

IMPLEMENTATION OF THE LUANDA GUIDELINES IN ZIMBABWE

A REVIEW OF THE POLICY
FRAMEWORK RELATING TO
ARREST, POLICE CUSTODY
AND DETENTION

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1. INTRODUCTION

In 2013, Zimbabwe enacted a new progressive Constitution¹ with an expansive Bill of Rights that draws on international and African norms to enhance the protection and promotion of human rights. The Ministry of Justice, Legal and Parliamentary Affairs (MoJLPA) is responsible for facilitating the alignment of existing legislation to the new Constitution in a process to ensure consistency between the Constitution and all legal and administrative procedures. To lead this process, the MoJLPA established the Inter-Ministerial Task Force of Alignment of Legislation to the Constitution (IMT).² The work of the IMT to date has included the alignment of legislation for a number of sectors, including good governance and public resource management, realisation of socio-economic rights, and local governance. However, the alignment of policing and broader criminal justice legislation, which falls under justice delivery, remains outstanding, with the exception of the Criminal Procedure and Evidence Act (CP&E Act).³

The IMT's task is significant, as it provides an opportunity for all relevant stakeholders to reflect on past challenges, and to embed in law a vision for policing and criminal justice that is both responsive to those challenges and to the intention of the constitutional drafters. However, the task ahead of the IMT is also complex and urgent. It is complex, as the alignment process requires the comprehensive review of the current legal framework for policing and criminal justice to ensure that the constitutional Bill of Rights is translated into practices, processes and procedures that are rights compliant. It is urgent, because criminal justice institutions such as the police continue to operate under legislative frameworks that fall well short of the requirements of the new Constitution, specifically, and Zimbabwe's binding African regional human rights obligations, more generally.

In considering how to address the alignment for policing and criminal justice, the IMT and its stakeholders can draw on related work already underway at African regional level. For the past ten years, the translation of human rights norms into the national legal frameworks for policing and criminal justice has been a key focus area of the African Commission on Human and Peoples' Rights (ACHPR). As part of its mandate, the ACHPR has adopted a range of legal instruments that are designed to guide State Parties to the African Charter on Human and Peoples' Rights (ACHPR) on the promotion and protection of human rights. Relevant to Zimbabwe, this includes the ACHPR's 2014 adoption of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines).⁴ The Guidelines provide a blueprint for a rights-based approach to these core and visible areas of policing and criminal justice, and authoritatively translate human

rights standards into operational and procedural practice for law enforcement and justice agencies.⁵ As a State Party to the AChHPR, the Luanda Guidelines can therefore provide Zimbabwe, through the IMT, with a template against which the review and revision of the current framework can be assessed and strengthened to promote rights compliance.

To promote the use of the Luanda Guidelines in the alignment process, and to contribute to the current discourse on police and criminal justice reform in Zimbabwe, the African Policing Civilian Oversight Forum (APCOF), in collaboration with the Zimbabwe Human Rights Commission (ZHRC), has conducted this assessment of the current legislative and policy framework of arrest, police custody and remand detention in Zimbabwe against the Luanda Guidelines. The review contains a number of recommendations for how the Luanda Guidelines can be used to support the effective alignment by the IMT of relevant policing and criminal justice legislation. As part of the review, the status of the IMT's process was also analysed, and concerns raised by stakeholders at the lack of progress in relation to justice related legislation were considered. In that regard, this review also addresses the specific role that can be played by IMT's stakeholders, including state institutions and civil society organisations, to promote the alignment (and establishment) of outstanding policing and criminal justice legislation.

2. METHODOLOGY

This review is based on an extensive review of literature and research-related material on the subject. Material and documents reviewed include: the Constitution of Zimbabwe; national legislation; articles; and documents from the United Nations including the Universal Periodic Review, relevant reports of UN Treaty Bodies and media reports. This review is structurally informed by the Luanda Guidelines.

A draft review was prepared and presented at a multi-stakeholder consultation held in Harare, Zimbabwe on 20 and 21 September 2017. The main objective of the consultation was to discuss the draft assessment of the legislative and policy framework for arrest, police custody and remand detention in Zimbabwe against the new Constitution and the Luanda Guidelines, as well as to gather more relevant information. Key participants of the consultation included, but were not limited to, the ZHRC, Zimbabwe Republic Police (ZRP), the Zimbabwe Prisons and Correctional Services (ZPCS), the National Director of Public Prosecutions Office, and various Civil Society Organisations (CSOs).⁶ Based on the information and feedback received on the draft, the review was revised and finalised.

This review of Zimbabwe's framework of arrest, police custody and pre-trial detention against the requirements of the Luanda Guidelines is also part of a larger continental process that has focused on the implementation of the Luanda Guidelines on a national level in a number of African states. APCOF, together with implementing partner organisations, has conducted such reviews in Côte d'Ivoire, Ghana, Kenya, Malawi, South Africa, Tanzania, Tunisia and Uganda. The aim of the reviews has been to identify the gaps and challenges that exist between the Luanda Guidelines and a country's criminal justice system. Work to address those gaps and challenges in these countries is underway, and includes interventions as varied as review of national laws and standard operating procedures, the establishment of detention monitoring systems, review of bail systems, improvements to official data collection and analysis, and training for police and prison officials. The process underway in Zimbabwe to assess compliance with the Luanda Guidelines continues this broader continental process, and will inform the ACHPR and its stakeholders' broader efforts to promote implementation of the Luanda Guidelines at national levels.

