HUMAN RIGHTS IN AFRICAN PRISONS

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EDITED BY JEREMY SARKIN

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Contents

Tables and figures

Tables

Figures

Acknowledgements

This book emerges out of a process, begun in 2005, during which the idea of putting together a book focused on prisons in Africa was conceived. However, to find contributors willing to write on human rights issues in prisons throughout the continent was far more easily conceived of than done. While there are many researchers interested in prison issues in Africa, few examine the issues on a continental basis. There is good reason for this: getting information and access to prisons in many African countries is extremely difficult and as a result there is generally little or no information available on prison issues for many parts of Africa and very few publications exist. Certainly there was the impression at the beginning of the project that this is an ambitious one, and that it would be difficult to generalise about Africa. But, because this was an original project with nothing comparable to it, and something which was sorely needed, the contributors were keen to come on board and expand on the existing scant research on prison issues in Africa. The contributors therefore need to be thanked for their efforts. Hopefully the chapters will inspire further research and debate on issues in African prisons.

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Jeremy Sarkin
Boston
October 2007

Acronyms and abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CESCA	Central, Eastern and Southern African Heads of Correctional Services
CPT	(European) Committee for the Prevention of Torture
CRC	(UN) Convention on the Rights of the Child
DCS	Department of Correctional Services (South Africa)
ECHR	European Convention on Human Rights
ICPS	International Centre for Prison Studies
MDGs	Millennium Development Goals
NCCS	National Committee on Community Service
NEPAD	New Partnership for African Development
NGO	non-governmental organisation
NIS	National Integrity Systems
NORAD	Norwegian Agency for International Development Co-operation
OAU	Organisation of African Unity
PID	pelvic inflammatory disease
PRI	Penal Reform International
SMR	Standard Minimum Rules for the Treatment of Prisoners
STD	sexually transmitted disease
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime

1 An overview of human rights in prisons worldwide

Jeremy Sarkin

One out of every 700 people in the world is in prison (Walmsley 2003: 65) and the world's prison population stands at over 9 million. The continent of Africa is home to 53 countries, roughly 3 000 prisons, and approximately 1 million prisoners. Some countries (Algeria, the Democratic Republic of the Congo, Ethiopia, Kenya, Madagascar, Nigeria, South Africa, Sudan, Tanzania and Uganda) each have about 100 prisons or more. Three of these countries (South Africa, Uganda, the Democratic Republic of the Congo), however, have 200 or more prisons each, while others have only one or two. Although African prisons hold just over 10 per cent of the world's prison population, the prison population in Africa has been rising over the last few years (see Walmsley 2003: 67–68; 2005a). South Africa has the highest rate of incarceration in Africa and the fourteenth highest in the world, as far as rates of detention are concerned. It must be noted, however, that three countries – the US, China and Russia – collectively hold about half the world's prison population.

Prisons in many parts of the world are in crisis. Never before have there been so many problems within penal systems and such large numbers of people incarcerated. The penal crisis is not limited to poor countries or those in the global south; it extends to many western countries as well (Cavadino & Dignan 2006). The problems are primarily attributable to the high rate of confinement, which results in a lack of resources and overcrowded, unsafe and squalid conditions. These difficulties are such that even in European countries, where prisons are generally considered good, prisoners are 'simmering on the point of riot or rebellion' (Cavadino & Dignan 2006: 43). Their discontent is not only with their fellow inmates, but also with prison staff, who are often demoralised, disaffected and restless (Cavadino & Dignan 2006). Thus, problems in prisons are not a uniquely African problem.

The importance of prison research

Prisons have always been a key focus of those interested in human rights, the rule of law and a host of other matters. Their significance as a field of enquiry has lately been amplified, partly due to the rise in inmate population numbers. Issues in criminal justice, human rights and other related disciplines are no longer pertinent only for the nation state, but have major global implications for the international community. In this context, prisons offer a critical field of research as they concern a state's most intrusive and extensive powers to curb individual human rights. Prison

research thus brings into sharp focus the relationship between individuals of a state and the state itself (Yates & Fording 2005).

A society's human rights record is mirrored in the state of human rights protection in its prisons. Apart from the death penalty, imprisonment is one of the harshest punishments a society can impose on those who transgress its rules. What goes on in the prisons of any given country reflects its penal system, its legislation, its policies and, more obliquely, its history, developmental maturity, culture and ideologies. How and whom the state chooses to confine reflects that state's attitudes and policies towards rights in general, and the rights of vulnerable groups in particular. In this regard Nelson Mandela aptly wrote, 'No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but it lowest ones' (1994: 187). In this context prisoners are usually grouped with other vulnerable groups in a society, such as women (see Worrall 1990), children and the disabled, whose rights are most likely to be abused and are therefore most in need of protection.

Prisons are still universally accepted and located as the central feature of criminal justice systems in all states. However, there is a growing international awareness that prisons are not adequately equipped to deal with those who have transgressed the law. Yet prisons continue to be seen as the most effective institutions to deal with people deemed deserving of punishment. The pressure citizens exert on states to penalise offenders is part of the reason why prisons remain the primary instruments of punishment. Communal panic is frequently exacerbated by the media and others who, indifferent to the larger context, focus exclusively and intensely on individual events in criminal justice. Crime and criminals regularly become a politicised issue used to garner support for a particular politician, political party or the state in general. Often prisoners are referred to in language that signifies the way societies think about them. Thus, terms such as 'garbage' or 'filth' are used (Duncan 1996). Fortunately, there is a growing awareness in other spheres that prisons have and cause many problems, and that ultimately alternatives to lengthy incarcerations need to be found. Yet, regrettably, attempts to revise traditional penal practices are often seen as the state's unwillingness to deal effectively with criminality or as the state's being weak on crime. Policy issues related to prisons and criminal justice in general are extremely politicised.

A conspicuous global trend has shown that punishments handed down to the convicted have become harsher over the last few years. It has been argued that this attitude is due to a greater fear of crime, diminishing confidence in the criminal justice system, 'disillusionment' with positive treatment measures and an increase in a retributionist philosophy (Walmsley 2003: 71). This mindset has not only resulted in harsher sentences, but also in a dramatic increase in the number of incarcerations around the world.

There are undoubtedly enormous benefits to a society as a whole when there is adherence to human rights standards in prisons. Such compliance is more likely to

result in a person being reformed upon release (Zinger 2006), with the attendant benefits to public safety.

As globalisation and crime become increasingly borderless, so international and comparative prison research becomes imperative. Criminal justice systems have to operate in a global context, as criminals operate across national and international borders. Critically, penal systems must cooperate and learn from each other. Increasingly, prisons across the world are taking note of constructive developments elsewhere and introducing such reforms locally.

Prison issues cannot be viewed in isolation. For example, in the criminal justice system the effectiveness of and resources allocated to other branches, such as the police and the courts, have a specific and direct effect on the prisons. The global expenditure on criminal justice in 1997 was estimated to be US$360 billion – or $424 billion at 2004 prices. This amount was distributed as follows: 62 per cent on police, 3 per cent on prosecutions, 18 per cent on courts and 17 per cent (or $62.5 billion) on prisons (Farrell & Clark 2004: 9). Relatively, the costs are more burdensome on poor countries. Overcrowding encourages wealthier countries to build more prisons, yet poorer countries that cannot afford them have to manage with existing prisons and are therefore cramming more prisoners into less space.

The availability of data and statistics about the criminal justice systems (for prosecutions, trials and prisons) in Africa is for the most part extremely limited (van Zyl Smit & Dünkel 2001; Boone et al. 2003). For some countries, such as South Africa, there is generally quite a lot of information (see Bukurura 2002), but for others the information is either simply not available or the prisons statistics are not always accurate and thus do not adequately reflect the situation. So, while there is some knowledge about the prison situation, there is generally a paucity of literature on the topic. Literature that has examined such issues has often examined only one or a few countries.

Prisoners may not be kept in formal prisons but held in police cells or other places of confinement that are not included when statistics are gathered. In certain countries this is particularly pertinent to awaiting trial prisoners. In addition, information-gathering systems are often unwieldy, as information is frequently captured and collated manually. Statistics and research would be significantly enhanced if information were gathered more consistently with more accurate capturing systems.

The dearth of information on prisons in the global south is also partly a product of the fact that the prisons there are usually run by the state which, generally, has gone out of its way in many countries to make access to prisons and information about them difficult to obtain. For example, many countries in North Africa have allowed little access to their prisons; this is true in the Middle East as well (Human Rights Watch 2006b). Information is thus often hard to come by. (Having said that, there are often equally significant problems in the relatively few privatised prisons, as they are essentially state institutions run by private companies that release information only through the state).

Because human rights abuses are common in such institutions, there is understandably a desire to keep these malpractices out of the public domain. In many countries civil society is weak and media scrutiny remains limited, therefore prison issues fly under the radar until some major event, such as a prison riot, thrusts them into the open. Another factor contributing to the shortage of information is the 'lock them up and throw away the key' mentality, which often reflects public sentiment towards prisoners and indifference about the harsh treatment meted out to them. This mentality is maintained by the public's general ignorance of the grim conditions in these institutions. In many places in the developing world there is little access to prisons and the problems pervading them are hidden and receive no publicity. The attempts to avoid public scrutiny and enquiry are not characteristic only of Africa or the developing world; similar practices have occurred in many countries, including the UK, the US and Canada (Stern 2006). The attempts of these countries to avoid scrutiny are often less successful, as they have sophisticated media resources, vigilant civil societies with many organisations devoted to prison oversight, and political oppositions that are often eager to exploit such problems. This is not generally the case in Africa, Latin America and Asia.

The lack of public awareness of and discourse on African penal systems exacerbates the problems afflicting these prisons, as many critical issues remain submerged. Multiple factors cause and maintain this silence: the public's indifference, deliberate attempts to conceal what happens behind prison walls, and limited media scrutiny. The media in the global south and in African countries in particular do not always have sufficient resources to undertake investigations into human rights issues or are unwilling to do so for fear of government responses. Governments have often restricted the media, limiting their work and intimidating or confining journalists. Most human rights organisations in African countries also have limited resources, inhibiting their ability to expose and address maltreatment. International human rights organisations are most successful in conducting prison investigations and writing reports, as they have adequate resources and their international status affords them more leeway to carry out such work and protects them from censorship.

Why this book?

This book focuses on prisons in Africa and looks at the issues from a continental perspective. It attempts to examine and address some of these challenges and find the similarities, differences, strengths and weaknesses in prisons across nations in Africa and make recommendations as to how the situations can be improved. It hopes to contribute to the research on African prisons and hopefully inspire debate and engender further research.

This book therefore aims to raise awareness about issues in African prisons, to provide a detailed consideration of the situation in African prisons, and to show how the regional human rights system is dealing with human rights concerns in these prisons.

A review of the literature on prisons around the world yields an abundance of work focusing on North America and Europe, with very little scrutiny of the other continents. Prisons in Africa, Latin America and Asia are acutely under-researched. While there is some material concerning prisons in the reports of various NGOs such as Human Rights Watch and Amnesty International, most of the African literature concerning prisons emanates from South Africa and, to a lesser extent, from Nigeria. For most other African countries the data are sparse and the available information is largely superficial and often anecdotal. Although there are a few journal articles dealing with prisons in a particular African country or with themes that are illustrated with pertinent examples from African countries, there remains a need for a comprehensive study of the continent as a whole and its specific issues.

This book therefore draws together the available research and highlights the vast gap between the international legal obligations assumed by African states and the reality of the treatment of prisoners in those states. It also shows some of the reforms under way in Africa and indicates that, in spite of the challenges faced by African countries, others can learn from these processes and reforms.

While many African countries are making political and economic gains, often such progress is fragile. Of the 49 countries in the world classified as least developed, 34 are in Africa (Karuuombe 2003: 3). Most people in Africa live in conditions of poverty and disease and suffer human rights violations, including a lack of food and other basic necessities such as water. Africans face these horrible circumstances as if they were the normal conditions of life. These conditions have been exacerbated by the HIV/AIDS pandemic sweeping the continent (Braimah 2004).

Three hundred and forty million people, or half of the population of Africa, live on less than US$1 per day. The mortality rate of children under five years of age is 140 per 1 000, and life expectancy at birth is only about 54 years.[1] As far as direct foreign investments are concerned, Africa is completely neglected in the global competition for international capital. At the end of the 1990s, Organisation for Economic Co-operation and Development countries had 68 per cent of the world stock of foreign investments compared to 1.9 per cent in Africa. In 2000, Africa attracted just 0.7 per cent of the world's direct foreign investments. In fact, while Africa's share of global trade in 1950 was 7 per cent, by 2002 it had fallen to 2 per cent. While its share of global capital in 1950 was 6 per cent, by 2002 it was only 1 per cent. Africa's share of global foreign direct investment in the 1980s was 30 per cent; by 2002 it was 7 per cent in spite of its oil and gas production (Cilliers 2004: 28–29). Some believe that this trend may continue (Moore 2001).

To address these issues a mandate was given to the five Heads of State (Algeria, Egypt, Nigeria, Senegal and South Africa) by the Organisation of African Unity (OAU) to develop an integrated socio-economic development framework for Africa. The New Partnership for African Development (NEPAD) framework was adopted by the OAU in 2001. NEPAD seeks to address Africa's under-development and marginalisation in a number of ways, including by promoting and protecting

democracy and human rights in African countries. A further vision of NEPAD is to eradicate poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable growth and development and, thus, to halt the marginalisation of Africa in the globalisation process.

The issues that NEPAD focuses on play themselves out in the paltry allocation of resources to prisons in Africa. As a result, conditions of detention in Africa are at times deplorable, as a lack of adequate resources leads to overcrowding, inadequate food and healthcare, inefficient administration and training, and so on.

Because criminal justice systems, and prisons specifically, share many common problems, a comparative view of these systems would be valuable in understanding one's own system and learning from others. Yet there are very few comparative studies of prisons in Africa. Such studies could yield both similarities and differences, trends could be discerned and generalisations would be warranted, as the differences often pertain to the magnitude of the problems and the responses to them.

While this book attests to the dire conditions in African prisons, it is important to note that Africa's prisons are not the worst in the world. Some of the worst conditions are in fact found in Central and Eastern Europe and Central Asia (International Centre for Prison Studies 2005a). There are major problems in Latin America and the Middle East as well, where most prisons suffer from massive overcrowding, decaying infrastructure, a lack of medical care, guard-on-prisoner abuse, corruption and prisoner-on-prisoner violence. Malnutrition and a lack of hygiene and medical care cause many deaths in these prisons (Amnesty International 2005e).

Though violence is a common feature of penal systems around the world, Latin American prisons seemingly hold the distinction of witnessing the worst overall and most lethal violence (Human Rights Watch 2006c). While riots have occurred in African prisons, such as in Libya in 1996 and 2006, they are generally infrequent when compared to other parts of the world. Riots and hostage taking are fairly common in Latin America, however. There, conflicts between groups, factions, militias and others that occur outside prisons are regularly brought into the prisons (Ungar 2002). Thus, prison skirmishes occurred in Honduras and the Maldives in 2003 (Stern 2006). In 2004 Ecuadorian prisoners took more than 300 visitors to the prisons hostage (Stern 2006: 12). A month later, hostages were taken in a women's prison. Similar events regularly take place in Brazilian prisons. In most prisons violence between inmates, including sexual assault, is commonplace (see Kruttschnitt & Gartner 2003). Sexual violence directed at female prisoners is also widespread, especially where male warders guard female prisoners. In various US states female prisoners are also frequently sexually abused (Sharfstein 2003), and this too is attributed to the general practice of having male guards overseeing female prisoners. From a comparative perspective, Chinese prisons are reported to be the worst overall (Stern 1998). In this regard, Stern notes that in China '[t]he cruelties of banishment to a forced labour camp are combined with the pressure on the personality and the mind to be remoulded and reformed' (1998: 84). In addition, these prisons systems are regarded as the most secretive.

Economics is often the root cause of dubious prison conditions. Running prisons is expensive. The cost per prisoner is exorbitant and these expenses escalate annually. In both the developed and the developing world, prison management is a major drain on resources. The scarcer the resources, the greater the impact, and these funds could be better spent on housing, education, healthcare, poverty alleviation and so on. In the United States it costs more than $20 000 per prisoner per year and, due to rising levels of incarceration, state budgets for other sectors such as higher education have suffered (Blumstein 2002: 472). However, problems and conditions are not solely the cause of limited resources; often they are the result of deliberate decisions to use resources elsewhere.

Undoubtedly it is limited resources that impact on African prisons' failure to reach international standards of confinement. Economic woes are not unique to Africa either; a report on prisons in East and Central Europe cites economic constraints as one of the most serious impediments to improvement (Walmsley 1995). Although developing countries share similar problems caused by limited resources, prisons in parts of the developed world are also afflicted by insufficient funds. In these instances the shortages are symptomatic of public or political pressure as to how available resources ought to be allocated.

However, the challenges facing prisons are also partly due to institutionalism. To maintain control, prison management is characterised by top-down structures and discipline is strictly enforced. Although the degree to which disciplinary measures occur and the targets at whom they are directed differ at times, violence is common in prisons around the globe. Studies show that prisoners carry over the violent behaviour learned in prisons into society upon their release (Banister et al. 1973). Research conducted in the US indicates that moving prisoners from minimum security confinement facilities to low security institutions with an intensified criminal element doubles their likelihood of being rearrested within three years of release (Chen & Shapiro 2004). The rate of reoffending is thus influenced by the type of confinement and the conditions of detention, and recidivism obviously exacerbates overcrowding. These issues give some credence to public perceptions that prisons are 'universities of crime'.

It is therefore imperative to investigate African prisons and generate information about the issues affecting the continent's penal systems. Currently available data are contained in country-specific publications and it is difficult to find information in one comprehensive source. Such research is often written by negative critics of the situation in Africa, and fails to examine positive examples of improvement.

Different countries and individual prisons around the world and in Africa have specific characteristics and face unique challenges. It must be remembered that Africa is an expansive continent that spans many different cultures, languages, peoples, political institutions and systems of penal incarceration. It is thus difficult, if not impossible, to generalise or incorporate an in-depth discussion and evaluation of all the issues and challenges facing African prisons; they are many and varied. While

making broad generalisations for a continent as vast and diverse as Africa can be problematic, there are observable trends common to many of the penal institutions found on the continent. Interestingly, the rhetoric at the regional level reflects a desire to conform to international standards, but the actual practices at times continue to fall short of the desired aims. However, there are attempts all over the continent to address the challenges despite the many obstacles. It has been noted that '[t]oday the African continent finds itself at a favourable juncture. Effective administration, respect for human rights, rule of law, and promotion of entrepreneurship are now central policy themes in Africa' (Costa 2005).

That being said, certain pervasive human rights violations are glaringly obvious on the continent. Generally, prisoners in African prisons face years of confinement in often cramped and dirty quarters, with modest food allocations, problematic hygiene care, and little or no clothing or other amenities being provided. Such conditions are not, however, the same everywhere on the continent.

Prisons around the world and in Africa have much in common. First, prisons are integral fixtures of all societies. They form an intrinsic part of the state system that is embodied in the criminal justice system used to maintain order and social control. Prisons not only function as confining physical sites to punish those who have violated the law, but also act as deterrents for (potential) lawbreakers. At the same time prisons represent a microcosm of the contemporary societies of which they are a part.

Secondly, prisons globally are plagued by similar problems. Although there are variations in degree, especially between richer and poorer countries, prisoners generally live in dire conditions. Corruption is a universal problem in prisons, although the degree to which it occurs differs in different penal systems. It is clearly not only a problem in poor countries but in rich ones too (Stern 2006).

Prison populations around the world also have much in common. They are virtually always dominated by poor, uneducated, unemployed young men, often from minority groups. Indigenous groups are also over-represented in prison populations. For example, in New Zealand 45 per cent of prison inmates are Maori, although they comprise only 14 per cent of the national population (Stern 1998: 32–33). In Australia, Aborigines are more than nine times more likely to be arrested, more than six times more likely to be imprisoned, and 23 times more likely to be imprisoned as juveniles (Broadhurst 1997: 410).

In the US, African-Americans form 12.7 per cent of the population but make up 48.2 per cent of adults in prison. Hispanics constitute 11.1 per cent of the national population, but form 18.6 per cent of the prison population. Native-Americans are less than 1.0 per cent of the population, but 4.0 per cent of adults in this group are incarcerated.[2] This also holds true for Canada, where indigenous women make up only 3.0 per cent of females in the country, but comprise 29.0 per cent of the female prison population (Stern 1998: 32–33).

Rising global prisoner numbers

Internationally, prisoner numbers have been growing dramatically, especially since the 1990s. In the six years between 1998 and 2004 the number of prisoners in the world increased from 8.1 million to 9.1 million (Stern 2006: 99). In the 173 countries with available data, two-thirds have seen an increase in inmates (Stern 2006: 99). Fifty of these countries have shown a 50 per cent increase in prison populations in the 12-year period from 1992 to 2004 (Stern 2006: 7).

Factors contributing to the increased numbers include 'get tough' stances by governments to appease public sentiments and pressures, a resistance by the criminal justice system and others to the use of alternatives to imprisonment, and an increase in minimum sentences. The International Crime Victim Survey found that the majority of people in Africa (69%) and Asia (60%) supported incarceration, as opposed to those in other parts of the world (Robert 2004: 2).

The US has the highest confinement rate in the world: 714 individuals for every 100 000 of its national population. Next follow Belarus, Bermuda and Russia, each with 532 per 100 000; Palau with 523; the US Virgin Islands (490); Turkmenistan (489); Cuba (487); Suriname (437); Cayman Islands (429); Belize (420); Ukraine (417); Maldives Islands (416); St Kitts and Nevis (415); South Africa (413), and the Bahamas with 410 per 100 000 (Walmsley 2005a; International Centre for Prison Studies 2005b). South Africa is the only African country on this list of countries with high confinement rates.

While prisoner numbers have risen in nearly three-quarters of all countries, there are continental variations in incarceration rates. Eighty-eight per cent of Asian countries reported an increase in prison population numbers, as did 79 per cent of countries in North and South America, 69 per cent of countries in Europe and Oceania and 64 per cent of African countries.[3]

In Europe in the 1990s the numbers of prison inmates rose on average by 20 per cent, but in half of those countries the numbers rose by 40 per cent (Walmsley 2003: 70). In the Netherlands the prison population nearly doubled in that period. Pre-1990 Finland was seen to be a model society as its inmate numbers fell dramatically and then stabilised. However, Finland prisoner numbers have once again risen. More recently there have been quite dramatic changes in the numbers of prisoners in some countries in Europe. In the twenty-first century alone the numbers went up 45 per cent in Poland over a two-and-a-half year period, 27 per cent in Finland over nearly two years, 50 per cent in Greece in four years, 46 per cent in the former Yugoslavian Republic of Macedonia over four years, and 39 per cent in Ireland over four-and-a-half years (Walmsley 2003: 70). Countries reporting a decrease in inmate numbers are Switzerland (22 per cent over a two-and-a-half year period), Northern Ireland (31 per cent over the four years to 2003) and Bulgaria (21 per cent over three years) (Walmsley 2003: 70).

In the Americas the 1990s saw the number of prisoners grow by between 60 per cent and 85 per cent in Argentina, Brazil, Columbia, Mexico and the US (Walmsley 2003: 70). However, over the same period the prison population in Canada grew by only 12 per cent (Walmsley 2003: 70). In the late 1990s and early 2000s, the numbers rose 50 per cent in three years in El Salvador and Mexico, while in the Dominican Republic the numbers increased by 38 per cent and in Brazil by 40 per cent (Walmsley 2003: 70).

