National Human Rights Institution in Africa in 2013.

The judiciary

The judiciary plays an important role as an oversight and accountability mechanism for pre-trial detainees. Courts have an oversight role while hearing both criminal and civil cases. Pre-trial detainees have an opportunity to complain to the courts of lengthy detention, torture and ill-treatment, or any other human rights violation. Indeed, a few detainees have used the courts as a channel of redress for lengthy detention, as well as torture and ill-treatment while in custody. An example of this is the case of *CPL Opio Mark v Attorney General*[170] in which the plaintiff sought redress for detention in a police cell for 11 days without being brought before court. The plaintiff was awarded damages in the amount of UG SHS 6 000 000. In another case, *Martin Edeku v Attorney General*,[171] the plaintiff was award damages for a violent arrest, detention beyond 48 hours and torture while in detention. However, the courts face challenges in the form of case backlogs, corruption, and inadequate logistics, among others.[172] As a result, only a few cases make it the courts and are heard to completion within a reasonable period of time.

Parliament

Parliament also has an oversight role to play with respect to places of detention. Members of Parliament have many routine opportunities for oversight through question time as well as annual reviews of performance, especially at budget-allocation time. Parliamentarians have raised concerns relating to conditions of detention, particularly torture and other ill-treatment, and a few members of Parliament have also condemned excessive the use of force by security agencies. Parliament also played an important role in passing the Prevention and Prohibition of Torture Act of 2012 following the strong and collaborative advocacy efforts of the UHRC and the Coalition against Torture. Unfortunately, torture is still prevalent. Since the Act was passed in 2012, the complaints received by the UHRC only dropped slightly from 303 to 273 in 2013, but then increased to 357 in 2014.[173]

Visiting justices

The Prisons Act makes provision for what it describes as 'visiting justices'. These are persons who are allowed to visit and inspect prisons on a regular basis and are appointed by the Minister.

Nonetheless, the Act recognises certain people as ex officio visiting justices. These include: the chairperson and members of the UHRC; a judge of the High Court, Court of Appeal and Supreme Court; the Minister responsible for internal affairs; the Minister responsible for justice; all Cabinet ministers; a Chief Magistrate and resident magistrates in any area in which a prison is situated; the Chief Administrative Officer of the district in which a prison is situated; the Permanent Secretary in the Ministry responsible for internal affairs; and the IGG.[174] The functions of visiting justices are detailed in section 110 and include: inspecting every part of a prison and visiting every prisoner in the prison where practicable, especially those in confinement; inspecting and testing the quality and quantity of food ordinarily served to prisoners; inquiring into any complaints or requests made by a prisoner; ascertaining as far as possible whether the rules, administrative instructions, and standing orders issued to prisoners and the prisoners' rights are brought to their attention and are observed; inspecting any book, document or record relating to the management, discipline and treatment of prisoners; and performing such other functions as may be prescribed. Other persons allowed to inspect prisons include Cabinet ministers and judges,[175] as well as the African Commission Special Rapporteur on Prison Conditions.[176]

Civil society organisations

Some non-governmental organisations (NGOs) visit places of detention, but, at times, their access may be limited and/or they may have to give advance notice. The Prisons Act provides that such organisation require the permission of the Commissioner General of Prisons to inspect places of detention.[177] Information regarding the frequency and methodology of the visits to places of detention by NGOs is limited. Some of the civil society organisations that visit include: the African

Centre for Rehabilitation of Torture Victims; the Uganda Prisoners Aid Foundation; the Foundation for Human Rights Initiative; the Avocats Sans Frontières; and Human Rights Network Uganda, among others.

Regional mechanisms

At the regional level, oversight mechanisms are the African Commission on Human and Peoples' Rights (ACHPR), the Special Rapporteur on Prisons and Conditions of Detention in Africa, the African Court on Human and Peoples' Rights, the Committee of Experts on the Rights and Welfare of the Child, and the East African Court of Justice, among others. These also play an oversight and accountability role with respect to pre-trial detention.

African Commission on Human and Peoples' Rights

In terms of the African Charter on Human and Peoples' Rights (AChHPR), the ACHPR has a mandate to promote and protect human rights.[178] Since Uganda is party to the AChHPR, it is subject to the authority of ACHPR. The ACHPR, whose role has been greatly supported by NGOs, fulfils its mandate through the complaints mechanism, the consideration of state reports, interpretation, special rapporteurs, site visits, and resolutions which contribute to oversight and accountability.

The ACHPR has received two communications relating to illegal arrest, arbitrary detention and torture. The case of *Nziwa Buyingo v Uganda*[179] involved a complaint of alleged illegal arrest, arbitrary detention, torture, and the extraction of money from the complainant by Ugandan soldiers in Kisoro contrary to Articles 5, 6, 12 and 14 of the AChHPR. However, the complaint was dismissed by the ACHPR on the grounds of inadmissibility because the complainant had failed to show that he had exhausted local remedies. The other case was an interstate communication, namely the *Democratic Republic of Congo (DRC) v Burundi, Rwanda and Uganda.*[180] In this communication, the DRC alleged numerous violations of the AChHPR and other international obligations by the respondent states. In its decision, the ACHPR found that the respondent states had violated articles of the AChHPR, including Article 5.

