

## Pre-Trial Justice in Africa

### An Overview of the Use of Arrest and Detention, and Conditions of Detention

Louise Edwards

#### PART A: OVERVIEW

##### *Introduction*

Arbitrary arrest and detention, and poor conditions of pre-trial detention are prevalent but under-examined areas of criminal justice practice and reform.<sup>1</sup> Approximately 43.3% of detainees across Africa are pre-trial detainees, with statistics ranging from 7.9% of the total prison population in Namibia, to 88.7% in Libya.<sup>2</sup> These statistics are unlikely to include detainees in police detention facilities, and may therefore be significantly higher.

Pre-trial detainees often exist in the shadows of the criminal justice system, as their detention and treatment are not generally subject to the same levels of judicial and other oversight as sentenced prisoners. Overall, pre-trial detainees experience poorer outcomes than sentenced prisoners in relation to conditions of detention, the risk of torture and other ill-treatment, susceptibility to corruption, and experience conditions of detention that do not accord with the rights to life, humane treatment and the inherent dignity of the person.<sup>3</sup> Pre-trial detention has a disproportionate impact

1 Schoenteich M (2008) *The Scale and Consequences of Pre-Trial Detention around the World*. New York: Open Society Justice Initiative. [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles/publications/pre-trial20080513?res\\_id=104079](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles/publications/pre-trial20080513?res_id=104079), accessed 14 June 2011

2 International Centre for Prison Studies. World Prison Brief. <http://www.prisonstudies.org>, accessed 17 January 2012. The overall figure is an average calculated on available statistics, excluding Equatorial Guinea, Eritrea, Guinea Bissau, Mayotte, Reunion, and Somalia for which statistics are unavailable.

3 Schoenteich M (2008) *The Scale and Consequences of Pre-Trial Detention around the World*. New York: Open Society Justice Initiative. [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles/publications/pre-trial20080513?res\\_id=104079](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles/publications/pre-trial20080513?res_id=104079), accessed 14 June 2011

on the most vulnerable and marginalised, with pre-trial detainees more likely to be poor and without means to afford legal assistance or to post bail or bond.<sup>4</sup> The over-use of pre-trial detention, and conditions of detention that do not accord with basic minimum standards, undermines the rule of law, wastes public resources and endangers public health.<sup>5</sup>

This study provides an overview of the challenges to achieving a rights-based approach to the use of arrest and detention by the police across Africa. It sets out the general principles of international law in relation to the procedural safeguards for arrest and detention and minimum standards for conditions of detention, and examines whether, and why, reports of arbitrary arrest and detention, and poor conditions of detention in police facilities persist across the African continent. The paper is structured as follows:

- Part A: Introduction and methodology
- Part B: The use of arrest
- Part C: The use of pre-trial detention in police custody
- Part D: Conditions of detention in police facilities
- Part E: Conclusion and recommendations.

The report concludes with a number of recommendations aimed at promoting a rights-based approach to arrest and detention. Specifically, it proposes that the African Commission on Human and Peoples' Rights (ACHPR) use its mandate to 'formulate and lay down principles and rules' in relation to human rights<sup>6</sup> to adopt a dedicated set of guidelines on pre-trial detention that promotes the implementation of a rights-based approach to arrest and detention across the continent.

## **Methodology**

This study focuses primarily on arrest and detention until an individuals' unconditional or bonded release, or their transfer to detention facilities outside the control of the police. However, where appropriate it also recognises the role played by other criminal justice stakeholders, including government, the judiciary and the prison system on the ability of police to achieve a rights-based approach to arrest and detention.

The standards for a rights-based approach to arrest and detention articulated in this paper are a composite of international and regional human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (UNCAT) and the African Charter on Human and Peoples' Rights (ACHPR). Reference is also made to other non-binding instruments, such as the United Nations (UN) Standard Minimum Rules of the Treatment of Prisoners, the United Nations Code of Conduct on the Use of Force and Firearms, determinations made by the United Nations Human Rights Council and international jurisprudence.

Information about the implementation of the international framework for arrest and detention in Africa is taken from the reports of UN special mechanisms and treaty bodies from the last decade. The report is not an in-depth examination of implementation of the international framework in Africa, but rather aims to provide a high-level overview of key common and recurring issues relating to implementation. The decision to rely on UN treaty body and special mechanisms' reports, and content submitted by governments, national human rights institutions (NHRIs) and civil society as part of those reporting processes, was taken in consideration of the high-level nature of this report, and limitations related to languages other than English.

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4 Shaw M (2008) *Reducing the Excessive Use of Pre-trial Detention*. New York: Open Society Justice Initiative. [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles/publications/pre-trial20080513?res\\_id=104079](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles/publications/pre-trial20080513?res_id=104079), accessed 14 June 2011

5 *Ibid.*

6 African Charter on Human and Peoples' Rights, articles 45(b) and 60

The countries reviewed, which are representative of the four African regions, and the diversity of judicial systems across the continent, are:

Algeria	Angola
Benin	Burundi
Cameroon	Cape Verde
Central African Republic	Chad
Côte d'Ivoire	Democratic Republic of Congo (DRC)
Djibouti	Egypt
Equatorial Guinea	Ethiopia
Ghana	Kenya
Madagascar	Malawi
Mauritania	Mauritius
Morocco	Nigeria
Senegal	South Africa
Sudan	Togo
Uganda	Zambia

## **PART B: THE USE OF ARREST**

### ***Introduction***

International human rights law provides a comprehensive framework for a rights-based approach to the arrest of individuals in conflict with the law. State signatories to key international human rights treaties, such as the ICCPR and UNCAT, have an obligation to implement the framework into domestic law and practice. This international framework recognises the link between unlawful and arbitrary arrest and further human rights abuses, such as arbitrary detention, torture, extrajudicial executions, discrimination and other ill-treatment,<sup>7</sup> and is supplemented by guidelines and determinations of the UN Human Rights Council to assist state compliance.<sup>8</sup>

### ***Procedural Rights for Arrest***

Arbitrary arrest is prohibited by article 9(1) of the ICCPR,<sup>9</sup> and article 6 of the AChHPR.<sup>10</sup> Police powers to arrest are limited to grounds that are established by law and in conditions that are appropriate, just, predictable and accord with due process.<sup>11</sup> Article 9 of the ICCPR, which protects the rights to liberty and security of the person, has been broadly interpreted by the UN Human Rights Council as giving the police recourse to arrest and detain only insofar as it is necessary to meet a pressing societal need, and is done in a manner appropriate to that need.<sup>12</sup>

The international legal framework provides a set of procedural safeguards to protect the rights of persons subject to arrest, and requires the police to:<sup>13</sup>

- Clearly identify themselves and the unit to which they belong;
- Use vehicles that are clearly identifiable and carry number plates;
- Record information about the arrest, including the reason for the arrest, the time and place of arrest and the identity of the officers involved;
- Inform arrested persons, at the time of arrest, of the reasons for their arrest and their rights;<sup>14</sup>
- Limit the use of force to circumstances in which it is strictly necessary, proportionate and in accordance with the UN Code of Conduct on the Use of Force and Firearms;
- At the time of arrest, detention, imprisonment or transfer, notify relatives or a third party of the arrested persons' choice; and
- For non-citizens, notify consular authorities without delay.<sup>15</sup>

### ***Challenges to implementation of the international legal framework***

An analysis of reports from UN treaty bodies and special mechanisms revealed a range of factors that contribute to the use of arbitrary arrest across the continent. These are discussed below.

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7 *AW Mukong v Cameroon*, Communication No. 458/1991, 21 July 1994, GAOR A/49/40 (vol.III), [9.8]

8 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 27 August to 7 September 1990

9 'Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'.

10 'Every individual shall have the right to liberty and to security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'.

11 *AW Mukong v Cameroon*, Communication No. 458/1991, 21 July 1994, GAOR A/49/40 (vol.III), [9.8]

12 United Nations United Nations Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005, [60] – [64]

13 United Nations United Nations Commission on Human Rights, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [30]

14 International Covenant on Civil and Political Rights, Article 9(2); Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, principles 13–14

15 International Convention on the Protection of Migrant Workers and their Families, Article 16(7); Vienna Convention on Consular Relations, Article 36(1)(b) and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16(2)

### *Expansive police powers*

In a number of countries, including Equatorial Guinea and Nigeria, police legislation and criminal codes provide the police with expansive powers to arrest and do not guarantee the procedural safeguards set out in international law.<sup>16</sup>

The implementation of law that fails to meet international standards for non-discrimination can lead to the disproportionate use of arrest, including arbitrary arrest, against particular groups. In Senegal, for example, police have arrested persons committing ‘unnatural sex acts’ as part of the broader campaign of discrimination against lesbian, gay, bisexual, transsexual and intersex communities.<sup>17</sup>

In Mauritania, the broad interpretation of constitutional provisions regarding ‘public offences against Islamic morals and decency’ provides the police with wide discretion to arrest individuals on grounds that contravene international law, particularly protections against discrimination on the basis of sex and sexual identity.<sup>18</sup>

Legislative restrictions on the activities of the press, political opposition and human rights defenders have also contributed to the arrest and subsequent ill-treatment of members of these groups in a number of countries, including Mauritania, Cameroon and Madagascar.<sup>19</sup>