The incarceration rate in the US remained very stable between the 1920s and the 1970s at about 110 per 100 000 (Blumstein 2002: 451). There were spikes, for example during the Great Depression, and reductions, for example during World War Two. The number of those confined in the US rose by 600 per cent between 1970 and 2003. There are currently about 6.9 million Americans in the US correctional system who are either incarcerated, on probation or under parole supervision.[4]

In Asia inmate numbers went up 112 per cent in Cambodia, 66 per cent in Thailand, 51 per cent in Indonesia and 35 per cent in Sri Lanka over a period of about four years (Walmsley 2003: 70). There were no significant decreases in Asia or Oceania. In the 1990s the incarceration rate rose 50 per cent in Australia, 38 per cent in New Zealand, 33 per cent in South Korea and 10 per cent in Japan (Walmsley 2003: 70).

Africa's incarceration rate compares favourably with that of many other parts of the world. The continent's 2005 incarceration rate of 127 per 100 000 was below the world average of 152 per 100 000. The number of African countries showing an increase in incarceration rates is also lower than in the rest of the world (bearing in mind that the availability of data regarding criminal justice systems in Africa is limited) (Boone et al. 2003). However, imprisonment rates vary appreciably in different parts of the African continent. For example, the median rate of incarceration for southern Africa is 324 per 100 000 of the population, while for West Africa it is 52 per 100 000 people. Thus, when the confinement rates of different parts of Africa are taken into account, it is clear that they are often even more favourable.

Are states with high prisoner populations more punitive?

It has been argued that a country's rate of imprisonment (the extent to which it incarcerates its citizens) is an effective measure of its 'punitiveness' (Yates & Fording 2005: 1099). Yet this argument has been countered by the view that countries with the highest rates of confinement do not necessarily have the most punitive criminal justice systems, but are more effective in detecting those responsible for crime and prosecuting them (Walmsley 2003). It is also argued that while higher crime and detection rates can contribute to rising prisoner numbers, crime rates in many countries have been stable or decreasing, yet their incarceration rates have been increasing (Walmsley 2003). Many criminal justice experts are convinced that the global rise in inmate population can be attributed to the pervasive belief that

incarceration is the best strategy (Walmsley 2003). Despite the debates, it seems as if punitiveness remains the primary factor for increased rates of imprisonment.

Overall, the US is seen as the most punitive country.[5] There, the legislatures and the courts have regularly reduced prisoners' rights. At the national level the Prison Litigation Return Act has limited prisoners' ability to seek redress through the courts (Sharfstein 2003). The move towards more draconian prison policies has partly been attributable to public pressure – a reaction to growing crime rates – particularly in developing countries or countries in transition. According to academic James Lynch (2002), the US uses incarceration for every category of crime more regularly than any other industrialised state, even if there are other disciplinary alternatives available such as fines and house arrest. In the past the US had similar incarceration rates to other countries for violent crimes, but has always had a higher rate of imprisonment for property and drug crimes. Lynch (2002) argues that the US does not have the highest crime rate – even for industrialised societies – but that the discrepancy is that violent crimes in the US more often result in fatalities. Interestingly, the increasing prisoner rate in the United States has not had an effect on the occurrence of crime (Blumstein 2002). While there has been a dramatic increase in those confined in the United States for drug offences, prison and the threat of incarceration have not made a dent in drug selling or usage (Blumstein 2002). Another factor contributing to the high incarceration rate in the US is recidivism, as two-thirds of inmates released each year are back in prison within three years (Langan & Levin 2002: 1).

It is interesting to note that the US may be shifting towards a trend of prison reform. In 2004 President Bush asked Congress in his State of the Union address to enact a $300 million programme to assist prisoners upon release to reintegrate into their communities. He noted:

> This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. So tonight, I propose a four-year, $300 million prisoner re-entry initiative to expand job-training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life. (*The New York Times Magazine* 24 December 2006[6])

This was a rare breath of fresh air into an otherwise harsh climate of dealing with offenders in which, as during the 1990s, both Democrat and Republican congresses removed grant programmes for prisoners, disqualified drug offenders from getting federal student loans and slashed highway funds for states that did not cancel or suspend the driver's licences of those convicted of drug offences. At the end of 2006 Congress began to debate the Second Chance Act to deal with these issues. However, it proposes only US$100 million over two years rather than the much more expansive

version outlined in the State of the Union address in 2004. Spending on prisons is on the rise and a number of states are also rolling back minimum sentence legislation as well as taking steps towards reform in areas such as parole (*The New York Times Magazine* 24 December 2006).

Even in the European Union, which is considered progressive regarding prisoner rights, states are becoming sterner in dealing with prisoners. While the European Court of Human Rights has continued to hand down decisions that demand high standards, many European states continue to deal with offenders using harsh measures. As a result, there is considerable variation in rates of incarceration across Europe. While the median rate of the prison population across Europe is 80 per 100 000, in Eastern European countries it is more than double that at 184 per 100 000. Estonia confines 337.9 per 100 000 while Iceland has only 39.6 prisoners per 100 000. While the average ratio of prisoners to guards is about 100:1, Poland has a ratio of more than 1 400:1 while in Iceland it is only 1.6:1.[7]

The historical context

To understand fully the status of human rights in African prisons, it is critical to understand the development of the penal system in Africa, as many of the problems that existed during colonial times are still prevalent throughout the continent. Specifically, analysing the historical reasons behind the creation of prisons – such as racial discrimination, subjugation, political oppression and forced labour – and the use of corporal and capital punishment, sheds light on the deplorable conditions that have always existed (Bernault 2003). In fact, the problems plaguing the continent's penal systems have been problems for hundreds of years.

As Stephen Peté notes in his chapter, penal incarceration as we understand it today was largely unknown in pre-colonial Africa. Although alleged criminals were detained prior to trial, incarceration was not viewed as a specific form of punishment aimed at redressing the wrongs committed. Interestingly, redress in pre-colonial Africa tended to be victim-focused, with compensation as the focal point, not punishment of the offender. As with any generalisation applied across Africa, there are exceptions; centralised states seemed to have rudimentary prison systems, but again, victim compensation was viewed as more appropriate than offender incarceration (Bah 2003). Incarceration and capital punishment were used in rare circumstances in which the offender posed a danger to the community as a whole, such as repeat offenders and witches (Clifford 1969). Although prisons did exist on the continent at this time, most notably associated with the Atlantic slave trade (Vansina 2003; see also Thomas 1998), the use of imprisonment as a form of punishment was not widely popularised until the end of the nineteenth century (Killingray 2003), when the colonial powers began using incarceration as a means of subjugating the indigenous populations. Southern Africa, however, was an exception as prisons emerged at the beginning of the nineteenth century, much earlier than the rest of the continent. Prisons began appearing all over the continent

as administrative outposts and garrisons of the colonial powers towards the end of the nineteenth century.

Colonial prisons, while loosely aimed at controlling crime, had another agenda – the subjugation and control of the local native populations for economic, political and social purposes. Politically and socially, incarceration was seen as a method of controlling political dissidents and maintaining colonial control over the occupied territories and their indigenous populations. As such, these prison systems were hardly aimed at rehabilitating criminals or reintegrating them into society. In fact, these prisons successfully created a subclass of humans who were available as cheap labour. They lived in inhumane conditions, even for minor offences.

These developments can be linked to the perceptions and racism prevalent during the colonial period, when the native populations were deemed childlike savages unworthy of 'civilised' lifestyles (see Read 1969). An example of this was the treatment of white prisoners compared to black prisoners – not only were food, clothing and accommodation better for white inmates, but they were also sent to industrial schools in order to develop the skills necessary to assimilate back into white society upon their release (Peté 1986). The use of various methods of torture and cruel punishment during the colonial period also highlights the racist sentiments that governed the entire continent and the penal systems that emerged. At a time when European prisons were abandoning torture as a means of punishment, African colonial prisons revived ancient and horrific means of torture, essentially as a means of enforcing racial subordination. As the 'natives' were deemed to be uncivilised, childlike and savage, corporal punishment was viewed as a cost-effective means of dealing with them in a manner suitable to their status (see Peté & Devenish 2005).

The shocking conditions associated with these first prisons and the prevailing themes that plagued them are still often prevalent today. While over the last few decades Africa has emerged from colonialism, this has often been in name more than in practice. Africa has had to endure many challenges, not only as a result of the legacy left by the colonial era but also because of a multitude of other problems, including ongoing dependence and under-development. Many post-colonial governments have embraced the model developed by the colonial powers of political oppression and human degradation. Many of the same problems – chronic overcrowding, antiquated buildings, and the use of corporal and capital punishment (ACHPR 1997b; Peté 2000; Dissel 2001) – still plague the human rights of prisoners in Africa. In addition, corruption, long delays awaiting trial, prison gangs, and a lack of separate facilities for juveniles and sometimes women also affect the current status of human rights in African prisons.

During colonial times, racial oppression was the driving force behind incarceration in Africa. However, in many post-colonial states political oppression has supplanted racial or other types of discrimination as the major reason for incarceration other than crime. Political oppression is at times still rooted in ethnic or cultural identity, thus segregating and oppressing similarly situated groups of people.

Conditions and overcrowding

Throughout the chapters in this book, the subject of overcrowding in African prisons pervades the discussion. The chapter by Victor Dankwa is specifically devoted to the question of overcrowding.

Prisons in African countries share similar problems regarding overcrowding as those in other developing countries. When it comes to the highest rates of overcrowding on a country-by-country basis, African countries appear at the top of the list: Barbados (302.4%), Cameroon (296.3%), Bangladesh (288.5%), St. Lucia (278.4%), Grenada (258.3%), Mayotte (France) (247.7%), Zambia (245.9%), Iran (243.1%), Thailand (230.8%), Burundi (230.6%), Kenya (228.1%), Pakistan (222.5%), Belize (219.4%), French Polynesia (France) (215.1%) and Rwanda (202.4%) (Walmsley 2005b: 9–12).

Some countries, such as Saudi Arabia and Singapore, have seen a tripling of their inmate populations in a decade. Thailand and Indonesia have doubled their numbers of prisoners in a ten-year period, as have Turkey, Bahrain, Cyprus, Nicaragua, Honduras, Croatia and Kyrgyzstan (Stern 2006: 100). Brazil and Haiti have reported a 50 per cent increase in their numbers, as have the Netherlands, Costa Rica, Cambodia and Panama. Consequently, overcrowding has increased. The highest rate of overcrowding is found in South Asia, where there are on average 191 prisoners for every 100 beds. Next follows Africa with 154 prisoners per 100 beds, then Latin America (151), the Middle Eastern countries (125), Asia and the Pacific (120) and Europe (107). North America has on average 100 prisoners per 100 beds, southern Europe has 99, and Central-Eastern Europe and the Commonwealth of Independent States have 95 (UNODC 2005a).

Regarding the overcrowding rate in countries for which data were available, the figures are:

- In 67 of 158 countries the overcrowding rate was 120 per cent.
- This rate (120%) was found in 70 per cent of African, Caribbean and South American prison systems, as well as in about 60 per cent of prisons in Asia and Central America.
- In approximately 25 per cent of prison systems, the inmate population is at 150 per cent of capacity and in 15 countries the rate exceeds 200 per cent.
- Of those 15 countries with more than 200 per cent of capacity, six were African countries, four were in Asia and three in the Caribbean.
- Of the prison systems whose inmate populations were under 100 per cent capacity, 32 were in Europe, four in Africa, Asia and Oceania and three in North America (Walmsley 2005a).

Many of the numbers for African states are significantly higher than for countries such as the US (107.6%), Great Britain and Wales (109.4%), France (112%), India (140.5%) and Australia (105.9%). However, a number of prisons in other countries are as crammed as those in Africa; Pakistan's prisons are at 247.7 per cent of capacity

and Iran's at 243.1 per cent (US Department of State 2006; International Centre for Prison Studies 2006c).

Of the 31 countries in Africa for which information was available, 27 have overcrowded prisons. Of the 12 countries in North and Central America for which data were available, nine reported prison overcrowding. Thirteen of the 14 Caribbean countries with available statistics showed overcrowding; the same holds for 12 of the 13 countries in South America. In Asia overcrowding occurred in 20 of the 24 countries with accessible information. Overcrowding was a problem in only 23 of 55 European countries and five of the nine countries in Oceania. It is important to note here that while European prisons are generally not overcrowded, remand and awaiting trial prisoners are often confined in overcrowded conditions (Walmsley 2005b: 9–12).

Although not all African prisons are filled to capacity, many are. A survey of 27 African countries found that national prison systems, on average, operated at nearly 150 per cent of capacity (*New York Times* 6 November 2005[8]). The variations from country to country are quite dramatic. In 2002 the average rate of overcrowding was 141 per cent (*New York Times* 6 November 2005). However, the range varied dramatically from 40 per cent to 350 per cent. Thus, in São Tomé e Príncipe prisons operated at approximately 43.3 per cent of capacity, while Kenya's prisons operated at 343.7 per cent and Zambia's at 330.6 per cent. However, these figures do not always portray an ideal snapshot of the reality of prison overcrowding, as overcrowding can vary among prisons within a given country. In South Africa, for example, 85 of the approximately 240 prisons had populations ranging from 175 per cent to 370 per cent of their capacity. However, 74 prisons had less than 100 per cent occupancy, 72 prisons exceeded 150 per cent and 38 exceeded 175 per cent. There were even a few prisons in which occupancy was nearly at 400 per cent of capacity (Inspecting Judge of Prisons 2006).

Though there are variations from country to country and across regions, inmates in African prisons face a myriad of dangers because of overcrowding. As a result of the numbers of prisoners, it is hardly surprising that death, disease, unsanitary conditions and violence ravage these populations. Although disease has always been a plague in African penal systems, the onslaught of AIDS on the continent has caused the number of deaths in prison to grow exponentially over the past decade (Dissel & Ellis 2002).

Although prison overcrowding is not unique to Africa, the problem is particularly acute as prisoner numbers have increased significantly while the number of facilities to house them has not. The facilities have also often not been expanded or renovated. This contrasts with North America and Europe, where the rising number of inmates has led to the construction of more prisons. In a number of countries, specifically those with large prison populations per capita, there has also been a trend towards privatising prisons (Pozen 2003). By the end of 2001 private prisons held more than 6.5 per cent of the US's state and Federal adult prison population – about 90 000

prisoners (Pozen 2003: 253). At the same time the proportion of prisoners in Britain held in private prisons was 9.4 per cent – approximately 6 000 prisoners. Australia, Canada, Holland, New Zealand, Scotland and South Africa now also have private prisons and countries such as Ireland, Latvia, Serbia, Malaysia, the Philippines, South Korea, Taiwan, Thailand, Tanzania, Costa Rica, Jamaica, Panama and several South American countries are all considering this option (Pozen 2003).

Overcrowding is not only symptomatic of poor countries; it also affects affluent countries such as the US (Sharfstein 2003). In the US this is attributed to greater rates of violent crime, coupled with harsher sentencing practices for many offences. These practices are often mandatory and determinate sentencing restricts judicial discretion on these questions (Mauer 2003). Consequently, there has been a drastic escalation in the number of prisoners in the US serving life imprisonment terms. For human rights reasons, and occasionally in an attempt to avoid increases in the prison populations, some countries forbid life imprisonment sentences. These countries include Portugal, Brazil, Costa Rica, Columbia and El Salvador (in their national constitutions), Mexico and Peru (by decision of their courts), and Norway and Slovenia (by legislative action) (van Zyl Smit 2006). The increase in suicides and violence (including sexual assault) is directly linked to the overcrowding phenomenon, yet the US penal system is in denial about these problems. Denial is a common perspective of US states and they reject the idea that their prisons fall below international minimum standards (Dugard & van den Wyngaert 1998).

Deprivation is a key feature of maximum-security prisons in the US. While deprivation is also common in African prisons, this is often due to a lack of resources and not a matter of choice by the authorities. While funding shortages are an important factor in prison overcrowding, it is again not limited to poor or under-developed countries. For example, prisons in the US also suffer from under-funding (although it must be viewed from a relative perspective). Conditions are also often squalid, with major problems of sewage and insect infestation (Sharfstein 2003).

It is not surprising that overcrowding plagues the vast majority of African countries and prisons, given the scarcity of resources. Although, generally, African prisons do not hold the same number of prisoners as in other counties, it has been noted that: '[g]iven the low numbers of police and judges, it is therefore surprising that Africa has nearly as large a share of its population in prison as do other regions of the world' (UNODC 2005a). A UN report blames this situation on the inefficiency of having so many remand or awaiting trial prisoners (Costa 2005).

Although overcrowding is a direct cause of many of the problems in African prisons, it is not a new phenomenon; chronic overcrowding in Africa began during the colonial era. Many prisons are archaic and dilapidated, which exacerbates problems due to overcrowding as there is inadequate ventilation and means for dealing with human waste. Also, overcrowding is not just an issue of space; it dehumanises prisoners, encourages the spread of communicable diseases (especially HIV/AIDS),

minimises the supervision of prisoners, burdens prison staff, and detracts from acceptable levels of hygiene, sanitation and sufficient food.

Various steps have been taken to address this situation. In 1996, the Kampala Declaration on Prison Conditions in Africa and, in 2002, the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa were adopted. Both sought to alleviate the plight of African prisoners. In an environment devoid of the resources and stability necessary to implement these reforms, however, awareness and education about problems is critical, even if reforms are at times slow in coming. Steps taken by the African Commission on Human and Peoples' Rights (ACHPR) in this regard are discussed below.

Prisoners across Africa often suffer inhumane conditions in prison. However, these conditions must be contextualised within the general living standards of people in Africa, where poverty is high and access to the amenities of life low. Nonetheless, the African Commission has noted that:

> the conditions of prisons and prisoners in many African countries are afflicted by severe inadequacies including high congestion, poor physical, health, and sanitary conditions, inadequate recreational, vocational and rehabilitation programmes, restricted contact with the outside world, and large percentages of persons awaiting trial, among others. (see ACHPR 1995a)

It has also been argued that:

> [t]he inhumanity of African prisons is a shame that hides in plain sight. Black Beach Prison in Equatorial Guinea is notorious for torture. Food is so scarce in Zambia's jails that gangs wield it as an instrument of power. Congo's prisons have housed children as young as 8. Kenyan prisoners perish from easily curable disease like gastroenteritis. (*New York Times* 6 November 2005)

In Malawi, at the Maula Prison, an average of one in 60 inmates died while incarcerated, while one in 20 prisoners died in Zomba Prison. This is in contrast to one in 330 US prisoners (*New York Times* 6 November 2005). 'Rape is common, and given that probably most prisoners are HIV positive, often lethal. Gangs use the virus as a means of control' (*The Economist* 27 March 2004[9]). In addition to inadequate resources, the lives of African prisoners are often endangered by dangerous structural defects that are found in old, dilapidated facilities (*Panafrican News Agency Daily Newswire* 21 April 2004[10]). A lack of hygiene, insufficient food, inadequate clothing and severe overcrowding leave prisoners without space to lie, sleep and even sit (Tkachuk & Walmsley 2001). Prisons are plagued with 'crowded cells where inmates sleep in shifts…warders who "sell" juvenile offenders for sex with other cons; and… guards who smuggle weapons, drugs and alcohol to paramilitary inmate gangs' (*The Economist* 27 March 2004). While these examples are highly problematic

(see Dissel 2001), it must be noted that there are thousands of prisons across the continent whose conditions are not so problematic. However, the situation is serious and in need of corrective measures.

Overcrowding has severe ramifications for prison systems and those that inhabit prisons. It is a global problem: a study examining prisons in the 158 countries for which information was available found that in 109 countries (or 69%) the prison system was overcrowded (Walmsley 2005a: 10). However, there are no universal measures governing what constitutes overcrowding; the individual prison systems determine how much space they deem sufficient for each prisoner. Furthermore, the absence of overcrowding does not necessarily equate to a lack of problems. For example, Japanese prisons are not overcrowded and prisoners live in single cells, but these cells are usually bitterly cold and prisoners spend only half an hour per day outside their cells (Stern 1998). In addition, severe restrictions and harsh disciplinary measures are imposed: no talking is allowed, letters are heavily censored and solitary confinement is regularly used.

Overcrowding is not only affected by the number of prisoners incarcerated in a facility at a given time, but also by the length of time for which prisoners are confined. Given that countries such as the US are handing out longer sentences and that life sentences are increasing in frequency, the difficulties, including overcrowding, are escalating. Furthermore, as noted, overcrowding is not just a spatial issue but also one that dramatically exacerbates a range of other related problems. In this regard, former UN Secretary-General Kofi Annan stated that '[u]ntil the problem of overcrowding…[is] resolved, efforts to improve other aspects of prison reform…[are] unlikely to have any meaningful impact'.[11]

The staff to prisoner ratio increases in overcrowded prisons, often leading to inadequate supervision. Staff in overcrowded prisons have insufficient time to organise events and activities for prisoners. Overcrowding also leads to heightened tension, which in turn generates more violence – both towards staff and among inmates (Walmsley 2003). The Chief Inspector of Prisons for England and Wales commented in her 2001–02 annual report that:

> Safety in prisons depends on dynamic, as well as physical, security: relationships between staff and prisons that provide both understanding and intelligence. These are much less easy to make and sustain when there are more prisoners…Frustrations at the amount of time spent in cell, or locations away from home can easily boil over into disturbances, and it is scarcely surprising that these, too, have increased. (quoted in Steinberg 2005)

All around the world the causal connection between prison overcrowding and the increase in disease has been noted. A 1998 report on prisons in the former Soviet states causally linked overcrowding and high degrees of disease, and similar findings have been reported in prisons in Russia and Brazil (Weiler 2004). Prisons are often seen as breeding grounds for various infectious diseases such as AIDS, gonorrhoea,

syphilis, hepatitis B, hepatitis C and tuberculosis, and overcrowding typically exacerbates this problem (Senok & Botta 2006). The prevalence of such diseases is significantly higher in places of incarceration compared to the general population. One study found that about a third of all HIV/AIDS sufferers in Central Asia are prisoners. The study also found that, as in other parts of the world, the incidence of tuberculosis was higher in prisoners than in the general population. Overcrowding was specifically implicated, as it is typically associated with inadequate ventilation and poor nutrition (Walcher 2005).

In the US the incidence in prison of various physical and mental disorders is far higher than in the general population. The conditions include 'coronary artery disease, hypertension, diabetes, asthma, chronic lung disease, HIV infection, hepatitis B and C, other sexually transmitted diseases, tuberculosis, chronic renal failure, physical disabilities, and many types of cancer' (Re-Entry Policy Council 2005: 157). In 2001 it was found that HIV infection and hepatitis C for prisoners was about 10 times higher than in the general population, while for tuberculosis it was between four and seven times higher (Freudenberg 2001: 214, 217). The mental health of prisoners in the US is reflected in the observation that the 'nation's largest mental health facilities are now found in urban jails in Los Angeles, New York, Chicago, and other big cities' (Freudenberg 2001: 218). Regarding women's prisons, Freudenberg (2001: 218) found that more than a third of female prisoners had syphilis, 27 per cent had chlamydia and 8 per cent had gonorrhoea.

The trend in African countries appears similar, although the lack of data makes it difficult to judge the extent of the problem. The available research does, however, indicate that there is generally a much higher prevalence of disease in prisons (Human Rights Watch 2006d; UNAIDS 2006) than in the rest of the population (Adjei et al. 2006). For example, the prevalence of HIV infection in South African prisons is believed to be at 40 per cent, or double the rate of the general population. Making condoms readily available in prisons still remains controversial in most African countries. Interestingly, a study in Ghana found a higher rate of HIV infection among the correctional officers than among the general population (Adjei et al. 2006).