During the consideration of state reports by Uganda, the ACHPR has specifically made recommendations to Uganda in relation to pre-trial detention in the following respects: It has expressed concern that ordinary Ugandans cannot afford legal services in order to obtain compensation for human rights abuses.[181] The ACHPR has also raised concerns that only 19% of prisoners have access to clean water, and only 62% of prisoners are provided with meals on a daily basis.[182]

The ACHPR was, among other things, also concerned about the lack of legislative measures to criminalise torture of, and violence against, children,[183] the trial of civilians by military courts,[184] the lack of adequate legal aid,[185] and the retention of the death penalty.[186]

Special Rapporteur on Prisons and Conditions of Detention in Africa

The ACHPR established the position of Special Rapporteur on Prisons and Conditions of Detention in Africa. The current Special Rapporteur is Med Kaggwa. The Special Rapporteur has powers to examine the situation of persons deprived of their liberty within the territories of states parties to the AChHPR. The Special Rapporteur's work entails: examining the state of prisons and conditions of detention and making recommendations to improve them; advocating for adherence to the AChHPR and international human rights norms; and, if requested by the ACHPR, making recommendations regarding communications by individuals who have been deprived of their liberty. The visits of the Special Rapporteur are carried out only after obtaining the agreement of the state concerned. Reports are published after integration of comments and observations of the state authorities concerned. Although, the Special Rapporteur has the potential to contribute to the operation of oversight and accountability mechanisms, Uganda has yet to avail itself of this

opportunity. Nevertheless, it is important to note that the Luanda Guidelines were passed during the term of office of the Special Rapporteur.

African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights ('the African Court') complements the protective mandate of the ACHPR. In addition, the court has the power to take final and binding decisions on human rights violations.

Uganda is among the 26 countries that have so far ratified the protocol establishing the court and is thus subject to the court's jurisdiction. However, the role of the African Court is limited because Uganda has not made a declaration to allow it to receive complaints of human rights violations directly from civil society organisations and individuals.[187] Although the African Court has not yet handled any matter relating to Uganda, it has the potential to contribute to the process of oversight and accountability.

Committee of Experts on the Rights and Welfare of the Child

When Uganda presented its initial report, the Committee on the Rights and Welfare of the Child made several comments. It commended Uganda for efforts made with regard to the establishment of family and juvenile courts as well as the National Rehabilitation Centre, and for creating possibilities to amicably resolve cases concerning children in conflict with the law.[188] However, the committee was concerned that several districts do not always have provisional detention centres for children and that the number of functional re-education centres is limited.[189] The committee was also concerned that children are held with adults in police detention centres.[190] Moreover, the committee observed that the report did not provide information pertaining to the treatment of mothers incarcerated with their children, pregnant women and young children.[191]

International mechanisms

At the international level, the Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR). In addition, there is the Committee against Torture as well as the Committee on the Rights of the Child. Furthermore, there is the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Apart from these bodies, there are various international organisations that are also involved in visiting places of detention, such as the International Committee of the Red Cross.

Human Rights Committee

The Human Rights Committee (HRC), which is the monitoring mechanism for the implementation of the ICCPR, is one of the mechanisms with respect to oversight and accountability. During its consideration of the initial report of Uganda, the HRC noted various important human rights concerns that demonstrate Uganda's lack of compliance with the ICCPR. The committee noted, for instance, the frequent lack of implementation by the government of UHRC decisions concerning both awards of compensation to victims of human rights violations and the prosecution of human rights offenders in cases where the UHRC had recommended such prosecution.[192] It further noted that state agents continue to arbitrarily deprive persons of their liberty, including in unacknowledged places of detention.[193] It also noted the deplorable prison conditions, such as overcrowding, scarcity of food, poor sanitary conditions, and inadequate material, human and financial resources. The HRC was furthermore concerned about the treatment of prisoners, especially about such aspects as corporal punishment, solitary confinement, deprivation of food as a disciplinary measure, and the fact that juveniles and women are often not kept separate from adults and males.[194] It noted the practice of imprisoning persons for contractual debts, which is incompatible with Article 11 of the ICCPR.[195] The committee also noted with concern the shortcomings in the administration of justice, such as delays in proceedings and with regard to pre-trial detention, the lack of legal assistance for

non-capital offenders, and the conditions under which confessions may be secured.[196] Notably, all these challenges still remain.

Committee against Torture

Article 20 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) mandates the Committee against Torture to visit places of detention. However, the committee may only visit states parties to UNCAT which have assented to such visits. Further, visits are made only in the cases of 'systematic torture' and the proceedings in relation thereto are confidential. No visits by the Committee against Torture have been made to Uganda. Nevertheless, during the presentation of state reports, the committee has noted various human rights concerns which are still relevant.

The Committee against Torture was concerned about: the lack of incorporation of UNCAT into Uganda's legislation; the lack of a comprehensive definition of torture in Uganda's domestic law; the lack of an absolute prohibition on torture; and the absence of universal jurisdiction for acts of torture in Ugandan law.[197] The committee also expressed concern regarding the widespread practice of torture and ill-treatment of persons detained by the military as well as by other law enforcement officials.[198] Furthermore, it was concerned about the length of pre-trial detention, including detention beyond 48 hours as dealt with in Article 23(4) of the Constitution, and the possibility of detaining treason and terrorism suspects for 360 days without bail.[199]