There are also links between broad powers of arrest and excessive use of force. In Cameroon, for example, there are reports that police are largely unaccountable for excessive use of force during arrest, even in circumstances where the arrested person was not a threat to the arresting officers or others.<sup>20</sup>

### *Inadequate police resources and training*

Inadequate resources for police organisations contribute to arbitrary arrest and unlawful police conduct during arrests. For example, police may not have access to resources to aid investigations, such as adequate staffing levels, vehicles or forensic facilities. This can lead to the problem of confession-based convictions, which is a recognised factor in relation to arbitrary arrest. So too, the lack of investment in police resources, such as defensive and non-lethal incapacitating weapons, can lead to a heavy-handed approach to maintaining law and order, including the ill-treatment of detainees during and immediately following arrest.<sup>21</sup>

The lack of investment in police training can also create problems in relation to arrest and detention. The inadequacy of police training across the continent is routinely criticised as producing police officers who lack understanding of their rights and responsibilities, including in relation to arrest and detention, which leads to endemic corruption and human rights abuses, such as arbitrary arrest and detention.<sup>22</sup>

Under-resourcing and poor training for criminal investigations, coupled with inadequate judicial oversight of police investigations and evidence collection, has contributed to the use of confessions as the basis for convictions, rather than investigation and evidence gathering, in a number of

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16 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add.18, 18 February 2008, [31]; Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [39]

17 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Senegal, A/HRC/13/30/Add.3, 23 March 2010, [72]

18 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Mauritania, Addendum, A/HRC/10/21/Add.2, 21 November 2008, [77]

19 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Senegal, A/HRC/13/30/Add.3, 23 March 2010, [65]; United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Mauritania, Addendum, A/HRC/10/21/Add.2, 21 November 2008, [78]. United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture: Madagascar, CAT/C/MDG/CO/1, 21 December 2011, [8]

20 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, E/CN.4/2009/9/Add.2, 11 November 1999, [53]

21 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [13]

22 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [39]; United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add.18, 18 February 2008, [63]

countries including Equatorial Guinea, Kenya, Nigeria and Togo.<sup>23</sup> Without adequate resources or training for investigations, there is considerable pressure on police to extract confessions, which contributes to the use of arbitrary arrest, and to torture and ill-treatment during interrogation.<sup>24</sup>

International law prohibits the admission into evidence of statements made as a result of torture, except in proceedings against a person accused of committing torture as evidence that the statement was made.<sup>25</sup> The prohibition safeguards the freedom against torture, and recognises that confessions and statements obtained under torture are inherently unreliable.<sup>26</sup> A number of countries, including Nigeria, do not have robust criminal procedure legislation that prohibits the admissibility of confessions into evidence,<sup>27</sup> while in others, such as Togo and Djibouti, there are reports that confession-based convictions, including those extracted by torture, are common despite legislation that prohibits the admissibility of evidence or confessions obtained through torture.<sup>28</sup>

### *Racial and other forms of discrimination*

The UN Working Group on Arbitrary Detention has observed that discrimination against certain groups, who are either vulnerable on account of current or past discrimination (such as ethnic minorities), or are otherwise marginalised (including people with HIV/AIDS or mental illness), experience higher rates of arrest than the general population. This has led to a gross over-representation of these groups in the criminal justice system.<sup>29</sup>

Prevailing ethnic tensions in South Africa, for example, have resulted in some foreigners experiencing arbitrary arrest.<sup>30</sup> South Africa's immigration laws and policies, which curtail the right of persons in detention to seek asylum, coupled with the failure by internal and external accountability agencies to bring the police to account for harassment and arbitrary arrest of non-citizens, has contributed to a concerning rate of arbitrary arrest and detention of foreigners.<sup>31</sup>

In some countries, such as Equatorial Guinea, where there are no laws operating to govern illegal migration, police routinely carry out checks and raids to identify and arrest undocumented foreigners. Undocumented foreigners are reportedly vulnerable to police corruption, and there are reports of individuals being held in police custody indefinitely, pending expulsion, without an opportunity to challenge the lawfulness of their arrest or detention.<sup>32</sup> Even where laws provide procedural safeguards for undocumented foreigners, in some parts of West Africa, such as Nigeria

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23 United Nations General Assembly, Human Rights Council, 13th session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum, Mission to the Republic of Equatorial Guinea, A/HRC/13/39/Add.4, 7 January 2010, [55]; United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [6]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, pg 2 and [84]; Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [59]

24 United Nations General Assembly, Human Rights Council, 13th session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum, Mission to the Republic of Equatorial Guinea, A/HRC/13/39/Add.4, 7 January 2010, [55]; United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [6]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [2] and [84]; Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [59]

25 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15

26 Human Rights Council, 16th Session, Report submitted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, A/HRC/16/52, 3 February 2011, [58]

27 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [28]

28 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [28]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [29]. United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJ/CO/1, [20]

29 United Nations Commission on Human Rights, 62nd Session, Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005, [65]

30 United Nations Economic and Social Council, Report of the Working Group on Arbitrary Detention – Visit to South Africa, Addendum (4–19 September 2005), E/CN.3/2006/7/Add.3, 29 December 2005, [80]

31 United Nations Economic and Social Council, Report of the Working Group on Arbitrary Detention – Visit to South Africa, Addendum (4–19 September 2005), E/CN.3/2006/7/Add.3, 29 December 2005, [80]

32 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add., 18 February 2008, [46] and [82]

and Mauritania, political agreements with governments of Western Europe have resulted in the arbitrary arrest of non-citizens, who are then detained or repatriated without an opportunity to challenge the legality of their arrest, detention or expulsion.<sup>33</sup>

In Djibouti, there are reports of Ethiopian and Yemeni nationals being held in police custody and tortured prior to their extradition. These detainees were held incommunicado and denied access to consular assistance, or access to the courts to challenge the legality of their arrest, detention and extradition.<sup>34</sup>

There are also reports of systemic discrimination by police against the socially and economically marginalised and disadvantaged, which has been often cited as a factor contributing to arbitrary arrest.<sup>35</sup> In Mauritania, for example, particular identifiable groups are over-represented in the criminal justice system while others, protected by their families or ethnic groups, are largely absent from the prison system.<sup>36</sup> In Kenya, police routinely round up the poor, women, homeless children, migrants and refugees in mass arrests (often night raids in informal settlements) without search or arrest warrants. These groups are then reportedly subjected to beatings, sexual abuse and rape, and extortion by the police.<sup>37</sup>

### *'Tough on crime' approach to policing*

A number of countries studied have adopted a 'tough on crime' approach to policing in response to public concerns and perceptions about high rates of violent crime and insecurity. This contributes to high rates of arrest, including arbitrary arrest. In Kenya, Nigeria and South Africa, the police, under pressure from the government, media and public to arrest and 'punish' perpetrators of crime, enjoy expanded powers to search and arrest without effective oversight. It is reported that sweeping arrests and the ill-treatment of arrested persons are now culturally accepted norms in these countries.<sup>38</sup> In South Africa, the adoption of tough policing approaches has resulted in increased rates of arrest and pre-trial detention.<sup>39</sup> The impact of tough policing can also have a disproportionate impact on particular groups. In Cape Verde, for example, criminal activity by 'youth gangs' has resulted in police brutality against juveniles, a practice that has reportedly received popular support.<sup>40</sup>

High rates of arrest are also fuelled by mandatory and harsh sentences for particular categories of crime. In South Africa, for example, arrest and detention is applied in a systematic manner in relation to particular categories of crime – even for minors – with or without the completion of a thorough criminal investigation.<sup>41</sup>

In the context of violent criminality, the police will invariably be required to use force, including lethal force, in order to protect life. However, there are reports in a number of countries, including Kenya, Nigeria and South Africa, that the excessive use of force during arrest, or the use of lethal force in circumstances when an arrest could have been made, persist due in part to pressure on police to make arrests, coupled with inadequate oversight, and ambiguous use of force regulations.<sup>42</sup> In

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33 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Mauritania, Addendum, A/HRC/10/21/Add.2, 21 November 2008, [65] and [68]; United Nations Commission on Human Rights, Report of the Special Rapporteur, Mr. Philip Alston, Addendum, Mission to Nigeria, E/CN.4/2006/53/Add.4, 7 January 2006, p.2; United Nations Commission on Human Rights, 61st Session, Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004, [59]

34 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJI/CO/1

35 United Nations Committee against Torture, 41st Session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Kenya, CAT/C/KEN/CO/1, 19 January 2009, [11]

36 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Mauritania, Addendum, A/HRC/10/21/Add.2, 21 November 2008, [79] and [81]

37 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [17]

38 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [13]. Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [39]

39 United Nations Economic and Social Council, Report of the Working Group on Arbitrary Detention – Visit to South Africa, Addendum (4–19 September 2005), E/CN.3/2006/7/Add.3, 29 December 2005, [62]

40 Human Rights Committee, Concluding observations of the Human Rights Committee: Cape Verde, CCPR/C/CPV/CO/1, 23 April 2012, [11]

41 *Ibid.*, [64]

42 Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Mission to Kenya, A/HRC/11/2/Add.6, 26 May 2009, [9]

Nigeria, high rates of violent crime have resulted in the label of 'armed robber' often being used to justify the arrest and/or extrajudicial execution of individuals who have come to the attention of the police for a range of reasons, including the refusal to pay a bribe.<sup>43</sup>