3. CONTEMPORARY CONTEXT

The Luanda Guidelines were developed by the ACHPR in response to its growing concern about the human rights challenges posed by arbitrary and prolonged pre-trial detention across Africa. As an interpretive instrument of the AChHPR, the Guidelines provide an authoritative statement on the application of rights such as life, security, non-discrimination and freedom from torture in a criminal justice context.⁷ The Guidelines reinforce the importance of a criminal justice system built on core human rights principles, and aim to ensure fewer arbitrary arrests and more rational and proportionate use of pre-trial detention. This enables a more effective use of human and financial resources, for example targeted towards legal aid and crime prevention.⁸ The provisions of the AChHPR are largely reflected in the new Zimbabwe Constitution. As such, the Luanda Guidelines are a relevant resource for the IMT and its stakeholders as it embarks on the process currently to align policing and criminal justice legislation to the new Constitution.

3.1. Zimbabwean constitutional reform

The Zimbabwean constitutional framework is consistent with the Luanda Guidelines, specifically section 50, which provides for the rights of arrested and detained persons. The Constitution also provides for the rights of accused persons in section 70, which includes: the right to be presumed innocent until proved guilty; the right to be informed promptly of the charge, in sufficient detail to enable the accused person to answer it; the right to be given adequate time and facilities to prepare a defence and the right to remain silent; and the right not to testify or be compelled to give self-incriminating evidence.⁹ It also protects the rights of women in section 80, the rights of children in section 81, the rights of the elderly in section 82, and the rights of persons with disabilities in section 83, which is consistent with the Luanda Guidelines which provide safeguards for these vulnerable groups.

Despite the constitutional guarantees mentioned above, most of the national legislative framework relevant to arrest, police custody and pre-trial detention is not aligned with the Constitution. The current system for pre-trial detention does not align at the legislative or practical levels with the Luanda Guidelines. Part 4 of the Constitution requires that all existing laws be reviewed and, where necessary, revised to ensure that all national laws are consistent with the constitutional framework. Since 2013, significant efforts have been made by the IMT and, as of January 2016, 154 laws had been aligned, with 206 statutes still requiring review and alignment.¹⁰

The functions of the IMT are: to coordinate the activities of all Line Ministries, with the responsibility of initiating legislative and administrative reforms; to provide a framework for the provision of technical legal support to Line Ministries in the development of legislation and administrative procedures; to facilitate, monitor and oversee the development of legislation and administrative procedures; to coordinate with the Office of the Attorney-General and the Law Development Commission (LDC) in the preparation of legislation; and to report every three months to the MoJLPA.¹¹ The IMT consists of four structures, namely: the IMT Steering Committee; the IMT Technical Committee; Line Ministries at the Technical Level; and Line Ministries as the Policy Level.

The alignment process has been moving at a very slow pace.¹² This is due to the fact that the process is complex, as well as a lack of initiative by some Line Ministries to initiate reforms on critical laws, and low visibility of the work of the IMT, with more focus on process than substantive issues. In respect of policing and criminal justice legislation, no progress has been made and no action has been taken yet by the IMT to amend the Police Act,¹³ the Immigration Act¹⁴ and the Public Order and Security Act,¹⁵ which fall under the Ministry of Home Affairs. The Ministry has not yet identified gaps in this legislation and submitted a request for technical assistance to initiate the legislative process. Technical legal research support for the development of a discussion paper and policy document containing the proposed reforms for this legislation can only be done after the Line Ministry has initiated the process.

As the legislative alignment process for the criminal justice system is still incomplete, it puts those who come into contact with the system at risk of rights violations. Further, the resort to courts for clarity on specific provisions where inconsistencies remain is contributing to the high number of cases and to the already burdened criminal justice system with reported limited capacity.¹⁶ The IMT was established specifically to prevent a 'floodgate' of constitutional litigation and to ensure the smooth operations of government. In this regard, in accordance with its mandate in section 244(1) of the Constitution, the ZHRC should request the Ministry of Home Affairs to inform it of the steps taken to ensure that the Police Act, Immigration Act, and the Public Order and Security Act undergo the required legislative reforms. Currently the ZHRC has been requested to sit in the IMT's Secretariat meetings where feedback is provided on the progress of the IMT.

3.2. The Luanda Guidelines¹⁷

In promoting a rights-based approach to criminal justice in Zimbabwe through the IMT process, the ACHPR's Luanda Guidelines are a relevant resource for the IMT and its stakeholders to consider. The Guidelines trace the steps from the moment of arrest until trial, focusing on the decisions and actions of the police, correctional services and other criminal justice actors such as the judiciary and prosecution services. The Guidelines broadly promote cooperation, transparency and continuous capacity building of the criminal justice role players, and emphasise the importance of oversight in achieving democratic, professional and accountable policing and criminal justice institutions. In terms of operational guidance, the Guidelines contain numerous sections covering the framework for arrest and custody, important safeguards, and measures to ensure transparency and accountability.¹⁸ Of specific importance to the current review are the sections relating to arrest, police custody, pre-trial detention, conditions of detention, vulnerable groups and registers/access to information. A brief overview of each section is instructive for the comparison that will be undertaken in section 3.3, from which the recommendations will then be drawn.

3.2.1. Arrest

Part I of the Luanda Guidelines covers the grounds for arrest, procedural guarantees and the rights of suspected and arrested persons, including the requirement that they be notified of their rights. The aim of Part I is to reduce the number of unnecessary and arbitrary arrests, and to protect persons who are under arrest from the denial of procedural safeguards and from other human rights abuses. The rights to life and liberty are central to the construction of Part I, and the grounds for arrest limit the use of arrest to exceptional circumstances and as a measure of last resort. The Guidelines promote alternatives to arrest, where appropriate, for minor crimes, and encourage State Parties to the AChHPR to establish diversion systems. The rights of an arrested person are set out at length in Guideline 4, and include the right to:

- freedom from torture and other ill-treatment;
- information on the reason for arrest and charge in a language and format understood by the arrested person, and the necessary facilities to exercise rights;
- silence and freedom from self-incrimination;
- access to legal assistance, family or other person of choice and medical assistance;
- humane conditions of police custody;
- information in an accessible format;
- release on bail or bond as the presumptive right;
- challenge the lawfulness of arrest;
- freely access complaints and oversight mechanisms; and
- reasonable accommodation for persons with disabilities.