A trend that does emerge is that there are high numbers of abnormal deaths in African prisons. In a study of eight countries researchers found that in five of them prison overcrowding – and the dire conditions often associated with it – was the leading cause of the deaths of inmates. The Ghana study reported that in 2002 at least 100 prisoners died in detention as a result of malnutrition and disease. In 2003, 300 prisoners in Uganda died of malnutrition and disease caused by unsanitary conditions and overcrowding. In Kenya hundreds of prisoners died as a direct result of harsh prison conditions; the same holds true for Nigeria and Ethiopia (Cherubin-Doumbia 2004).

The courts in various countries have been unwilling to enforce prisoners' entitlement to a prescribed spatial area. Instead, they have examined the spatial aspect of the

living conditions in the broader context of how much time prisoners spend in their cells, the amount of ventilation in the cells, how much exercise and sunlight they get, the quality of the food and general nutrition, the opportunities for recreation and training, the climate and whether they work or not (Steinberg 2005). Often courts are limited in their capacity to remedy overcrowding and there is a need to create 'enforceable accommodations standards' by 'setting specific standards that can be challenged in court if necessary' (van Zyl Smit 2004: 240). In South Africa a court finding that 'the "usual" remedies, such as the declarator, the prohibitory interdict, the mandamus and awards of damages may not be capable of remedying… systematic failures or the inadequate compliance with constitutional obligations, particularly if one is dealing with the protection, promotion or fulfilment of rights of a programmatic nature', ordered a 'structural interdict, a remedy that orders an organ of state to perform its constitutional obligations and report [to the court] on its progress in doing so from time to time'.[12] Thus, there are possibilities for the courts in African countries to be more proactive and to play a remediating role in dealing with dire prison conditions.

A number of African countries are taking steps to deal with overcrowding. At one level there are attempts to reform the law to address its inadequacies; at another level specific steps have been taken to address the inmate numbers in prisons. Kenya reduced its prison population by 8 000 in July 2006 by releasing prisoners. Yet with 50 000 prisoners housed in a prison system designed for 16 000, the system is still grossly overcrowded. In a bid to curb overcrowding Nigeria released 25 000 prisoners in January 2006. Some of those prisoners released had been awaiting trial for 10 years. The Nigerian government has also approved the establishment of a prison board, consisting of law enforcement officials and human rights workers, for each of the country's 227 prisons. A nationwide chief inspector of prisons will also report to the President of Nigeria. Nigerian Justice Minister Bayo Ojo noted that the 'conditions of the prisons are just too terrible. The conditions negate the essence of prison, which is to reform.'[13] In Tanzania, President Kikwete pledged in May 2006 to improve prison conditions. He promised that the government would address the overcrowding in prisons, admitting that 'the situation is terrible' and 'there is a lot to be done to see to it that inmates are treated like human beings'.[14]

A lot more needs to be done on the continent to address prison conditions. A useful step taken in Europe was the adoption by the Council of Europe of the European Prison Rules in 2006.[15] These rules make it clear that having transparent and consistent prison policy across that continent is important. The same is true in Africa and such a set of rules established by the AU would ensure progress on prison reform.

Resources and prison governance

Chris Tapscott's chapter deals with questions relating to prison governance. One of the major direct causes of the problems affecting African prisons is the scarcity of

resources. At the same time, there is fierce competition for those scarce resources to accommodate the various social needs in African countries. Many believe that there are needs more pressing than prison improvement. Often the attitude towards the appropriate function of penal institutions is that they are simply facilities for detention, punishment and crime prevention. Hence, the focus is often not on rehabilitation and reintegration but on punishment and detention (Kibuka 2001). This contributes to high rates of recidivism, which is extremely burdensome in terms of monetary and societal costs.

Trying to determine what constitutes good prison governance is a difficult task, as very little literature exists that highlights good practices in terms of administration, management and proper functioning in the African context. There is international consensus on the acceptable objectives and treatment of offenders in correctional facilities, which is reflected in various international instruments.[16] In Africa, increasing rates of incarceration, coupled with inadequate resources and societal beliefs that incarceration should be punitive, create horrible conditions of detention in some countries. The practical reality may at times be dreadful, but a progressive movement over the past decade promises to bring about reforms to the conditions in which prisoners are held. Donors are assisting in this process and providing resources as well as technical assistance (Piron 2005). Various regional instruments, such as the Kampala Declaration on Prison Conditions in Africa; the fourth conference of the Central, Eastern and Southern African Heads of Correctional Services (CESCA); the Arusha Declaration on Good Prison Practice; and the Ouagadougou Plan of Action, to name only a few, highlight this movement. Most African countries have adopted these instruments, which provide hope for sweeping reforms in African prisons.

One of the underlying and recurring themes of these regional instruments is the need for effective administration and competent leadership. Prison leadership affects the entire running of a prison, and quality leadership is a prerequisite for a well-run prison. Recruiting, training and education of prison staff also play a pivotal role in effective governance. Unfortunately, prison administrations in Africa tend to be associated with the military or police, and so a sense of authoritarian control and discipline pervades prison culture. Another factor leading to ineffective management is the decentralisation of prison authority, with many individual prisons operating under their own standing orders and not under a centralised order from the government.

Shortages of well-trained and competent staff exacerbate the problems facing prison administrations. Staff shortages can lead to frustration and anger on the part of the staff; this needs to be effectively combated. Various mechanisms, such as adequate training and education; increased staff numbers; team-building exercises to create a sense of camaraderie; increased pay and benefits; adequate supervision, directives and discipline, and well-defined career paths are instruments that could lead to more effective prison governance and a higher regard for the human rights of those detained.

One of the major impediments to effective prison governance is the overwhelming number of inmates crowded into institutions that are far above capacity and that do not have sufficient resources to deal with them. This creates an institutionalised problem that must be addressed before it worsens. The effects of overcrowding can be somewhat alleviated by efforts to increase the inmates' time outside of their cells, yet staff shortages often hamper this possibility. Various recreational and training activities, such as prison farms or vocational training, can serve an important function in minimising the effects of overcrowding. When trying to combat the problem of overcrowding, simply building more prisons to accommodate prisoners will not be sufficient. Systemic overhauls of penal systems that address the reasons for increased prison populations are necessary. This will effectively challenge traditional notions of justice and encourage the use of alternative forms of sentencing.

Resource shortages also impact on issues such as rehabilitation programmes. This is discussed below. However, generally, prisons in Africa lack adequate rehabilitation programmes because of staff shortages and overcrowding. In addition, the societal belief that prisons are places of punishment and not of rehabilitation limits the perceived need for rehabilitation programmes. There is also a lack of motivation and innovation among prison staff and prison administrations, which contributes to the lack of rehabilitation programmes.

Pre-release programmes are also critical in facilitating reintegration into society (see Muntingh 2004). These programmes try to establish support systems for inmates preparing for release by increasing their interactions with family and members of society in an effort to ensure that offenders can reintegrate upon release.

One aspect of prison conditions that must be addressed for prison governance to reach acceptable standards is the provision of adequate healthcare. This calls for better sanitation and methods of waste disposal, better food, increased rations and, most importantly, adequate measures to combat the spread of disease, especially HIV/AIDS. Some prison systems have developed educational opportunities to inform inmates of the dangers of the disease but more is needed, for example, making condoms readily available. In addition, those already infected require more assistance.

Access to education and recreational facilities is also very limited in African prisons. Such programmes would assist in ameliorating the current conditions of detention. Creative ideas that are relatively inexpensive to implement yet beneficial are exactly the type of initiatives necessary for prison governance to improve.

Awaiting trial detention

Martin Schönteich's chapter deals with questions relating to awaiting trial detention. Many of those imprisoned in Africa have never been convicted but are still awaiting trial.

> Two-thirds of Uganda's 18,000 prison inmates have not been tried. The same is true of three-fourths of Mozambique's prisoners, and four-fifths of Cameroon's. Even in South Africa, Africa's most advanced nation, inmates in Johannesburg Prison have waited seven years to see a judge. (*New York Times* 6 November 2005)

Problematically, convicted and awaiting trial prisoners are often held together because of a shortage of space.

While the rate of overcrowding in African prisons is at the highest levels in the world, the continent's awaiting trial rate of 45 per 100 000 was only marginally above the global average of 44. Africa's awaiting trial detention rate, at about 36 per cent of inmates, is higher than the world average, which is about 29 per cent. Latin America and Asia, at 38 per cent and 42 per cent respectively, have a higher proportion of pre-trial detainees than Africa. In some countries such as Honduras and Paraguay the rate is about 90 per cent (Ungar 2002: 52).

Pre-trial detention, in theory, does not constitute a human rights violation in the appropriate circumstances, under the right conditions of detention, and as a last resort with minimal periods of incarceration. While it seems that Central and West Africa have the highest rates of pre-trial incarcerations on the continent, there are few accurate statistics that detail the length of time that individuals spend in pre-trial detention. What is clear is that at times such detention is extensive and arbitrary, and detainees are subjected to awful conditions. This type of detention has a disproportionate impact on the destitute and indigent as they rarely have access to counsel, private or otherwise. Corruption also poses a problem to the indigent as they rarely have the connections or financial means to ensure pre-trial release. Even when detainees are afforded conditions of release, very few, especially the destitute, are able to meet those requirements, even if set at low levels. Furthermore, pre-trial detention drains resources, sometimes unnecessarily. This is especially true in countries where the percentage of pre-trial prisoners is very high as a percentage of all prisoners being held. Examples of a high proportion of pre-trial detainees occur in countries such as Mozambique (75%), Mali (68%), Madagascar (65%), Cameroon (65%), Nigeria (64%) and Uganda (58%).

Regarding remedial steps to be taken to address the situation, the African Commission has called for hearings to be held within a reasonable time and before an appropriate tribunal where fairness, justice and due process are applied, so that pre-trial detainees are held only in appropriate circumstances and in conditions that reflect international standards. These ideas and goals have been further emphasised by the Resolution on the Right to Recourse Procedure and Fair Trial, adopted by the African Commission; the Kampala Declaration on Prison Conditions in Africa, adopted in 1997; the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by the African Commission in 2002; the Ouagadougou Plan of Action, adopted in 2002; and the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, adopted in 2003.

Clearly, much needs to be done to make these principles a practical reality. However, drawing on actual experiences in Africa (Stapleton 2005a), various groups have already compiled useful 'good practices' to reduce pre-trial detention.

Women

As Lisa Vetten notes in her chapter, the subject of women in prisons has traditionally been overlooked in the academic discourse surrounding prisons, especially in Africa. This oversight usually extends to prisons that are geared towards male prisoners and accommodate women as an afterthought. Africa, in particular, is lacking in progressive thought about combating this neglect when compared to Europe, North America and Australia. One of the major factors contributing to this is the lack of available and reliable information regarding the conditions of detention for women. It is evident, however, that imprisonment in Africa, as elsewhere, is generally a male-dominated enterprise.

In spite of this there are more than half a million women and girls in prisons around the world. About 4.3 per cent of women worldwide are in prison. The approximate averages by continent are: North America, South America and Asia (5.0%); Europe and Oceania (4.5%); and Africa (2.65%).

Most women confined in prisons are found in just a few countries. Nearly 200 000 are confined in the US and 75 000 in China. The approximate numbers of female prisoners in other countries are: Russia (55 000), Thailand (30 000), India (13 000), Ukraine (12 000), Brazil and Vietnam (11 000), Mexico (10 000) and the Philippines (7 000) (Walmsley 2006). Individual countries with figures above the global average are Samoa and Palau (about 9.0%); The Netherlands (8.8%); Spain (8.0%); Finland and Russia (about 6.5%); Guernsey and Jersey (7.5%), and Andorra, Australia and Portugal (about 7.0%). African countries do not feature on the list of countries with high numbers of female prisoners.

While in most prison systems female prisoners comprise between 2.0 and 9.0 per cent of the prison population, in some systems this percentage is higher: Hong Kong (China) (22.0%); Myanmar/Burma (18.0%); Thailand (17.0%); Kuwait (15.0%); Qatar and Vietnam (12.0%); Ecuador, Netherlands Antilles and Singapore (11.0%); Aruba, Bermuda and Laos (10.0%), and Macau (China) (9.2%) (International Centre for Prison Studies 2005b).

Women make up between 1 per cent and 6 per cent of prison populations in Africa. While there are women's prisons in some countries, in others men and women are held in the same prison and not always separately (Samakaya-Makarati 2003). Although in Africa the average percentage of women in confinement is significantly lower than in the rest of the world, percentages vary. For African countries with available statistics, the highest percentage of women confined in North Africa is in Egypt, with 4.5 per cent; in West Africa the highest percentage is in the Cape Verde, where the rate is 5.0 per cent; in Central Africa, Angola is the highest at 3.3 per

cent; in East Africa the highest percentage is in Mozambique at 6.3 per cent, and in southern Africa, Botswana tops the list with 5.0 per cent. The lowest percentages in these regions (again, for countries with accessible statistics) are North Africa: Sudan (1.7%); West Africa: Burkina Faso (1.0%); Central Africa: São Tomé e Príncipe (1.0%); East Africa: Malawi (1.2%); and southern Africa: Namibia 1.8% (Walmsley 2006).[17] Over the past decade, there has been a dramatic increase in the number of women imprisoned in some African countries.

The problems that women face in prison are often similar to those faced by men, but there are differences in how these difficulties are faced by each gender. As with prisons for men, women's prisons face problems of violence and abuse (Human Rights Watch 1996b). Sexual abuse is likely to occur in situations in which men are guarding women. Physical and psychological abuse of women, by staff or other inmates, is the norm rather than the exception.

There are also deficiencies in the services available to female prisoners across the African continent. Few recreational and/or vocational programmes are available and those that are available often reinforce gender norms and stereotypes. Access to adequate mental and physical healthcare is severely lacking for women, just as it is for men. Again, the limited availability of resources and personnel seems to hinder the availability of these services.

The reasons for the incarceration of women in Africa vary by country, but a unifying characteristic among women in prisons is the poverty they faced outside of prison and the associated low levels of education. Some prevailing crimes committed by women throughout the continent include murder, attempted murder, infanticide, abortion and theft. The sentencing regimes in many African countries represent disparate treatment towards women for crimes that can be committed only by women, such as abortion or procuring an abortion, which can carry a life sentence in many countries.

In some countries facilities lack appropriate provisions to allow women who are mothers to remain with their children, even while nursing. In other cases, the lack of resources makes it difficult to establish the necessary physical arrangements for preventing the abuse of women (and children) prisoners by other prisoners or prison officials (Tkachuk & Walmsley 2001).

Overall, the conditions of detention for women held in African prisons do not adequately deal with women as women, especially with regard to the effective and sanitary management of menstruation. Apart from this, there is a general lack of understanding that the different needs presented by female prisoners are, in many respects, different from those presented by male prisoners.

There is, however, a progressive movement for prison reform specifically aimed at women. This is embodied in regional instruments, such as the Kampala Declaration, although many documents such as this are still lacking. The Kampala Declaration, for example, simply recognises that women in prison require 'particular attention'

and 'proper treatment' because of their 'special needs'. The needs of children and pregnant women are absent from the progressive rhetoric in the Declaration.

Children

Julia Sloth-Nielsen's chapter deals with children in prisons. While data on the numbers of children in detention in African countries are often problematic and hard to come by, the available information indicates that children make up a very small proportion of the general prison population in Africa, although the actual number of children in prison in some countries is quite high. In other countries, the indications are that no children are being detained. While the numbers of children being held vary from country to country, they generally range from 0.5 per cent to 2.5 per cent of the general prison population, with the highest proportion being attributed to Namibia at 5.5 per cent.

Further, the ages of those in detention are not always known and, in at least some countries, there is a practice of inflating ages so that children are recorded as adults, thereby greatly diminishing the actual reported numbers of children in prison. South Africa seemingly has the largest number of children in prison, detaining about 3 200 children in January 2005 and 2 450 in December of that same year (Inspecting Judge of Prisons 2006: report 13).

Children in African prisons must be divided into two separate and unique categories: those serving a prison sentence for criminal behaviour and those who are in prison with their mothers (Sloth-Nielsen & Gallinetti 2004a). Problematically, children are routinely held in prisons with adults, although South Africa, the Ivory Coast, Mali and Angola are examples of countries where steps have been taken to separate children from adults, and even to separate children based on offence and age.

While the right to a speedy trial has been well articulated, in many African countries the majority of child prisoners are awaiting trial. Many children spend months and some even years in prison before being brought to trial. This is generally troubling, but especially so when dealing with children because this can represent a significant time frame during their developmental years. Another reality is that children are being imprisoned for minor or petty offences, including not carrying proper identification, vagrancy, begging, loitering, truancy and being beyond their parents' control.

The separation of children from adult offenders has long been recognised as integral to maintaining and respecting the dignity and rights of the child. Some countries on the continent have provided separate institutions or separate facilities within existing institutions, maintained by the prison administrations. Others have established completely independent institutions that are not associated with the prisons. These positive trends, however, are not widespread across the continent. For many developing countries, the notion of expending tremendous resources to establish

and maintain facilities for a relatively low proportion of the prison population is daunting and nearly impossible; this is especially true when resources are scarce and competition amongst various needs is fierce.

Conditions of detention for children are often below the articulated international standards. For example, overcrowding creates conditions of detention that intensify the already poor levels of hygiene. Another consequence of overcrowding is the sexual abuse that has been well documented in youth prisons. Furthermore, there exists a severe lack of adequate nutrition and healthcare for detained children and a general indifference to their educational and developmental needs. This is not true in all countries, as some have developed educational programmes aimed at rehabilitating children so that they may effectively reintegrate. But in general, while these conditions are prevalent in African prisons as a whole, they are exponentially more problematic when dealing with children, as the ramifications of inhibiting their emotional and physical development will impact on their lives forever.

Certain positive programmes and approaches have begun to emerge and should be seen as a positive indicator of future endeavours. The use of diversion instead of detainment has seen increasing use. Egypt is one country using diversion and other restorative justice programmes (Costa 2005). Pre-release programmes specifically targeted at children are also beneficial in rehabilitating the youngest of offenders who have their entire lives ahead of them. The reintegration and rehabilitation of the most vulnerable of groups must be zealously pursued.

There is a range of legislative reforms in place in various countries to protect the rights of children in detention. Cooperation at a domestic, regional and international level allows for information exchange as well as for best practices to be developed and exported across the continent. These positive developments give hope for the future.

Rehabilitation

Amanda Dissel's chapter deals with issues relating to rehabilitation. As she notes, prisons in Africa serve various societal functions by incarcerating criminal offenders. Incarceration serves as a means to indicate public disapproval of certain behaviours, as a means of retribution for the offence committed, as a means to deter others from committing crime, as a means of incapacitation to ensure that further crimes are not committed, as a means of rehabilitation and, finally, as an opportunity to reintegrate criminals into society.

In the African context, the task of rehabilitation proves difficult as prisons are routinely overcrowded, severely underfunded and have poor conditions of detention. Despite the conditions surrounding centres of detention, rehabilitation is still a focus of prisons, and various efforts are being made around the continent to achieve that goal. These efforts are undermined by a lack of resources and, in places, a lack of will by prison authorities to carry out the programmes.

The relationship between rehabilitation and recidivism in Africa is under-researched. Statistical information is generally limited and crude when available. What is known is that recidivism rates in Africa vary remarkably, from single-digit percentages in some countries to as high as two-thirds or more in other countries. Although some argue that rehabilitation programmes are not generally successful, rates of recidivism do drop where programmes operate under sound conditions (Layton MacKenzie 2000).

As far as attempts to address various prison issues are concerned, several instruments have been drafted to ameliorate conditions in prisons. These include the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa, which was adopted in 2002 and outlines specific measures targeted at rehabilitation. A Plan of Action accompanying the Declaration gives specific concrete measures that governments and NGOs can take to provide comprehensive rehabilitation to offenders. Furthermore, the Plan of Action calls for these services to be provided to awaiting trial prisoners as well.

In addition, CESCA drafted an African Charter on Prisoners' Rights in 2002. This Charter has many features which, if implemented, could achieve major improvements. Already, many countries – including Cameroon, The Gambia and São Tomé e Príncipe (Costa 2005) – are in the process of adopting new legislation and taking other steps to promote human rights in prisons. These initiatives, while extremely promising, rarely focus on rehabilitation but rather on more pressing concerns associated with prisons such as overcrowding, insufficient personnel and training, and introducing minimum human rights standards, as well as procedures for implementing such standards. However, a number of countries, including South Africa, Uganda and Botswana, have made efforts to improve programmes of rehabilitation.

Even countries that are dedicated to improving programmes of rehabilitation and reintegration face many obstacles in implementing these programmes. Despite these obstacles, many countries are making efforts to implement certain aspects of the Plan of Action. These programmes aim to achieve rehabilitation and reintegration into the community during imprisonment with a focus on vocational and educational training, social and psychological support and counselling, promotion of contact with family and friends outside of prison, access to religious services, open prisons, and the reintegration of prisoners into civil society.

The success of these programmes is very difficult to measure, particularly since there is a lack of consensus on appropriate standards and measurements for gauging success, especially in the African context. Certain common themes have, however, emerged as being central to successful programmes. These themes include sufficient flexibility to cater to individually identified needs, a balance between quality and quantity, a focus on addressing employment-related skills, ongoing monitoring and follow-up, integrated multidimensional services that address a wide range of factors, working with families and communities, a component of restorative justice where offenders accept responsibility and, finally, that programmes should last nine months

to a year. While these programmes are at a relatively early stage of development, they do present a positive trend towards increasing the role that rehabilitation plays in imprisonment across Africa.

Alternative sentencing

Lukas Muntingh's chapter argues that the use of alternative sentencing can be a tool in alleviating human rights violations – which have been directly linked to overcrowding – in African prisons. He argues that although the movement towards using alternative sentencing in Africa is relatively young, there is much promise in the prospect of fully integrating alternative sentencing into the criminal justice systems in African countries.

The alternative sentencing debate is primarily focused on the use of community service orders for lesser offenders as a means of reducing custodial prison populations. However, any discussion about implementing such programmes has to take into account that many developing countries in Africa suffer from a lack of adequate resources to successfully implement such programmes. Thus, the movement to implement such a plan has explored alternatives, such as the payment of fines or compensation, as a means of achieving the overarching goal of reducing prison populations.

The use of alternative sentencing has much promise, but there are also many obstacles that must be addressed before these programmes can be successfully integrated into the criminal justice systems of African countries. Defining what types of crime and when alternatives ought to be used will be pivotal in determining how effective alternative sentencing will be in reducing prison populations. The practical realities of acknowledging and trying to accommodate the interests of all parties involved, such as victim-rights groups, politicians, criminals, the media and the general populace, make it difficult to determine appropriate and proportional non-custodial sentences for various infractions.

Corruption and a lack of transparency in governance are also obstacles to achieving these goals. The need for transparency and integrity in the criminal justice systems is critical to the success of implementing any alternative sentencing programmes. Reports reveal that many African countries are reputed to be suffering from crises of integrity within their states and criminal justice systems and, as such, particular steps are being taken to address these issues and mechanisms are being put in place by African states to remedy these problems.

Alternative sentencing can be a very effective tool in African criminal justice systems. While it cannot be attempted in isolation as a cure-all, it can be implemented as part of sweeping criminal justice system reforms that take into account the developmental stage of African countries as well as the individual differences unique to each country. The use of alternative sentencing in Africa will face intense scrutiny and cynicism in the coming years, but the perseverance of international organisations, governments, NGOs and individuals will be determine its success.

The role of the African Commission on Human and Peoples' Rights

Rachel Murray's chapter examines the role of the ACHPR on the question of prisons. When the African Commission came into being in 1986, it fell under the auspices of the OAU. Since 2002 it has resided under the AU, which replaced the OAU (Viljoen 2004). The AU has various structures including a secretariat, an Assembly of Heads of State and Government, an Executive Council of Ministers of Foreign Affairs, and the African Court of Justice, as well as financial institutions and technical committees.