The committee also raised concerns about the reported limited accessibility and effectiveness of habeas corpus[200] and the continued allegations of widespread torture and ill-treatment by the state's security forces and agencies.[201] The committee moreover concerned about the wide array of security forces and agencies in Uganda with the power to arrest, detain and investigate.[202] The Committee against Torture noted the disproportionateness between the high number of reports of torture and ill-treatment and the very small number of convictions for such offences, as well as the unjustifiable delays in the investigation of cases of torture, both of which contribute to the impunity prevailing in this regard.[203] It further noted the alleged reprisals, intimidation and threats with regard to persons reporting acts of torture and ill-treatment.[204] The committee also expressed concern about the frequent lack of implementation of the UHRC's decisions concerning both awards of compensation to victims of torture and the prosecution of human rights offenders.[205]

Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other mechanisms

The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Working Group on Forced or Involuntary Disappearances, and the Working Group on Arbitrary Detention were established by resolutions of the UN Commission on Human Rights. Their visits are often occasional and based on prior agreement by the state concerned in order to assess the situation in the particular country. Their recommendations are issued on the basis of information communicated to the rapporteur and are verified, or are made following visits carried out in the country concerned. The recommendations are not binding on states but provide guidance on how the situation can be improved. Public reports are presented at the session of the UN Human Rights Commission.

Uganda has not had an official visit from the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Working Group on Forced or Involuntary Disappearances, or the Working Group on Arbitrary Detention. Nevertheless, such bodies have the potential to contribute to the process of oversight and accountability.

Universal Periodic Review

Uganda was considered as part of the Universal Periodic Review (UPR) process in October 2011. During the UPR consideration of Uganda's state report, a number of issues related to pre-trial detention were raised by states and other stakeholders.[206] In particular, concerns were expressed regarding: torture by security agents;[207] reports of the use of 'safe houses' or unofficial places of detention;[208] the regular use of torture as a method of interrogation by the police;[209] the arbitrary arrest and torture of journalists;[210] as well as a penitentiary system plagued by poor treatment of detainees, overcrowding, inadequate feeding, poor medical care and sanitary conditions, forced labour, and inadequate rehabilitation programmes.[211]

International Committee of the Red Cross

Visits from the International Committee of the Red Cross (ICRC) are based on the 1949 Geneva Conventions[212] for situations of conflict and on an agreement with the state concerned for other situations. Monitoring of conditions of detention is targeted at persons arrested and detained in relation to a situation of conflict or internal strife. In certain situations, monitoring extends to other categories of persons deprived of their liberty. In a situation of international conflict, the states parties to the conflict are obliged to authorise visits to military internees and civilian nationals of the foreign power involved in the conflict. In other situations, visits are subject to prior agreement by the relevant authorities. The ICRC visits are often permanent and regular visits during a situation of conflict or strife or its direct consequences. The ICRC often provides relief or rehabilitation activities with the agreement of the authorities and helps to restore family links. ICRC procedures and reports are confidential. The ICRC has been working in Uganda for the last 33 years. It has been monitoring the treatment of detainees in both civilian and military places of detention and working with the authorities to improve conditions of detention.

Vulnerable groups

The Luanda Guidelines provide for special measures and the protection of persons such as children, women (especially pregnant and breastfeeding women), persons with albinism, the elderly, persons with HIV/Aids, refugees, sex workers, those with needs relating to gender identity, refugees and asylum seekers, non-citizens, stateless persons, racial or religious minorities, or other categories of persons with special needs.[213] Special measures have to be applied and should be subjected to periodic review by a competent, independent and impartial authority.[214]

Children

With regard to children, their best interests are paramount both under Ugandan law and the Luanda Guidelines.[215] The Luanda Guidelines, like Ugandan law, define a child as one below the age of 18, but further provide that, if there is uncertainty, the person has to be treated as a child until his or her age is determined.[216] As with Ugandan law,[217] the Luanda Guidelines provide that children are only to be detained as a measure of last resort and for the shortest possible period.[218] A child deprived of his or her liberty has to be treated with humanity and respect, taking into account his or her age.[219] The Luanda Guidelines, like Ugandan law,[220] also encourage diversion and alternatives to pre-trial detention, such as close supervision, and intensive care or placement with a family, in an education setting, home, or other place of safety.[221] The Luanda Guidelines and Ugandan law further provide that, if the arrest of a child is absolutely necessary, his or her parents or guardians must be informed promptly. However, the Luanda Guidelines also require that children should be informed of their rights, including their rights to an interpreter, lawyer or other legal service provider.[222]

Furthermore, the Luanda Guidelines and Ugandan law provide that an arrested child must be given access to a lawyer or other legal service provider and must be afforded the opportunity to consult freely

and confidentially with such service provider.[223] Children have the right to the presence of a lawyer, or other legal service provider, of their choice and, where required, access to free legal services from the moment of arrest and at all subsequent stages of the criminal justice process.[224] However, the Luanda Guidelines further require that legal assistance be accessible, age-appropriate and responsive to the specific needs of the child.[225] Unless it is their best interest to stay with family members who have been detained, children have to be detained separately from adults and females must be separated from males.[226] Children also have the right to the presence of a parent or guardian at all stages of the proceedings, unless this is not in their best interest.[227] Children in custody have to receive care, protection, and the necessary social, educational, vocational, psychological, medical and physical assistance that they may require.[228] During the judicial proceedings, the child must have an opportunity to be heard either directly or through a representative of his or her choice, and the child's views must be taken into account by the relevant authority.[229] The conduct of law enforcement officials in dealing with child suspects must be respectful of their legal status, must promote their well-being and ensure the child's privacy, and must avoid harm to the child.[230] The Luanda Guidelines encourage the creation of specialised units to deal with children in conflict with the law.[231] Children in detention must have reasonable access to parents, guardians, or statutory authorities responsible for the care and protection of children.[232]