The excessive use of arrest, and the use of force and other ill-treatment during arrest, has also been described as an 'overreaction' by under-resourced police stressed by levels of violence and criminality.<sup>44</sup> In Kenya, for example, the issue is compounded by the lack of access to appropriate non-lethal incapacitating weapons and self-defence equipment.<sup>45</sup>

### *Legacy of conflict*

The legacy of conflict in a number of countries, including Angola, Nigeria, Cameroon, Burundi, Kenya and Togo, has resulted in policing cultures that undermine constitutional democracy and efforts to reform the administration of justice.<sup>46</sup> In Nigeria, Togo and Cameroon, the legacy of conflict has resulted in militarised police forces that emphasise military skill rather than the capacity for criminal investigations and the maintenance of law and order, leading to heavy-handed policing.<sup>47</sup> In these circumstances, the use of arrest can become a tool of sanction and oppression, rather than in aid of investigations or the maintenance of law and order.<sup>48</sup> In addition, the discriminatory application of arrest powers can lead to the use of arrest in the context of civil law, or arrest on the orders of administrative authorities, as observed in Togo and Cameroon.<sup>49</sup>

### *The absence/failure of oversight and accountability mechanisms*

Across Africa, serious concerns have been raised about the extent to which oversight and accountability mechanisms are effective at holding police to account for misconduct and human rights abuses.<sup>50</sup> Weaknesses in accountability mechanisms stem from a number of factors, including the lack of effective internal and external accountability mechanisms; mistrust or unavailability of complaints mechanisms; and a general culture of impunity that pervades the criminal justice system.<sup>51</sup> Without effective oversight, the police are not incentivised to act lawfully, and victims of arbitrary arrest or police abuse are not provided with recourse.

### *Corruption*

Police corruption is a key driver of arbitrary arrest and detention, and a challenge to the effective administration of justice.<sup>52</sup> Across the continent, there are numerous and credible reports that police corruption during and immediately after arrest is endemic.<sup>53</sup> Corrupt practices include release from custody in exchange for gifts or payment; torture with the aim of extracting bribes; payment in exchange for visitation by relatives; and demands for bribes to ensure the prompt handling of

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43 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [39]

44 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [13]

45 *Ibid.*

46 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, [88]

47 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, E/CN.4/2009/9/Add.2, 11 November 1999, [46]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [77]

48 *Ibid.*

49 *Ibid.*

50 African Policing Civilian Oversight Forum (2008) *An Audit of Police Oversight in Africa*. Cape Town: African Policing Civilian Oversight Forum, <http://www.apcof.org.za>, accessed 16 January 2013

51 *Ibid.*

52 Human Rights Council, 10th Session, Report of the Working Group on Arbitrary Detention, A/HRC/10/21, 16 February 2009, [60]

53 Human Rights Committee, List of issues prepared in the absence of the initial report of Cote d'Ivoire due in 1993, CCPR/C/CIV/Q/1, 7 December 2010, [21]



investigations. These practices are demonstrated to impact disproportionately on the economically disadvantaged.<sup>54</sup>

There are also reports that police in some countries become involved in commercial disputes by using their powers to arrest in favour of one of the parties to the dispute. In Senegal, for example, the police arbitrarily arrested and detained taxi drivers for up to eight days without charge during a dispute between taxi drivers' associations.<sup>55</sup>

### *Political interference*

Political interference in policing, whether enshrined by law through weak separation of powers, or entrenched in practice, contributes to arbitrary arrest. As observed in Equatorial Guinea and Senegal, political interference can take the form of arrests on the order of administrative authorities, such as governors, government representatives, or the military, rather than solely on the basis of independent investigations into alleged criminal offences.<sup>56</sup> In Equatorial Guinea, Cameroon, Ethiopia, Burundi and Morocco, police have reportedly carried out arrests against persons exercising their political rights, including the rights of peaceful assembly, expression and association.<sup>57</sup>

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- 54 United Nations General Assembly, Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum, Mission to the Republic of Equatorial Guinea, A/HRC/13/39/Add.4, 7 January 2010, [63]; United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p. 3; United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [11]; Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [39]; United Nations Commission on Human Rights, Report of the Special Rapporteur, Mr Philip Alston, Addendum, Mission to Nigeria, E/CN.4/2006/53/Add.4, 7 January 2006, p. 2; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [79]; United Nations Committee against Torture, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Chad, CAT/C/TCD/CO/1, 4 June 2009, [17]
- 55 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Senegal, A/HRC/13/30/Add.3, 23 March 2010, [78].
- 56 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add. 18 February 2008, [28]. United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Senegal, A/HRC/13/30/Add.3, 23 March 2010, [78].
- 57 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add., 18 February 2008, p.2; United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [11]; United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, [14]; United Nations Committee against Torture, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Chad, CAT/C/TCD/CO/1, 4 June 2009, [17]; United Nations Committee against Torture, 35th session, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Burundi, CAT/C/BDI/CO/1, 15 February 2007, [10]; United Nations Committee against Torture, 31st session, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Morocco, CAT/C/CR/31/2, 5 February 2004, [5]

## PART C: THE USE OF PRE-TRIAL DETENTION IN POLICE CUSTODY

### **Introduction**

As with arrest, international human rights law provides a comprehensive framework for the lawful and rights-based approach to the use of pre-trial detention in police custody for persons in conflict with the law. States have an obligation to implement this legal framework into their domestic law and practice, which is supplemented by guidelines and determinations of the UN Human Rights Council to assist state compliance.<sup>58</sup>

### **International framework for procedural rights in pre-trial detention**

Article 9(1) of the ICCPR and article 6 of the AChHPR prohibit arbitrary arrest. Deprivation of liberty is only permitted on grounds that are clearly established in law and which accord with international standards for detention, and must not be motivated by discrimination of any kind. Detention should be an exception rather than a rule, and for as short a time period as possible.<sup>59</sup>

International law establishes a number of procedural safeguards to protect individuals from arbitrary detention, which include:<sup>60</sup>

- The right to be informed of a criminal charge;
- The right to prompt access to judicial authorities;
- The right to challenge the lawfulness of arrest and detention; and
- The right to compensation for unlawful arrest or detention.

Each is discussed below.

#### *The right to be informed of a criminal charge*

At the time of their arrest, individuals have the right to be informed of the reason for their arrest and any charges brought against them.<sup>61</sup> Police must make detainees reasonable aware of the precise reasons for arrest, and enable detainees to take immediate steps to secure their release, including accessing a lawyer or judicial authority.<sup>62</sup>

#### *The right of prompt access to judicial authorities*

Detainees have the right to be 'promptly' brought before a court or other judicial officer to have their detention reviewed, which is consistent with the principle that pre-trial detention be the exception rather than the rule.<sup>63</sup> The UN Human Rights Council has interpreted 'promptly' as not exceeding a few days<sup>64</sup> and, in its review of Angola, urged the Angolan government to ensure that police detention not exceed 48 hours.<sup>65</sup> Longer periods of detention in police custody may be permitted if a detainee is charged with a serious offence, providing that other procedural safeguards for detention are observed.<sup>66</sup>

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58 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 27 August to 7 September 1990; United Nations Standard Minimum Rules of the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988

59 Jordan J Praust (2003), Judicial Power to Determine the Status and Rights of Persons Detained Without Trial, *Harvard International Law Journal* 44: 503, 505-6.

60 International Covenant on Civil and Political Rights, articles 9(2)-(5). See also, Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (2nd edn, 2004) p.304

61 International Covenant on Civil and Political Rights, article 9(2). See also, *Kelly v Jamaica*, Communication No 253/87 [5.8]

62 *Drescher v Caldas v Uruguay*, Communication No 43/79 (11 January 1979) [13.2]

63 International Covenant on Civil and Political Rights, article 9(3)

64 United Nations Human Rights Committee, General Comment No 8: Right to Liberty and Security of the Persons (art 9) (30 June 1980) [2]. *Kone v Senegal*, Communication No 386/89, [8.6]

65 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p.3

66 Joseph, Schultz and Capstan (2004) *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary*, 330

This key procedural safeguard operates so that a detainee is not held in a facility under the control of their interrogators or investigators for longer than required by law to obtain a judicial warrant which, if granted, should require the transfer of the detainee to a dedicated pre-trial facility with no further unsupervised contact with interrogators or investigators.<sup>67</sup> The extension of custody by judicial warrant should be a measure of last resort, underpinned by proportionate and legitimate aims.<sup>68</sup>

Prompt access to a judge ensures that the lawfulness of a detained person's arrest and detention is reviewed, and can provide oversight in relation to the rights of detainees, including adherence by the police to procedural safeguards, freedom from torture and other ill-treatment, and conditions of detention.<sup>69</sup> Prolonged detention in police cells raises concerns regarding conditions of detention, as police cells are not designed for extended periods of custody. They often lack the space and facilities required to meet minimum conditions for detention, which are set out in the section below. Excessive periods in police custody contribute to overcrowding that, in turn, can negatively impact detainees' access to hygiene, health, bedding and privacy.<sup>70</sup>

### *The right to habeas corpus*

Detainees have the right to *habeas corpus* – that is, the right to appeal their detention to a judicial authority on the grounds that their detention is arbitrary or unjust.<sup>71</sup> The right to challenge the legality of detention is a fundamental safeguard against arbitrary detention, and states are not permitted to limit or remove this right under any circumstances, including states of emergency.<sup>72</sup> A writ of *habeas corpus* is also an avenue for detainees to defend and protect their substantive, procedural and institutional guarantees under law. Without this right, detainees are at risk of abuse of authority, ill-treatment and other rights violations.<sup>73</sup>

Detainees who seek to file a writ of *habeas corpus* may require access to legal assistance, a right that is guaranteed by international law.<sup>74</sup>

### *Compensation*

Compensation and other reparations that are adequate and just are part of a broader accountability framework, and ensure redress for victims of arbitrary arrest and detention.<sup>75</sup> As part of a broader accountability framework, it is an important element to deter the police from the arbitrary use of power, including the power to detain, which may limit the rights of liberty and security.<sup>76</sup>

## **Challenges to implementation of the international legal framework for the use of detention**

There are a number of challenges to the implementation of procedural safeguards against arbitrary detention across Africa. The challenges are discussed below in relation to each of the four procedural safeguards identified in the previous section of this paper.

