PROMOTING PRE-TRIAL JUSTICE IN AFRICA

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Offences inherited from colonial times are still applied in Africa, driving up rates of pre-trial detention. PPJA calls on African countries to heed the call of the Ouagadougou Declaration to repeal outdated offences.

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The Southern African Litigation Centre takes the South African Prosecuting Authority to court for its failure to pursue a case against police torturers of Zimbabwean political detainees.

UN Rules for the treatment of prisoners to change?

Conversion of rules into 'hard law' unlikely; fear of softening standards makes targeted changes the probable outcome.

Events

51st Session of the African Commission on Human and People's Rights

18 April - 2 May 2012, Banjul, The Gambia.

Editorial

In this second PPJA newsletter we report on PPJA's campaign for the repeal of outdated offences currently being launched at the 51st session of the African Commission on Human and People's Rights.

Research on Zambia and Malawi featured in the previous PPJA newsletter showed that a significant proportion of people in pre-trial detention, particularly those in police cells, are held in relation to outdated offences, often inherited from colonial times, which may today be inappropriate and even unconstitutional.

The insight that many people in detention are held on questionable offences is not new. Indeed as long ago as 2003 the African Commission called on its member states through the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa to decriminalise offences such as "loitering" in order to reduce the size of the prison population.

Despite this call, many African states still retain colonial offences such as being a "rogue and vagabond" on their statute books. The PPJA campaign aims to encourage states to explore decriminalisation of a range of outdated offences. Such decriminalisation would reduce the rate imprisonment across Africa. The rate of pre-trial detention is likely to be particularly affected as these offences are often withdrawn before reaching court.

We also report on attempts to prosecute Zimbabwean torturers in South Africa. At the height of the political crisis in Zimbabwe five years ago members of the political opposition were detained and tortured by police in Zimbabwe. \

The Southern African Litigation Centre has argued in court that the Rome Statute through South Africa's implementing legislation gives South African courts jurisdiction to prosecute such cases in South Africa. Given the continued abuse of pre-trial detention for political ends in Zimbabwe, the case could have a significant impact through discouraging torture of detainees in Zimbabwe.

Even where detainees are not explicitly tortured, conditions of detention across Africa often amount to cruel, inhuman or degrading treatment. The United Nations Standard Minimum Rules on the Treatment of Prisoners have been a useful tool guiding states in achieving acceptable conditions of detention for some decades.

Because their dated nature, for some time there has been discussion on whether the rules should be converted into "hard law", or revised to take account of changed practices, or simply explained via a commentary to assist states with implementation.

A review considering various approaches is currently under way under the auspices of the Commission on Crime Prevention and Criminal Justice of the United Nations Office on Drugs and Crime (UNODC). We report on the risks and

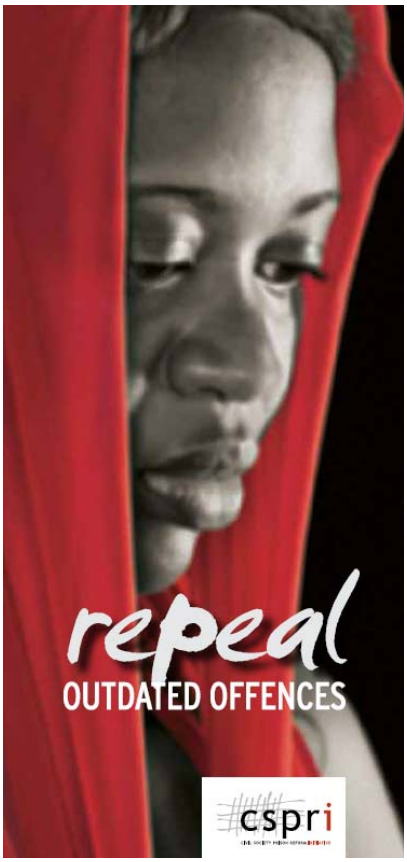
the benefits of the various approaches being considered.

The PPJA team

'Repeal outdated offences!'

Many people in prison in Africa are detained for nothing more than being poor or homeless or a 'nuisance'.

Many of these detainees are charged with offences which do not comply with national Constitutions or international law. Many will experience terrible conditions, fall ill, or suffer abuse in detention, and their families will be without their support. Now is the time for African countries to review and repeal outdated offences inherited from colonial times.



This is the message of the PPJA campaign for the repeal of outdated offences. An example of an outdated offence is being a 'rogue and vagabond'. Rogue and vagabond offences across Africa have their roots in England's Vagrancy Act of 1824. The offence criminalises various 'nuisance' behaviours. For example, the Malawi Penal Code, like many others, provides that the following people are deemed to be rogues and vagabonds:

- every 'suspected or reputed thief who has no visible means of assistance and cannot give a good account of himself'
  'any person found on a road or at a public place 'at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose'.

This kind of offence, which relies a great deal on subjective interpretation, gives licence to police to arrest someone who is homeless or poor or is assumed to be a thief, even though such a person may not have caused harm to anyone. The offence may be abused in order to detain almost anyone. This is against the right not to be detained arbitrarily.

The Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa of 2003 endorsed recommendations calling for reducing the size of prison populations in Africa.

The Plan of Action recommended 'decriminalisation of some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents' as a strategy to reduce the prison population. Read more about these and other outdated offences on the PPJA poster to be launched at the 51st session of the African Commission.

Many of the offences identified by the African Commission in the Ouagadougou Declaration as ripe for repeal amount to nothing more than the criminalisation of poverty, homelessness, unemployment, or previously having committed an offence. Nearly a decade has passed and few countries appear to have made any progress in implementing this strategy endorsed by the African Commission. PPJA will be raising awareness on this issue throughout the 51st session of the African Commission currently being held in Banjul, The Gambia.

Tell us about colonial or other unconstitutional offences in your country and the progress made in repealing these laws. Email us on: ppja@communitylawcentre.org.za

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Zimbabwean torturers to be prosecuted in South Africa?

Southern African Litigation Centre takes Prosecuting Authority to court to force reconsideration of decision not to pursue case against torturers of Zimbabwean detainees

Zimbabwean police raided the headquarters of the opposition Movement for Democratic Change (MDC) and arrested over 100 MDC supporters in March 2007. Many detainees were subsequently tortured.

The Southern African Litigation Centre (SALC) compiled a detailed dossier of these events, including affidavits from the victims themselves and supporting papers from lawyers and medical practitioners confirming that the detainees were tortured. These papers were then presented to South Africa's National Prosecuting Authority (NPA) as a basis for prosecution.

How is that South Africa may prosecute crimes committed in in Zimbabwe?

South Africa is a state party to the Rome Statute, the international treaty which establishes the International Criminal Court (ICC). The Rome Statue arose from the need to be able to prosecute individuals responsible for crimes against humanity, genocide and war crimes, who would otherwise be able to shield themselves by invoking the doctrine of sovereign immunity. But the ICC itself can only exercise its jurisdiction over state parties, and only if the state is unable or unwilling to prosecute locally.

However South Africa ratified the Rome Statue through domestic legislation in the form of the Implementation of the Rome Statue of the International Criminal Court Act 27 of 2002 (the Implementation Act).

The preamble to the Implementation Act specifically states that the aim of the Act is, inter alia, .. “to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances”.

South Africa’s Implementation Act establishes that South African courts have jurisdiction to prosecute international crimes such as torture if the alleged perpetrator of crimes is in South Africa, is a South African citizen or resident, or committed the crimes against a South African resident or citizen (section 4) .

More strongly than that, the Implementation Act provides that in deciding whether or not to prosecute such crimes the National Director of Public prosecutions must 'give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in Article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime' (section 5).

'Crimes' for the purposes of the Implementation Act are genocide, crimes against humanity and war crimes. 'Crimes against humanity' include torture 'when committed as part of a widespread or systematic attack directed against any civilian population'. 'Torture' means the 'intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused'.

The National Prosecuting Authority has established a Priority Crimes Litigation Unit whose mandate includes the prosecutions of crimes arising from the Rome Statute, as well as crimes arising from the denial of or failure to apply for amnesty in South Africa’s Truth and Reconciliation Commission (TRC).

The torture documented by the SALC falls well within the Implementation Act definition of torture. Given the collapse of the rule of law in Zimbabwe, the well-documented, systematic and continued use (even in 2012) of the apparatus of the criminal justice system to intimidate and torture political opposition and the fact that the officials allegedly responsible for the torture of MDC supporters are known to visit South Africa from time to time, South Africa is well situated to investigate, arrest and prosecute the alleged perpetrators under the Implementation Act.

South Africa’s NPA took months to respond to the SALC, saying the matter had been referred to the South African Police Service (SAPS) for investigation. Months later the SALC were informed that the SAPS had decided not to investigate the matter. SALC instituted review proceedings in the High Court, arguing that the refusal to investigate and prosecute the torture allegations amounted to, amongst other things, a failure on the part of the NPA, SAPS the Director-General of the Department of Justice to apply their minds to the matter.

The reasons given for the decision not to investigate included (incorrectly) that the SAPS and NPA were not permitted under the Implementation Act to investigate such crimes, as well as the bald assertion that if an investigation were to be initiated, it would impact negatively on South Africa's diplomatic relations with Zimbabwe, as South Africa would be seen to be 'criticizing the Zimbabwean government'. Presumably South Africa being seen as 'harbouring torturers' was not a consideration for South Africa’s image.

The review, which was heard on 26 March 2012 in the North Gauteng High Court, began dramatically when the SALC submitted an affidavit from Advocate Anton Ackermann, head of the Priority Crimes Litigation Unit, in which he said he had recommended the allegations be investigated and had disagreed with the reasons the police and NPA gave for not pursuing the case. On 29 March the High Court reserved judgment on the matter.