The UPF has created family and child protection units, but these have yet to yield the anticipated results. Although the law requires that children only be detained as a matter of last resort, they are often incarcerated instead of being diverted away from the criminal justice system.[233] Also contrary to the law is the fact that children have been detained together with adults. The UHRC, for instance, found 91 children who were detained with adults in police stations and prisons.[234] Children's parents are often not informed of their child's arrest, and arrested children frequently have no access to legal assistance or representation, which frustrates their bail applications and causes them to stay longer in pre-trial detention.[235] Furthermore, a review of the Remand Homes and the National Rehabilitation Centre found that children were not provided with adequate care and protection, as well as the necessary social, educational, vocational, psychological, medical and physical assistance.[236] The study also found that the number of girls in conflict with the law was very small compared with boys, with the ratio being one or two girls to 20 or 30 boys.[237] It was also noted that girls were not only likely to miss other female company, but were also potentially vulnerable to sexual exploitation given that defilement is such a prevalent offence.[238]

Women

States have an obligation under the Luanda Guidelines to protect the rights, special status and distinct needs of women and girls who are subject to arrest, police custody or pre-trial detention.[239] Women and girls should: only be searched by female law enforcement officials, and then purely in a manner that accords with the dignity of the woman or girl; be held separately from male detainees; be permitted, if they are responsible for caring for their children, to make arrangements for the children or to have their detention suspended in the best interests of the children; be provided with the facilities necessary to contact their families and legal representatives; be provided with gender-specific hygiene facilities and materials, as well as health screening and care in accordance with their rights to dignity and privacy; and be allowed to be seen by a female medical practitioner.[240] Furthermore, women and girls should not be subject to close confinement or disciplinary segregation if pregnant, breastfeeding, or accompanied by an infant, must have access to obstetric and paediatric care, and must never be placed in physical restraints.[241] States are also required to provide for the needs and physical, emotional, social and psychological development of babies and children who are allowed to remain in the place of detention.[242]

Women comprise about 4.5% of the prison population in Uganda.[243] More than half of the women are pre-trial detainees.[244] The criminal justice system is generally not gender-sensitive and specific to

women's needs, although the law does in fact provide for this. Ugandan law, like the Luanda Guidelines, provides that women must be searched by female law enforcement officials and that women must be held separately from male detainees.[245] By and large, these provisions are observed. However, the law does not specifically provide that women should be permitted, if they are caring for children, to make arrangements for their children or have their detention suspended in the best interests of the children. Some of the female detainees in Uganda are mothers and, more often than not, are the primary or sole caregivers of their children. When arrested, these women have no opportunity to make arrangements for the care of the children, with the result that the children end up neglected and abused while the mothers are in detention.[246] Furthermore, although the law allows women access to their families and legal representatives, their families – and especially their husbands – abandon them when they are arrested and most of them cannot afford legal representation.[247] Women in detention often do not have adequate food and hygiene facilities such as soap and sanitary towels and their access to health care is limited.[248] There are cases of pregnant women[249] and women who are incarcerated with children who do not receive adequate care.[250] Although, mothers are allowed to keep babies or young children in prison with them up to a certain age, there is often no budgetary provision for this.

Persons with disabilities

Persons with disabilities have the right to liberty and to the provision of alternatives to detention. If they are in fact detained, they have the right to reasonable accommodation and the right to informed consent with regard to treatment.[251] States further have an obligation to take account of their disability in their disciplinary actions.[252] Apart from the aforementioned rights, persons with disabilities have the right to enjoy full legal capacity and the right of access to justice while in detention.[253]

Although the rights of persons with disabilities are protected under the Constitution and the Persons with Disabilities Act, implementation is still weak. There are no adequate measures to ensure that those inmates with disabilities are assisted to enjoy the same rights as other suspects or inmates, for example inmates with physical disabilities often encounter challenges in using bathroom facilities.[254] The treatment of persons with mental disability leaves a lot to be desired. The law[255] provides that, when it appears in the course of a trial after an inquiry that a person is incapable of presenting a defence, the court must order the detention of such person, with the file being sent to the Minister of Justice for certification. The provisions also allow for the detention of a person even when such person is acquitted of an offence, yet the period of detention is not defined. Unfortunately, such persons have been detained for long periods in prisons awaiting such certification.[256] Given the deplorable conditions in prisons. their detention therein only worsens their situation.

Non-nationals

Non-nationals such as refugees, migrants and non-citizens have to be informed of their right to contact consular officials and other relevant international organisations and to be provided with the means of contacting those authorities without delay and hindrances if they so wish.[257] Refugee children are entitled to the same rights as are provided for other children in the Luanda Guidelines.[258] Stateless persons also have the right to be informed of their right to contact a lawyer or other legal service provider, as well as relevant international organisations, that can address their needs, and to be provided with the means to contact them and the facilities to meet with them without delay if they so wish.

Foreigners in Ugandan prisons constitute about 0.4% of the prison population.[259] The Prisons Act affirms the rights in the Luanda Guidelines, including the right to contact consular officials. Notably, prisoners have the same rights as nationals. These rights include the right to: communicate with

family and humanitarian organisations; to information on the prison regime; and to assistance in a language they can understand when dealing with medical or programme staff and concerning such matters as complaints, special accommodation, special diets, religious representation, and counselling.[260] There have been a few complaints regarding access to lawyers. Also, non-nationals often encounter language barriers and discrimination and are subjected to long stays in detention while awaiting deportation.