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67 United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [34]

68 United Nations Commission on Human Rights, 62nd Session, Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005, [60] – [64].

69 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 11, 32 and 37

70 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [81]

71 United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [39]. See also, United Nations Commission on Human Rights, 61st Session, Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004, [59]

72 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988, principles 11, 32 and 37

73 Human Rights Council, 10th session, Report of the Working Group on Arbitrary Detention, A/HRC/10/21, 16 February 2009, [49]

74 International Covenant on Civil and Political Rights, article 14

75 International Covenant on Civil and Political Rights, article 9(5). Human Rights Council, 16th Session, Report submitted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, A/HRC/16/52, 3 February 2011, [48]. Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [182]

76 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [182]

### *Failure to lay charges or inform detained persons of charges against them*

In most countries studied, including Togo and Madagascar, domestic law requires the police to inform persons in custody of any charges against them.<sup>77</sup> However, there are numerous and credible reports that police systematically fail to bring charges against persons in their custody and, when charges are filed, to inform the person of the charges against them.<sup>78</sup>

### *Failure to observe the 48-hour rule*

Police organisations across the continent fail to observe the 48-hour rule, either in disregard of domestic law that sets appropriate time limits, or because the criminal procedure law fails to implement this international standard.

In a number of states, including Djibouti, Ghana, Mauritania, Cameroon, Burkina Faso, Equatorial Guinea, Togo and Nigeria, domestic law provides for initial police custody of between 24 to 72 hours, depending on the offence, renewable for a limited number of times by a judicial officer. However, there are numerous and credible reports that police fail to adhere to these time limits.<sup>79</sup>

In Mauritania, the law requires the extension of police custody to be made in writing by judicial officers. However, most police stations visited by the UN Working Group on Arbitrary Detention were unable to produce extension authorisations for detainees in custody beyond the permitted 48 hours, including some who were held for up to 23 days. Prosecutors were often involved in covering up these breaches by issuing authorisations for extended custody after the fact.<sup>80</sup>

In Kenya, police reportedly flout the requirement that an arrested person be brought before a judicial authority within 24 hours, or as soon as practical thereafter, by transferring detainees from one police detention facility to another, which has the effect of resetting the clock.<sup>81</sup> Kenyan police have the authority to issue bonds if they are unable to bring a person before a court within 24 hours, but this is reported to be a rare occurrence.<sup>82</sup>

In Equatorial Guinea, detainees are reportedly held in police custody for up to a month before they are presented to a judicial authority, and detainees have complained about being interviewed by a court secretary rather than a judge.<sup>83</sup>

In Togo, the police maintain physical control and access over suspects beyond the prescribed time limit for the purpose of 'solving' criminal cases by, amongst other things, extracting confessions from suspects, or acting as a mediator between victims and offenders.<sup>84</sup>

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77 Human Rights Council, Report of the Working Group on Arbitrary Detention (Addendum): Mission to Mauritania, A/HRC/10/21/Add.2, 21 November 2008, [27]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [21]

78 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [81]. United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture: Madagascar, CAT/C/MDG/CO/1, 21 December 2011

79 Human Rights Council, Report of the Working Group on Arbitrary Detention (Addendum): Mission to Mauritania, A/HRC/10/21/Add.2, 21 November 2008, [28]; United Nations Commission on Human Rights, 56th Session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, E/CN.4/1999/9/Add.2, 11 November 1999, [48] – [49]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [65]; Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [25]; UN Human Rights Committee, Rapport Initial du Burkina Faso relatif à la Convention Contre la Torture et autres Peines ou Traitements Cruels, Inhumains ou Degradants, en application de l'article 19, Mars 2012, CAT/C/BFA/1, United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJI/CO/1, United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture – Ghana, CAT/C/GHA/CO/1, 15 June 2011, [9]

80 Human Rights Council, Report of the Working Group on Arbitrary Detention (Addendum): Mission to Mauritania, A/HRC/10/21/Add.2, 21 November 2008, [89]; United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p.3

81 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [59] – [60]

82 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [61]

83 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add., 18 February 2008, [62]

84 United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [70]

In Nigeria, the dysfunction of the criminal justice system has resulted in an informal system of 'holding charges', whereby the police present detainees to a magistrate who remands them to indefinite police custody, without formal charge, while the police conduct their investigation. It is reported that this practice has led to the prolonged and indefinite detention of innocent people.<sup>85</sup>

In states such as Algeria, Chad and Morocco, domestic law permits periods of police custody, which are incompatible with international law. In Algeria, the law provides for a maximum period of 12 days, with provision for repeated and indefinite extensions.<sup>86</sup> Criminal procedure law in Chad and Morocco provides the vague requirement of 'reasonable time'.<sup>87</sup>

### *Restrictions on habeas corpus*

A number of countries reviewed, including Equatorial Guinea, Togo, Cameroon, Kenya and Angola, recognise the right to a writ of *habeas corpus*. In Equatorial Guinea, for example, the law prescribes the circumstances in which detention is unlawful, including when procedural safeguards have been breached, detention in an unauthorised facility, or when the maximum period of detention has been exceeded without judicial authorisation.<sup>88</sup>

In reality, systemic barriers to accessing courts and lawyers in most countries reviewed makes *habeas corpus* an ineffective and impractical option for detainees who seek to challenge the lawfulness of detention. In Togo, the lack of access to courts and lawyers, corrupt judicial authorities, and the lack of awareness about *habeas corpus* by detainees means that few take advantage of this facility.<sup>89</sup> In Cameroon, procedural barriers exist, including the requirement that a writ be accompanied by an order of release from prosecutors. This process delays applications and is reportedly subject to interference by the police who do not operate independently from prosecution and judicial authorities.<sup>90</sup> In Kenya, the cost of filing a writ presents a significant barrier to most detainees, while in Angola, the main barrier for detainees is complicated procedural requirements.<sup>91</sup>

These barriers are compounded by the lack of access to lawyers. As detailed in this report, there are significant barriers to accessing legal assistance services across the continent, including the unavailability and expense of defence counsel, and restrictions on the rights of detainees to meet with counsel while in police detention.

### *Failure to provide compensation*

Limitations on the right of detainees to compensation for arbitrary detention are numerous and widespread across Africa.

In a number of countries, such as Djibouti, Senegal, Equatorial Guinea, Burundi, Nigeria and Morocco, the law provides for the right to compensation and other redress for arbitrary and prolonged detention, or for police misconduct, including torture, either as part of broader civil

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85 United Nations Commission on Human Rights, Report of the Special Rapporteur, Mr. Philip Alston, Addendum, Mission to Nigeria, E/CN.4/2006/53/Add.4, 7 January 2006, [93]

86 United Nations Committee against Torture, 40th session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Algeria, CAT/C/DZA/CO/3, 26 May 2008, [5]

87 United Nations Committee against Torture, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Chad, CAT/C/TCD/CO/1, 4 June 2009, [25]. See also, United Nations Committee against Torture, 31st session, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Morocco, CAT/C/CR/31/2, 5 February 2004, [5]

88 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add.18, 18 February 2008, [32] – [33]

89 United Nations Commission on Human Rights, 61st Session, Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004, [63]. See also, Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [100]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [21]

90 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [13]

91 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p.2.

compensation processes, or provisions specific to police misconduct.<sup>92</sup> However, few cases of reparation or compensation are ever brought to court. Factors include the barriers to accessing the courts and lawyers already discussed in relation to *habeas corpus*, complex procedural requirements and, in a few concerning examples, specific limitations on the right to compensation. For example, in Nigeria, compensation for unlawful arrest and detention is not available to individuals who are arrested and charged in relation to a capital offence.<sup>93</sup> In Algeria, the law imposes terms of imprisonment and fines on anyone who ‘insults the honour’ or undermines an institution of the state or its agents – a provision which may discourage persons who have been subject to arbitrary arrest from making a complaint or filing an application for compensation.<sup>94</sup>

Where courts make awards for compensation or reparation, there are often problems and delays in providing the remedy to victims. In Zambia, awards to victims have been criticised as falling short of the requirements of international law that compensation be adequate and just.<sup>95</sup> In Kenya, delays in making awards are caused by a number of factors, including lack of government resources, corruption and the lack of political will to make resources available.<sup>96</sup>