The tendency of South Africa’s NPA to shirk politically difficult prosecutions and systematically to interpret its discretion not to prosecute in a manner which takes insufficient account of the duty to prosecute is the subject of a forthcoming Monograph to be published by the Institute for Security Studies in 2012.

The judgment of the High Court may be the next step in affirming South Africa’s duties in relation to prosecution in terms of its own laws and international obligations.

This article is based on an op-ed by Clare Ballard published on PoliticsWeb.

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Rules for the treatment of prisoners to change?

Rules for the treatment of prisoners are under review - softening of standards is a risk

UN Standard Minimum Rules for the Treatment of Prisoners ("UNSM Rules") adopted in 1957 remain the guidelines for the treatment of prisoners around the world. The rules have stood the test of time well, and continue to be used by inspection and monitoring bodies to monitor conditions of detention, to develop national strategies and to offer recommendations for detention reform.

But the UNSM Rules are a soft law instrument. This means they are not binding on states. Furthermore they contain gaps and use outdated language. For some time there has been discussion over whether to update the UNSM Rules to reflect modern language and practice, to re-write them, or whether to incorporate them into a hard law convention on the rights of detainees.

Persons deprived of their liberty are a vulnerable group in need of solid and specific protection, and a specific convention on the rights of detainees would offer persons deprived of their liberty the most comprehensive and effective legal protection. Such 'hard law' protection is available in relation to torture, in conventions such as the United Nations Convention against Torture and the Optional Protocol to the Convention against Torture, but not in relation to conditions of detention alone.

There are risks to opening the UNSM Rules to codification into 'hard law'. The most significant of these risks is that a hard law instrument to which states may be prepared to bind themselves would almost certainly embrace a lower standard than is currently set by the UNSM Rules. A further risk is that a convention would apply only to state parties, rather than to the whole international community. But if a new 'hard law' convention became a reality, it is likely it would become the new standard. This would lower the significance of the current UNSM Rules even among states not party to such a convention.

A revision of the UNSM Rules could also be aimed at replacing old practices and refining language, or even redrafting the rules entirely. A risk of lowering standards also applies to amending or redrafting the existing UNSM Rules even without codification into hard law. The risk of inadvertently lowering standards in making such changes does exist, particularly where existing case law refers to the older language of the original text.

In the past, where specific gaps have been identified in the range of minimum protection offered by the UNSM Rules, supplementary texts such as the UN Rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok Rules), the UN standard minimum rules for non-custodial measures (the Tokyo Rules) and the standard minimum rules for the administration of juvenile justice (the Beijing Rules) have been adopted to provide more comprehensive protection for particularly vulnerable groups in detention.

These supplementary rules show how further standards can be approved without damaging the integrity of the UNSM Rules. However a plethora of rules also has disadvantages as it makes dissemination and widespread knowledge of the rules more difficult.

There remain in many countries gaps between what is stipulated by the UNSM Rules alone and the actual conditions experienced by persons in detention. This is sometimes because there is a lack of guidance on how the standards stipulated may be achieved.

Consequently another option is a commentary which would be appended to the UNSM Rules to assist states in implementing the necessary standards. Practical operational guidelines designed to help with the implementation of each rule contained in such a commentary would assist oversight institutions as well as officials of correctional facilities and other places of detention.

The adoption of practical operational guidelines has the significant benefit of preserving the integrity of the original text, thus reaffirming its status and avoiding the risk that agreed revisions would lower existing standards.

These debates around the UNSM Rules were translated into specifics in December 2010 with the UN General Assembly Resolution 'on the revision of existing United Nations standard minimum rules for the treatment of prisoners so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on Crime Prevention and Criminal Justice on possible next steps' .

The Commission on Crime Prevention and Criminal Justice (the Commission) is part of UN Office on Drugs and Crime (UNODC). In early October 2011 an "open-ended intergovernmental expert group meeting" (IEGM) was convened in Vienna by the UNODC pursuant to this resolution. The IEGM met again in January 2012 to discuss a concept paper by expert group member Professor Coyle, in which he recommended a commentary to the UNSM Rules, rather than any revision of the text itself.

Under pressure from NGOs and several experts it was agreed that other options – a total revision and a revision of key provisions – would also be put on the table for states to consider. At this stage it does not appear that drafting of a "hard law" convention is under serious debate.

The January 2012 meeting resulted in the adoption of recommendations calling on the Commission to examine targeted changes to the current UNSM Rules. The areas of potential change identified by the IEGM include:

- respect for prisoners' inherent dignity and value as human beings
- medical and health services
- disciplinary action and punishment
- investigation of all deaths in custody, including signs or allegations of torture and other ill-treatment
- protection and special needs of vulnerable groups deprived of their liberties
- the right to access legal representation
- independent oversight
- training of relevant staff, and
- the replacement of outdated terminology.

The IEGM's recommendations will go to the 20th Session of the Commission in April 2012. This process should be keenly followed by all those with an interest in conditions of detention.

This article was written with contributions by Gwenaelle Dereymaeker.

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for future topics for the PPJA newsletter.
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