3.2.2. Police custody

Part II of the Luanda Guidelines sets out in detail the procedural and other safeguards for persons who are deprived of their liberty in police custody. The provisions are designed to promote freedom from arbitrary detention, and emphasise the use of police custody as an exceptional measure of last resort. To promote the rights of persons who are held in police custody, the Guidelines highlight the need for independent monitoring of police cells, and provide safeguards for detainees who are subject to questioning and interrogation. Guideline 7 provides guidance for police agencies who have the statutory authority to grant bail, which are the same as the Guidelines set out in Part III for judicial decision-makers (see below). Guideline 8 sets out the requirement for the provision of legal assistance services to accused persons. The use of the term 'legal assistance' rather than 'lawyer' is deliberate, as it acknowledges that there are a range of legal service providers, such as paralegals, who can provide legal information and assistance to accused persons. However, this expanded definition does not diminish the importance of access to qualified lawyers, who must remain at the centre of any national legal aid scheme.

3.2.3. Pre-trial detention

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

3.2.4. Conditions of detention

Acknowledging the comprehensive framework for physical conditions of detention provided in the recently updated UN Minimum Rules for the Treatment of Prisoners (the Mandela Rules),¹⁹ the Luanda Guidelines focus on the procedural safeguards to ensure the safe custody of persons held in police cells and other pre-trial detention environments. The Guidelines emphasise that all fundamental rights and freedoms apply to accused persons, except those limitations that are demonstrably necessary by the fact of detention itself. The safeguards promoted by the Guidelines include:

- alternatives to detention to reduce overcrowding;
- limitations on the use of force and firearms, permissible restraints, disciplinary measures and solitary confinement;
- legislative, budgetary and other measures to ensure adequate standards of accommodation, nutrition, hygiene, clothing, bedding, exercise, physical and mental healthcare, contact with the community, religious observance, reading and other educational facilities, support services, and reasonable accommodation;
- health assessment screenings and harm-reduction strategies;
- procedures for the safe transfer of accused persons;
- provision for adequate and efficient staffing;
- separation of categories of detainees; and
- appropriate communication facilities, and access by accused persons to those facilities.

3.2.5. Registers/access to information

Part IV of the Luanda Guidelines sets out the requirement for record-keeping at all stages of the arrest, custody and remand process, and provides for access to registers by detainees, lawyers, family members, oversight authorities and any other organisation with a mandate to visit places of detention. This Part sets out the minimum information to record in a register, such as key identifying information (like name and address), details for the next of kin, and any observations in terms of the physical and mental health of the person subject to arrest, police custody or remand detention. Guidelines 39 and 40 (which are in Part VIII of the Guidelines) deal specifically with data collection and access to information. These provisions require that State Parties establish processes for the systematic collection of disaggregated data on the use of arrest, police custody and remand detention, and ensure that there are systems and processes in place to guarantee the right of access to information for accused persons, their lawyers, family members and others.

3.2.6. Vulnerable groups

Part VII focuses specifically on the rights of groups and persons identified as vulnerable to rights abuses in arrest, police custody and remand detention settings, or for whom special protections apply on the basis of a status, or intersection of one or more statuses. It contains general provisions that encourage State Parties to enshrine the right to freedom from discrimination in national law, and outlines specific protections in relation to all categories of persons afforded protection in the AChHPR, as well as the following specific groups:

- *Children*: definition of a child as anyone aged below 18; primacy of the best interests of the child; laws and policies to promote diversion and alternatives to detention; safeguards for arrest, police custody and remand detention; right to be heard and provision of legal assistance services; a framework for conduct of officials and establishment of specialised units; access to third parties;
- *Women*: safeguards for arrest and detention, including separation from male detainee populations; provisions for accompanying children;
- *Persons with disabilities*: definition of disability, which includes physical, mental, intellectual or sensory disability; legal capacity and access to justice; accessibility and reasonable accommodation; and
- *Non-nationals*: specific protections for refugees, non-citizens and stateless persons in terms of access to third parties and translation services.

3.3. Review of The Zimbabwean constitutional and legal framework against the Luanda Guidelines

Although Zimbabwe has not ratified most of the international treaties relevant to arrest, police custody and pre-trial detention,²⁰ it has ratified the AChHPR, which guarantees procedural and substantive rights in relation to arrest, police custody and pre-trial detention.²¹ In addition, Chapter 4 of the Constitution provides an expansive Declaration of Rights, which enshrines a wide range of human rights and freedoms, consistent with the international and regional human rights framework, inclusive of specific rights for arrested and detained persons. The rights protected by the Constitution relevant to arrest, police custody and pre-trial detention include:

- Right to life (section 48);
- Right to personal liberty (section 49);
- Rights of arrested and detained persons (section 50);
- Right to human dignity (section 51);
- Freedom from torture or cruel, inhuman or degrading treatment or punishment (section 53);
- Equality and non-discrimination (section 56);

- Right to privacy (section 57);
- Right to administrative justice (section 68);
- Right to a fair hearing (section 69); and
- Rights of accused persons (section 70).

These rights are further protected by numerous pieces of national legislation that have been undergoing alignment with the Constitution.