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- 92 United Nations General Assembly, Human Rights Council, 13th session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum, Mission to the Republic of Equatorial Guinea, A/HRC/13/39/Add.4, 7 January 2010, [51]. Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [34]; United Nations Committee against Torture, 35th session, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Burundi, CAT/C/BDI/CO/1, 15 February 2007, [23]; United Nations Committee against Torture, 31st session, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Morocco, CAT/C/CR/31/2, 5 February 2004, [4]; United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Senegal, A/HRC/13/30/Add.3, 23 March 2010, [77]; United Nations General Assembly, Human Rights Council, 13th session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum, Mission to the Republic of Equatorial Guinea, A/HRC/13/39/Add.4, 7 January 2010, [51]. United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJI/CO/1
- 93 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [34]
- 94 United Nations Committee against Torture, 40th session, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding observations of the United Nations Committee against Torture, Algeria, CAT/C/DZA/CO/3, 26 May 2008, [17]
- 95 Human Rights Council, 16th Session, Report submitted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, A/HRC/16/52, 3 February 2011, [48]; United Nations Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Zambia, CAT/C/ZMB/CO/2, 26 May 2008, [9]
- 96 United Nations Committee against Torture, 41st Session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Kenya, CAT/C/KEN/CO/1, 19 January 2009, [25]

## PART D: CONDITIONS OF DETENTION IN POLICE CUSTODY

### **Introduction**

International human rights law provides a comprehensive framework to safeguard minimum standards for the detention of persons in conflict with the law that accord with the rights to life, humane treatment and the inherent dignity of the person. As with the procedural safeguards for arrest and detention, the framework for conditions of detention is supplemented by guidelines and determinations of the UN Human Rights Council to assist state compliance.<sup>97</sup>

This section sets out the framework for conditions of detention as it pertains to police custody.

### **International legal framework for conditions of detention**

International law protects the rights of persons deprived of their liberty to life, to be treated with humanity and respect for the inherent dignity of the person.<sup>98</sup> The framework includes implementation of the following safeguards, which are discussed in turn below:

- The maintenance of a custody register;
- Interrogation rules and techniques that discourage the use of torture and other ill-treatment;
- Access to lawyers, medical care and family;
- Limitations on the use of force and discipline;
- The absolute prohibition against torture and other ill-treatment;
- Minimum requirements for the physical conditions of detention;
- Special measures to safeguard vulnerable groups; and
- Regular and independent inspections and oversight.

### *Maintenance of a register*

The maintenance of a register at police stations is one of the most basic safeguards against arbitrary detention and ill-treatment.<sup>99</sup> Registers are also important for preventing enforced disappearances and other serious human rights violations, such as torture.<sup>100</sup> At a minimum, the register should be regularly updated and include the date a detainee enters and leaves the police station, the name of the arresting officer, the names of the judicial authorities before which the detainee appears and the corresponding dates.

### *Interrogations*

Interrogation rules, instructions, methods and practices must be kept under systematic review with a view to preventing torture and ill-treatment. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also offer procedural safeguards for interrogations, such as intervals between each interrogation and a register to record the identity of the officials conducting the interrogation. Interrogations should be recorded, preferably video-recorded, and evidence from non-recorded interrogations should be excluded from court.<sup>101</sup>

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97 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 27 August to 7 September 1990; United Nations Standard Minimum Rules of the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988

98 International Covenant on Civil and Political Rights, articles 10 and 14

99 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010

100 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add., 18 February 2008, [97]. See also, United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [11]

101 United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [34]

### *Access to lawyers*

In the determination of criminal charges, all persons have the right to legal counsel, including free legal assistance if they cannot afford a lawyer.<sup>102</sup> Access to lawyers for detainees should be prompt and regular, with initial contact within 24 hours of detention.<sup>103</sup> The Committee on the Prevention of Torture has further suggested that the right to a lawyer is applicable from the moment a person is obliged to remain with police.<sup>104</sup> In exceptional circumstances, under which prompt contact with a detainee's lawyer might raise genuine security concerns, or where restrictions on contact are judicially endorsed, it should be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association.<sup>105</sup>

### *Access to medical care*

International law guarantees the rights of all people, including detainees, to the highest attainable standard of health within a state's available resources.<sup>106</sup> For persons deprived of their liberty, this includes the right to prompt and independent medical examinations upon the commencement of detention, and as required and/or requested by the detainee during detention.<sup>107</sup>

### *Access to family members*

Persons deprived of their liberty have the right to contact and receive regular visits from their relatives and, when security arrangements permit, third parties such as non-governmental organisations and other persons of their choice.<sup>108</sup> Access can be restricted only in accordance with the law, and on reasonable conditions.<sup>109</sup>

### *Prompt access to judicial authorities*

As discussed above in relation to procedural guarantees during detention, detainees have the right to be 'promptly' brought before a court or other judicial officer to have their detention reviewed, which is consistent with the principle that pre-trial detention be the exception rather than the rule.<sup>110</sup>

### *The use of force and discipline*

The police have a lawful authority to apply force in the course of making an arrest, or during detention, when circumstances require it. The adoption, implementation and enforcement of the legal framework on the use of force that is consistent with the rights to life, liberty, security, freedom from ill-treatment and the presumption of innocence is crucial in reassuring the community that the police are adhering to the rule of law.

Under international law, the right to life is one of the most fundamental of all human rights, and states are not permitted to derogate from this right in any circumstances.<sup>111</sup> The right to life includes an obligation on the state to take legislative measures to strictly control and limit the circumstances in which a police officer may use force and deprive an individual of their right life. The UN Basic Principles on the Use of Force and Firearms provide states with guidance on the safeguards

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102 International Covenant on Civil and Political Rights, Article 14(3)(d)

103 United Nations Human Rights Committee, CCPR General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art.7), 10 March 1992

104 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010

105 United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [32]

106 International Covenant on Economic, Social and Cultural Rights, article 12

107 United Nations Standard Minimum Rules of the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, rule 24; United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988, principle 24

108 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988, principle 19

109 United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [43]

110 International Covenant on Civil and Political Rights, article 9(3)

111 International Covenant on Civil and Political Rights, article 1



necessary to meet their international obligations, including that the use of force (including firearms), should only be used as a last resort when all other non-violent means of carrying out duties have failed. It limits the intentional use of lethal force to circumstances in which it is 'strictly unavoidable in order to protect life'.

Disciplinary measures must also meet the standards for the use of proportionate and necessary force. Restraint techniques that are imposed in a degrading or painful manner, or imposed for longer than strictly necessary, constitute ill-treatment.<sup>112</sup>

#### *Freedom from torture and other ill-treatment*

International law imposes an absolute prohibition against torture. Signatories to the UNCAT are required to ensure that acts of torture are criminal offences, and to provide a definition of torture that accords with the Convention.<sup>113</sup> The Committee against Torture has emphasised that states must criminalise all acts of torture, which includes acts of attempt, complicity and participation, and that penalties must commensurate to the gravity of the crime.<sup>114</sup>

Confessions extracted by torture are not permitted into evidence in any proceeding, except against a person accused of torture as evidence that the statement was made.<sup>115</sup> Interrogators should receive training to ensure that they have the necessary skills to conduct interrogations and interview witnesses and victims.<sup>116</sup>

Allegations of torture and ill-treatment must be thoroughly and impartially investigated, and all law enforcement officials must receive training on international human rights standards, including the absolute prohibition on torture.<sup>117</sup>

#### *Minimum requirements for physical conditions of detention*

All persons deprived of their liberty must be treated with humanity and respect for their inherent dignity, which includes minimum requirements for the physical condition of detention. This includes providing all detainees with adequate food, clothing and hygiene in accordance with the Standard Minimum Rules for the Treatment of Prisoners.

#### *Special measures to safeguard the rights of vulnerable groups*

International law provides special protections to juveniles and women who are deprived of their liberty, in addition to the general safeguards that apply to all persons who are deprived of their liberty.