Various institutions are tasked with the protection of human rights, including the ACHPR, the African Court, and the African Committee on the Rights and Welfare of the Child. While the African Court is not up and running yet, the latter body began operating in 1999.

The African Commission has appointed a number of Special Rapporteurs (see Harrington 2001; Evans & Murray 2002) and other structures to work on matters concerning human rights. These include the Special Rapporteur on the Rights of Women in Africa, a Working Group on the Death Penalty, a Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights, a Working Group on Indigenous Populations/Communities in Africa, a Special Rapporteur on Human Rights Defenders in Africa, a Special Rapporteur on Freedom of Expression in Africa, and a Special Rapporteur on Prisons and Conditions of Detention (discussed later).

The ACHPR plays a pivotal role in examining prisons and making recommendations to states to improve the status of human rights on the continent. While the objectives of the Commission are admirable, with regard to prisons the Commission at times lacks a clear and coherent approach and policy. The Commission uses various instruments to improve conditions of detention, including hearing cases, drafting resolutions and questioning governments. Its most important contribution, however, has been the creation of the Special Rapporteur on Prisons and Conditions of Detention (see Evans & Murray 2002; Viljoen 2005).

When adjudicating cases and assessing the status of human rights in African prisons, the Commission has adopted or referenced various international standards, such as the UN Standard Minimum Rules for the Treatment of Prisoners (SMR), the International Covenant on Civil and Political Rights, and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Murray 2000). The Commission has also adopted instruments such as the African Charter on the Rights and Welfare of the Child (Chirwa 2002) and the Protocol on the Rights of Women, adopted in July 2003.

The Commission has stressed that each individual state has the responsibility to care for and ensure that all detainees are afforded minimum guaranteed rights. Furthermore, the Commission extends those rights to all forms of abuse, whether

mental or physical. One of the main problems, however, is the lack of standards. The Commission does not specify degrees of violation nor has it enunciated clear standards for what is and what is not a violation. In adjudicating cases, generally the Commission first looks to the evidence presented by the complainant and then at the extent to which the government responds to the allegations; if the government fails to respond, the Commission finds in favour of the complainant.

The Commission has adopted various resolutions concerning conditions in prison. These include the Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Penal and Prison Reform in Africa. The Special Rapporteur was requested to report on its implementation and the Commission called for the Declaration and Plan of Action to be widely disseminated and publicised. The Declaration and Plan of Action make a number of recommendations relating to the reduction of the prison population, making African prisons more self-sufficient, promoting the reintegration of offenders into society, applying the rule of law to prison administration, encouraging best practices, promoting the African Commission, and advocating the development of a Charter on the Basic Rights of Prisoners under the UN. Practical steps to implement these goals include using alternative sentences other than imprisonment, recognising restorative and traditional justice, and enhancing the links between these methods and more formal criminal justice referral systems. It also suggests that some offences should be decriminalised, and measures such as speeding up trials, making cost orders against lawyers for delays, and restricting the time in police custody to 48 hours are all methods that could be used to reduce the number of people held on remand. With respect to the sufficiency of prisons, the Plan of Action urges more training for staff and involvement of prisoners in industries, enhancing their literacy and, therefore, their employment prospects, providing 'adequate social and psychological support', as well as increasing contact with their family and community. Further recommendations with respect to the rule of law include ensuring legislation on prisons is reviewed in the light of international human rights obligations and encouraging the increased use of independent inspections.

The Robben Island Guidelines, established in 2002, are very detailed about the conditions of detention that are deemed acceptable and that conform to minimum international standards. The Guidelines are explicit about different aspects of penal systems, including judicial independence, actual physical conditions, the role of NGOs, the use of alternative sentencing to alleviate overcrowding, the separation of vulnerable groups such as children and women, and increasing awareness and training of staff, among many other provisions. The Guidelines also established a Follow-Up Committee that is charged with disseminating information about the Guidelines to countries, proposing strategies to the African Commission for the implementation of the Guidelines domestically, promoting and facilitating the implementation of the Guidelines within member states, and inviting NGOs and other actors to disseminate and use the Guidelines in their work.

Through the combined use of the Special Rapporteur on Prisons and Conditions of Detention, case adjudication and the use of resolutions, the Commission has established a decent framework for combating the problems facing African prisons. The lack of cohesion and structure, however, detracts from the overall effectiveness of the Commission in combating these problems. All three mechanisms utilised by the Commission need to function in conjunction with each other more appropriately. Without a centralised and structured approach, the Commission is bound to make little headway on the continent. The establishment of all the essential foundations is now in place, and it is a matter of consolidating and structuring them to be more effective. As with so much else regarding prisons in Africa, there is hope for the future but more must be done.

The Special Rapporteur on Prisons and Conditions of Detention in Africa

The Special Rapporteur on Prisons and Conditions of Detention was established in 1996 in an effort to combat the conditions in African prisons. Although the ACHPR did not initially deal with the rights of prisoners, the Commission did adopt a resolution in 1995, the Resolution on Prisons in Africa, that extended all the rights contained in the African Charter on Human and Peoples' Rights to prisoners and persons being detained. The Commission formed the position of Special Rapporteur pursuant to Article 45(1)(a) of the African Charter, which grants the Commission the power to undertake research and studies on the status of human rights in Africa in an effort to promote those rights. In addition, Article 46 grants the Commission the power to use any appropriate method to investigate. The Special Rapporteur has been primarily associated with Article 45(1)(a); this is beneficial because that Article is associated with the Commission's promotional function, which is performed through public meetings (Viljoen 2005).

The position of Special Rapporteur on Prisons is held by a member of the African Commission and, like any other Special Rapporteur of the Commission, it is held for a two-year period. Initially, the position was held by Commissioner Victor Dankwa of Ghana, followed by Commissioner Vera Chirwa of Malawi; most recently, it has been held by Commissioner Mumba Malila of Zambia.

The Special Rapporteur is entrusted by the Commission to examine the situation of prisons and prison conditions and to ensure the protection of persons in detention or in prison. She or he is meant to seek out and receive credible information about prisons and prison conditions, to examine issues concerning prison conditions in all African countries, to intercede with governments in African countries regarding prison conditions in their states, to examine individual cases relating to prisons, and to present an annual report to the African Commission. The Special Rapporteur is also meant to suggest appropriate solutions and ways to improve conditions in African prisons. In addition, the Special Rapporteur attempts to promote the training

of law-enforcement personnel, police, prison guards, magistrates and lawyers. This, in turn, will improve conditions in prisons.

The Special Rapporteur achieves these objectives in various ways. The most public manner is by visiting countries and preparing a report containing recommendations concerning that country. The Special Rapporteur also makes follow-up visits on occasion.

Sixteen country visits had been conducted by 2005, with 13 different countries having been visited at an average of two per year. The visits, although conducted by different commissioners, follow a very similar pattern. The Special Rapporteur begins with a meeting with government officials, followed by a press conference, and then visits places of detention – such as prisons, police holding cells and reform schools – for about 10 working days. During the visits, the Special Rapporteur meets with administrators and inmates and tours the grounds. After the visits, the Special Rapporteur follows up with government officials, makes any urgent appeals that he or she deems necessary, and concludes with a final press conference. The Special Rapporteur then drafts a report based on the visit and the government gets an opportunity to respond to this report; following this response, the Special Rapporteur then drafts a final edition of the report. While these reports were easily available in the past, this is no longer the case. This problem ought to be addressed: the Special Rapporteur's annual report to the Commission should be published and widely disseminated (Viljoen 2005).

The reports of the Special Rapporteur obviously vary from country to country, but one unifying recommendation made to most countries is the need to allocate more budgetary resources to facilities. This is a common theme around the continent, especially with regard to places of detention and penal systems. Another common theme is the need to train prison officials properly to promote and protect the rights of detainees; but again, this training is inextricably linked to increasing budgetary allocations. Finally, the reports note the need to improve relations between prisoners in an effort to protect basic human rights.

In addition to conducting visits, the Special Rapporteur also assesses national laws to ensure that they are in compliance with international standards and the African Charter.

Although the Special Rapporteur could be instrumental in promoting and protecting the rights of prisoners, the actual scope of this function has been extremely limited. Given the resource limitations and the fact that the Special Rapporteur is a part-time position occupied by a person already employed in their own country, as well as being a commissioner of the African Commission, it is not surprising that the role of Special Rapporteur has not fulfilled its potential. As a result, only a few countries in Africa have been visited. Part of the reason for the limited number of visits can be attributed to the consent requirement that is needed from the state in order for it to receive a visit, as well as the limited resources allocated to the Special Rapporteur. Countries that have been visited require follow-up visits to ensure that

recommendations are implemented and that the situation is improving. For the Special Rapporteur to be truly effective, visits must become more frequent and more countries should be included in them. The Special Rapporteur also has a major role to play in dealing with issues such as overcrowding, health, hygiene and alternatives to prison across Africa.

Even though the Special Rapporteur has many hurdles to overcome, there are many positive aspects of its work that provide hope for the future. First and foremost, it has solidified prisoners' rights on the agenda of the Commission, thus ensuring that even if progress is slow, these issues continue to receive attention and remain in the spotlight. While the number of visits undertaken by the Special Rapporteur is quite low, it has, over a 10-year period, examined about 250 places of detention. Although this is just a fraction of the number of prisons on the continent, it is a good start. The Special Rapporteur has also been able to highlight issues that were previously ignored. Most notable amongst these issues is the staunch opposition to capital punishment displayed by Vera Chirwa. The present incumbent has made strong statements concerning corporal punishment (Viljoen 2005).

Increased fiscal resources, communication between NGOs and other international organisations, communication between countries being visited and the Special Rapporteur, communication and integration between the Special Rapporteur and the Commission, and overall legal analysis and restructuring will all be vital to the Special Rapporteur's mandate in the years to come. Much of the success of the position will hinge on these factors. While the task is daunting, it is far from impossible and is a necessary and vital tool in combating these problems.

Besides the ACHPR and its mechanisms, independent oversight of prison administration is also necessary in order to ensure effective prison governance and greater transparency in African prisons. While a number of countries have national human rights institutions, some are more effective than others. These institutions do not focus on prisons alone and are often spread thinly. To deal with issues that concern prisons, South Africa has created an Office of the Inspecting Judge of Prisons to deal with prisoner complaints and investigate conditions in prisons. There is also the Independent Complaints Directorate that investigates complaints against the police, who often have awaiting trial prisoners in their care. Despite this, in South Africa over 500 deaths per year have occurred in police custody since 1994. In previous years, there have been over 700 deaths per year of prisoners held in police places of detention. This does not include those who died in the ordinary prisons. Institutions of this nature are sorely needed in the national context to ensure continued scrutiny of prisons and police stations where people are incarcerated or detained.

Prison reform in Africa

In many parts of Africa there is a general trend towards reform and liberalisation which aims to expand the human rights of prisoners. Governments, NGOs and other international participants are playing a proactive role in attempting to ameliorate

the situation (Achieng 1999). Unfortunately, in the past prison reform was rarely a national priority (Stern 2006). While this is changing to some extent today, states are faced with numerous other pressing concerns affecting their entire population, such as disease, education, housing, unemployment and political instability. Yet there have been indications that steps are being taken across the continent to achieve penal reform as well as reform in the criminal justice system broadly. While resource shortage continues to remain one of the biggest problems in achieving greater human rights protection in African prisons, donor assistance in achieving this reform has been forthcoming. In 2002 alone various donors contributed US$110 million to African countries to reform the justice sector (Piron 2005: 4).

African countries have taken a number of steps to address prison issues. Various countries, such as South Africa, have reduced prison sentences for thousands of inmates by six months to ease overcrowding. In Kenya, petty offenders have more recently been sentenced with community service. Fines are imposed rather than imprisonment and probation is offered more regularly. Early releases of thousands of prisoners have also occurred to ease overcrowding (US Department of State 2006). These and other reforms that are taking place in Kenyan prisons, such as an expansion of health clinics, are having an impact on the health of prisoners. Nigeria has also begun measures to reduce overcrowding. Uganda enacted the Community Service Act in 2005, allowing community service rather than imprisonment for certain groups of offenders (US Department of State 2006). Malawi, too, has begun to use community service options. In Mali and Niger laws to introduce community service as an option are pending before the legislature. Angola has recently opened a women's unit at one of its prisons and is renovating other prisons.

While in general prison conditions in North Africa remain problematic, the UN Human Rights Committee has noted that various positive legislative reforms have been introduced to promote human rights, specifically in Morocco. The UN Committee on Torture has also remarked that noteworthy efforts have been made by the government to educate prison officials on human rights issues. However, the high number of deaths in prisons, overcrowding and violence all continue to be matters of concern.[18] Morocco did reform its Prison Code in 1999 and its Penal and Criminal Procedures Codes in 2003. Algeria, as well, is making strides to reform its prisons. It has requested the assistance of Penal Reform International (PRI) to conduct training of prison and other officials in its efforts. After a gap of more than 15 years, Libya permitted Amnesty International and Human Rights Watch, in 2004 and 2005 respectively, to enter the country and examine the human rights situation. The Ministry of Justice also began a project with the International Centre for Prison Studies (ICPS) in the UK to improve human rights and management issues in prisons. An Arabic translation of the handbook *A Human Rights Approach to Prison Management* (Coyle 2002b) was also prepared to heighten awareness of human rights issues among prison officials. Tunisia has also recently let in human rights monitors for the first time in more than 15 years. It also enacted a new law in 2001 to ensure prison reform. Furthermore, in 2002 a commission was established to examine the situation in prisons.

Various support programmes have been introduced into other African prisons. Thus, conditions in Sierra Leone's prisons have recently improved, partly as a result of a UN Development Program-funded prison reconstruction and rehabilitation programme. Sierra Leone is also permitting visits by family members to inmates for the first time. Elsewhere, organisations such as PRI are assisting in prison reform initiatives around Africa. The organisation is also helping to educate the public on pertinent issues, such as bail, that impact on prisons. The International Committee of the Red Cross has assisted by monitoring prisons, but has also taken other measures such as providing soap to thousands of inmates in the Congo; upgrading water, sanitation, kitchens and other aspects of prisons in Guinea; and providing assistance in various ways to prisons in more than 40 other African countries (see PRI 2005).

In September 2006 African correctional service ministers showed their commitment to prison reform by agreeing to launch an organisation in 2007 that would assist in improving the conditions in overcrowded institutions in Africa. This agreement emerged from CESCA, which was held in South Africa and attended by the ministers, heads of prisons and various other senior officials from prison departments of 13 African countries (*Xinhua News Agency* 1 September 2006). CESCA itself seeks to promote good prison practices that are consistent with international standards. These standards include the promotion of humane treatment of prisoners, and respecting and protecting their dignity and human rights (*AllAfrica Africa News* 30 August 2006[19]). The new organisation would be committed to prioritising a number of critical issues and, in so doing, ensure improvement and upliftment in African prisons. The conference decided that the organisation would have specific areas of focus, namely 'governance frameworks, technical assistance, human resource development, education and training, research and data collection, learning and knowledge exchange and awards of excellence in correctional services' (*AllAfrica Africa News* 30 August 2006). There was consensus that addressing overcrowding should be a primary mission of the new structure (*Xinhua News Agency* 1 September 2006). To guarantee that the new structure would begin its work in 2007, a Strategic and Technical Working Group was established. Its membership comprises officials from Namibia, South Africa, Tanzania, Kenya and Swaziland. Arguing the need for such an organisation in Africa, the South African minister of correctional services noted that:

> African countries cannot continue to be bashed internationally for their inability to transform their prisons services, in tandem with international standards, if they are not supported and encouraged to do so by any coordinating structure at international and continental level where their views and interests could be heard, represented and pursued. (*AllAfrica Africa News* 30 August 2006)

Thus, coordination and assistance are critical components of this new institution. South Africa and Zambia are already exploring such coordination and reciprocal support. In May 2006 the two countries signed an agreement that will see their prison

administrations working together. The agreement 'will promote and institutionalize cooperation in various areas of management of prisons including good governance, human resources development, sharing of information and experiences, prison and agricultural industries and partnerships in addressing multi-lateral issues of common interest' (*Xinhua General News Service* 12 May 2006[20]).

Conclusion

In general, reflections on Africa in the past have been quite negative. In 2000, *The Economist* called Africa the 'hopeless continent'. However, more recently there seems to be a positive shift in attitudes towards Africa. A recent UN report noted:

> Africa seems to have entered, at last, into a period of hope. Throughout the continent signals multiply that matters are changing for the better. Military coups are now rare, and democratically elected governments are on the rise. More African states are experiencing economic growth and social recovery. Once irresolvable conflicts, such as the North-South war in the Sudan, and the civil wars in Angola and Sierra Leone, have dwindled or ended, while serious efforts are being made to resolve other, seemingly intractable ones. New leaders seem driven by empowerment by their people and pressure by their peers, with a renewed commitment to meeting the United Nations' Millennium Development Goals. Bold statements by developed nations show greater readiness to help support these collective efforts to attain global goals. Pan-African initiatives are multiplying. More than ever before, African states now view themselves as shareholders in a collective destiny, partners in continent-wide institutions like the African Union (AU) and its programme, the New Partnership for African Development (NEPAD). (Costa 2005)

These same sentiments can be applied to prisons in Africa. While rights of prisoners have been narrowed in countries around the world, the trend seems to be the opposite in Africa. Yet there are still huge variations across the continent in this regard. For example, prisons in many African countries are still home to thousands of political detainees. Both Ethiopia and Rwanda, for example, have confined many opposition leaders. In countries such as Algeria the security forces seemingly still detain and torture people despite movements on the continent towards greater public scrutiny and accountability. In July 2006 Amnesty International (2006) noted that 'detainees are beaten, subjected to electric shocks and forced to drink dirty water, urine or chemicals'. Globalisation also poses a major threat to progress in prison reform. The worldwide tendency towards greater austerity in the criminal justice system, and specifically the 'war on terror', is having a pervasive influence on prison policy in many countries.

Overcrowding is still a major issue in Africa. Prisoners across the continent, already deprived of their liberty, suffer the degradation and inhumanity of being crammed into overcrowded cells. In places the increasing incarceration rates and longer

prison terms have decreased the inmate turnover rate, leading to overcrowding. Such overcrowding has damaging long-term implications for society in general. This needs to be dealt with far more comprehensively.

Critically, African countries may not have the resources to make major and costly changes in their prisons but are attempting to improve the treatment of prisoners and the conditions under which they are held. These sentiments are evidenced by the progressive rhetoric that is prevalent on the continent in various forms. However, policy must be converted into reality on the ground and now is the time to do so. It is now a matter of fully implementing these theoretical desires.

Notes

1 *NEPAD in Brief* (October 2001), available at <http://www.nepad.org/2005/files/documents/inbrief.pdf>, accessed on 26 June 2006.

2 Defending Justice, 'Basic Facts about the Criminal Justice System' (2005), available at <http://www.defendingjustice.org/pdfs/factsheets/7-Fact%20Sheet%20-%20Basic%20Facts.pdf>, accessed on 1 October 2006.

3 Information was available for 211 countries. Countries in Africa for which data were not available were Guinea Bissau, Liberia, Sierra Leone, Equatorial Guinea, Gabon, Eritrea and Somalia.

4 Defending Justice, 'Basic Facts about the Criminal Justice System', 2005.

5 Blumstein (2002: 472) finds that from the 1970s the growth in the rate of confinement in the US can be ascribed to punitiveness.

6 Chris Suellentrop, 'The Right has a Jailhouse Conversion'. *The New York Times Magazine*, 24 December 2006.

7 Council of Europe, 'Annual Penal Statistics', November 2005.

8 Survey conducted by PRI and cited in Michael Wines, 'Wasting Away, A Million in African Jails'. *New York Times*, 6 November 2005, p. 11.

9 'Where Life Means Death'. *The Economist*, 27 March 2004.

10 'US$25 Million for Ghana Prison Service's Transformation'.

11 UN, Commission on Crime Prevention and Criminal Justice, 'Use and Application of United Nations Standards and Norms', UN Doc E/CN.15/2002/3 (February 2002: 12).

12 Decision of Judge Plasket in *S v. Zuba* and 23 similar cases, CA40 (2003), paragraphs 37 and 38, quoted in Steinberg (2005).

13 'Nigeria: Thousands of Prisoners Awaiting Trial to be Freed 2006-01-09' (5 January 2006), available at <http://www.irinnews.org/report.asp?ReportID=50962>, accessed on 5 January 2006.

14 'Tanzania: Kikwete pledges to improve Prison Conditions' (5 May 2006), available at <http://www.irinnews.org/report.asp?ReportID=53167>, accessed on 5 May 2006.

15 Committee of Ministers, Meeting of the Ministers' Deputies, *Recommendation of the Committee of Ministers to Member States on the European Prison Rules* (11 January 2006).

16 Such as UN instruments which include the Standard Minimum Rules for the Treatment of Prisoners (1957), the UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules); the Code of Conduct for Law Enforcement Officials (1979); the Standard Minimum Rules for the Administration of Juvenile Justice (1985); the Body of Principles for Protection of All Persons under any form of Detention or Imprisonment (1988); and the Basic Principles for the Treatment of Prisoners (1990). In the context of Africa, the Kampala Declaration on Prison Conditions in Africa (1996), the Arusha Declaration on Good Prison Practice (1999), and the Ouagadougou Declaration on Accelerating Penal and Prison Reform (2002).

17 The figures for Tunisia, Guinea Bissau, Liberia, Niger, Sierra Leone, Cameroon, the Central African Republic, Congo (Brazzaville), Equatorial Guinea, Gabon, eastern Africa (Comoros, Djibouti, Eritrea, Ethiopia and Somalia) are unknown, while for Chad, the Democratic Republic of the Congo, Mauritania and Togo figures are available only for the main prison, while in Egypt figures are for convicted prisoners only.

18 Conclusions and Recommendations of the Committee against Torture: Morocco, 5/22/2004, UN Doc CAT/C/CR/31/2 (Concluding Observations/Comments).

19 'South Africa; Minister Calls for Body Representing African Prisons'. *AllAfrica Africa News*, 30 August 2006.

20 'South Africa helps Zambia Manage Prisons'. *Xinhua General News Service*, 12 May 2006.

2 A brief history of human rights in the prisons of Africa

Stephen Peté

In his introduction to the work *African Penal Systems*, Alan Milner warns that '[t]he making of generalizations about Africa is a foolish pastime' (1969: 1). Africa is a vast continent with a long and complex history. Attempting to trace the history of human rights in the prisons of Africa in a single chapter may seem too broad an undertaking. Consequently, this chapter should not be considered to be more than a brief overview of certain main themes which, from a human rights standpoint, characterise the development of prisons in Africa.

As many scholars have pointed out (see for example Rusche & Kirchheimer 1968; Foucault 1977; Ignatieff 1978), imprisonment is essentially a form of punishment that rose to prominence during the birth of the modern era in Europe. For centuries before the onset of modernity, criminals, slaves and those defeated in war were subjected to detention of one kind or another. Imprisonment as a specific form of punishment,[1] however, is a distinctly modern phenomenon. Thus, in a strict sense, imprisonment in Africa may be said to have begun with the introduction of this 'modern' form of punishment to the continent by the colonial powers. Although some of the forms of detention in the pre-colonial period will be discussed briefly, the main focus of this chapter will be on the colonial and post-colonial periods. Of particular interest will be the manner in which penal theories and technologies of punishment imported from Europe were adapted and transformed in the African context and the effects of this on the human rights of prisoners in Africa.[2] Although not strictly 'imprisonment' in the modern sense, some attention will be devoted to the detention of slaves in Africa, due to the massive impact of slavery on the continent prior to the colonial period. The overall focus of this chapter will be to reveal the intense suffering endured over the years by millions of ordinary prisoners, confined in deplorable and inhumane conditions in the prisons of Africa, and to isolate some of the reasons for the systematic abuse of their human rights.