Aside from the challenges associated with legislative frameworks that do not align with the new Constitution, implementation of legislation has also been identified as a key issue in policing and justice governance. A study conducted by the Law Society of Zimbabwe and ZLHR found that the implementation of legislative provisions remains the major obstacle in Zimbabwe, due primarily to funding shortages, institutional capacity constraints, and the slow recovery in the country's economy.²² Delays in pre-trial procedures are also due to a continued shortage of magistrates and court interpreters, inadequate bureaucratic procedures, the low capacity of court officials, and a lack of resources.²³

The following sections provide an analysis of existing national legislation with the Constitution and Luanda Guidelines, and both identify and analyse related issues, such as legislative implementation and resource constraints, that affect the governance of rights-based justice practices in Zimbabwe.

3.3.1. Over-arching criminal justice legislation

In the justice context, the IMT prioritised the alignment of the Criminal Procedure and Evidence Act (CP&E Act) with the Constitution. The CP&E Amendment Act,²⁴ which sought to harmonise this Act with the Constitution, came into effect on 10 June 2016 and is particularly relevant to the discussion on arrest, police custody and pre-trial detention. The Amendment Act made several changes in order to align the CP&E Act with the Constitution by including the right to be informed of the reason for arrest, the right to be brought before a court of law within 48 hours,²⁵ and the right of an arrested person to contact a legal practitioner, relative or spouse.²⁶ It also provides that records with information for arrested and detained persons be kept,²⁷ and that police officers provide a receipt for any items confiscated during the search.²⁸ However, not all the provisions of the CP&E Act align to the Luanda Guidelines, with key challenges highlighted in sections 3.3.3, 3.3.5 and 3.3.9 which focus on arrest and police custody, custodial time limits and vulnerable groups respectively.

3.3.2. Independence and accountability and transparency

Luanda Guideline 41 encourages States to establish, and make known, oversight mechanisms for authorities responsible for arrest and detention. Consistent with this Guideline, section 210 of the Constitution provides for the legislative establishment of an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of the police, prison and correctional service officers and other members of the security services. However, in the continuing absence of legislation to establish the independent mechanism, the operationalisation of section 210 of the Constitution remains an outstanding issue in the broader justice sector alignment process. An application to expedite its establishment was taken to the Constitutional Court, with a decision still pending.²⁹

An independent complaints mechanism is necessary to promote accountable policing and criminal justice, and to improve public confidence in these institutions. International and regional standards recommend the establishment of a dedicated and specialised agency for policing and justice sector oversight, as contemplated in section 210 of the Constitution. The operationalisation of section 210 should therefore be a priority for the IMT and the Parliament of Zimbabwe.

In the absence of dedicated policing oversight, other oversight institutions can perform this function. In Zimbabwe, section 243 of the Constitution, which aligns with Luanda Guideline 41, provides that the ZHRC exercises an oversight mandate for the criminal justice system through, *inter alia*: ensuring observance of human rights in Zimbabwe;³⁰ protecting the public against abuse of power and maladministration;³¹ directing the Police to investigate suspected crimes involving human rights violations;³² and requiring State agencies and other persons to provide information and reports to the Commission.³³ However, the ZHRC Act³⁴ does not provide for all these functions and requires amendment to reflect this.

The Luanda Guidelines also promote transparency through access to information in criminal justice systems. The ACHPR encourages State Parties to establish systems and mechanisms for the collection and public dissemination of relevant disaggregated data, both in terms of overall rates of arrest, police custody and pre-trial detention, as well as information pertaining to individual cases that should be made available to detainees, their legal representatives, and families.³⁵ Publicly available data on arrest, police custody and pre-trial detention is not easily accessible for Zimbabwe using local sources, and the data that is available is not disaggregated in accordance with the Luanda Guidelines. Without access to such information, evidence-based responses to the challenges of arrest, police custody and pre-trial detention are difficult for the relevant criminal justice institutions and their stakeholders.³⁶

3.3.3. Arrests and police custody

Parts I and II of the Luanda Guidelines prohibit arbitrary arrest and detention, and encourage the use of arrest and detention only as a measure of last resort. Deprivation of liberty is only permitted on grounds, and in accordance with procedures, that are established by law, and not based on discrimination of any kind.³⁷ The Luanda Guidelines also encourage the use of alternatives to arrest and detention, particularly for minor offences, and limit the use of force in arrest and detention settings to circumstances in which the force is proportionate, reasonable and strictly necessary.³⁸

There have been a number of reports of arbitrary arrests and detention in Zimbabwe. In 2013, ZLHR reported that a total of 425 people were arrested and/or detained and were later released without being charged.³⁹ The organisation found that, in most cases, police arrest in order to investigate.⁴⁰ In early 2017, the ZRP embarked on an operation to reduce street trading and arbitrarily arrested vendors and severely assaulted them during the process.⁴¹ Citizens who take part in protests are also continuously arrested and this is exacerbated by the fact that much needed reform of the Public Order and Security Act has not yet been done. Human Rights Watch noted an increase in cases of arrest against thousands of people who peacefully protested human rights violations and the deteriorating economic situation in 2016.⁴² During the same year, 17 members of the Zimbabwe National Students Union arrested on charges of allegedly gathering in contravention of the Public Order and Security Act were later released after spending 3 nights in detention, and their arrest was declared unlawful.⁴³ It is recommended that the Ministry of Home Affairs prioritise the alignment of the Public Order and Security Act with the Constitution.