The principle of detention as a measure of last resort is particularly relevant to minors.<sup>118</sup> Children deprived of their liberty must be kept separate from adults, and be provided with age appropriate treatment that maintains the best interest of the child at its core.<sup>119</sup>

Female detainees must be held separately from men, and police lock-up must provide facilities for pregnant and breastfeeding women.<sup>120</sup>

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<sup>112</sup> United Nations Standard Minimum Rules of the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, rule 34

<sup>113</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 1 and 4

<sup>114</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 4(2)

<sup>115</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15

<sup>116</sup> United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [35]

<sup>117</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<sup>118</sup> International Covenant on Civil and Political Rights, article 14(4), United Nations Convention on the Rights of the Child, article 49(3)(b)

<sup>119</sup> United Nations Convention on the Rights of the Child, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, article 49

<sup>120</sup> United Nations Standard Minimum Rules of the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; rule 8

### *Inspections and oversight*

Independent complaints and oversight mechanisms should be provided for in law and their operation must be effective, with a sufficient mandate and resourcing to address complaints.<sup>121</sup> Detained persons have the right to communicate freely and confidentially with persons who visit places of detention.<sup>122</sup> If a mechanism receives a complaint from or on behalf of a detainee, an inquiry should always take place and, unless the allegation is 'manifestly ill-founded', the officials involved should be suspended from their duties pending legal or disciplinary proceedings and their outcome.<sup>123</sup>

In relation to complaints of torture, the UN Special Rapporteur on Torture recommends that complaints be dealt with immediately by an independent authority with no connection to the police organisation or prosecutors.<sup>124</sup>

Regular inspections of detention facilities ensure that safeguards are implemented, can be a deterrent, and provide an opportunity for detainees to complain. The Optional Protocol to the CAT (OPCAT) was adopted by the UN General Assembly and aims to prevent ill-treatment and promote humane conditions of detention by requiring that all places of detention are subject to independent monitoring and inspection.<sup>125</sup> It encourages state parties to establish national preventative mechanisms (NPMs), an independent body with a mandate to conduct both announced and unannounced visits to places of detention, to make recommendations to prevent ill-treatment and improve conditions, and to report publicly on its findings and views.<sup>126</sup>

## **Challenges to the implementing a framework for conditions of detention**

### *Registers*

In most countries reviewed, including Equatorial Guinea and Cameroon, there is no systematic registration of information on detainees in police custody.<sup>127</sup> In some countries, such as Togo and Nigeria, there is a legal requirement for police to maintain a register, but there are reports that police either deliberately or negligently fail to maintain the register, or make erroneous entries.<sup>128</sup> In Togo, for example, the Special Rapporteur on Torture uncovered disparities between the two main registries held by police, and evidence that police made entries into the registry after the fact.<sup>129</sup>

### *Interrogations*

Generally, detainees are not treated in a manner consistent with their right to the presumption of innocence. In most examples reviewed, detainees in police custody are vulnerable to conditions that create an incentive for self-incrimination, in violation of the presumption of innocence.<sup>130</sup>

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121 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

122 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988, principle 29(2)

123 United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [40]

124 United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2004/56, 23 December 2003, [40]

125 General Assembly, 65th session, Note by the Secretary General, A/65/273, 10 August 2010, [77]

126 General Assembly, 65th session, Note by the Secretary General, A/65/273, 10 August 2010, [80]

127 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add.18, 18 February 2008, [97]. See also, United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [11]

128 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [19]; United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [21]

129 United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [70]

130 United Nations Commission on Human Rights, 61st Session, Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004, [68]–[70]

In Angola, police investigators are permitted to conduct the first interrogation of a suspect alone if the suspect was arrested during the commission of a crime. In all other circumstances, interrogations are only lawful if done in the presence of a prosecutor.<sup>131</sup>

As previously discussed, evidence obtained under torture is commonly used as the basis for convictions, with under-investment in police infrastructure and training resulting in considerable pressure on police to extract confessions *in lieu* of thorough criminal investigations. Even in countries where domestic legislation prohibits the admission into evidence of confessions extracted by torture, there are reports that courts rarely investigate complaints by detainees, or disallow such evidence at trial.<sup>132</sup>

In Kenya, there are reports that suspects are routinely convicted on the basis of confessions extracted through torture despite Kenyan law prohibiting the use of such confessions. Non-governmental organisations have complained that medical evidence is not requested at judicial proceedings, and that most suspects are not represented by a lawyer and therefore do not complain about their treatment.<sup>133</sup>

### *Access to lawyers*

Access to counsel is guaranteed by the constitution and law of a number of countries, including Malawi, Ghana, Kenya and Côte d'Ivoire. However, despite such safeguards, access to lawyers is limited by the lack of available and affordable defence lawyers, and limited numbers of legal aid lawyers.<sup>134</sup>

In some countries, the legal framework provides restrictions on the right of detainees to access a lawyer. In Senegal, defendants do not have the right to contact a lawyer during the first 24 hours in police custody.<sup>135</sup> In Mauritania, access to lawyers may be authorised by the prosecutor as from the first extension of police custody – however, detainees charged with state security or terrorism offences are not entitled to communicate with counsel during their time in police custody, which can last between five and 23 days.<sup>136</sup> In Equatorial Guinea, lawyers do not have access to police stations, nor can they otherwise contact detainees held by the police.<sup>137</sup> In Burkina Faso, the criminal procedure legislation is silent on the right of persons in custody to communicate with their lawyer during the preliminary investigation phase.<sup>138</sup>

### *Access to medical care*

Access to medical care for detainees in police custody is a challenge across the continent. Detainees often have no or limited access to medical facilities and treatment, and for those suffering from illness, this has resulted in further health complications or death. This has occurred despite legal frameworks in some countries, such as Cameroon, Kenya and Mauritius, which guarantee the right of detainees to medical care.<sup>139</sup> In Cameroon, access to medical care is restricted by the requirement that doctors obtain a court order to access persons in detention facilities. In Kenya, the lack of access to medical care also hinders detainees from making complaints of torture and ill-treatment, as independent verification of injuries is required to file an application with the court.<sup>140</sup>

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131 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, [42]

132 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [9]

133 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [62] – [63]

134 United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture – Ghana, CAT/C/GHA/CO/1, 15 June 2011, [9]. Human Rights Committee, List of issues prepared in the absence of the initial report of Cote d'Ivoire due in 1993, CCPR/C/CIV/Q/1, 7 December 2010, [23].

Human Rights Committee, Concluding Observations of the Human Rights Committee: Malawi, CCPR/C/MWI/CO/1, 18 June 2012

135 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Senegal, A/HRC/13/30/Add.3, 23 March 2010, [57]

136 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Mauritania, Addendum, A/HRC/10/21/Add.2, 21 November 2008, [30]

137 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add. 18 February 2008, [74]

138 United Nations Human Rights Committee, Rapport Initial du Burkina Faso relatif a la Convention Contre la Torture et autres Peines our Traitements Cruels, Inhumains ou Degradants, en application de l'article 19, Mars 2012, CAT/C/BFA/1, [17]

139 United Nations Committee against Torture, Concluding observations of the United Nations Committee against Torture: Mauritius, CAT/C/MUS/CO/3, 15 June 2011, [10]

140 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [9]

In Ghana, there are concerns about police and executive interference in medical examinations, and safeguards for the privacy and confidentiality of medical information of detainees. Currently, the police legislation requires medical examinations of detainees to be conducted under the supervision and control of government medical officers, who can be present during independent medical examinations.<sup>141</sup>

#### *Access to family members*

In all countries reviewed, detainees in police custody were not guaranteed direct access to their families, either because the law failed to provide this right or, as in Cameroon, the police either failed to inform families of the detention, or denied their access to detainees.<sup>142</sup>

#### *Access to judicial authorities*

Access to judicial authorities is discussed in relation to *habeas corpus*, above. Despite some countries, including Kenya, having legal frameworks that limit incommunicado detention, it is reported that detainees are often held incommunicado for longer than the legally permitted time. In Kenya, it is also reported that in order to maintain incommunicado detention beyond the prescribed time limit, detainees are transferred between police stations, which has the effect of 'resetting' the time limit. Detainees are particularly vulnerable to torture and ill-treatment as a result of this practice.<sup>143</sup>

#### *The use of force and discipline*

In a number of countries, including Cameroon, the police have a mandate to use whatever force is necessary to overcome resistance during arrest and detention, despite the international legal framework limiting the use of force.<sup>144</sup> In Nigeria, legislative frameworks prohibit the unnecessary use of restraints on persons in police custody, and limit the use of force to circumstances in which it is both reasonable and necessary. However, ill-treatment in the form of excessive use of force and restraint was reported to be widespread and systematic, owing to the culture of impunity for police abuses.<sup>145</sup>

#### *Freedom from torture and other ill-treatment*

With few exceptions, there is a significant gap between the international legal framework for the eradication of torture and domestic law and practice across Africa.

In Burkina Faso and Djibouti, for example, torture is not defined or prohibited in domestic criminal law, and is therefore prosecuted as a form of assault in contravention on the UNCAT.<sup>146</sup> Failure to prohibit the specific offence of torture results in criminal penalties that are not commensurate to the seriousness of the crime.<sup>147</sup> In Equatorial Guinea, for example, terms of imprisonment for acts of torture are limited to five years, while in Togo, the provisions of the Criminal Code pertaining to wilful violence are rarely applied and subject to statutes of limitations.<sup>148</sup>

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141 United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture – Ghana, CAT/C/GHA/CO/1, 15 June 2011, [9]

142 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [56]

143 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [7]

144 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [20]

145 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [26]

146 UN Human Rights Committee, *Rapport Initial du Burkina Faso relatif à la Convention Contre la Torture et autres Peines ou Traitements Cruels, Inhumains ou Degradants, en application de l'article 19, Mars 2012*, CAT/C/BFA/1, [11]. United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJI/CO/1

147 United Nations Committee against Torture, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Chad, CAT/C/TCD/CO/1, 4 June 2009, [23]

148 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010

In other jurisdictions, such as Kenya and Ghana, torture may be prohibited by the constitution or police legislation, but complementary provisions in the criminal codes are absent, which both weakens the nature of the prevention and the availability of remedies for victims.<sup>149</sup> In Madagascar, legislation prohibits torture in accordance with the UNCAT, but the imposition of penalties is at the discretion of the judge rather than prescribed by law.<sup>150</sup> In Mauritius, torture is permitted in 'exceptional circumstances', and penalties are not commensurate to the gravity of the offence.<sup>151</sup>