The pre-colonial period

Penal incarceration was rare in pre-colonial Africa.[3] The detention of criminals, prisoners of war, slaves and others did take place but was usually secondary to some other purpose and was not regarded as a specific form of punishment. Criminals in the smaller decentralised African societies were usually detained by being

chained out in the open. Although the centralised states of West Africa did possess permanent prisons, these were used for detaining political prisoners, or accused persons awaiting trial and punishment by other means.[4]

The fact that imprisonment, as such, was not regarded as a suitable form of punishment for ordinary offenders during the pre-colonial period is confirmed by James S Read (1969), who points out that forms of physical restraint were rarely used in East Africa during pre-colonial times. Detention does not appear to have been regarded as a punishment in itself. In those rare cases involving detention, offenders would be held for purposes of attending their trial, or awaiting the imposition of some other form of punishment. Read points out that on rare occasions offenders in the kingdom of Ankole were detained in a form of stocks usually pending their execution and that stocks were used also in Buganda. Read confirms, however, that 'prisons were introduced only after the advent of British rule' (1969: 103).

Similarly, in discussing the kingdom of Dahomey and the empire of Samori Touré, the great military states which existed in West Africa during the nineteenth century, Thierno Bah (2003) notes that there is no firm evidence to support the existence of a systematically organised penitentiary system in either of these states. The penal systems which existed in certain pre-colonial states do, however, share certain characteristics with modern systems of imprisonment. In discussing the centralised states of Cameroon during the nineteenth century, Bah states:

> Standardized state imprisonment seems to have been practiced by centralized states, such as the Mandara kingdom, which reached its pinnacle during the nineteenth century. The Mandara system of official titles proves that the kingdom used a classical penitentiary system, complete with torture and squads of guards…The Fulani emirate of northern Cameroon, founded in the wake of Usman dan Fodio's *jihad* (1804), also established a judiciary system with punishments that varied from fines to long prison sentences, and included forced labor. Each political unit of command (*lamidat*) had a prison, perceived by local populations as a place of terror…In the *lamidat* of Mindif, the *Bongo*, a Muslim convert who did not belong to the Fulani ethnic group, acted as chief of police and prison guard…Physical cruelty and starvation were frequent. Recalcitrant prisoners were tortured by being shut up in a stifling hut, and exposed to smoke of hot peppers thrown onto fire. (2003: 74)

In a modern sense, however, it may be said that, apart from southern Africa, the punishment of imprisonment became widespread only towards the end of the nineteenth century.

According to Read, the main focus of penal systems in traditional societies was to secure compensation for the victim, as opposed to punishment of the offender. He points out that compensation for some common injuries was probably fixed in certain communities and refers to Kikuyu law, which provided that 'nine sheep or

goats had to be paid for adultery or rape, and one hundred sheep or ten cows for homicide' (Read 1969: 103–104). The rate of compensation did not change with the wealth or age of the victim and was not affected by the intention or motive of the killer. Read submits that the purpose of the compensation was to restore the equilibrium of society. The family of the offender could be held collectively liable to pay compensation to the victim. The focus of the colonial authorities on punishment of the offender, as well as their lack of concern for arranging compensation for the victim, led to great dissatisfaction among East Africans, who felt that justice was not served if compensation was not paid. William Clifford (1969) confirms Read's views on punishment in pre-colonial African societies. Speaking of the punishments imposed by the tribes of Central Africa prior to colonisation, Clifford states that death or exile was used only in response to crimes which threatened the safety of the community, such as 'in cases involving witches or persistent offenders' (1969: 241–242). In other cases, the penal system was focused on compensating the victim and restoring the equilibrium of the community which had been upset by the crime. According to Clifford, prisons did not exist 'and even murder, assault and property damage could be redressed by compensation and only provoked penal sanctions when their effects threatened the stability of the community as a whole' (1969: 241–242).

As far as corporal punishment and the death penalty are concerned, Read submits that these punishments were rarely used in the traditional societies of East Africa. The death penalty was regarded as an exceptional punishment of last resort, to be used only to protect the community from dangerous offenders. While a habitual thief might be regarded as a danger to the community as a whole and be subject to execution, isolated instances of theft would generally be addressed by demanding the payment of some form of compensation. According to Read, Kikuyu law drew a distinction between different kinds of homicide. Normally homicide would be a matter requiring some form of compensation. To cause death by poison or witchcraft, however, was regarded as a crime against the whole community, and could attract the punishment of death by burning (Read 1969).

Prisoners of war, in certain parts of Africa at least, were liable to be executed or sold into slavery. In a discussion of West African societies during the nineteenth century, Bah (2003) points out that the end of a military campaign was celebrated by the distribution of war booty. War booty could include prisoners, who would be executed, ransomed, exchanged or enslaved.

A significant punishment in pre-colonial times was to ostracise the offender. In the context of the cohesive societies of pre-colonial Africa, ostracism was a severe punishment. It could take the milder form of social isolation within the community itself or the more severe form of total banishment by means of a formal ritual (Read 1969; Bernault 2003).

Spiritual sanctions were also an important sanction during the pre-colonial period. Religious rites were often conducted to protect the community from the anger of the

ancestral spirits and to make amends for the actions of the guilty parties. Religious rites denouncing the crime were also used as a form of punishment. According to Read, the elders of the Nandi tribe of Kenya would deal with serious crimes by uttering curses which, unless formally removed, 'would prove fatal, spreading also through the offender to his family and descendants' (1969: 105).

Finally, the Muslim *Shari'a* law that was applied in many areas of Africa during pre-colonial times continues to regulate many parts of the continent to this day. For example, one of the early British administrators had the following to say about the law applied in Zanzibar:

> According to strict Mahommedan law murder may be atoned for, and in cases of mutilation the application of the *lex talionis*, which I need scarcely say now no longer obtains in practice, may be avoided by the payment of '*diya*' or blood-money with the consent of the victim, or, if he has been killed, of his legal heirs. (Read 1969: 105)

The Atlantic slave trade

No discussion of human rights and imprisonment in Africa would be complete without reference to the Atlantic slave trade, which involved the capture and detention of millions of Africans. Although enslavement did not amount to imprisonment in the strictly modern sense, the sheer scale of this trade in human beings, which began around 1440 and lasted for over four centuries until finally coming to an end around 1870, demands attention.[5] Moreover, the forts and slave castles which were put in place as a result of the trade were to become important centres of detention even after the abolition of slavery.

There are many examples of slave castles and fortresses along the west coast of Africa. For example, Ghana is home to the slave castles of Elmina and Cape Coast. The former was built in 1482 by the Portuguese and is now the oldest European structure in tropical Africa, while the latter was built in 1650 by the Swedes. Another well-known slave castle was built by the French at Goree Island off the coast of Senegal, where an important port for the trans-shipment of slaves was situated.[6] In the Portuguese colony of Angola, three fortresses, known as São Miguel, Penedo and São Pedro, were built in Luanda shortly after the city was founded in 1576. Although these fortresses contained dungeons, they were reserved for white inmates or high-profile African political prisoners. For example, in 1836 Alexis, a prince of Kongo, was imprisoned in Penedo 'for having asserted the independence of the kingdom of Kongo' (Vansina 2003: 59). Ordinary slaves, however, had to be content with places of confinement that were far more rustic than a castle or fort.

Transporting slaves from the hinterland to the coast, and then on to slave ships for their journey to the Americas, involved different methods of confinement. One method of transporting slaves across country was to attach between 30 and 100

captives to a long chain known as a *libamo*, which became a kind of walking prison (Vansina 2003: 63).

Once on board a ship, the conditions of slaves' detention were even worse (Reader 1997).

The colonial period

The rapid development of imprisonment

Although prisons have existed on the continent of Africa for centuries, the punishment of imprisonment became widespread in most of sub-Saharan Africa, with the notable exception of southern Africa, only towards the end of the nineteenth century.[7] As the colonial powers extended their control across the length and breadth of the African continent, they established prisons in all their garrisons and administrative outposts.[8] These institutions were to play an important role in the expansion and consolidation of colonial authority (Bernault 2003). Florence Bernault (2003) describes the early spread of prisons in sub-Saharan Africa as being massive and systematic. She argues that in the British territories a comprehensive series of prison ordinances was issued and jails were built in all new administrative posts. She notes that in French West Africa white administrators were permitted to sentence Africans to 15 days in prison without trial. In French West Africa and Equatorial French Africa, Bernault notes that a variety of penal facilities were provided. Within each police precinct, 'security rooms' known as *cachots* were provided for the detention of accused persons. Within each small administrative district or 'circumscription', a modest prison known as a *maison d'arrêt* or a 'house of correction' was provided to hold persons awaiting trial or offenders sentenced to a short term of imprisonment. In the capital of each colony, a larger prison known as a *maison central* was provided for the detention of those sentenced to between six months and five years' imprisonment. Finally, at the federal level there were a number of larger fortified prisons known as *pénitentiers*, which held persons who had been sentenced to more than five years' imprisonment, as well as political prisoners.[9]

In the British colony of Uganda, the first prisons were established during the late nineteenth and early twentieth centuries. Uganda is an interesting example because it is one of the few African countries in which a dual prison system emerged, with some prisons controlled by the local authorities and others by the colonial authorities. Read notes that it was not the colonial government, but the 'native government of Buganda' (1969: 108), that established the first prisons in Uganda, soon after the declaration of the Protectorate in 1894. The colonial government established prisons some years later based on legislation passed in 1903 and 1909 (Read 1969).

In the East African Protectorate, the first prison was established at Fort Jesus in Mombasa during the first years of British rule. Read points out that in 1897 Fort Jesus held a total of 130 convicts on average and that the prison 'was also used for the custody of vagrants, lunatics and paupers, who were accommodated separately from

the convicts' (1969: 109). Bernault submits that the British colony of Kenya 'offered the most extraordinary attempt to organize a full hierarchy of penal institutions' (2003: 13). She points out that by 1911 a total of 30 penitentiaries had been established in the colony and that by 1927 there were 22 'detention camps', which supervised hard labour in the territory. By 1933, according to Bernault, 'forced labor had become such a frequent sentence that the government began building "prison camps" entirely devoted to agricultural and public works' (2003: 13). She comments that the system of detention operating in the colony was 'perhaps one of the few in Africa to resemble a "carceral archipelago" ' (2003: 13).

The first prisons in Ghana were mainly custodial institutions and, by 1850, a maximum of 129 prisoners could be accommodated in cells located in four different forts (Seidman 1969: 435). During the 1860s, the punishment of imprisonment became increasingly harsh, with the introduction of penal labour in the form of shot drill, crank drill and the treadmill.[10] Severe corporal punishment was administered by the dreaded cat-o'-nine-tails and prison diets were diminished to a level at which they were only just sufficient to keep the prisoners alive (Seidman 1969).

Other British colonies included Freetown, where a three-storey stone prison building was completed in 1816 'that remained largely unaltered for a century' (Killingray 2003: 102). In Nigeria, the Broad Street Prison in Lagos opened in 1872, and could accommodate 300 prisoners (Killingray 2003: 102). In Zambia, prisons were erected after the then Northern Rhodesia became a colonial territory in 1924. By 1935, there were six central prisons and 29 local prisons (Clifford 1969: 241–242).

Prisons in a modern sense were established earlier in southern Africa than in the rest of Africa. The punishment of imprisonment was imported into the Cape Colony at the beginning of the nineteenth century, at around the time of the prison reform movements in Europe and the Americas (Bernault 2003). Before this, from the time of the first colonial settlement at the Cape in 1652 until the reforms of the nineteenth century, the main focus of punishment in the Cape Colony was the direct infliction of physical pain on the body of the accused. Van Zyl Smit notes that the punishments usually involved a cruel public spectacle and included 'public crucifixions in which the convicted, with some of their limbs broken or severed, were left to die slowly' (1984: 148). Increasing opposition to such cruel 'punishments of the body' (to use Michel Foucault's term) ensured that the punishment of imprisonment came to the fore at the beginning of the nineteenth century.

From the time of their inception, prisons in southern Africa were to become an integral part of a system of racial oppression which, towards the middle of the twentieth century, developed into the notorious political system known as 'apartheid'. Bernault notes that 'from the late 1880s onward, prisons [in southern Africa] provided early sites for testing racial segregation, thus offering crucial models for racial separation schemes in the larger society' (2003: 8).[11] Further, as I have noted in relation to colonial Natal, prisons played an important role in enforcing racist

legislation aimed at controlling the indigenous African population, and in particular the power of their labour (Peté 1986).

In the southern African context, prisons were seen as part of a wider set of institutions which were designed to confine and control the African population, in particular African workers. For example, from the 1870s on, compounds and hostels were built to accommodate the thousands of African workers employed in the diamond and gold mines of southern Africa. For the inmates of these compounds and hostels, life was similar to that of the average prisoner. As Bernault notes, spatial confinement in southern Africa 'shaped the economic, medical, and political landscape in ways that far exceeded other policies of enclosure on the continent' (2003: 8). The extent to which prisons and mine compounds operated in tandem to confine and control the emerging black working class in South Africa is well captured in Jonny Steinberg's (2004) work *The Number*.

Antiquated facilities, chronic overcrowding and social control

If there is a single theme which may be said to characterise the punishment of imprisonment in the African context, from the time this form of punishment became widespread on the continent to the present day, it is consistent and chronic overcrowding. Part of the reason for this is found in the particular way in which prisons in Africa were used as instruments in the struggle to establish colonial and racist control over indigenous populations. The colonial authorities resorted to the widespread use of administrative sentences, which entailed short arbitrary periods of detention affecting a high percentage of the indigenous adult male population. According to Bernault, the purpose of administrative imprisonment was to act 'as an economic incentive to enforce tax collection, forced labor, or cultivation, and to provide colonial companies with a constant influx of cheap labor' (2003: 12). The prisons of Africa were employed not only, or even principally, to control crime, but were used to impose colonial control on the indigenous population.[12] Such policies resulted in penal facilities which were constantly and chronically overcrowded.

Just after the turn of the century, official inspectors in French West Africa denounced chronic overcrowding in the prisons.[13] Furthermore, dilapidated prisons beset by chronic overcrowding characterised the penal systems of French West Africa well after the turn of the century (see Fourchard 2003).

Prisons in the British colonies were often similarly dilapidated and chronically overcrowded. Referring to Owerri Prison in south-eastern Nigeria, Killingray (2003: 101) notes that by 1919 there were more than 900 prisoners in a structure designed to accommodate about 100. He notes that conditions there were unsanitary, there was little food and that as a result many inmates died.

In the prisons of Ghana, overcrowding was a problem from the very earliest times. In 1869, for example, the secretary of state advised the administrator of the Gold Coast that the need to build additional prison cells might be avoided 'by resorting

to shorter and sharper punishments, by whipping in addition to shorter terms of imprisonment or in total substitution for any imprisonment…by substituting in the earlier stages of imprisonment strictly penal labour, and by lowering diet to the minimum required for health' (Seidman 1969: 436).[14] In 1899 the Accra Prison was described by Acting Governor Low as being unfit for its purpose. He commented that prisoners were 'crammed into unsuitable rooms, sometimes as many as 15 in one room. There is no accommodation for the various grades of prisoners. Debtors, political prisoners, prisoners awaiting trial, are all huddled into one room at night and penned like sheep during the day within a small concreted yard under a galvanized iron roof' (Seidman 1969: 440).

Robert Seidman points out that overcrowding in Ghanaian prisons had reached crisis levels by 1949 and that this situation became even worse as time went on. The prison population of Ghana increased from 1 500 before World War Two to 3 600 by 1951 and showed no signs of decreasing (Seidman 1969: 448). This chronic overcrowding within the Ghanaian penal system was to continue into the post-colonial period.

The situation in southern Africa was no better. In 1938, the Director of Prisons for Southern Rhodesia visited and reported on the prison system in Northern Rhodesia. He found that there were inadequate facilities for classification and segregation, which resulted in juveniles as well as certified mental patients being confined in prisons together with both male and female offenders (Clifford 1969). The Livingstone Central Prison was found to be 'antiquated and thoroughly unsatisfactory from every point of view' and the Kasama prison was condemned as being in 'a dangerous state of repair' (quoted in Killingray 2003: 103). Poor conditions in the prisons of Northern Rhodesia resulted in serious abuses of the human rights of inmates. In 1940, for example, justices visiting the Livingstone Central Prison remarked on the disgraceful practice of chaining prisoners to large pieces of railway ties to prevent their escape (Killingray 2003).

In South Africa, prisons during the colonial era were often similarly dilapidated and overcrowded. The penal system of colonial Natal provides a good example of the chronic and enduring nature of the overcrowding which afflicted many prisons in South Africa during the colonial period. Almost from the time of their establishment in 1842, the prisons of colonial Natal were plagued by overcrowding. Over the years, African resistance to restrictive colonial legislation aimed at the social control of the indigenous population resulted in large numbers of what were essentially political prisoners (in the broad sense) being confined within the prisons of the colony. In 1872, for example, the Durban Gaol was overcrowded to such an extent that only 176 cubic feet of space was available for each prisoner. This was despite the fact that official policy required at least 900 cubic feet of space per prisoner.[15] Space in the Durban Gaol was so limited that even the cells allocated to sick prisoners were overcrowded. On 5 November 1872, the Durban Gaol Board noted that 'in some cases it is to be feared that life has been sacrificed for want of proper accommodation for the sick'.[16] In May 1877, the lieutenant governor of the colony examined the state of accommodation at the Pietermaritzburg Gaol and concluded that it was 'wholly

inadequate to the demands upon it, the daily number of prisoners being far greater than the prison can properly accommodate, whilst sometimes there is excessive overcrowding'.[17] Overcrowding in the Pietermaritzburg Gaol was made even worse by the outbreak of the Anglo–Zulu War in 1879, which resulted in an increasing number of military prisoners being sent to the prison. In 1880, the superintendent of the goal complained that it was 'almost impossible to crowd more prisoners into the cells where the prisoners have not 200 cubic feet each'.[18] The overcrowding resulted in serious health problems, and the district surgeon pointed out that serious forms of dysentery and diarrhoea were a frequent occurrence in the Pietermaritzburg Goal.[19] Eventually, the prison authorities were ordered to pitch tents for African prisoners in order to relieve the overcrowding. The resident magistrate of Pietermaritzburg complained that the '[o]rder has been complied with; but it involves crowding and it is impossible to put men under long sentence in tents. Moreover, measles have [sic] broken out in the Gaol'.[20] The increase in the prison population of colonial Natal was such that, as soon as extra accommodation was built, it was filled to bursting point. In 1886, only three years after additional accommodation had been constructed at the Durban Gaol, the district surgeon reported that, in the cells set aside for 'Coloured' prisoners '[a]s many as from 5 to 8 adults are placed frequently in a small cell of say 577 feet cubic space'.[21] Despite further additions to the Durban and Pietermaritzburg gaols in 1889 and 1890 respectively, within a very short time overcrowding had once again become a major problem. In October 1892, the Durban Gaol was so overcrowded that 50 short-sentenced prisoners were forced to sleep in the corridors at night.[22] In December 1893, the superintendent of the Durban Gaol informed the government that, as a result of overcrowding, 73 prisoners were forced to sleep in the corridors at night.[23] This chronic overcrowding persisted after the turn of the century. In his report for 1903, the Chief Commissioner of Police noted that even though a new block had been completed at the Durban Goal, the accommodation was still insufficient and the gaol was overcrowded.[24]

The chronic overcrowding which beset the prisons of colonial Natal more or less throughout the colonial period was not unique to the colony, the region or the continent as a whole.

Corporal and capital punishment

An enduring theme which has, over the years, had a significant impact upon the human rights of offenders in Africa is the extensive use of corporal punishment, both as an alternative to and in conjunction with the punishment of imprisonment. Within the penal system of colonial Natal, for example, the imposition of corporal punishment by means of the infamous cat-o'-nine-tails was so widespread that the Prison Reform Commission of 1906 described it as the 'cult of the Cat' (Peté 1986: 102). In the Belgian Congo, Bernault notes that 'the famous *chicotte* – whipping administered by agents of the Force Publique – became so widespread that it later remained as an icon of colonial punishment in the memories of contemporary Zairians' (2003: 15). In relation to German East Africa, Read (1969: 109) describes

the 'widespread and frequent use of corporal punishment as a summary punishment' during the German administration of the colony.[25] Furthermore, Killingray's (2003) work points to the extensive use of corporal punishment in British colonial Africa.

The main purpose of the colonial prison was not to promote social harmony within African society but rather to secure white sovereignty and control.[26] For this reason, corporal punishment formed an important part of the penal systems of most colonies. This pre-modern sanguinary form of punishment, to use Foucault's term, which had lost much of its authority in western societies, still resonated with power in the colonies of Africa. As Bernault points out, the penal systems of Africa had a completely different *raison d'ĕtre* from those of Europe, accounting for the importance of apparently archaic forms of punishment in Africa. She argues that prisons aimed at reinforcing:

> [the] social and political separation of the races to the sole benefit of white authority by assigning the mark of illegality to the whole of the dominated population. As such, the colonial prison did not supplant, but rather encouraged penal archaism. This is why the colonial prison did not *replace* physical torture in the colonies; it only *supplemented* it – recycling, far from the European metropoles, the long-forgotten practice of state violence and private vengeance. (2003: 16)

The ideological reasons for the particularly prominent role of this barbaric form of punishment within African penal systems over the years are, perhaps, to be found in colonial attitudes towards African offenders. The ideology of racist paternalism, which dominated the thinking of many colonists, resulted in an ambiguous view of African offenders as being brutal and savage, but at the same time, simple and childlike.[27] Corporal punishment was regarded as the ideal form of punishment, both to impress the power of white colonial sovereignty upon the 'brutal savage', and to guide the 'childlike Native' towards civilised values.[28] An argument which was consistently advanced in favour of the extensive use of corporal punishment was that many African petty offenders simply did not have the money to pay the small fines to which they had been sentenced. It was argued that in the absence of whipping as an alternative form of punishment the prisons would be crowded with petty offenders who did not really belong in prison, but were simply there because they were poor (see for example Read 1969). The colonists also believed that imprisonment, in itself, was not sufficient punishment for African offenders. It was believed that imprisonment was 'too civilized a punishment for the black man, who received better food, clothes, treatment, and accommodation while inside prison, than during his normal life as a free man' (Peté 1986: 104). The liberal application of corporal punishment inside African prisons was thought to add a necessary punitive dimension to the punishment of imprisonment.[29]

Killingray points to the brutal nature of the whippings and beatings administered throughout British colonial Africa, noting that the notorious cat-o'-nine-tails was 'a brutal instrument that cut the body of the victim unless he…were protected in some

way' (2003: 107). Although the use of the cat-o'-nine-tails had been phased out by the early part of the twentieth century, Killingray (2003: 107) notes that the hide-whip which replaced it 'could also cut the body of the victim', and that the use of this instrument was phased out in Uganda only in 1925, Tanganyika in 1930 and Nigeria in 1933. In the context of colonial Natal, 'white sovereignty, power, and authority received expression in the lash marks on the backs of countless black offenders' (Peté 1986: 106).