Consistent with Luanda Guidelines 4(b) and 5, section 50(1)(a) of the Constitution states that an arrested person must be informed at the time of arrest of the reason for the arrest. Both the Guidelines and Constitution provide an element of timeliness as to when the arrested person is informed of the reason for arrest, which must be provided at the time of arrest. Section 32(5) of the CP&E Act states that 'when an arrest is made without warrant, the person arrested shall be informed forth-with by the person arresting him of the cause of the arrest'. The term 'forth-with', which means immediately following, is not being applied correctly by those implementing the law. In practice, arrested persons are not informed of the reason for arrest at the time of arrest. Some are kept in police custody for a number of days without being informed of the reason.⁴⁴ The timing of when one is informed of the reason for arrest is critical to ensuring that procedural safeguards are known and afforded to a suspect from the earliest stages of the criminal justice process. It is recommended that

efforts be made to ensure that the correct interpretation of the term is understood by all law enforcement officials in order to reduce problems associated with implementation through, for example, training or strengthening the interpretation of this section in regulation or standard operating procedures.

Luanda Guideline 4(c) guarantees the right to remain silent and freedom from self-incrimination, which is reflected in the Constitution in section 50(4)(a). However, section 257 of the CP&E Act provides that, if a person fails to mention certain facts to police during questioning, adverse inferences can be drawn from the refusal. As such, this section is inconsistent with the Guidelines and the Constitution. The right to remain silent is a crucial right to arrested persons, and one's decision to exercise this right by refusing to answer questions cannot be held against them. It is recommended that the Act be reviewed to address the shortcomings highlighted.

3.3.4. Torture and other cruel, inhuman or degrading treatment or punishment

Although Zimbabwe has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Article 5 of the AChHPR and Luanda Guideline 4(a) prohibit the use of torture and other ill-treatment, and elements of both UNCAT and the AChHPR have been incorporated into the Constitution. Section 53 provides for the right to be free from torture or cruel, inhuman or degrading treatment or punishment. However, torture is not defined or criminalised in national legislation, which allows for impunity for acts of torture.

Human Rights Watch has found that torture and other ill-treatment of detainees by the police and intelligence services have remained a serious and systemic human rights problem in Zimbabwe.⁴⁵ Documented cases of torture include severe beatings that involve victims being punched, kicked, and struck with batons, beatings on the soles of the feet, repeated banging of detainees' heads against walls and the shackling of detainees in painful positions.⁴⁶ There have been reports of torture against children in detention, including waterboarding, being dragged and shoved.⁴⁷ In some cases, torture is an element of coercive interrogations, while in others it is used as a form of punishment for the activists' perceived leanings or intentions.⁴⁸ During the 2016 Universal Periodic Review, Zimbabwe rejected the recommendation to cease arbitrary arrests and detention as well as excessive force, torture, intimidation and harassment, interference and anti-protest discrimination and the recommendation to review and align domestic laws with the Constitution, particularly those pertaining to the prohibition of torture.⁴⁹ However, in light of the fact that section 53 of the Constitution guarantees freedom from torture or cruel, inhuman and degrading treatment, Zimbabwe has an obligation to ensure that national legislation criminalises torture and that all necessary safeguards and systems are in place to prohibit and prevent its practice by law enforcement officials, in accordance with the Luanda Guidelines and Robben Island Guidelines.

3.3.5. Custodial time limits

Luanda Guideline 7(b)(ii) provides that the maximum duration of police custody, prior to presenting an arrested person before a judge, must be set out in national law that prescribes time limits of no more than 48 hours. Section 50(2) of the Constitution complies with the Luanda Guidelines and states that any person who is arrested or detained and who is not released must be brought before a court as soon as possible and in any event not later than 48 hours after the arrest took place or the detention began, as the case may be, whether or not the period ends on a Saturday, Sunday or public holiday. However, the CP&E Act only provides that those who have been arrested without a warrant should be brought to court within 48 hours,⁵⁰ and does not provide a custody time limit for the same for those arrested with a warrant.⁵¹ This provision therefore permits detention in police custody in excess of 48 hours for those arrested with a warrant, which could contribute to prolonged detention and overcrowding of police cells. The CP&E Act should be reviewed and amended to ensure consistency with the Constitution and Luanda Guidelines.

3.3.6. Access to legal assistance services

Guideline 8 of the Luanda Guidelines sets out the requirements for the provision of legal assistance services for persons in conflict with the law. Section 31 of the Constitution makes provision for the State to take all practical measures, within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice. The Legal Aid Directorate in Zimbabwe is the government institution tasked with providing free legal services. In addition, a number of private institutions also provide legal aid, including ZLHR, the Legal Resources Foundation (LRF) Catholic Commission for Justice and Peace, Zimbabwe Council of Churches (Justice and Peace Department) and the Msasa Project. According to the Legal Aid Act,⁵² Part III, section 7.2(a)(ii), the Director of the Legal Aid Directorate will only grant legal aid to the applicant if he is satisfied that the resources of the directorate and legal aid fund will be sufficient to provide the legal aid required.

However, access to legal assistance services in Zimbabwe is constrained by two key factors – knowledge about legal aid by accused persons, and constraints in the resources available for legal aid service delivery. The Legal Aid Act does not require anyone to *inform* the accused of their right to request legal aid, which limits such access by accused persons. As a result, accused persons are reportedly going to trial without legal representation, with some not even aware that there is provision for legal aid services. Furthermore, due to the fact that government institutions are financially constrained, legal aid is not available to all who require it.⁵³ Moreover the Legal Aid Directorate services have not decentralised to all parts of the country, with offices established in eight out of the ten provinces in Zimbabwe: Harare, Bulawayo, Masvingo, Mutare, Bindura, Gwanda, Gweru and Chinhoyi.