### *Minimum requirements for physical conditions of detention*

As a rule, police cells are not designed for extended periods of custody and lack the necessary space and other facilities to ensure that the minimum safeguards for conditions of detention are provided. Often, detainees in police cells are not provided with food or water. Overcrowding contributes to issues of hygiene, health, bedding and privacy.<sup>152</sup> In many situations, detainees in police cells slept on the floor with no bedding, and no toilet facilities, food or water were provided. Cells are generally dirty, overcrowded and lack sufficient light and fresh air.<sup>153</sup>

Police officials reportedly claim that it is not their responsibility to provide detainees with the minimum necessary facilities for survival and dignity. In Equatorial Guinea and Cameroon, for example, families provide detainees with water and food, and the containers are later used by detainees *in lieu* of toilet facilities. If detainees have no family or friends to provide food and water, they depend on their fellow detainees for survival.<sup>154</sup>

### *Special measures to safeguard the rights of vulnerable groups*

Domestic law in a number of countries, including Cape Verde, Nigeria, Djibouti and Equatorial Guinea, requires that juveniles and women be detained in facilities that are separate from those of adult males. However, juveniles and women are frequently detained in the same facilities as adult males, largely on the basis that police stations lack the resources to provide separate detention facilities.<sup>155</sup>

### *Inspections and oversight*

Impunity for police misconduct and ill-treatment of detainees is endemic across the continent. In Togo, Mauritania, Ethiopia and Equatorial Guinea, for example, UN special procedures were not provided with information about a single case of a police officer or other state agent responsible for persons in detention receiving a criminal sanction for acts of torture or ill-treatment, nor was information received about the proper functioning of internal or external complaints mechanisms.<sup>156</sup> In Djibouti, despite numerous and credible reports of torture by police officers, there have been no serious investigations into these cases.<sup>157</sup>

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149 United Nations Commission on Human Rights, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya, E/CN.4/2009/9/Add.4, 9 March 2000, [57]. United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture – Ghana, CAT/C/GHA/CO/1, 15 June 2011, [9]

150 United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture: Madagascar, CAT/C/MDG/CO/1, 21 December 2011, [6]

151 United Nations Committee against Torture, Concluding observations of the United Nations Committee against Torture: Mauritius, CAT/C/MUS/CO/3, 15 June 2011, [9]

152 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010

153 Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [232]

154 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [54]. Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, [233]

155 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [39]. United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add, 18 February 2008, [83]. United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJI/CO/1. Human Rights Council, Concluding observations of the Human Rights Committee: Cape Verde, CCPR/C/CPV/CO/1, 23 April 2012, [14]

156 United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [61]; United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, [14]. Human Rights Council, Report of the Working Group on Arbitrary Detention (Addendum): Mission to Mauritania, A/HRC/10/21/Add.2, 21 November 2008, [53]. General Assembly, Note by the Secretary General, A/65/273, 10 August 2010, [75]; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, p.2 and 31

157 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJI/CO/1, [9]

The UN Special Rapporteur on Extrajudicial Executions identified a number of drivers of impunity, which are reflected either in whole or in part in the challenges to effective oversight and inspections in all the countries studied. These include:<sup>158</sup>

- The absence, or ineffectiveness, of external oversight mechanisms for police custody;
- The unwillingness or inability of police to carry out independent investigations of torture, ill-treatment and deaths in custody;
- The failure by the police to refer cases of torture, ill-treatment and deaths in custody to prosecutorial services;
- Prosecutorial services that lack training and resources, or are corrupt;
- The lack of judicial independence;
- Inadequate and non-existent witness protection programmes; and
- Systemic delays in the justice system.

Issues pertaining to external accountability mechanisms, internal investigations, inadequacy of forensic capacity, and the role of prosecutors and the judiciary are discussed below.

#### *External accountability mechanisms*

Where complaints mechanisms are provided for by law, effectiveness is often undermined by inaccessibility and the lack of prompt, independent and thorough investigations into allegations. It is reported that detainees are often not aware of their right to complain, or, as observed in Cameroon, fear reprisals if they do make a complaint.<sup>159</sup>

In Nigeria, the Human Rights Desk has a mandate to receive complaints about police misconduct. However, the mechanism has been described as 'utterly ineffective', as its mandate is restricted to making recommendations to government, and it lacks the financial and human resources to make thorough investigations and to enforce redress.<sup>160</sup> Indeed, the UN Special Rapporteur on Torture observed that in one afternoon at Nigeria's NHRI, he received more complaints than the Human Rights Desk had claimed to receive in one year.<sup>161</sup>

In Equatorial Guinea, victims of police misconduct have a legal entitlement to complain to a judge, who is required to then promptly and impartially investigate the complaint. However, it is reported that detainees are reluctant to make complaints due to fear of reprisals, particularly from the police.<sup>162</sup> Similarly, in Cameroon and Zambia, fear of reprisals coupled with low levels of awareness about complaints procedures results in few complaints being lodged with complaints mechanisms.<sup>163</sup> In Chad, there are no follow-up mechanisms for complaints of torture received by public prosecutors or investigating judges.<sup>164</sup>

In terms of NPMs and systematic inspections of police detention facilities across Africa, states have either failed to ratify OPCAT or have not established NPMs in accordance with the protocol. Accordingly, there are few states with regular or systematic mechanisms or activities to ensure

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<sup>158</sup> Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24, 20 May 2010, [53] – [54]. See also, United Nations General Assembly, Human Rights Council, 13th session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum, Mission to the Republic of Equatorial Guinea, A/HRC/13/39/Add.4, 7 January 2010, [55]

<sup>159</sup> Human Rights Council, 13th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, A/HRC/13/39/Add.5, 5 February 2010, United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, E/CN.4/2009/9/Add.2, 11 November 1999, [53]

<sup>160</sup> Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [32].

<sup>161</sup> *Ibid.*

<sup>162</sup> United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add, 18 February 2008, [56]

<sup>163</sup> United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [56]. United Nations Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Zambia, CAT/C/ZMB/CO/2, 26 May 2008, [13]

<sup>164</sup> United Nations Committee against Torture, Consideration of reports by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Chad, CAT/C/TCD/CO/1, 4 June 2009, [21]

the independent monitoring of detention facilities.<sup>165</sup> In Mauritius, for example, the mandate of the NPM is based on a governmental decree rather than legislation,<sup>166</sup> which raises concerns about the independence of the mechanism.

NHRIs often have a mandate to provide oversight in places of detention. However, there are numerous reports of NHRIs that lack the mandate and resources to independently receive and investigate complaints, and to conduct regular inspections of detention facilities.<sup>167</sup> In Djibouti, the National Human Rights Commission has visited police stations and gendarmerie units, however the monitoring is not systematic and regular. There are also concerns about the independence of this NHRI, with the Chair and Vice-Chair appointed by the President.<sup>168</sup> In Equatorial Guinea, the Commission on Human Rights has a mandate to receive complaints and make investigations. However, in 2008, it was reported that the Commission had not taken any complaints or made any investigations despite evidence of systemic ill-treatment of detainees in police custody.<sup>169</sup>

In Togo, the NHRI lacks the resources and equipment to regularly and effectively carry out its mandate to visit places of detention,<sup>170</sup> and in Ghana, there are concerns that the NHRI is not adequately funded to undertake its mandated activities.<sup>171</sup> In Cameroon, the National Committee on Human Rights and Freedoms has a broad mandate to inspect and make investigations, but is compromised by inadequate staffing levels and having its recommendations for improvement dismissed or ignored by the relevant authorities.<sup>172</sup>

A number of jurisdictions have other mechanisms, such as an Ombudsman, to conduct inspections of places of detention. However, there are numerous reports that there is a dearth of public information available about these mechanisms, and that they lack a broad enough mandate. In Angola, for example, the Ombudsman does not have a mandate to make unannounced visits, and is unable to make decisions and recommendations that are binding on the police or government.<sup>173</sup>

In some countries, such as Angola, non-governmental organisations may visit police detention facilities, although this authority is not usually provided for by law and is revocable on the whim of the government or police.<sup>174</sup>

### *Internal accountability mechanisms*

The overall lack of effective internal police complaints mechanisms across Africa is cause for concern, given that the authorities entrusted with the investigation of torture are often the same authorities accused of committing the offence, as is the case in Equatorial Guinea.<sup>175</sup> In Togo, this represents a significant barrier to victims obtaining justice, and to deterring police misconduct and ill-treatment of detainees.<sup>176</sup> In Cameroon, police conduct internal investigations, which are criticised as lacking independence and seldom result in thorough investigations or prosecutions for misconduct.<sup>177</sup>

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165 Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria (4 to 10 March 2007), A/HRC/7/3/Add.4, 22 November 2007, [35]; United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding observations of the United Nations Committee against Torture, Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, [14]; United Nations Committee against Torture, Consideration of reports by States Parties under Article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Benin, CAT/C/BEN/CO/2, 19 February 2008, [2]

166 General Assembly, 65th session, Note by the Secretary General, A/65/273, 10 August 2010, [82]

167 United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture – Ghana, CAT/C/GHA/CO/1, 15 June 2011, [9] Human Rights Committee, Concluding Observations of the Human Rights Committee: Malawi, CCPR/C/MWI/CO/1, 18 June 2012, [5]

168 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Djibouti, 22 December 2011, CAT/C/DJI/CO/1, [12]

169 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add., 18 February 2008, [57]

170 United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [73]

171 United Nations Committee against Torture, Concluding Observations of the United Nations Committee against Torture – Ghana, CAT/C/GHA/CO/1, 15 June 2011, [14]

172 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [64]

173 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, [31]

174 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, [70]

175 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add., 18 February 2008, [59].