At a political and psychological level, the white colonists tended by and large to regard themselves as the bearers of civilisation, who were outnumbered and surrounded on all sides by warlike savages. A challenge to white authority and sovereignty had to be swiftly and severely dealt with, before it developed into open rebellion. Corporal punishment, with its sanguinary roots linking it to the absolute power of the pre-modern monarch, was seen as a potent form of punishment, capable of protecting white civilisation from the savage onslaught (see Peté 1986, 1998a). The purpose of punishment in the colonial context was not to reform but to intimidate. According to Bernault, punishment in colonial Africa 'was to be limited to the body, and should not attempt to reach the native's soul' (2003: 25). Its purpose was to contain crime, intimidate wrongdoers, and discipline the masses into an amenable workforce. The prisons of colonial Africa were not designed to replace archaic sanguinary punishments with a set of humane and reform-oriented disciplinary techniques, as may have been the case in Europe. Instead, African prisons acted as points of focus, where brutal pre-modern forms of punishment could be employed openly in support of colonial hegemony.[30]

Turning to capital punishment, it is submitted that an important function of the death sentence was to reinforce colonial domination by acting as a symbol of white sovereignty and authority. As applied by the colonial powers in Africa, this form of punishment retained something of its pre-modern character as an instrument of terror. In the Belgian Congo, for example, capital punishment and public executions were permitted many years after such sentences had been outlawed in Belgium. Bernault cites the case of an offender who was put to death in 1922, in a ceremony clearly designed to re-establish white authority: 'In Elisabethville, the spectacle of the torture of Francois Musafiri, a man who had stabbed a European who had seduced his wife, took place in front of a crowd of a thousand Europeans and three thousand Africans. He was hung on the public square on September 20, 1922' (2003: 15). In the case of South Africa, the imposition of the death penalty during the apartheid era was clearly biased along racial lines (see Welsh 1969).

Racial discrimination

An important factor which affected the human rights of prisoners in colonial Africa was discrimination and the segregation of inmates on the basis of race.[31] In work detailing the penal history of colonial Natal, I have pointed to the social stigma which, in the eyes of white colonial society, attached to the imprisonment of white offenders

alongside African offenders (see Peté 1985, 1986). To the white colonists of Natal, this practice not only degraded the white prisoner himself, but also brought shame upon the white race as a whole. The authority relationship between white master and black servant had to be preserved at all costs, and it was regarded as 'particularly important that white prisoners as members of the white master class should not be seen by the black public in a position of subservience' (Peté 1986: 109).[32] A fierce debate on this issue took place in the newspapers of the colony in 1904:

> In numerous articles and letters the practice of 'herding together…black and white prisoners' was condemned as a 'grave defect in prison administration'. The practice was seen as being intensely degrading to the white prisoner who would be hardened by the experience. It was pointed out time and time again that the white prisoner had not only to face the social stigma of imprisonment but also that of being placed on [a] par with black prisoners. (Peté 1986: 107)

The proposed solution to this problem was the construction of a separate industrial prison for white prisoners, where they would be provided with industrial skills which would enable them to fit in as members of the white ruling class upon their discharge from prison (Peté 1986). Commenting on the architecture of prisons in colonial Africa, Bernault notes that the 'prison architectures sought to reproduce colonial hierarchies, erected not only upon the race distinction, but also upon a subtler contrast between individual citizens (whites) and the collective, untitled mass of African subjects' (2003: 21).

Racial discrimination within the prisons of colonial Africa often manifested itself in different dietary scales which applied to different race groups, with serious consequences for the human rights of prisoners who found themselves classified in the most poorly fed groups.[33] For example, Killingray (2003) has noted that rations were graded by race and socio-cultural status. Laurent Fourchard (2003: 138) points out that in 1958 in the prisons of Upper Volta food for an African prisoner cost 8 500 francs a year while that of a European prisoner cost around 55 000 francs per year. Poor diet coupled with a lack of hygiene led to the deaths of many inmates in the prisons of Upper Volta. Fourchard notes that in 1929, a shocking 66 per cent of the prison population detained at Ouagadougou died from dysentery. In 1959, 30 years later, prisoners detained in the Ouagadougou prison were still dying because of a 'chronic lack of hygiene' (Fourchard 2003: 141).

The imprisonment of women

Bernault (2003) has commented that as regards conditions of detention of female offenders in the prisons of colonial Africa, women experienced the worst conditions of confinement. Because they fell into the three vulnerable categories – women, prisoners and Africans – they were subjected to greater abuse. Referring to the prisons of Senegal during the colonial period, Dior Konaté (2003) notes that female prisoners suffered chronic neglect. In fact, the neglect and abuse which women

inmates suffered in the prisons of Africa during the colonial period had the most severe impact on their human rights. Konaté sums up as follows:

> Deprived of special wards, subject to promiscuity and sexual abuse, and forced to labor without wages, female detainees – both adults and minors – experienced a harsher exclusion than male convicts. As a result, women's health and psychological security deteriorated dramatically in prison. (2003: 161)

The struggle for independence and its effect on the human rights of prisoners

During the twentieth century, the African continent experienced great political turmoil, which impacted on the conditions in prisons. The struggle for independence in Kenya, for example, placed great strain on the infrastructure and staff of the Kenyan penal system (Read 1969; see also Killingray 2003). Bernault points out that, during this period in Kenya, 'the government organized fifty additional "emergency camps" in which entire villages and thousands of Gikuyu prisoners were forced to resettle. At that time, the entire colony – whites excepted – was subject to incarceration on a massive scale' (2003: 13).

The post-colonial period

Crumbling infrastructure and chronic overcrowding, political oppression and economic collapse, the continued use of corporal and capital punishment, long delays in awaiting trial, a lack of separate facilities for juveniles, the activities of prison gangs, the ravages of HIV/AIDS, and rampant corruption have all exacted a terrible toll on the human rights of prisoners in post-colonial Africa.[34]

Before each of these aspects is examined in turn, it should be noted that there have been moves at the international level during recent years to confront these challenges. In September 1996, 133 delegates from 47 countries, including 40 African countries, met in Kampala, Uganda, to discuss penal reform in Africa. The deliberations produced the Kampala Declaration on Prison Conditions in Africa (UN Economic and Social Council 1996) which, it was hoped, would set the agenda for prison and penal reform in Africa in the years that followed. One positive outcome of the Kampala Declaration was the appointment of a Special Rapporteur on Prisons and Conditions of Detention in Africa.[35]

In September 2002, a second Pan African Conference on Penal and Prison Reform in Africa took place. It was held in Burkina Faso and resulted in the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa. Prior to the conference in Burkina Faso, a questionnaire had been sent to prison services, representatives of the judiciary, and non-governmental organisations throughout Africa. The answers to this questionnaire were combined in a report setting out the main issues confronting African countries in relation to penal reform. Some of the findings set out in this report are referred to in the discussion that follows.[36]

Crumbling infrastructure and chronic overcrowding

Most prisons in Africa today are poorly maintained and characterised by material degradation. Bernault notes that the maintenance of prisons 'is often relegated to the last lines of national budgets' (2003: 32). Referring to prisons in Niger and Congo-Brazzaville, Bernault points out that maintenance is no longer carried out on the buildings, which date from the colonial era. As a result, the prisons have become 'permeable' and Bernault notes that 'Families and donors can enter the prison yard on a daily basis, while prisoners can leave the buildings for work, visits, walks or errands, or casual conversation with visitors' (2003: 32). In relation to Liberia, Gerald H Zarr noted in the late 1960s that the 'jails and prisons of Liberia vary considerably in their physical condition from each other, but have officially been described as being in a deplorable state of disrepair' (1969: 199). In Mali, the report of the Special Rapporteur on Prisons in Africa following a visit conducted in August 1997 indicates that appalling conditions prevailed in the prisons of that country at the time.[37]

In Ghana, the post-colonial government inherited a chronically overcrowded network of prisons. Seidman (1969: 449–450) points out that, in the years between 1953 and 1964, the overcrowding in Ghanaian prisons as a whole varied between 125 and 164 per cent, whereas in the years between 1953 and 1962 the overcrowding in the male central prisons varied between 153 and 198 per cent. In 1962, the 17 local male prisons in Ghana were 180 per cent overcrowded. Seidman notes that '[c]omplaints about the seriousness of overcrowding permeate the reports since 1949, as they had perennially before that' (1969: 458). Writing in the late 1960s, Seidman outlines the experience of the average Ghanaian prisoner as follows:

> The impact upon the convict admitted to the prisons must be the same as it was in 1876. He sees the same fortress-like structures. He meets conditions of almost animal overcrowding. The Regulations are read to him, on their face imposing a severe, degrading, dehumanizing regime. (1969: 451)

Summing up the main factors influencing the Ghanaian prison system, Seidman submits that endemic overcrowding 'more than any other single factor has frustrated the humanely motivated and strenuous efforts of the staff' (1969: 463). Writing in 1972 on the topic of penal practice in Africa as a whole, RES Tanner points out that 'overcrowding of prison buildings is widespread' and, referring specifically to prisons in Ghana, states that 'it has been officially admitted that many have held double the authorised number' (1972: 453).

With regard to the prisons of Kenya, it is startling to note that there were more prisons at the time it became independent in 1963 than there were almost 40 years later in September 2000. In 1963, there were 86 prisons in Kenya accommodating 13 000 prisoners, whereas in September 2000 there were only 78 prisons, with a capacity for 18 953 prisoners, accommodating 41 211 prisoners (Dissel 2001). Conditions in Kenya's prisons during the post-colonial period were and remain appalling.[38] Hundreds of prisoners are alleged to have died in Kenyan prisons annually, with

650 reported to have died in 1997. Torture and ill-treatment of prisoners was reported to be widespread, including beatings with hippo-hide whips (Dissel 2001). Conditions in the prisons of Uganda during the post-colonial period were similarly appalling.[39]

South African prisons were characterised by chronic overcrowding throughout the apartheid period. One of the main reasons for this overcrowding is found in the apartheid legislation which was introduced to control the African population.[40] According to the report of the Truth and Reconciliation Commission, set up after the demise of the apartheid system, pass law offenders comprised as many as one in four inmates confined in South African prisons during the 1960s and 1970s (TRC 1998: 200 paragraph 8). According to the report, conditions in South Africa's overcrowded prisons were particularly brutal for black prisoners.

The chronic overcrowding within South African prisons failed to improve with the advent of democracy in 1994. In 1995, for example, certain prisons in South Africa, such as Pollsmoor Maximum Security Prison in Cape Town, were overcrowded by more than 100 per cent (Peté 1998b: 54). The chronic overcrowding in South Africa's prisons reached such crisis proportions that, in 1995, the government was forced to authorise the mass release of certain categories of prisoner (informally known as 'bursting') in order to relieve the pressure (Peté 1998b). In October 1997, the South African Minister of Correctional Services condemned the conditions in most South African prisons (*Sunday Tribune* 19 October 1997).[41] By the year 2000, the situation had not improved, and the Judicial Inspectorate of Prisons in South Africa reported that conditions in the prisons were so ghastly that they could not wait for long-term solutions (Inspecting Judge of Prisons 2000). By the year 2005, the human rights of South African prisoners were still being seriously compromised due to the evils which resulted from overcrowding. On 31 January 2005, the percentage overcrowding in the 10 most overcrowded prisons in South Africa ranged from 268.44 per cent to 383.38 per cent.[42] In February 2005, South African High Court Judge Bertelsmann commented that the state of overcrowding in South African prisons was such that if animals were to be similarly crammed into a cage, there would be a prosecution for cruelty to animals.[43]

The appalling human rights abuses suffered by prisoners in Africa during the post-colonial period are, perhaps, best summed up by reference to the various responses to a questionnaire sent out prior to the second Pan African Conference on Penal and Prison Reform. The 20 African countries which responded to the questionnaire all reported that their prisons were overcrowded. The rate of overcrowding ranged from 69 per cent to 296 per cent, with an average rate of 141 per cent (PRI 2003: 6). One of the authors of the report, Roy Walmsley, stated:

> [T]he Kampala Declaration uses particularly strong language about the level of overcrowding in African prison systems, and it is clear from the responses received that this is one of the two or three most important problems of all that are faced by the prison administrations.

> Overcrowding, which reaches tragic proportions in some cases, has consequences on many other aspects of prison life: hygiene, health, exercise are, among others, affected. (PRI 2003: 7)

The other author of the report, Amanda Dissel, pointed out that the most pervasive problem reported by NGOs in relation to African prisons was overcrowding. In a separate paper written in 2001, Dissel provides the following overall assessment of prisons in Africa:

> A review of the literature on prisons in Africa suggests that these prisons are characterized by severe overcrowding. In most cases the prison capacity is very limited and has not been expanded over time. Although the inmate to population ratios may be small, the impact of overcrowding on inmates is nevertheless severe. Coupled with this, many of the facilities are rudimentary in nature, and there are shortages of food, bedding, medical supplies and treatment, and an absence of recreation facilities. Ill-treatment or torture of inmates was also reported for many of the countries.

Political oppression and economic collapse

As was the case in the colonial period, much of the post-colonial period in Africa has been characterised by intense political turmoil. John Reader (1997) points out that more than 70 military coups occurred during the first 30 years of the post-colonial period, and that by the 1990s most African states did not preserve even the vestiges of democracy. Furthermore, according to Reader, 'One-party states, presidents-for-life, and military rule became the norm; resources were squandered as the elite accumulated wealth and the majority of Africans suffered' (1997: 657). The political turmoil of the post-colonial period had a significant impact on the human rights of prisoners in Africa. The breakdown of effective government, coupled with economic collapse in certain states, led to the neglect of the prison infrastructure and resulted in appalling conditions of detention in many parts of the continent. Furthermore, political unrest resulted in the prisons being used to detain political opponents of dictatorial regimes, thereby becoming instruments of political repression rather than a means to rehabilitate offenders. A lack of infrastructure, desperate overcrowding, and the inability to conduct any meaningful rehabilitation programmes are enduring themes which characterise imprisonment on the African continent during the post-colonial period.[44]

Developments in the penal system of Rwanda following its independence provide an interesting case study of the negative effects of political turmoil on the prisons of Africa during the post-colonial period. In the early years following independence in 1960, political leaders began to use the penal system to terrorise their political opponents. Michele Wagner notes that 'throughout Rwanda, from Kibungo to Cyangugu, local-level officials – *bourgmestres* and *préfets* – arbitrarily threatened, detained, and abused their competitors' (2003: 256). Particularly before elections,

the political opponents of those in power were subjected to 'preventative detention', without much regard for the legality of this process. Wagner points out that 'the tedious problem of justifying renewals, were non-issues in this era, since magistrates had little training and were beholden to political authorities' (2003: 256). Throughout the 1960s, 1970s and 1980s, those in political control continued to use mass arrests and detentions to retain their grip on power.[45] Those subjected to preventative detention were usually detained in a *cachot*, a site either inside or outside prison designated for this purpose. Wagner notes that:

> [a]buses of preventative detention, in conjunction with mass arrests or 'sweeps' of opponents or public 'examples', increased in the 1980s, a decade ushered in by the detention of more than thirty persons without charge and without trial in the *cachot* of Ruhengeri for more than a year. Held incommunicado, some in cells of total darkness (*cachots noirs*) for nearly a year, the untried detainees could neither be visited, nor rendered medical assistance, despite reports that some of them had been tortured by beatings and electric shock in order to elicit confessions and after preliminary inquiries had found that some of the defendants had no accusations filed against them. (2003: 259)

Frequent reports of the widespread torture of political detainees eventually resulted in an admission by the government in 1986 that 56 political prisoners had been killed without recourse to law (Wagner 2003: 259). In 1990, the situation grew worse, however, as political conflict between Rwandan Patriotic Front guerrillas and the government intensified. Following the genocide of 1994 in which hundreds of thousands of people (mainly Tutsis) lost their lives, the Rwandan penal system had to cope with a massive influx of detainees who were thought to have been responsible for the mass killing. Wagner points out that 'accused criminals were apprehended and detained in all manner of arbitrary ways' since there were 'almost no trained judicial authorities to investigate, issue arrest warrants, process inmates, or establish the circumstances of their cases' (2003: 260). Wagner cites cases of detainees 'being amassed and often tortured in private houses, in abandoned buildings, in sheds and outhouses, in military barracks, in shipping crates, and even in holes in the ground' (2003: 261). Conditions within Rwanda's prisons were appalling, with a prison population five times its maximum capacity. The conditions in Rwanda's *cachots* were equally appalling (Wagner 2003). The result of this almost unbelievable overcrowding in the *cachots* was an influx of calls by international human rights organisations for detainees to be transferred to prisons. This was despite reports of appalling conditions in the prisons, which included reports 'of high death rates, of amputations of gangrenous limbs caused by endlessly standing in mud and filth' (Wagner 2003: 262).

There is insufficient space in a brief overview such as this to examine in detail the numerous other cases in which prisoners in various parts of Africa in the post-colonial period have suffered the most appalling human rights abuses at the hands of brutal political dictators. No discussion on this point would be complete, however, without

at least a passing reference to certain of the most notorious centres of detention and torture constructed by different dictators. According to Bernault, centres such as Sékou Touré's Camp Boiro in Conakry (Guinea), Bokassa's prison at Ngaragba (Central African Republic) and Idi Amin Dada's jails in Kampala (Uganda) 'speak to no other logic than that of megalomaniacal and murderous power' (2003: 32). With regard to Camp Boiro, Bah (2003) points out that hundreds of prisoners died from hunger at this notorious camp during Sékou Touré's regime. Referring to Didier Bigo's study of Ngaragba Prison, Bernault states that this prison functioned like an 'open-air theatre, where torturers and prisoners enacted tragic scenes of power and submission that celebrated Bokassa's personal will and grandeur' (2003: 33).

Yet another example of a penal system abused by corrupt politicians in order to oppress their political opponents is that in South Africa during the struggle against apartheid. Van Zyl Smit notes that, in the period following the Sharpeville massacre, 'The incarceration of political detainees and sentenced political prisoners became a significant permanent feature of South African prison life' (1992: 33).[46] This is confirmed in the report of the South African Truth and Reconciliation Commission (TRC 1998). The report goes on to confirm that the Truth Commission received 'extensive evidence of gross human rights violations suffered by prisoners, either in detention or serving prison sentences' (1998: 199 paragraph 2). Referring to detention without trial during the apartheid period, the report notes that an estimated 80 000 South Africans were detained without trial between 1960 and 1990 (1998: 201 paragraph 12). Further, the report states that possibly 20 000 detainees were tortured in detention and 73 deaths of detainees were recorded (1998: 201 paragraph 14). Van Zyl Smit (1992) points out that the suffering of both ordinary prisoners and political prisoners within the South African penal system during the apartheid era has been detailed in a 'virtual literary subgenre' comprising many autobiographical accounts of life in South African prisons and police cells.[47]

It is important to note that abuses such as those detailed in this section are not simply a historical phenomenon. Many prisoners in Africa today continue to suffer the most appalling abuse of their human rights due to political oppression and economic collapse.[48]

The continued use of corporal and capital punishment

Harsh corporal punishment of offenders did not disappear when the colonial period came to an end. In Tanzania, for example, corporal punishment was widely extended after independence with the passing of the Minimum Sentences Act of 1963. This legislation required a minimum sentence of two years' imprisonment plus 24 strokes of the cane for a number of corruption-related offences. Read notes that 'it was the German policy which was cited with approval by many speakers in the Parliamentary debate' (1969: 109).

In South Africa, corporal punishment continued to play an important part within the penal system until the advent of democracy in 1994. In March 1993, for example, the

South African Minister of Justice revealed that more than 30 000 offenders had been sentenced to corporal punishment without the option of a fine or imprisonment during 1992 (Peté 1994: 302–303). With regard to capital punishment, the report of the Truth and Reconciliation Commission of South Africa notes that 'capital punishment was used as an important weapon against opponents of apartheid' (TRC 1998: 213 paragraph 47). The report notes that 1 154 people were executed for capital crimes in South Africa between 1976 and 1985 (TRC 1998: 213 introduction to 'Capital Punishment').

Long delays awaiting trial

An inordinate delay awaiting trial amounts to a serious abuse of a prisoner's human rights; unfortunately, this is a common theme for prisoners detained in Africa. Over the years, many African prisons have been overcrowded with large numbers of persons either accused or convicted of petty offences. Owing to poverty, these persons are unable to pay even a small amount set as bail or imposed as a fine. Confined with hardened criminals, they become hardened to a criminal way of life. In 1931, for example, a Committee of the Legislative Council of Tanganyika considered this problem and found that 'almost one-third of the admissions [to prisons] were of persons on remand who were subsequently acquitted, discharged or given sentences other than imprisonment' (Read 1969: 112). The committee recommended that 'for first offenders, fines might well be replaced in many cases with cautions or binding over to keep the peace; that strict and full inquiry should be made into the individual's ability to pay before a fine was imposed, and that corporal punishment should be extended, particularly for juveniles' (Read 1969: 113). Zarr refers to the following serious abuses which he encountered in the 1960s in a Liberian prison:

> Of the forty-five prisoners incarcerated in Monrovia Central Prison in May 1965 on charges of murder, nearly half had been in detention for periods of two to six years and I encountered three individuals who had each been incarcerated for more than ten years. (1969: 203)

A more recent example of the problem of large numbers of prisoners awaiting trial, clogging the prisons, is found in the penal system of South Africa following the demise of apartheid. In 1998, for example, prisoners in South Africa spent an average of five months in prison before their trials were finalised. With the penal system in crisis, groups of prisoners embarked on a series of hunger strikes in protest at the long delays awaiting trial. South African Human Rights Commission chairperson Jody Kollapen pointed out that '[e]verybody is entitled to a speedy trial, depending on the circumstances and complexity of the case. If prisoners can show that their constitutional rights to speedy trials have been violated, they have the right to claim damages' (*Cape Argus* 22 September 1997).[49]

Juvenile offenders

The detention of juvenile offenders together with adult prisoners has proved an enduring problem on the continent of Africa. For example, Zarr (1969) points out that in the late 1960s no separate facilities were provided for the detention of juvenile offenders in Liberia, other than in Monrovia, where a separate wing of the new prison building in that city had been set aside for juveniles. In the rest of the country, juveniles were committed to ordinary prisons. A more recent example is that of South Africa where, even in the post-apartheid period, juvenile offenders were detained in adult prisons under conditions that left much to be desired.[50] The conditions in certain facilities set aside for juvenile offenders were not much better (*City Press* 26 October 1997).

Prison gangs

A significant influence on the human rights of prisoners in some parts of Africa has been a continuing reign of terror by powerful prison gangs. This is particularly the case in the prisons of South Africa, where prison gangs have existed since the end of the nineteenth century (see van Onselen 1982; Steinberg 2004).[51] Amanda Dissel and Stephen Ellis (2002) point out that highly organised and structured criminal gangs have dominated all aspects of life in South African prisons for more than a century. The activities of prison gangs often make the lives of ordinary prisoners a living hell, and contribute substantially to the gross violation of the basic human rights of such prisoners (see Steinberg 2004).

HIV/AIDS

Towards the end of the twentieth century, the prevalence of HIV/AIDS within the prisons of Africa, coupled with a lack of funds and political will to provide effective treatment, began to have a serious impact on the human rights of prisoners.[52] In South African prisons, for example, the number of deaths of prisoners due to 'natural causes' rose abruptly from 186 in 1995 to 1 087 in 2000, with as many as 90 per cent of these deaths believed to have been AIDS-related (Dissel & Ellis 2002). Dissel and Ellis (2002) point out that '[t]he prison environment creates many opportunities for the spread of the disease through high-risk behaviour. Sodomy – coercive, forced and consensual – is widely practiced in prison. Gang violence and sharing of tattooing needles also contributes to the spread of HIV.' In 2005, the South African Inspecting Judge of Prisons, Judge Johannes Fagan, noted that between 1995 and 2004 the death rate in South African prisons escalated from 1.65 deaths per 1 000 prisoners per annum, to 9.1 deaths per 1 000 prisoners per annum.[53] Clearly, the reality of the AIDS epidemic sweeping through the prisons of Africa poses a serious and escalating threat to the human rights of prisoners in Africa.