5. Strategies for implementation of the Luanda Guidelines

the present review proposes several strategies for implementation of the Luanda Guidelines. Such strategies cover, inter alia, advocacy and raising awareness; the amendment of legislation; the role of national oversight and accountability mechanisms; the role of international regional mechanisms; and coordinated efforts at all levels by all actors.

Advocacy and raising awareness

There is a need for advocacy concerning implementation of the Luanda Guidelines. However, advocacy has to be preceded by raising awareness of such guidelines. Since the Luanda Guidelines are relatively new, it will be necessary to inform people about them and their importance in the lives of those in detention, and why the government has to implement them. Raising awareness can help in increasing political commitment to their implementation at the national level, especially as regard Parliament, the UPF, the Uganda Prison Service and the UPDF.

Amendment and implementation of legislation

The Luanda Guidelines elevate human rights standards in many respects. Generally, they require more transparency in terms of furnishing pre-trial detainees with information on their rights and providing oversight mechanisms with access to data that has not specifically been made available in the past. More particularly, certain laws, especially the Police Act and Criminal Procedure Code Act, will need to be amended in terms of arrests, searches and the register, among other things. In addition, investigations and trials will need to be expedited, and this will require resources. Furthermore, it will be necessary to provide legal aid services and adequately equip detention facilities so as to comply with the Luanda Guidelines. Finally, implementation requires sound political will as well as commitment.

Use of the Luanda Guidelines by national oversight and accountability mechanisms

In order to promote the implementation of the Luanda Guidelines, they will need to be used by national oversight and accountability mechanisms in their monitoring work. If the guidelines are included in checklists for inspections and the monitoring reports indicate to what extent such guidelines have been implemented, accompanied by recommendations on how they can be implemented, this will help to incrementally implement the guidelines, which is a step in the right direction.

Use of regional mechanisms to promote the Luanda Guidelines

The ACHPR can enhance the adoption and application of the Luanda Guidelines by examining state reports, by handling individual communications, and by way of its resolutions, guidelines or declarations. The Special Rapporteur on Prisons and Conditions of Detention in Africa should promote

the guidelines in the course of making recommendations on the situation of persons deprived of their liberty as well as on the state of prisons and conditions of detention subsequent to state visits. Moreover, he or she should promote the guidelines and adherence to the AChHPR and international human rights norms. Furthermore, the African Court, which complements the protective mandate of the ACHPR, can also take final and binding decisions on human rights violations using the Luanda Guidelines for those countries which have subjected themselves to the court's jurisdiction concerning individual complaints. Also, the Committee of Experts on the Rights and Welfare of the Child can use the guidelines while examining state reports, making recommendations or statements, and adopting resolutions or decisions on communications.

Coordinated efforts

There have to be coordinated efforts to improve the situation for all persons in detention at all levels. Efforts at the national, regional and international level to alleviate the human rights concerns surrounding pre-trial detention should be coordinated in order to ensure the effectiveness of such rights. Furthermore, it is important to have coordinated efforts in improving conditions for all detainees. For example, it is important not only to raise awareness and engage in sensitisation with respect to the Luanda Guidelines, but also the Bangkok Rules and the Nelson Mandela Rules, as well as other new developments, so as to holistically improve the conditions of detention. If amendments are to be made, it would be better to do this as a whole and not in part.

6. Conclusion and recommendations

The Luanda Guidelines are groundbreaking, especially in terms of creating new obligations for states concerning the rights of pre-trial detainees, and require specific action to be taken by various stakeholders in order to implement them fully.

African Commission on Human and People's Rights

The ACHPR should include the Luanda Guidelines:

- In its examination of state reports;
- When handling individual communications; and
- In its resolutions, guidelines and declarations.

The Special Rapporteur on Prisons and Conditions of Detention in Africa should promote the Luanda Guidelines when making recommendations on:

- The situation of persons deprived of their liberty;
- The state of prisons and conditions of detention subsequent to state visits; and
- Adherence to the African Charter and international human rights norms on the treatment of persons deprived of their liberty.

African Committee of Experts on the Rights and Welfare of the Child

The committee should use the Luanda Guidelines:

- In the examination of state reports on the rights and welfare of the child; and
- To make recommendations or statements, adopt resolutions, and guide their decisions on communications relating to children in detention.

African Court on Human and Peoples' Rights

The African Court should take final and binding decisions on human rights violations relating to pre-trial detainees using the Luanda Guidelines for those countries which have acceded to the court's jurisdiction in respect of individual complaints.

Uganda government

The Uganda government should:

- Review and amend its laws in order to domesticate the Luanda Guidelines; and
- Provide budgetary support for, and enhance adherence to, the Luanda Guidelines.

Ugandan security agencies

Ugandan security agencies should include the Luanda Guidelines in their standard operating procedures.

Uganda Human Rights Commission

The UHRC should:

- Undertake human rights education based on the Luanda Guidelines;
- Conduct investigations into human rights violations; and
- Continually monitor and document progress concerning implementation of the guidelines.

Civil society organisations

Civil society organisations should:

- Advocate for the implementation of the Luanda Guidelines;
- Defend the rights of all detainees; and
- Complement government in the provision of legal aid service and health care, among other things.