176 General Assembly, 65th session, Note by the Secretary General, A/65/273, 10 August 2010, [75]; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, p. 2 and 31

177 United Nations Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Concluding Observations of the United Nations Committee against Torture, Cameroon, CAT/C/CMR/CO/4, 19 May 2010, [60]

### *Prosecutorial services*

Prosecutors often have a legal mandate to ensure the rights of detainees, including time limits for police custody, ensuring that registers are maintained, and regularly carrying out inspections of places of detention. However, there are numerous and credible reports that prosecutorial services in a number of states, including Mauritania and Togo, fail to provide this level of oversight on a regular and systematic basis.<sup>178</sup>

In Angola, there are reports that prosecutors are complicit in covering up police misconduct in relation to arbitrary arrest and unlawful interrogations by legalising police actions that contravene national and/or international law, for example by authorising extensions of police custody after the fact.<sup>179</sup> In Cameroon, prosecutors fail to fulfil their duty to make regular inspections of police detention facilities on the basis that they lack the necessary resources. There are also concerns about the independence of prosecutors in this context. Given the close working relationship between police and prosecutors in the criminal justice process, questions have been raised as to whether prosecutors are willing to take a confrontational role towards the police in an oversight context.<sup>180</sup>

### *Judicial independence*

A major contributing factor to impunity is the lack of investigation and prosecution of police misconduct by the judiciary. Although prompt and impartial investigations should be carried out on suspicion of mistreatment, this is often not the case. Detainees are reported to appear in court with visible signs of ill-treatment, yet judicial authorities fail to instigate investigations, and it is reported that victims don't make complaints for fear of reprisals. The problem is particularly acute in countries where *ex officio* judicial investigations are not enshrined in law.<sup>181</sup>

In Equatorial Guinea, for example, the judiciary routinely fails to act on complaints made by detainees about arbitrary arrest, detention and ill-treatment in custody.<sup>182</sup> In Togo, there are no reported cases of the judiciary initiating investigations into allegations of torture, or rejecting evidence of confessions obtained under torture, even where there is compelling medical evidence that torture has taken place.<sup>183</sup>

In Angola, judges are not involved in verifying the lawfulness of detention, as authorisations are generally made by a public prosecutor after the fact.<sup>184</sup> Due to the lack of judges, it is reported that police officers frequently sit on the bench as assessors, which represents a significant concern in relation to the right of the accused to a fair trial.<sup>185</sup>

In Cameroon, there is a general perception that judges are part of the Ministry of Justice, and therefore subject to the authority of executive power, in contravention of the separation of powers between the executive and judiciary. Accordingly, judicial oversight of police misconduct is ineffective.<sup>186</sup>

In Kenya, the judiciary has been described as corrupt and susceptible to political influence. Magistrates are required to hold a 'trial within a trial' if a defendant claims that s/he was subject to torture in police custody. However, it is reported that this procedure is rarely followed, and only on the insistence of defence lawyers.<sup>187</sup>

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178 United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [66]

179 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p. 3.

180 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, E/CN.4/2009/9/Add.2, 11 November 1999, [77]

181 General Assembly, 65th session, Note by the Secretary General, A/65/273, 10 August 2010, [75]

182 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add, 18 February 2008, [22]

183 United Nations Human Rights Council, 7th Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Togo, A/HRC/7/3/Add.5, 6 January 2008, [66]

184 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p. 2.

185 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, [84]

186 United Nations Commission on Human Rights, 56th session, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to United Nations Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, E/CN.4/2009/9/Add.2, 11 November 1999, [53]

187 United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Equatorial Guinea, Addendum, A/HRC/7/4/Add, 18 February 2008, [31]



## **PART E: CONCLUSION AND RECOMMENDATIONS**

### ***Conclusion***

This paper broadly highlights the challenges faced by Africa's police in achieving a rights-based approach to the use and conditions of pre-trial detention in police cells. It focuses on the factors that may cause police to rely on arrest and detention, and the issues associated with the management of police detention facilities to ensure the rights of detainees are upheld.

Despite international law providing a comprehensive framework to safeguard the rights of individuals in conflict with the law and deprived of their liberty by the police, there is a significant disparity between these standards and the laws and practice of police organisations across the continent.

Regarding arrest, the law may not provide the full suite of safeguards to detainees, or where the safeguards are guaranteed, the police systematically flout the law with impunity. The factors identified as contributing to the disparity between the international framework and the safeguards actually provided to detainees are numerous and varied. They include external pressures, such as the adoption of 'get tough on crime' approaches to policing, legislative frameworks that provide police with broad and largely unchecked powers, and political interference. Other factors are a symptom of broader police effectiveness and accountability issues, such as discrimination, corruption, reliance on confessions as a basis for criminal convictions, and inadequate resources for police investigations and training. Fundamentally, the lack of effective internal and external accountability mechanisms means that the rights of detainees are consistently breached with impunity.

In terms of safeguarding the right to be free from arbitrary detention, police custody is often no longer a precautionary measure aimed at facilitating effective criminal investigations, but serves as a type of punishment for suspects. Police, prosecutors and judges often lack understanding of the purpose of custody and pre-trial detention, and extended police custody has increasingly become a rule rather than an exception in criminal justice processes. Detainees in police custody are frequently denied, or unable to access, legal assistance services, are held beyond the legal time limits without judicial authorisation, and experience significant barriers to challenging the lawfulness of their detention in courts and to receiving compensation when their rights have been abused.

Similarly, despite a comprehensive framework to safeguard minimum conditions of detention that accord with the right to life, and of treatment that accords with humanity and respect for the inherent dignity of the person, this report confirms that conditions of detention in police cells across Africa regularly fail to meet basic standards. Detainees do not have access to regular and independent medical assessments, are subject to excessive and unchecked force and discipline, and are not provided with minimum standards of food, water and sanitation. The situation is particularly acute for vulnerable groups, such as juveniles and women, who are afforded special measures under international law. Internal police accountability measures are criticised for failing to address impunity, and prosecutors and judges often fail in their role to provide an additional layer of oversight, particularly in relation to the length of detention and the right to freedom from torture and ill-treatment. Where they exist, external oversight mechanisms are under-resourced and lack the mandate to hold individual officers accountable or address systemic rights abuses.

### ***Recommendations***

In terms of the challenges faced by Africa's police forces in achieving a rights-based approach to the use and conditions of pre-trial detention in police custody, it is recommended that the ACHPR adopt a dedicated set of guidelines on pre-trial detention that promotes the implementation of a rights-based approach to arrest and detention across the continent.

The value in the development of a resolution which consolidates the international and regional standards for the use and conditions of arrest and detention as they pertain specifically to the role of the police is as a comprehensive and agreed template to support a consistent and rights-based approach to the oversight and reform of the continent's police services, and as a template for state parties to report to the ACPHR.

Accordingly, the adoption by the ACHPR of Resolution 223 on the need to develop guidelines on conditions of police custody and pre-trial detention in Africa is noted as valuable progress towards this goal.<sup>188</sup> This signals a commitment by the ACHPR to establish measures to address the challenges to rights-based arrest and detention across the continent. Based on the gaps between the international legal framework for arrest and detention and law and practice across Africa, APCOF recommends that the ACHPR resolution include, at a minimum, address the following elements:

- Arrests should be carried out on grounds that are clearly established in law and accord with international standards. Arrests must not be motivated by discrimination of any kind.
- The subsequent decision to detain an individual should be based on grounds that are clearly established in law and in accordance with international standards for detention, and must not be motivated by discrimination of any kind. Detention should be an exception rather than a rule, and for as short a time period as possible. Police, and the justice system more broadly, must observe the procedural safeguards for detention as set out in international law.
- Conditions of detention in police cells should accord with the right to life and respect the inherent dignity of the person. Conditions should accord with international standards, and detainees must have the right to protection from torture and ill-treatment.

It is further recommended that the ACHPR Special Rapporteur on Prisons and Conditions of Detention in Africa be provided with the necessary resources to develop and implement the resolution envisaged by Resolution 223, and specifically also include civil society organisations and NHRIs in the development, implementation and monitoring of guidelines on police custody and pre-trial detention.

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<sup>188</sup> Adopted at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights in Yamoussoukro, Côte d'Ivoire, 9 to 22 October 2012



## ABOUT THE AUTHOR

Louise Edwards is a Projects and Research Officer at the African Policing Civilian Oversight Forum (APCOF), based in Cape Town, South Africa. She holds a Bachelor of Arts (Arabic) and Bachelor of Law from Deakin University and a Masters of Law (International Law) from the Australian National University. She has worked on police accountability and reform issues in eastern and southern Africa since 2007. Prior to this, Louise was a lawyer in both private and pro bono practice, and coordinated human rights policy and reform for the national organisation representing Australia's 205 community legal centres.

## ABOUT APCOF

The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

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

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.

## CONTACT APCOF

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

Tel: +27 21 447 1818  
Fax: +27 21 447 0373  
Email: [info@apcof.org.za](mailto:info@apcof.org.za)

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