Corruption

Corruption in the ranks of prison staff is yet another scourge which seriously affects the human rights of prisoners in Africa. The example of South Africa during the post-apartheid period indicates the extent to which rampant corruption is able to turn the lives of ordinary prisoners into a living nightmare.[54] In order to confront the problem of rampant corruption, and following the assassination of an official tasked to investigate corruption within the prisons of KwaZulu-Natal,[55] the South African Minister of Correctional Services set up a national commission of inquiry under the chairmanship of High Court Judge Thabani Jali, in August 2001. In the years that followed, many witnesses appeared before the commission and recited an appalling litany, detailing a never-ending list of corrupt practices permeating every aspect of South African prison life. During hearings throughout the country, the Jali Commission heard evidence of activities involving violence, intimidation, the operation of criminal syndicates, sodomy, prostitution and drug dealing, all of which were taking place within the prisons of South Africa with the active participation of corrupt prison staff.

Conclusion

From its inception, the prison system in Europe failed to live up to its ideal of reforming and reintegrating wayward citizens into a social order founded on the idea of a broad social consensus. Michel Foucault makes the point, however, that the very failure of the prison system proved to be an advantage in that it manufactured a class of delinquents which could then be controlled by those in power (Gordon 1980).

If the reformative ideals of the modern prison failed to be realised in Europe, the birthplace of this particular technology of punishment, this was even more the case in the African context. From the time that the colonial powers introduced and disseminated this alien form of punishment across the length and breadth of the African continent, it was inextricably bound up with aims and ideals that had far more to do with the subjugation of the indigenous population and the maintenance of white sovereignty than with the reform and reintegration of the offender. The punishment meted out in African prisons was characterised by a distinctly pre-modern coercive flavour, evidenced in particular by the extensive use of corporal punishment. From inception, the prisons of Africa were used by the colonial powers to control and subjugate the indigenous population. This social control function continued into the post-colonial period, with political dictators making full use of the coercive traditions embodied within these institutions. As many countries lapsed into dictatorship and experienced economic collapse, so the prisons of Africa crumbled, becoming ever more overcrowded and moving further and further from the reformative ideals which characterised the birth of this form of punishment.

After examining the systemic and sustained violations of human rights in African prisons, it is a fair assessment to say that Africa's overall record with respect to human rights in prisons is appalling. Urgent and immediate steps are required

to ensure that the continued gross violations of the basic human rights of this vulnerable population are brought to an end.

Notes

1 What Foucault might call a specific 'technology' of punishment.

2 As Steinberg points out, '[P]lans seldom travel well, especially to the colonies, where the questions of fear and control are bound to shape the organization of people and space' (2004: 104).

3 Bernault notes, for example, that this form of punishment 'was unknown to sub-Saharan societies prior to the European conquest, when colonial regimes built prisons on a massive scale for deterring political opposition and enforcing African labor' (2003: 2). See also Killingray (2003: 100).

4 Bernault describes the prisons of pre-colonial West Africa as follows: 'Instruments of aristocratic power, state goals mostly aimed to reduce political opponents. African states, however, did not use prisons as a penalty in itself. Captivity worked as an exceptional form of public and domestic power, both in daily life (domestic hostages, and pawns), or to meet unusual circumstances (prisoners of war, and, in some rare cases, dangerous criminals)… [R]eclusion did not aim to correct, but rather to seize the body to inflict punishment and allow legal reparation' (2003: 5–6).

5 The total number of slaves whose human rights were violated over the period the trade was conducted is immense. In his seminal work setting out the history of the Atlantic slave trade, Thomas (1998: 806) estimates the total number of slaves shipped from African ports at around 13 million. He estimates the number of slaves who arrived in the New World at around 11 million, which implies that as many as 2 million slaves died during their journey.

6 Slaving Castles of Africa, available at <http://www.mtholyoke.edu/~rmcamara/index.html>, accessed on 4 September 2007.

7 Before this, prisons on the African continent were few and far between. Bernault notes: 'European trading forts, erected on the coast since 1500, possessed jails and military cells, mostly used for the incarceration of military personnel. Outside the forts, Europeans had erected a few prisons in some coastal colonies in the nineteenth century. In Freetown (Sierra Leone), a prison opened in 1816. In Senegal, the senatus-consulte of July 22, 1867, allowed the construction of prisons at the trading and military stations of Saint-Louis and Gorée. In the mid-nineteenth century, colonial authorities started to use the prison of Saint-Louis to control African itinerant populations and petty urban criminals…Yet, in most cases, only a fraction of the inhabitants of the trading posts were liable to be detained in these prisons, and the experience of modern incarceration seldom touched the daily life of most Africans' (2003: 7).

8 Killingray (2003) notes that prisons were among the earliest examples of colonial architecture.

9 Bernault (2003) notes that *pénitentiers* were established at Fotoba in Guinea, Kidal in Mali and Ati in Chad.

10 Each of these forms of labour had no point other than punishment. Crank drill, for example, consisted of 'the useless turning of a braked windlass for thousands of turns per day', while shot drill entailed the lifting of heavy cannon balls, known as 'shot' (Seidman 1969: 436, 438).

11 See also my own work in which I trace the emergence of racially defined punishment in colonial Natal (Peté 1986; Peté & Devenish 2005).

12 Bernault provides the following interesting statistics indicating the widespread use of imprisonment as a method of social control: 'In the Upper Volta in 1932, during the peak of the farming season, the administrators pronounced at least 1,900 monthly disciplinary sentences of imprisonment – an average of one imprisonment for every 140 persons annually…In Tanganyika, one decade later, the state enforced regulations on soil erosion by imprisoning recalcitrant peasants on a large scale. In Kenya, the thirty prisons…received approximately 28,000 detainees in 1931 – 36,000 in 1941 and 55,000 in 1951, or one detainee for 146, 136 and 109 Africans, respectively. The highest figures come from the Belgian Congo, where, in the late 1930s, the administration evaluated the number of annual detainees at 10 percent of the male population. In 1954, in the province of Kivu, almost 7 percent of the adult males spent some time in prison' (2003: 12).

13 In December 1907, the prison at Kindia in Guinea, which consisted of two small rooms measuring five by six metres, contained 29 prisoners (see Bernault 2003: 12).

14 By 1876 the diet of prisoners in Ghana was less than one-half of what it had been in 1860.

15 This was set out in the Digest and Summary of Information Respecting Colonial Prisons of 1867, Chapter XVI, p. 84. The figure of 900 cubic feet of space per prisoner was applicable to prisoners in England, and it was generally accepted that even more space was necessary for prisoners in tropical climates such as that of colonial Natal.

16 Colonial Secretary's Office, *Natal 424/2228 Meeting of Durban Gaol Board* (5 November 1872).

17 Colonial Secretary's Office, *London 179/126 Bulwer to Hicks Beach 9 January 1878: Enclosure Number 1 – Minute of Lieutenant Governor 31 May 1877*.

18 Colonial Secretary's Office, *Natal 778/4359 Superintendent Pietermaritzburg Gaol* (10 November 1880).

19 Colonial Secretary's Office, *Natal 778/4359 District Surgeon Pietermaritzburg* (10 November 1880).

20 Colonial Secretary's Office, *Natal 778/4359 Resident Magistrate Pietermaritzburg to Colonial Secretary* (17 November 1880).

21 Colonial Secretary's Office, *Natal 1066/684 Report of District Surgeon Durban* (15 February 1886).

22 Colonial Secretary's Office, *Natal 1345/4668 Report in Natal Witness* of 13 October 1892.

23 Colonial Secretary's Office, *Natal 1382/5780 Superintendent Durban Gaol* (13 December 1893).

24 Governor Durban Gaol, *Report of Chief Commissioner of Police* (1903), Natal Blue Book, Volume II: 9.

25 No fewer than 5 944 official floggings were administered in the colony during the period 1911–12.

26 Bernault is clearly correct when she comments that: 'contrary to the ideal of prison reform in Europe, the colonial penitentiary did not prevent colonizers from using archaic forms of punishment, such as corporal sentences, flogging, and public exhibition. In Africa, the prison did not replace but rather supplemented public violence…[T]he principle of amending…criminals was considerably altered in the colonies, and largely submerged by a coercive doctrine of domination over Africans, seen as a fundamentally delinquent race' (2003: 3). I make a similar point in certain of my own previous work. In commenting on the differences between prisons in Europe and Africa during the colonial period, in particular prisons in England as compared to those in the colony of Natal, I point out that: '[I]n Natal there was no need for the rigid discipline and clockwork regularity of an institution such as England's Pentonville prison, since the colony possessed no large scale capitalist industry requiring a well disciplined work force. The black farm labourers of Natal had a far simpler lesson to learn than that taught by such a finely tuned institution as Pentonville. That lesson was that the white man's word was law, since it was he who held the whip in his hand' (Peté 1986: 101–102).

27 For example, the Kenyan Commission on the subject of 'Native Punishment' reported in 1923: 'The arguments advanced in favour of flogging are that it is inexpensive, that it is summary, that the native is a child and should therefore be punished as a child and that it is effective' (Read 1969: 111).

28 For an extensive discussion of the ideology underlying corporal punishment in colonial society, see Peté and Devenish (2005: 3–21); Killingray (2003: 106–110); Peté (1994, 1998a).

29 Bernault states, for example: 'Physical torture was routinely administered inside the prison as an additional punishment. In 1906, the governor of Dahomey reported that detainees who did not comply with the internal regulations of the prisons in Cotonou and Porto Novo were routinely submitted to "palm beating" (*correction palmatoire*), as guards violently beat the detainees' hands with a flat wooden cane twenty or thirty times…The frequency of physical violence in the prison suggests that administrators failed to believe that detention and the loss of liberty was a sufficient sentence for Africans' (2003: 15–16).

30 Killingray (2003: 106) notes, for example, that the pillory and stocks were introduced into Nigeria in 1904 and abolished only in 1932.

31 Bernault points out: 'The internal architecture of colonial prisons almost always provided for separate cells and courtyards for whites and blacks. When the buildings did not allow for separation, Europeans were incarcerated in a separate room in the police precinct or in the administration's residential housing. Even when detained in regular jails, the rare white prisoners enjoyed preferential treatment. In the prisons of Haute-Volta, for example, white prisoners enjoyed privileges related to food, sanitation, and clothing…Everywhere, they were exempt from forced labor. Penal segregation lasted well into the 1950s. Even when interracial marriages increased, urban segregation declined, and political privileges multiplied, the collective detention of Europeans and Africans was never practiced nor even envisioned by colonial authorities' (2003: 18–19).

32 Note that it was not only in colonial Natal that it was considered dangerous to allow the general public, particularly Africans, to see black and white convicts receiving equal treatment from prison guards. In 1929, the governor of the colony of the Ivory Coast stated: 'It would be immoral insofar as it would damage French prestige to send [European detainees] out to public work sites' (cited in Fourchard 2003: 138).

33 For a detailed discussion of the link between evolving conceptions of race and prison dietary scales in colonial Natal, see Peté and Devenish (2005: 14–16).

34 Bernault characterises the penal regimes of post-colonial Africa as follows: 'Colonial jails, whose carcass mimicked the reformed penitentiary, submerged African prisoners in corporal punishment, the personalization of sentences and authority, and the confusion between political and economic imperatives. Colonial legacy, moreover, has encouraged radical forms of political detention, later practiced extravagantly by post-colonial regimes. African prisons today reflect the exasperation of colonial modes of governance and social control, as well as their articulation with earlier, pre-colonial forms of despotism. These legacies are reinvented today in the context of a new political order (clientelism, personalisation of power, prebendal culture). Through the lens of its penitentiary regime, the African state does not resemble the Weberian or even the Foucaultian state based on techniques of power, general surveillance, and the citizen's interiorization of omnipresent discipline. Its prisons shed light on the personalization of relations of power, and the prevalence of social coercion over social protection' (2003: 33).

35 This is dealt with in other chapters of this book.

36 The report was co-authored by Roy Walmsley, consultant with HEUNI and the International Centre for Prison Studies (ICPS – UK), and Amanda Dissel, Centre for the Study of Violence and Reconciliation (CSVR – South Africa).

37 In the words of the report: 'Mopti prison requires urgent and early attention. Cells 1 and 2 where inmates are held 24 hours a day except when they go out for shower or toilet should have windows to let in light and air…Chaining of prisoners, especially those in cells should cease…Assault and battery of prisoners in Mopti prison should cease.' See ACHPR (1998d).

38 According to Dissel (2001): 'Kenya's prisons, described as "death chambers", are overcrowded and unhygienic. For instance, in Nakuru prison, 450 convicted inmates and 780 remand prisoners were held in 14 cells. Prisoners sleep on dirty and damp cement floors. The communal cells are often poorly ventilated and badly lit, and lack adequate washing facilities. Overflowing buckets in one corner of the cell usually serve as the only toilets. Acute water shortages in some prisons have exacerbated the unsanitary conditions. King'ong'o Prison had its water supply disconnected for failing to pay its water account in September 2000, and a water shortage in Nakuru Prison led to an outbreak of cholera.'

39 Reporting on the conditions in Ugandan prisons in 2001, Dissel (2001) pointed out that: 'Due to overcrowding, facilities were overused. Toilets, often in the form of buckets, were filthy and overflowing. The cells were generally unclean and prisoners complained of lice, bedbugs and fleas. Proper bedding was not available and prisoners had to sleep on the bare floor. Poor conditions in these prisons inform severe health risks and had led to a number of deaths from malnutrition, dehydration, dysentery and pneumonia…[T]he Uganda Human Rights Commission…found that the levels of torture in prisons were alarming. A visit to Nakifuma prison in Mukono District in August 2001 by the African Centre for the

Treatment and Rehabilitation of Torture Victims at work (ACTV) revealed that prisoners were often beaten with sticks, iron bars, metallic wires and motor vehicle fan belts. One of the prisoners had scars on his back from a recent beating with an iron bar.'

40 Dissel and Ellis (2002) state: 'Between 1975 and 1984, 1.9 million people, almost all of them black, were arrested for failing to carry their documents or for being in an unauthorised location. Pass-law offences, together with offences against the Immorality Act, and various forms of opposition to apartheid, were responsible for a large proportion of people sent to prison.'

41 For a more detailed analysis of overcrowding in South African prisons during the period 1995 to 1999, see Peté (2000: 9–14).

42 Judge Johannes Fagan, *Annual Report of the Inspecting Judge of Prisons – for the Period 1 April 2004 to 31 March 2005*, p. 13 paragraph 6.3.

43 Fagan, *Annual Report*, p. 12 paragraph 6.2.

44 Bernault speaks also of 'the proliferation of illegal cells and clandestine jails, the increasing spread of temporary confinements linked to conflict and war' which 'constitute a growing portion of African incarcerations' (2003: 39).

45 The country was led first by Grégoire Kayibanda and then by Juvénal Habyarimana. In 1973, the latter overthrew the former in a coup.

46 The Sharpeville massacre took place in 1960, when South African police shot dead 69 unarmed people who were protesting against the infamous pass laws, which were aimed at keeping black South Africans out of areas demarcated for the exclusive use of white South Africans. The Sharpeville massacre was followed by the declaration of a state of emergency, and ushered in a period of increased state repression.

47 These accounts include Blumberg (1962); First (1965); Sachs (1966); Kantor (1967); Jacobson (1973); Lewin (1974); Pheto (1983); Breytenbach (1984); Kathrada & Vassen (2000); Naidoo & Sachs (2000); Maharaj (2002); Mandela (2002, 2003); Steinberg (2004).

48 To take just one example drawn from a recent Amnesty International (2005a) report relating to the notorious Black Beach Prison in Equatorial Guinea: 'About 70 of the people held at Black Beach prison, in the capital, Malabo, are at risk of death from starvation and denial of medical treatment. Among them are scores of political detainees held without charge or trial, and 11 foreign nationals sentenced to long prison terms after an unfair trial…Many of the prisoners are weak because of the torture or ill-treatment they have been subjected to and because of chronic illnesses for which they have not received adequate treatment. The 11 foreign nationals (six Armenians and five South Africans) were among a group convicted of attempting to overthrow the government…They have been kept with their hands and legs cuffed 24 hours a day since they were arrested in March 2004. This constitutes torture; leg-irons are prohibited under international law.'

49 For a more detailed analysis of awaiting trial prisoners in South African prisons during the period 1997 to 1999, see Peté (2000: 14–19).

50 According to Fagan, *Annual Report*, there were still 3 284 children under the age of 18 years in prison. The Inspecting Judge commented: 'Children should not be in prison at all save in exceptional circumstances' (p. 18 paragraph 7.6). For a more detailed analysis of the conditions of detention of juvenile offenders in South Africa during the post-apartheid period, see Peté (1998b: 79–80; 2000: 32–39).

51 For a brief discussion of the abuse of human rights by South African prison gangs in the aftermath of South Africa's first democratic election in 1996 and during the period leading up to South Africa's second democratic election in 1999, see Peté (1998b: 80–81; 2000: 39–41).

52 One bright spot in the gloom which characterises the struggle of African prisoners against the ravages of HIV/AIDS is provided by a case heard in the Cape High Court in South Africa. On 10 April 1997, judgment was handed down in the matter of *Van Biljon and Others v. The Minister of Correctional Services and Others* 1997 (4) SA 441 (C). In this case, four HIV-positive prisoners brought an application for an order to declare, amongst other things, that they and any other HIV-positive prisoners who had reached the symptomatic stage had the right to have prescribed, and to receive at state expense, appropriate antiretroviral medication. The court ruled in their favour. See also Bukurura (2002: 102–103).

53 Fagan, *Annual Report*, p. 31 paragraph 16.

54 Commenting on the South African prison system in 2002, Dissel and Ellis (2002) state: 'The Correctional Services Department seems plagued by endemic corruption that interferes with its ability to meet its legal objectives. It has affected its most senior members. In 1999 Parliament's public accounts committee found the Commissioner for Correctional Services, Dr Khulekani Sitole, unsuitable for high office in public service and he was allowed to resign. The committee found that Sitole had wasted and misused state money and given himself generous merit awards of more than R100,000. He had also employed 24 players for his personal amateur soccer club and paid their salaries from the Correctional Services budget…[C]orruption extends right throughout the prison system. Media reports allege that prisoners are obliged to pay warders a fee for food, beds, bedding, or for a decent cell…In January 1998, it was reported that prisoners were able to purchase prostitutes, alcohol and even weekends out of prison. It was also alleged that prisoners had formed criminal syndicates with warders to smuggle and steal state property. Two warders from Grootvlei Medium B Prison in Bloemfontein were convicted in October 2001 for offering to give two prisoners a key that would secure their release.' For further analysis of the corruption plaguing South African prisons during the post-apartheid period, see Peté (2000: 23–24).

55 During July 2001, the Deputy Correctional Services Commissioner for KwaZulu-Natal, Thuthu Bhengu, was gunned down in the study of her home near Pietermaritzburg's Napierville Prison. At the time, she was believed to be in the process of finalising a report on her internal departmental investigation into allegations of wide-scale bribery and corruption within the Department of Correctional Services in KwaZulu-Natal.

3 Challenges to good prison governance in Africa

Chris Tapscott

In the course of the past decade, prisons on the African continent have been subjected to severe criticism for the way in which they are administered and resourced and, specifically, because of the manner in which prison inmates are treated (Agomach 2000). The African Commission on Human and Peoples' Rights (ACHPR) has noted that:

> the conditions of prisons and prisoners in many African countries are afflicted by severe inadequacies including high congestion, poor physical, health, and sanitary conditions; inadequate recreational, vocational and rehabilitation programmes, restricted contact with the outside world, and large percentages of persons awaiting trial, among others. (ACHPR 1995a)

The Commission has also observed that:

> prison conditions in many African countries do not conform with the articles of the African Charter on Human and Peoples' Rights and to the international norms and standards for the protection of the human rights of prisoners including the International Covenant on Civil and Political Rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners, among others. (ACHPR 1995a)

In countries where the population at large is subject to severe socio-economic deprivation, the governance of prisons and the welfare of prisoners are invariably accorded low national priority. Moreover, in situations where crime (and especially crimes against the person) is rampant, there are frequent calls from the public, endorsed by politicians, to 'get tough with criminals'. In such a context, emphasis is invariably placed on punishment, deterrence and the protection of society. As Kibuka asserts, 'the punitive element characterised by imprisonment constitutes the dominant perspective of conventional African penal systems' (2001: 4). Where the emphasis on punishment is especially strong, it can serve to negate the goal of reintegration, virtually in its entirety. Yet it remains a truism that a failure to create a prison environment which is conducive to the preparation of offenders for reintegration into society is a serious and costly omission. The costs of recidivism to society are high, both in monetary terms (the costs of reincarceration as well as the direct cost of criminal activity) and in terms of human suffering.[1]

In any context, good prison governance is to a large extent determined by the existence of an enabling policy framework, necessary resources and the extent to

which prison management has the ability to implement these policies on a day-to-day basis in a transparent, accountable and ethical manner. In the context of this chapter, however, the notion of governance is understood to encompass not only issues of administrative efficiency and probity, but also the extent to which the basic human/constitutional rights of offenders are recognised and respected. This relates both to the manner in which offenders are treated in the prison system and the opportunities which they are afforded to reorientate their lives towards a more constructive future in society. This chapter aims to identify challenges to effective prison governance in African states as well as to highlight important steps taken towards that goal.

International norms

Despite the fact that prisons in Africa, and elsewhere, fall under the constant scrutiny of the media and feature prominently in divergent political debates, little is generally known about the factors which contribute to a well-governed correctional institution. As Coyle[2] observes, '[T]he success of the prison is often measured in the eyes of the public by the absence of failure. A prison is successfully managed when there are no escapes or riots' (2002a: 42). A review of the international literature reveals the fact that there are considerable similarities in the form and scale of challenges which face prison authorities in many parts of the world. These include rapidly increasing prison populations, overcrowding, understaffing and limited access to resources. In societies which have undergone major political and social transformation, these challenges are most acutely felt. Despite these similarities, however, the diversity of administrative systems and socio-cultural contexts internationally is such that there is no universal model of best governance practice.

At the same time, although there is a vast body of international literature on correctional institutions, their objectives and their treatment of offenders, relatively little systematic analysis has been undertaken on the factors which contribute to good prison governance. As Coyle affirms, while there is much literature on the theory and practice of the management of large public institutions, such as schools and hospitals, comparatively little has been written about the management of prisons. 'This,' he maintains, 'is partly because the world of prisons itself remains relatively closed. It is also because until quite recently it was not acknowledged that there is a particular set of skills required to manage prisons properly' (Coyle 2002a: 17). In the past, he asserts, basic legal or administrative skills (whether acquired through the civil service or through the military) were deemed sufficient experience to manage a prison. And yet, while there are some generic management and administrative skills which apply to the running of prisons, certain skills are required that are particular to these institutions.

There are, notwithstanding, a number of international policy instruments which provide guidance on the treatment of offenders and, in so doing, provide indicators for appropriate management outcomes. Among the most prominent of these are

a number of UN instruments which include the Standard Minimum Rules for the Treatment of Prisoners (SMR) (1957); the Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules); the Code of Conduct for Law Enforcement Officials (1979); the Standard Minimum Rules for the Administration of Juvenile Justice (1985); the Body of Principles for Protection of All Persons under any Form of Detention or Imprisonment (1988); and the Basic Principles for the Treatment of Prisoners (1990). In the context of Africa, the Kampala Declaration on Prison Conditions in Africa (1996), the Arusha Declaration on Good Prison Practice (1999), and the Ouagadougou Declaration on Accelerating Penal and Prison Reform (2002) all present standards for more humane treatment of offenders and more effective administration of correctional institutions.