As a result, detainees may receive a custodial sentence for crimes they have not committed, or receive custodial sentences longer than necessary owing to no legal representative to support them in arguing their cases.⁵⁴ During Zimbabwe's Universal Periodic Review in 2011, the juvenile justice system was criticised for failing to provide free legal assistance to children whose parents or guardians lacked the means to pay for a private lawyer.⁵⁵ Between 2014 and 2016, CATCH, a CSO that works with children in conflict with the law in five provinces of the country,⁵⁶ encountered 346 convicted children. Of these children, only 60 had legal representation. It is recommended that government increases the budget allocated to the Legal Aid Directorate and also prioritises the training of legal aid staff to ensure that they have the capacity to deal with all diverse cases, including those involving children in conflict with the law.

3.3.7. Conditions of detention

Luanda Guideline 24 requires that conditions of detention in police custody and pre-trial detention conform to all applicable international law and standards, guarantee the right of detainees to be treated with respect for their inherent dignity, and to be protected from torture and other cruel, inhumane or degrading treatment or punishment.

In 2014, the Chief Justice described conditions in most police cells as 'inhuman and degrading' and called for the refurbishment of the cells countrywide to avoid breaching suspects' constitutional rights.⁵⁷ One of the challenges in ensuring that the physical conditions of remand detention align with the Luanda Guidelines is lack of adequate funding. There have been repeated requests for an increase in the budget allocated to the ZPCS.⁵⁸ The Parliamentary Portfolio Committee on Justice, Legal and Parliamentary Affairs has raised concern over the government's allocation to the ZPCS, which has often seen the institution operating without adequate food, drugs, clothing and linen for the inmates.⁵⁹ In early 2017, there were reports of typhoid outbreaks at Chikurubi Maximum Prison and Harare Central Prison. In May 2016, 2000 prisoners were pardoned in terms of section 112(1)(a) and (d) of the Constitution in a move to decongest the overcrowded prisons in the country.⁶⁰ The ZPCS is underfunded and relies mostly on donations and charity work. On 13 March 2015, more than 900 inmates rioted over poor prison conditions and food shortages in Chikurubi Maximum Security Prison.⁶¹

3.3.8. Standards of conduct and internal discipline for officials

Luanda Guideline 36 provides that States should have in place, and make known, laws, policies and standard operating procedures to set enforceable standards of conduct for police officials. Section 219(4) of the Constitution provides that an Act of Parliament must be enacted to provide for the organisation, structure, management, regulation, discipline and promotion and demotion of officers and other members. The current Police Act has not been aligned to the constitutional framework, with the IMT still awaiting the outcome of a meeting between the Ministry of Home Affairs and the MOJLPA on the question of review.⁶² The Police Act does not reflect a number of Constitutional provisions such as those dealing with the independence and impartiality of the Police Force.⁶³ A contravention of those sections requires a disciplinary process that is not currently provided for in alignment with the Constitution. Further, the current Police Act fails to reflect the functions of the Police Service Commission as provided in the Constitution: namely to fix and regulate conditions of service, including salaries, allowances and other benefits, of members of the Police Service, and to employ qualified and competent persons to hold posts or ranks in the Police Service.⁶⁴

In the absence of alignment there exist uncertainties in the application of existing provisions of the Police Act, which are being challenged on a case-by-case basis. For example, there is a constitutional challenge underway to section 40 of the Police Act, which excludes any police official who ceases to be a member of the police force from liability for offences committed under the Police Act.⁶⁵ In the absence of a review and alignment of the Police Act, different standards of conduct of the police officials will apply. The standards of individual conduct for officials are important as they inform the boundaries in which they work. Further, section 70 of the Police Act was recently challenged for its inconsistency with the Constitution,⁶⁶ which requires that civil proceedings brought against the State or a police officer be instituted within eight months of the conduct forming the basis of the civil claim. The High Court ruled that the short time limit of eight months is inconsistent with the Constitution, which guarantees the right to a fair hearing within a reasonable time (section 69(2)), and equal protection of the law (section 56(1)). The case has been referred to the Constitutional Court for confirmation of invalidity.

3.3.9. Vulnerable groups

Children

According to Guideline 31(g), children shall be guaranteed the right to the presence of a lawyer or access to free legal services. However, this right is not fully realised in Zimbabwe. As highlighted above, between 2014 and 2016 CATCH found that out of 346 convicted children only 60 had legal representation. This is due to financial constraints of the Legal Aid Directorate and a lack of collaboration amongst key stakeholders that deal with children such as the ZRP, Department of Social Welfare and CSOs that focus on access to justice for children. There is no specific referral system to ensure that when a child is detained police officers notify the CSOs and social workers; as a result of this children spend long periods in detention whilst awaiting trial and without having secured legal representation. It is recommended that the MOJLPA establish specific legislation that deals with juvenile justice and guidelines for institutions that work with children in conflict with the law.

Guideline 31(b) provides that states should enact laws and establish policies that prioritise non-custodial alternatives and diversion programmes for children in conflict with the law. In May 2013, the Zimbabwean government launched the pre-trial diversion programme, which now exists in five out of ten provinces in the country.⁶⁷ However an inadequate budgetary allocation for this programme has affected its effective implementation, as there are a few trained professionals who work with children. It is recommended that government prioritise and support this programme.

Women

Luanda Guideline 32(b)(iii) provides that States consider reasonable suspension of detention for women with care-taking responsibilities. Though the Constitution provides for special protection of

the rights of women in section 80, there is no specific provision in national legislation that provides for reasonable suspension of detention for women with care-taking responsibilities. Section 58 of the Prison Act⁶⁸ permits the admission of an infant with its mother and states that, after weaning, the child may be taken in by relatives (if available) or Social Welfare. In reality, the lack of a specific provision allowing for reasonable suspension of detention has cost the State, which is required to take care of a child when the mother is detained.