Endnotes

1 See Justice Law and Order Sector (JLOS), *Annual Performance Report 2014/2015*.

2 Ibid.

3 See UHRC, *17th Annual Report 2014*, at 19.

4 Constitution of Uganda (hereafter 'Constitution'), Article 45.

5 Ibid., Articles 211 and 212; Criminal Procedure Code Act of 1950 ('Criminal Procedure Code Act'). Also see the Police Act, s 23.

6 Constitution, Articles 208 and 209; UPDF Act of 2005 ('UPDF Act'), s 185 and 161(2).

7 Criminal Procedure Code Act, s 15; and UPDF Act, s 185(3).

8 See, generally, UPDF Act, s 119, and, specifically, s 119(1)(h).

9 UPDF Act, s 42 and 43; Police Act.

10 Constitution, Article 23.

11 Criminal Procedure Code Act, s 6.

12 Ibid.

13 Ibid., s 8. Also see the Police Act, s 23.

14 Criminal Procedure Code Act, s 2(2).

15 Ibid., s 2(3). Also see the Police Act, s 28, on the use of firearms.

16 Constitution, Articles 50–55.

17 Ibid., Article 23(2).

18 Ibid., Article 23(3).

19 Ibid., Article 23(4); Police Act, s 25(1).

20 Constitution, Article 23(5)(a).

21 Ibid., Article 23(5)(b).

22 Ibid., Article 23(5)(c).

23 Ibid., Article 23(6); Magistrates Courts Act, s 76.

24 Constitution, Article 23(7).

25 Ibid., Article 23(8).

26 Ibid., Article 23(9).

27 Ibid., Article 24; Prevention and Prohibition of Torture Act.

28 Constitution, Article 28.

29 Ibid., Article 28(3)(e).

30 Luanda Guidelines, 1(b).

31 Ibid., 1(c).

32 Ibid., 1(c).

33 Children Act, s 89 and 91(9).

34 See Penal Reform International, *A Review of Law and Policy to Prevent and Remedy Violence against Children in Police and pre-trial Detention in Uganda*, 2012, at 10.

35 Luanda Guidelines, 3(d).

36 Ibid., 3(d)(ii).

37 Ibid., 3(d)(iii).

38 Ibid., 3(d)(v).

39 Ibid., 3 (d)(vi).

40 Ibid., 3(e).

41 Prisons Act of 2006 ('Prisons Act'), s 61 and 62.

42 Ibid., s 98.

43 See UHRC, *17th Annual Report 2014*, at 54.

44 Luanda Guidelines, 5.

45 Ibid., 4(c).

46 Ibid., 4(e).

47 Ibid., 4(l).

48 These rights are implied in the Prisons Act, s 57, 59 and 69, among others.

49 See UHRC, *17th Annual Report 2014*.

50 World Prison Brief, Uganda, available at http://www.prisonstudies.org (accessed on 2 June 2016).

51 Ibid.

52 Luanda Guidelines, 6(a).

53 Ibid., 6 (b).

54 Ibid., 7(a).

55 Ibid., 7 (b) (i).

56 Ibid., 7(b)(ii).

57 Ibid., 7(c).

58 Ibid., 7(b)(ii).

59 Constitution, Article 23(4); Police Act, s 25(1).

60 See UHRC annual reports available at http://www.uhrc.ug.

61 See UHRC, *17th Annual Report 2014*, at 18.

62 See JLOS, *Annual Performance Report 2010/2011*, at 84 and 85. Also see UHRC, *17th Annual Report 2014*, at 19.

63 See UHRC annual reports available at http://www.uhrc.ug.

64 High Court Civil Suit No.4 of 2000 [2008] UGHC 86 (27 June 2008).

65 See UHRC, *17th Annual Report 2014*.

66 Constitution, Article 23(6).

67 Ibid., 23(6)(b).

68 Ibid., 23(6)(c).

69 See UHRC annual reports 2008–2014, available at http:// www.uhrc.ug.

70 Also see Foundation for Human Rights Initiative (FHRI), *A Citizen's Handbook on the Law Governing Bail in Uganda*, June 2011, available at http://ppja.org/countries/uganda/Bail%20Handbook.pdf (accessed on 2 June 2016).

71 Constitutional Petition No. 20 of 2006 [2008] UGCC 1 (26 March 2008).

72 Luanda Guidelines, 8(a).

73 Ibid., 8(b) and (c), 14(c).

74 Ibid., 8(d)(i).

75 Ibid., 8(d)(ii).

76 Ibid., 8(d)(iii).

77 Ibid., 8(d)(iv).

78 Ibid., 8(d)(v).

79 Ibid., 8(d)(vi).

80 Ibid., 9(a)(i).

81 Ibid., 9(a)(ii).

82 Ibid., 9(a)(iii).

83 Ibid., 9(a)(iv).

84 Ibid., 9(b).

85 Ibid., 9(c).

86 Ibid., 9(d).

87 Ibid., 9(e)(i).

88 Ibid., 9(e)(ii).

89 Ibid., 9(e)(iii).

90 Ibid., 9(e)(iv).

91 Ibid., 9(e)(v).

92 Ibid., 9(f) and 14(d).

93 Ibid., 9 (g).

94 See Report of the National Legal Aid Conference, *Emerging Issues and Recommendations*, October 2011, available at www.jlos.org (accessed on 3 June 2016) ('Report of the Legal Aid Conference'). Also see the National Legal Aid Policy, 2012, at 4.