Persons with disabilities

Luanda Guideline 33(iii) encourages States to ensure that persons with disabilities are informed of, and provided prompt access to, appropriate support to exercise their legal capacity, including through the provision of interpreters, information in accessible formats and/or independent third parties. According to section 22(3)(c) of the Constitution, the State and all institutions and agencies of government at every level must encourage the use and development of forms of communication suitable for persons with physical or mental disabilities. The CP&E Act, however, is not aligned with the Luanda Guidelines and provides that, if the accused is unable to properly conduct his defence by reason of deafness or muteness or both, the court may, if it is satisfied that it is in the interests of the safety of the public or for the protection of the accused, order that the accused should not be released from custody or should be kept in custody, as the case may be, pending the decision of the President.⁶⁹ The provision of the CP&E Act discriminates against persons with disabilities and disregards the inherent dignity of persons by detaining them for prolonged periods of time, due to their lack of capacity to defend themselves.

Moreover, according to Guideline 33(ii) the detention of a person with a physical, mental, intellectual or sensory disability must be in conformity with the law and consistent with the right to humane treatment and the inherent dignity of the person. Persons who are mentally ill are being held for long periods in detention, and in one case an inmate was held in remand detention for 32 months whilst waiting to be examined by a psychiatrist.⁷⁰ Such long periods of detention are inconsistent with the Luanda Guidelines and expose mentally ill persons to abuse in prison as they are sometimes held together with other detainees and not separately as they are still on remand. It is recommended that mentally ill persons be held separately and that ZPCS prioritises the employment of specialist doctors who are required for the assessment of persons with disabilities who are in conflict with the law.

Migrants

During its periodic visits to inspect and monitor police detention facilities, ZHRC has noted that illegal immigrants awaiting deportation are being detained at police stations and at Harare Central Prison, resulting in overcrowding.⁷¹ This is due to the fact that the Immigration Act does not provide for a specific designated place of detention for illegal migrants despite the fact that migrants detained in connection with their migrant status should be separated from convicted persons. On average illegal migrants spend six to twelve months in detention whilst the process of deportation is being undertaken. It is therefore recommended that the Immigration Act be amended to provide for a designated place of detention for illegal migrants.

3.4. Conclusion of review

While this review has identified a number of gaps that must be addressed if Zimbabwe is to achieve a rights-based approach to remand detention, the process of review itself provides an opportunity for key criminal justice stakeholders to critically engage with the AChHPR and the Luanda Guidelines, and to consider how these standards can support the constitutionally required legislative reform currently underway. As the confirmed African regional standards for arrest, police custody and pre-trial detention, the Luanda Guidelines were drafted to provide a blueprint for efficient and effective pre-trial justice systems, while also acknowledging the financial and other resource constraints experienced by African Union Member States. Accordingly, the utility of applying the Luanda Guidelines at this critical juncture in Zimbabwean criminal justice reform is clear and encouraged.

4. THEMATIC PRIORITIES AND RECOMMENDATIONS

Zimbabwe's pre-trial detention system faces three overarching challenges:

1. The alignment of the national legal framework to the Constitution (which itself is an accurate reflection of the Luanda Guidelines);
2. Coordination between relevant criminal justice stakeholders; and
3. resource constraints that limit the ability of the State to deliver effective and efficient justice within the framework provided by the ACHPR in the Luanda Guidelines.

This review has highlighted specific challenge areas that can be addressed through the implementation of the Luanda Guidelines as the Constitutional alignment progresses, and through the provision of adequate budgetary allocations. Recommendations to address these challenge areas are set out in detail below.

4.1. Constitutional alignment

The following Acts of Parliament should be aligned with the Constitution and the Luanda Guidelines in terms of the gaps identified in this review:

- The Police Act should be amended to include provisions that address the independence and impartiality of the Police Force and functions of the Police Service Commission;
- The Immigration Act should be amended to specifically provide for designated places of detention for illegal migrants and a framework for the detention of migrants that is aligned to the Constitution;
- The Zimbabwe Human Rights Commission Act should be amended to include the additional functions provided for in sections 243 and 244 of the Constitution;
- The Legal Aid Act should be amended to ensure that access to legal aid by accused persons is not limited and impose an obligation to inform accused persons of their right to request legal aid; and
- The Criminal Procedure and Evidence Amendment Act should be amended to:
 1. protect the right to silence and to provide a custody time limit for those who are arrested with a warrant;
 2. provide alternatives to arrest (such as community service and diversion systems, and the decriminalisation of minor offences), particularly for minor crimes, that are in line with the provisions of the Luanda Guidelines; and
 3. prohibit the detention of accused persons who are unable to properly conduct their defence by reason of their disability.

4.2. Role of criminal justice stakeholders

In the course of making this review and during stakeholder discussion in 2017, the significance of the role of key criminal justice stakeholders in expediting the progress of the legislative alignment process and introduction of new legislation was highlighted. As such, the following recommendations are made to specific stakeholders.

4.2.1. The Zimbabwe Human Rights Commission should:

- in accordance with Section 243(1)(a) of the Constitution, promote awareness of and respect for human rights and freedoms at all levels of society within the legislative alignment process and in the context of all IMT platforms, including

stakeholder consultation workshops, public engagement meetings and providing comments on zero draft bills;