95 Constitution, Article 28(3)(e).

96 See Report of the National Legal Aid Conference (n 94 above).

97 Ibid.

98 National Legal Aid Policy (n 94 above).

99 See US State Department, *Uganda 2014 Human Rights Report*, at 8, available at http://www.state.gov/documents/organization/236630.pdf (accessed on 3 June 2016).

100 Ibid.

101 See BJ Oppenheimer, 'From arrest to release: The inside story of Uganda's penal system', *Indiana International and Comparative Law Review*, (2005) Vol. 16:1 117 at 133.

102 See *Uganda Law Society & Another v Attorney General,* Constitutional Petitions No. 2 & 8 of 2002 [2009] UGCC 1 (5 February 2009).

103 See UHRC, *17th Annual Report 2014*, at 61.

104 Evidence Act, s 23.

105 Luanda Guidelines, 10.

106 Ibid., 10(d) and (e) and 13(a).

107 Constitution, Article 23(2).

108 Luanda Guidelines, Article 10(g).

109 A/HRC/19/16, §92 and A/HRC/WG.6/UGA/3, §30.

110 See Amnesty International, *Annual Report: Uganda 2007*, available at http://www.amnestyusa.org (accessed on 4 June 2016).

111 See HRW, *Open Secret: Illegal Detention and Torture by the Joint Anti-Terrorism Task Force in Uganda*, 2007 ('HRW, *Open Secret*'). Also see Redress Trust, *Torture in Uganda: A Baseline Study on the Situation of Torture Survivors in Uganda*, 2007.

112 See UHRC, *13th Annual Report 2010*, at 12.

113 A/HRC/19/16, p.12, §92, p.13, §105.

114 See HRW, *Open Secret* (n 111 above).

115 Luanda Guidelines, 11(a)(i) and 14(a).

116 Ibid., 11 (a)(i) and (ii).

117 Ibid., 11(b), (c) and (d).

118 Constitution, 50–55.

119 Luanda Guidelines, 11(e) and 35.

120 Ibid., 11(f).

121 Ibid., 11(g).

122 Ibid., 13(b).

123 Ibid., 13(c).

124 Ibid., 20 and 21. Also see the Inquests Act of 1935.

125 Luanda Guidelines, 22 and 24. Also see the Constitution, Articles 24 and 50–55.

126 Luanda Guidelines, 23.

127 Ibid., 25(a).

128 Ibid., 25(b).

129 Ibid., 25(c).

130 Ibid., 25(d).

131 Ibid., 25 (e) and (f).

132 See the Police Act and Prisons Act.

133 Luanda Guidelines, 25(g).

134 Ibid., 25 (h), (i) and (jj).

135 See UHRC annual reports available at www.uhrc.ug. Also see HRW, *Even Dead Bodies Must Work: Health, Hard Labor and Abuse in Ugandan Prisons,* 2011 ('HRW, *Even Dead Bodies Must Work*').

136 Ibid. at 16.

137 See UHRC, *13th Annual Report 2010*, at 37; HRW. Even Dead Bodies Must Work (n 135 above), at15.

138 See HRW, *Even Dead Bodies Must Work* (n 135 above), at 19.

139 Luanda Guidelines, 26.

140 See HRW, *Even Dead Bodies Must Work* (n 135 above) at 14.

141 See UHRC, *17th Annual Report 2014*, at 56.

142 Luanda Guidelines, 27.

143 Ibid., 28.

144 See UHRC, *12th Annual Report 2009*, at 47–48.

145 See UHRC annual reports 1997– 2014.

146 Luanda Guidelines, 39.

147 Ibid., 37(a).

148 Ibid., 37(b) and (c).

149 Ibid., 37(d).

150 Ibid., 38.

151 Ibid., 41.

152 Ibid., 42(a) and (c).

153 Ibid., 42(b).

154 Ibid., 43.

155 Police Act, s 70(1).

156 See UHRC, *17th UHRC Annual Report 2014*, at 19.

157 See UHRC, *14th Annual Report 2011*, at 22.

158 See UHRC, *17th UHRC Annual Report 2014*, at 49–63.

159 See Constitution, Article 225.

160 See IGG, *Report to Parliament January to June 2015*, at 7 and 13.

161 See Constitution, Article 51(1).

162 See UHRC, *14th Annual Report 2011*, at 50.

163 See Constitution, Article 52(1)(a).

164 See Constitution, Article 53.

165 See UHRC, *Complaints Handling Manual*.

166 See UHRC, *14th Annual Report 2011*, at 13 and 149.

167 See Uganda Radio Network, *UHRC Stuck with Cases Due to Expiry of Commissioner's Contracts*, 8 October 2015, available at http:// ugandaradionetwork.com/story/cases-pilling-up-at-uhrc-as-commission-grounds-to-a-halt-over-expired-contracts-#ixzz4AmRqHUhZ (accessed on 6 June 2016).

168 See Constitution, Article 53(4).

169 UHRC, *13th Annual Report 2010*, at 27.

170 Civil Suit No. 611 of 2006, High Court of Uganda.

171 HCCS 93A/89, High Court of Uganda.

172 See JLOS, Annual Performance Report 2014/2015.

173 See UHRC, annual reports for 2012–2017.

174 Prisons Act, s 109.

175 Ibid., s 111.

176 Ibid., s 112(1).

177 See Prisons Act, s 112(2).

178 AChHPR, Article 45(1).

179 Available at http://www.achpr.org/english/Decison_Communication/Uganda/Comm.8-88.pdf.

180 Available at http://www1.umn.edu/humanrts/africa/comcases/227-99.html.

181 Concluding Observations of the African Commission, *3rd Periodic Report of the Republic of Uganda*, para. 16.

182 Ibid., para. 32.

183 Ibid., para. 34.

184 Ibid., para. 37.

185 Ibid., para. 38.

186 Ibid., para. 38.

187 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5(3) and 34(6).