- in accordance with section 243(1)(c) of the Constitution, monitor the extent to which the legislative alignment process ensures the observance of human rights and freedoms. In particular it is recommended that the ZHRC requests a review of the recently amended Criminal Procedure Evidence & Amendment Act;
- monitor the status of the relevant laws on the bill tracker, the manner in which stakeholder workshops of the IMT are conducted, and the extent to which recommendations made by the respective Line Ministries are adopted;
- in accordance with section 243(1)(i) of the Constitution, make recommendations on measures that Parliament can take to promote human rights within the context of the legislative alignment process;
- in accordance with section 243(1)(j) of the Constitution, develop discussion papers with recommendations for legislative alignment, in particular on how to legislate human rights obligations and share these with relevant Line Ministries, stakeholders, IMT and members of public;
- in accordance with section 243(1)(j) of the Constitution, provide critiques of draft Bills produced by the IMT, to identify any outstanding gaps and to ensure uniformity in the drafting of human rights provisions and obligations;
- in accordance with section 244(2) of the Constitution, request that Line Ministries provide detailed updates to the ZHRC on their substantive proposals to align respective pieces of the legislation with the Constitution. In particular, ZHRC should follow up with the Ministry of Home Affairs regarding all the policing and criminal justice legislation;
- in accordance with section 244(2) of the Constitution, report to Parliament with specific recommendations to align specific laws; and
- as part of the Inter-Ministerial Taskforce, ensure that the Luanda Guidelines are taken into account during the review and reform of relevant criminal justice legislation.

4.2.2. Civil society organisations in the criminal justice sector should:

- familiarise themselves with the Luanda Guidelines and the IMT process, and contribute to the legislative alignment process through critiquing draft bills and offering recommendations on the legal reform.

4.2.3. The Parliament of Zimbabwe should:

- drive the introduction of legislation for the immediate establishment of the Independent Complaints Mechanism for criminal justice institutions. At minimum, the mechanism should:
 - have a legal mandate and adequate powers to carry out comprehensive investigations of human rights violations, and be sufficiently independent from the criminal justice institutions and the government;
 - be adequately resourced;
 - operate transparently and report regularly;
 - have the support of the public and government; and
 - involve civil society in its work.⁷²
- pass legislation to criminalise torture in accordance with the provisions of the Luanda Guidelines and the ACHPR's Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa.

4.2.4. The Zimbabwe Republic Police should:

- develop a **code of conduct** for the police, which aligns with the minimum standards of conduct in the Luanda Guidelines, and is based on the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) Code of Conduct;⁷³ and
- address issues of implementation of the law through a review and revision of current training, and a strengthening of internal disciplinary systems.

4.2.5. The Ministry of Justice Legal and Parliamentary Affairs should:

- establish specific legislation that deals with juvenile justice and guidelines for institutions that work with children in conflict with the law.

4.3. Budgetary allocations for the criminal justice sector

This review also noted the impact of the resource constraints on the ability of the State to deliver effective and efficient justice within the framework provided by the ACHPR in the Luanda Guidelines. The following recommendations are therefore made:

4.3.1. The Ministry of Finance and Economic Development should:

- make adequate budgetary allocations to the Ministry of Justice, Legal and Parliamentary Affairs and the Ministry of Home Affairs for the improvement of conditions of detention in prisons and in police holding cells in compliance with the minimum requirements for conditions of detention in the Luanda Guidelines;
- make adequate budgetary allocations to the Legal Aid Directorate to take into account the need for adequately trained personnel who have the capacity to deal with all diverse cases, including those involving children in conflict with the law, as well as ensure that Legal Aid has branches country-wide; and
- make adequate budgetary allocations to the Ministry of Justice, Legal and Parliamentary Affairs to ensure that the pre-trial diversion programme is in all provinces.

4.4. Criminal justice reform

The review also noted the need for reform in the criminal justice sector overall in areas mentioned in section 3, and the following recommendations are made:

4.4.1 The Ministry of Justice Legal and Parliamentary Affairs should:

- make provision for alternatives to detention, and for special measures, for pregnant and breastfeeding women, and women who are accompanied by children;
- prioritise the employment of specialist doctors who are required for assessments of persons with disabilities who are in conflict with the law;
- strengthen specialised juvenile court facilities and procedures with adequate human, technical and financial resources, and in particular increase the number of adequately trained professionals working in the juvenile justice system including Social Workers; and
- ensure that there is consistent collection of data on arrest, police custody and pre-trial detention and that this is publicly and readily available for the public.

5. CONCLUSION

The Constitution of Zimbabwe sets a foundation that supports a legal system based on respecting, protecting and upholding the human rights of all people in Zimbabwe. The alignment of national legislation is a crucial starting point for translating the Constitution into a living document in that it can be used to realise these rights. However, as highlighted in this paper, historic challenges in the legislative and accountability frameworks for policing and criminal justice, budgetary constraints, and the more recent delay in the alignment of relevant national legislation have significantly contributed to human rights violations in the criminal justice context.

The important work of the IMT, as the agency tasked with the alignment of all national legislation to the new Constitution, can be enhanced by the existing work of the ACHPR to translate normative human rights standards into legislative and operational frameworks for policing on key visible areas of policing and criminal justice. This review assesses the Constitutional and legislative framework of Zimbabwe against the standards established by the ACHPR in the Luanda Guidelines, and makes key recommendations aimed at promoting a rights-based legislative framework. The review has identified three broad categories of reform:

- the urgent need to align policing and related legislation to the Constitution, and the utility of the Luanda Guidelines in aiding this process;
- the need for budgetary allocations to the policing and criminal justice sector that are sufficient to promote a rights-based approach to arrest, police custody and pre-trial detention; and
- the critical role that can be played by IMT's stakeholders in ensuring that the new legislative framework for policing and justice is rights-based, and to providing oversight of the police and criminal justice sector's performance under the new Constitutional and legislative dispensation.

The importance of rights-based policing and criminal justice practices to the development and stability of any democracy cannot be over-stated. The new Constitutional framework in Zimbabwe provides a solid foundation for achieving this. Through the alignment process, and by reference to the key recommendations in this review, a justice system that is oriented towards dignity, fairness and accountability is within reach for all Zimbabweans.

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