188 Recommendations and Observations of the African Committee of Experts on the Rights and Welfare of the Child on the Initial Implementation Report of the Republic of Uganda on the African Charter of the Rights and Welfare of the Child, available at http://www.crin. org/docs/Uganda_COs.doc.

189 Ibid.

190 Ibid.

191 Ibid.

192 CCPR/CO/80/UGA, para. 7.

193 CCPR/CO/80/UGA, para. 17.

194 CCPR/CO/80/UGA, para. 18.

195 CCPR/CO/80/UGA, para. 19.

196 CCPR/CO/80/UGA, para. 21.

197 CAT/C/CR/34/UGA, para. 5.

198 CAT/C/CR/34/UGA, para. 6(c).

199 CAT/C/CR/34/UGA, para. 6(a).

200 CAT/C/CR/34/UGA, para. 6(b).

201 CAT/C/CR/34/UGA, para. 6(c).

202 CAT/C/CR/34/UGA, para. 6(d).

203 CAT/C/CR/34/UGA, para. 6(e).

204 CAT/C/CR/34/UGA, para. 6(g).

205 CAT/C/CR/34/UGA, para. 8.

206 See UN Summary of Stakeholders' Information prepared for the UPR UN Doc A/HRC/WG.6/12/UGA, 20 July 2011.

207 A/HRC/19/16, §46, and A/HRC/W.G.6/UGA/3, §24 and 44.

208 A/HRC/19/16, §92, and A/HRC/WG.6/UGA/3, §30.

209 A/HRC/WG.6/UGA/3, §25.

210 Ibid., §29.

211 Ibid., §31.

212 Uganda ratified the Geneva Conventions on 18 May 1964.

213 Luanda Guidelines, 29 and 30.

214 Ibid., 30 (b).

215 Ibid., 31(a)(i).

216 Ibid., 31(a)(ii) and (iii).

217 See Children Act, s 94(4).

218 Luanda Guidelines, 31(a)(iv) and 31(d)(i).

219 Ibid., 31(a)(v).

220 Children Act, s 89(1) and (2), 91(9).

221 Luanda Guidelines, 31(b) and (f).

222 Ibid., 31(c)(i) and (ii); Children Act, s 89(3).

223 Luanda Guidelines, 31(c)(iii).

224 Ibid., 31(g); Children Act, s 16(5).

225 Luanda Guidelines, 31(g).

226 Ibid., 31(d)(ii). Also see: Constitution, Article 34(6); Children Act, s 89(3).

227 Luanda Guidelines, 31(d)(iii).

228 Ibid., 31(d)(iv).

229 Ibid., 31(e).

230 Ibid.

231 Ibid., 31(i).

232 Ibid., 31(j).

233 See UHRC, *13th Annual Report 2010*, at 40–41.

234 See UHRC, *14th Annual Report 2014*, at 56.

235 Also see Penal Reform International, *A Review of Law and Policy to Prevent and Remedy Violence against Children in Police and pre-trial Detention in Uganda*, 2012, at 16.

236 M Moore, *Review of Ugandan Remand Homes and the National Rehabilitation Centre*, October 2010, available at http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf (accessed on 5 June 2016).

237 Ibid., at 13.

238 M Moore (n 236 above).

239 Luanda Guidelines, 32(a).

240 Ibid., 32(b)(i)–(v).

241 Ibid., 32 (b)(vi) and (vii).

242 Ibid., 32(c).

243 World Prison Brief, Uganda, available at http://www.prisonstudies.org (accessed on 2 June 2016).

244 Ibid.

245 Criminal Procedure Code Act, s 8. Also see Police Act, s 23 and Prisons Act, s 29.

246 Also see, generally, FHRI and Penal Reform International, *Who Are Women Prisoners? Survey Results from Uganda*, 2015, at 16–17.

247 Ibid.

248 Also see UHRC, *16th Annual Report 2013*, at 39.

249 See HRW, *Even Dead Bodies Must Work* (n 135 above), at 18. Also see Foundation for Human Rights Initiative and Penal Reform International (n 246 above), at 7–8.

250 See Forum for Women in Democracy (FOWODE), *Equal by Right, Uganda Women's Agenda 2010–2016*, at 28.

251 Luanda Guidelines, 33(a)(i)–(iv).

252 Ibid., 33(v).

253 Ibid., 33(b), (c) and (d)(i)–(vi).

254 See UHRC, *14th Annual Report 2011*, at 32.

255 Magistrates Courts Act, s 113; Trial on Indictments Act, s 45.

256 See UHRC, *14th Annual Report 2011*, at 26.

257 Luanda Guidelines, 34(a)(i) and (b).

258 Ibid., 34(a)(ii).

259 World Prison Brief (n 50 above).

260 See Prisons Act, s 82(1)–(7).

APCOF
The African Policing Civilian Oversight Forum
Suite 103–105, Building 17
The Waverley
Wyecroft Road, Mowbray 7925
South Africa

Tel: +27 21 447 2415
Fax: +27 21 447 1691
Email: info@apcof.org.za
Web: www.apcof.org.za
Twitter: @APCOF
Facebook: African Policing Civilian Oversight Forum