Despite the existence of these normative instruments, much of the character of a penal system, including its governance in practice, is shaped by the society at large. Politicians, responding to the demands of the public in particular, can influence the resources allocated to correctional services, the level of public oversight and the types of treatment meted out to offenders. Where the popular demand is for punishment rather than rehabilitation, this is reflected both in sentencing regimes and in the management of correctional centres, where the focus is frequently on security and retribution. As Kibuka maintains, 'In a number of countries, the public does not appear to tolerate any measures to deal with offenders and suspects other than imprisonment' (2001: 4).

During the past decade there has been a significant increase in prison populations in many countries around the world. Among African countries, for example, the first four years of the millennium witnessed prison population increases of 38 per cent in Ghana, 35 per cent in Malawi, and growth of 24 per cent and 26 per cent in South Africa and Cameroon respectively (Walmsley 2003: 70). In analysing the factors giving rise to the growth in prison populations, criminologists distinguish between what they term 'deterministic' reasons and 'policy-driven' reasons (Walmsley 2000: 2). Deterministic explanations consider such factors as changes in the crime rate, changes in demography, in the social economy, in unemployment, and poverty. Policy-driven explanations, on the other hand, attribute the size and growth of the prison population to the consequences of legislative measures, the criminal justice system and the courts in particular. According to Coyle, the widespread increase in prison populations globally has not been linked to any obvious increase in crime rates or detection rates. On the contrary, he asserts, '[i]t has largely been a matter of judges sending an increasing proportion of offenders to prison for longer periods. In other words, courts have been making greater use of imprisonment as punishment' (2002a: 27).[3]

However, despite these increases, with the exception of South Africa, Botswana, Swaziland and Namibia, African countries in general have lower rates of incarceration, both relatively and absolutely, than those in most economically advanced western societies (International Centre for Prison Studies 2006a). Of equal significance is the fact that a number of countries have registered an absolute decline in prison

numbers during the past decade. Thus, for example, the number of prisoners in Nigeria decreased by 26 per cent between 1996 and 2005, and by 22 per cent and 24 per cent respectively in Egypt and the Ivory Coast in equivalent periods of time (Human Rights Watch 2001; International Centre for Prison Studies 2006b). Many factors are likely to contribute to these comparatively low levels of incarceration. Amongst these would be cultural and religious factors (which promote the censure of deviant behaviour at community level), together with high levels of poverty and comparatively low levels of income differentiation. These latter two factors are likely to lead to lower levels of relative deprivation and the attendant criminogenic behaviour to which this frequently gives rise. It is also evident that a large number of disputes and petty offences in Africa are resolved through the intervention of non-state systems such as traditional courts and other community-based dispute-resolution arrangements (Piron 2005).[4] Through this mechanism, petty theft, common assault and other relatively minor offences are addressed through a variety of reparative measures (typically fines, or payments in kind, paid by offenders to their victims). This practice not only has widespread popular support but, more importantly, it serves to keep hundreds of thousands of cases out of state courts. By implication, it also serves to reduce the number of awaiting trial prisoners as well as those incarcerated simply because they lack the means to pay even the smallest of fines. These traditional systems of justice and punishment warrant further examination by countries experiencing exponential growth in their prison numbers.

Despite the fact that African countries, in the main, have lower per capita prisoner ratios than those in many economically advanced countries, available evidence suggests that the conditions of incarceration in these prisons are generally very poor and both the physical and the psychosocial needs of prisoners are frequently badly neglected. Having so stated, during the course of the past decade there have been a number of important initiatives to promote prison reform in Africa and, although slow and uneven in its implementation, there is clear evidence of positive change in prison governance across the continent.

Towards administrative reform of prisons in Africa

The first major initiative to promote continent-wide prison reform was the Kampala Declaration on Prison Conditions in Africa. The Declaration, adopted by delegates from 47 African countries, proposed far-reaching reforms, including the need to professionalise custodial work and, significantly, to safeguard the human rights of prisoners. Notable among the recommendations was the emphasis placed on improving the working conditions of prison officials, including appropriate remuneration, formal career structures, and the provision of the resources necessary for them to fulfil their responsibilities. Importantly, the Declaration recognised that 'any improvements in conditions for prisoners will be dependent on staff having a pride in their work and a proper level of competence' (UN Economic and Social Council 1996).

The resolutions of the Fourth Conference of the Central, Eastern and Southern African Heads of Correctional Services meeting which was held in Tanzania in February 1999, the so-called Arusha Declaration on Good Prison Practice, re-emphasised the need 'to promote and implement good prison practice, in conformity with…international standards' (UN High Commission for Human Rights 1999). The Arusha Declaration also stressed the need '(t)o improve management practices in individual prisons and in the penitentiary system as a whole in order to increase transparency and efficiency within the prison service'. It further highlighted the need to 'enhance the professionalism of prison staff and to improve their working and living conditions'.

The Ouagadougou Plan of Action,[5] an outcome of the Pan African Conference on Penal and Prison Reform, held in Burkina Faso in September 2002, advanced a more coherent and detailed strategy for the effective management of prisons. The Ouagadougou Plan is divided into six sections addressing the following priority areas: i) reducing prison populations; ii) making prisons more self-sufficient; iii) promoting the reintegration into society of alleged and convicted offenders; iv) applying the rule of law to prison administration; v) encouraging best practice; and vi) promoting regional and international charters on prisoners' rights. The Plan emphasises the need to keep all but the most serious offenders out of prison. Thereafter, it asserts the need to rehabilitate prisoners and to ensure that they are effectively reintegrated into society. Significantly, the Ouagadougou Plan recognises the resource constraints facing many states in Africa and consequently promotes the need for prisons to become self-sufficient in food production, to make use of appropriate low-cost technologies, and to establish workshops and other enterprises to produce the day-to-day needs of an institution.

Although the recommendations of these declarations do not have the force of law, they have been accepted in principle by the overwhelming majority of African states. Importantly, they establish the parameters for far-reaching reform and set standards against which progress may be monitored. The implementation of reform measures, however, has generally been hindered by treasury constraints. As a consequence, reform initiatives have tended to be stratified according to a hierarchy of needs, dealing first with the basic physical needs of prisoners, their fundamental human rights and, more distantly, with measures to promote their reintegration into society.

The promotion of self-sufficiency

Following on from the recommendations of the Ouagadougou Plan of Action, a number of countries have embarked on programmes to improve the self-sufficiency of their prisons. The objectives of this approach are manifold and include reduced dependence on limited national funds and improved nutrition for inmates and prison staff alike. The experiences of the Malawi Prison Service, in particular, serve to illustrate the many advantages to be gained from the introduction and efficient

management of prison farms. Although prison farms had been operating in Malawi since the early 1950s, a more sustainable and hence more productive model of farming was introduced in the mid-1990s (Malawi Prison Service 2006). This entailed the establishment of sound financial structures (which ensured financial autonomy for the farms' management) and improved administrative regimes. The benefits which have ensued from this programme have included improved nutrition and useful work for prisoners (who would otherwise be idle), the development of practical farming skills, a lessening of the impact of overcrowding and generally improved morale amongst inmates and staff (PRI 2002a). At the same time, the government has benefited from budget relief and an enhanced human rights profile.

A further example of prison self-sufficiency is to be found in the construction of biogas units, using human waste, in a number of Rwandan prisons. The units provide combustible gas (which is used in prison kitchens) as well as fertiliser (PRI 2002c). The initiative has helped to diminish the problems of sewage disposal (with the attendant health risks), has reduced fuel bills and has promoted vegetable gardens (contributing to further self-sufficiency). Such initiatives, which place relatively little burden on the national fiscus, are readily replicable in prisons across the continent.

The management of healthcare in prisons

Prison health facilities in most African states are sub-standard and, in certain instances, virtually non-existent (PRI 2000). The Penal Reform International (PRI) survey conducted in 2000 revealed that prisoners typically suffer from a range of illnesses generally reflective of poor living conditions, inadequate diet and inadequate healthcare. These included tuberculosis, respiratory tract infections, skin diseases (including scurvy) and various water-borne diseases such as cholera, typhus and diarrhoea. Prisoner mortality rates are high and range from 0.4 per cent in Nigeria and 2.0 per cent in Guinea Conakry, Malawi and Zambia to 4.5 per cent in the Ivory Coast (PRI 2003: 8). It is evident that the health of inmates in most prisons could be strengthened simply through improved nutrition and hygiene, both of which lessen prisoners' susceptibility to avoidable yet potentially life-threatening diseases.

Of particular concern to prisoners' health is the transmission of sexually transmitted diseases (STDs) and HIV/AIDS. In view of the high incidence of HIV/AIDS across the continent, it is inevitable that incoming offenders who are infected with the virus will bring the disease into prisons. It is thus certain that virtually all correctional institutions in Africa currently hold inmates infected with HIV and that many of these die as a consequence of AIDS. The response of prison authorities to the pandemic is variable and extends from virtual denial that a problem exists to more proactive initiatives to stem the spread of the disease.[6] In Uganda, Botswana, Rwanda and South Africa awareness programmes are run to alert offenders to the dangers of HIV/AIDS and STDs. These programmes are delivered by prison staff, by a variety of NGOs and by inmates who have undergone specialist training.

Typically, offenders are alerted to the dangers of HIV/AIDS on admission to a prison and, thereafter, are encouraged to attend periodic instructional programmes on the disease. In South Africa, prisons also solicit the assistance of religious organisations in their efforts to raise awareness of the dangers of unprotected sex and HIV/AIDS. Some youth prisons in the country have introduced peer-facilitation programmes as a means of alerting young offenders to the dangers of HIV/AIDS. In these programmes, offenders are trained to transmit ideas about the dangers of unprotected sex to other inmates and to stress the importance of abstinence. This information – which encourages healthy lifestyles – is transmitted through formal group instruction, through the medium of drama and through one-on-one counselling. In similar fashion, the 'In But Free' project in Zambia provides both peer mentoring on the risks of contracting HIV and other STDs and support for those living with AIDS (Simooya & Sanjobo 2005).

Overcrowding and prison design

The increase in prison populations across the African continent has not been accompanied by equivalent increases in resources to accommodate or administer correctional centres. The consequence has been an increase in prison overcrowding, with levels ranging from 20 per cent in Zimbabwe to as high as 116 per cent and 128 per cent in Tanzania and Kenya respectively (Kibuka 2001: 3). The impact of overcrowding is felt throughout the prison system and it places pressure on management and administrative practices as well as on the welfare of offenders themselves. Overcrowding, moreover, tends to have a multiplier effect, aggravating staff shortages and resource constraints and exposing weaknesses in administrative practice. Over and above the physical discomfort to inmates which arises as a consequence of overcrowded accommodation and facilities, excessive numbers of inmates limit prospects for the implementation of rehabilitative measures. With limited resources and staff and with excessive numbers of offenders, prison officials are often simply unable to deliver any rehabilitation programmes. Linked to this, overcrowding also impinges on the basic human rights of offenders, not only in limiting their personal space and privacy, but also in restricting opportunities for physical and mental stimulation.

Many prisons were built during the period of colonial rule and have undergone little or no physical improvement in the intervening 40 to 50 years. Prison overcrowding is further aggravated by the design of prisons, which are often not used for the specific purposes for which they were intended – for example, youth prisons which were built to accommodate offenders other than the young. As a consequence, neither the layout of the prison nor the facilities available facilitate the processes of rehabilitation (Kibuka 2001).

Although there is no international consensus on the recommended living space necessary for individual offenders (estimates of appropriate floor space vary from four to nine square metres per person), it is widely recognised that there are other

factors which can either aggravate or mitigate the impact of overcrowding. Thus, the amount of time that offenders are expected to spend locked up in their cells can lessen or increase the adverse impacts of overcrowding. Similarly, access to ablution facilities (and privacy in the use of sanitary facilities in particular), to exercise and to other out-of-cell activities can all serve to lessen the impact of overcrowding. However, where staff shortages curtail the amount of time spent out of the cells, the impact of overcrowding and limited facilities is felt most adversely.

Some attempts have been made to ameliorate the adverse effects of overcrowding by ensuring that offenders are kept busy through a range of activities, including sporting and cultural activities, which reduce the amount of time that they must spend in their cells. Thus, the re-establishment of prison farms, as has occurred in Malawi, performs a dual function, providing much-needed nutrition as well as activity outside of the prisoners' cells (PRI 2000).

Overcrowding unquestionably challenges most aspects of good governance. However, international experience has shown it is not possible to 'build one's way out of overcrowding' and other solutions to the problem are also required (Stern 2002). To an extent, the effects of overcrowding can be reduced by limiting lock-up time and by the optimal usage of all available open space. More significantly, as proposed by the Ouagadougou Plan, a reduction in overcrowding will require a review and reform of parole and sentencing regimes as well as improvements in the time it takes for cases to be brought to court – in effect, a joint initiative of the police service, the judiciary (through the legislature) and correctional services.

This ideal was reinforced by the UN Economic and Social Council Resolution of 27 July 2006, which asserts that the 'providing of effective alternatives to imprisonment in policy and practice is a viable long-term solution to prison overcrowding'. In giving effect to this objective, the Zimbabwean prison service introduced a programme of community service in the early 1990s. Following a survey which revealed that 60 per cent of prison inmates were serving sentences of six months or less, the Ministry of Justice initiated the Community Service Scheme as an alternative to imprisonment (Garwe 2002). The scheme has not only kept many thousands of individuals, and particularly the young and vulnerable, out of prison, but it has also saved the state millions of dollars, as the direct costs of administrating the service are markedly lower than the comparative costs of imprisoning offenders. The success of the Zimbabwean model has seen the extension of community service to 12 other countries in Africa (Garwe 2004).

The management of children and youth

Throughout Africa, children are to be found in adult prisons (PRI 2003). Many of these, including some who are very young, are incarcerated for extended periods for relatively minor offences. This is due, in part, to delays in trial dates and to the fact that their families lack the finances to post bail for them. Optimally, states try to ensure that young offenders are separated from adult offenders, but this is not always

the case and such children are especially vulnerable to abuse and corruption by older inmates. In a number of countries, including the Ivory Coast, Mali, Angola and South Africa, children are separated from adults. Also, in most prisons measures are in place to separate children and youth according to age cohorts. However, the most effective measures for dealing with young offenders are those which make provision for non-custodial forms of punishment and correction. Thus, in an attempt to divert children from prison, authorities in Angola have introduced a Juvenile Justice Court together with the establishment of municipal social centres, with the aim of assisting children at risk and in conflict with the law. A further element of this programme entails the registration and monitoring of foster families and NGOs that can accommodate sentenced minors as an alternative to incarceration.[7]

In South Africa, NGOs are involved in programmes supporting the reintegration of young offenders into society.[8] Although not run exclusively for young offenders, the National Institute for Crime Prevention and the Reintegration of Offenders' Tough Enough Programme assists pre-release offenders with the development of a variety of life skills. Importantly, the programme is also extended to post-release offenders for a period of up to nine months. This latter initiative provides continuing support to ex-offenders as they strive to reintegrate into their families and communities. Yet another South African NGO, Khulisa, works with both sentenced and unsentenced children, offering a four-part programme aimed at improving offenders' self-image, accountability for their actions and leadership skills, as well as providing them with training and work opportunities following their release from prison. A significant dimension of the Khulisa programme is the fact that it is facilitated by mentors who are either current or former offenders. These facilitators have an insider's understanding of the challenges which face young offenders, and the programme reports a high level of success.

Rehabilitation programmes

As a consequence of overcrowding, staff shortages and limited budgets, many prisons in Africa, if not the majority, provide few or no rehabilitation programmes for their inmates. In part this has to do with official and public perceptions of prisons as places of punishment rather than rehabilitation, but it also has to do with a lack of innovation and motivation on the part of prison staff. This is evident in the fact that some prison managers and their staff do manage to overcome the shortage of facilities and resources in their efforts to create a physical and social environment which is conducive to offender rehabilitation. Such initiatives are to be seen in individual prisons across the continent.

Access to education and training facilities in most African prisons is limited due to budgetary constraints, prisoner overcrowding and, in some instances, to a lack of interest on the part of the state. In South Africa most state prisons have teaching facilities, but there are generally too few to meet the needs of all offenders wishing to use them and their quality is often poor. These prisons typically have classrooms, a

library, a workshop and a computer room (although the computers are often dated). Most prisons also provide some form of training, including adult and basic education, basic computing skills, and craftwork. In Ghana, steps have been taken to promote practical skills amongst prisoners in the Winneba Prison through participation in tailoring and shoemaking programmes (*Ghanaian Chronicle* 6 November 2006).[9] Similar steps to improve prisoners' skills are to be seen in the Beauty Therapy Programme introduced into the Langata Women's Prison in Kenya (Odongo 2006). The programme, which includes fashion design and beauty treatment, improves prisoners' self-esteem and equips many with skills that can be usefully employed upon their release.

Access to recreational facilities in general is limited across the continent, and in many institutions there are no facilities at all. Despite the inadequacy of facilities, it is evident that some warders (particularly in the youth prisons) go to great lengths to organise recreational activities for the inmates. For example, despite the fact that Westville Youth Prison in South Africa has no playing fields and limited recreational facilities, the staff regularly organise sporting and cultural events for the inmates. These include soccer, basketball and volleyball tournaments between sections, fashion shows, singing competitions and plays. Similar activities have been introduced into prisons in Mali, with the added dimension that members of the public are invited as spectators. All of the activities organised assist offenders to channel their energies into positive activities.

A number of prisons have focused their efforts on reorienting the attitudes of offenders as the starting point for rehabilitation. Thus Goodwood Prison in South Africa has introduced an innovative programme on restorative justice. This involves interaction between offenders and victims and their respective families. The initiative, known as the New Beginnings Programme, helps offenders to assume responsibility for their actions and to acknowledge the consequences of their actions on others. The programme is currently being rolled out to at least 10 more prisons in the region. Pre-release programmes also represent a critical component of an offender's reintegration into society, and several prisons in South Africa promote the establishment of a support system between offenders and their families during the lead-up to their release. This process includes organised visits to families and weekend release programmes. Pre-release programmes have also been introduced by local NGOs in Cameroon and Uganda, which also extend counselling services to prisoners (PRI 2003).

Human resource management

A significant feature of the reform resolutions discussed earlier is the strong emphasis placed on the need to improve the competence and commitment of prison staff. In this regard, there is a broad consensus in the literature that the sound management of correctional centres and, in particular, the effective introduction of reforms are contingent on the quality of leadership shown by prison managers.

Above all, it is recognised that there is a need for leaders with integrity and with the ability to inspire and motivate staff to carry out their work with commitment and professionalism. Because prisons are by nature hierarchical, the character and the culture of an institution are inevitably shaped by its leadership. Where the leadership is strong and has integrity, managerial skill and vision, this is conveyed to all levels of the prison administration. Conversely, where leadership is ineffectual or corrupt, this weakness pervades all strata of the prison management, diminishes the prospects for initiative and increases the likelihood of maladministration and the mistreatment of offenders.

In addition to sound leadership, it is axiomatic that the effective utilisation of human resources is a key element in the management of any custodial institution. The manner in which prison staff are recruited, trained and rewarded will have a major impact on the manner in which they conduct their duties and the commitment and professionalism which they bring to their work. However, a study of prison systems on the African continent conducted by PRI in 2000 found that most prisons offered little more than rudimentary induction training and this was largely oriented to the control of prisoners (through the appropriate use of weapons) and to the legislation governing imprisonment (PRI 2000). In only a handful of countries (Kenya, Namibia and South Africa among them) was any specialist training on rehabilitation offered to prison officials.

A constraint to the development of a professional cadre of prison officials in many African states, moreover, is the fact that custodial services are seldom accorded any particular organisational standing in the civil service and are frequently linked to the police service, imbuing their administration with a militaristic character. A PRI study in 2003 found that in 12 of the 27 countries surveyed, prison administrations fell under the Ministry of Justice, and in 11 others it was located in the Ministry of Home Affairs or the Ministry of the Interior. In the remaining four countries prison administration was located in both the Ministry of Justice and the Ministry of the Interior, in a multi-purpose ministry, and in two instances in a special ministry for correctional services (PRI 2003: 5).

The PRI survey further found that in a number of countries (including Burkina Faso, Guinea Conakry, Mali and Cameroon) individual prisons operated according to their own standing orders. As a consequence of this, there are variances in the treatment meted out to prisoners from one prison to another. Recognising this phenomenon, the Kampala Declaration recommended 'that all prison personnel should be linked to one government ministry and that there should be a clear line of command between central prison administration and the staff in prisons' (UN Economic and Social Council 1996). Of further concern is the fact that the general standing orders and codes of conduct of prisons in many countries are seriously outdated and some have not been changed since the time of colonial rule. As a result, many prison rules have not been updated to meet the prescripts of an array of international norms on the humane treatment of offenders.

Staff shortages, which are a common feature of prisons throughout Africa, present a further serious challenge to effective prison governance. Most staff shortages ensue from the fact that personnel numbers are based on how many offenders the prisons have been built to accommodate, rather than on how many they actually accommodate. Staff shortages have a compounding effect on all aspects of prison life, not least on the performance of warders' work. A shortage of personnel exacerbates workloads and this in turn often leads to stress symptoms and burnout on the part of custodial staff. It also adversely affects the way in which warders conduct their duties and interact with inmates.

Although remuneration and working conditions are not the sole determinants of employee satisfaction, they do represent major contributors to the high turnover of prison staff and low morale. The absence of clear career paths similarly serves to demoralise staff. In such a context, it becomes extremely difficult to manage prisons effectively and, even more so, to introduce reforms progressively.

International experience suggests that transmission of the ideals of prison management, and of reform in particular, is best effected through close and frequent communication between managers and staff. Typically, however, junior officials are not extensively involved in shaping a new service. As a consequence, many become uncertain and apprehensive about change. This can lead to resistance, apathy or resignation from the service. Where staff at all levels are actively involved in conceptualising and directing change, the prospects for reorienting the culture and behaviour of the institution are greatly enhanced. A degree of trust in the competence and integrity of subordinates on the part of management is essential if new practices are to be introduced in a sustained way.

Of central importance to the process of prison reform is the need to change the attitudes of staff. For many who are accustomed to a particular administrative order, reform is not readily embraced. More problematic is that a small number of recalcitrant officials can exert an undue influence on their colleagues and on the culture of an entire prison. Changing the attitude of staff, however, is a process which takes time. Sound leadership, as indicated, is instrumental in reorienting the thinking of staff and in developing new ways of working. Of equal importance is the recruitment and training of prison officials.

In many countries, prison officials do not have the same status as their counterparts in the police or the military. At the same time, the expectations of prison officials are lower and the qualifications and experience required of them are less than in other sectors of the civil service. The Kampala and Arusha declarations together with the Ouagadougou Plan of Action all stress the need to professionalise correctional services throughout. This entails the development of prison work as a profession requiring both generic and specialised skills, which need to be taken into consideration in the recruitment of staff and in the process of their training. The impact of this training in turn depends to a considerable extent on the administrative and managerial environment in which it is conducted. Where prison management is able to create an

environment which is receptive, the prospects for the take-up of ideas and methods introduced through training are much greater.

An important dimension of training has been the need to instil in prison officials an understanding of the fact that prisoners do not forfeit their fundamental human rights once they are incarcerated. The recognition of prisoners' rights is of central importance in promoting the more humane treatment of prisoners and it is noteworthy that a growing number of countries, including Libya, Morocco, Algeria, Ghana, Kenya, Tanzania, Malawi, Namibia and South Africa, are introducing a rights-based aspect into their training of prison officials.

While training and leadership are of central importance in promoting new attitudes, it is also evident that measures need to be in place to ensure compliance with the directives issued by prison management and to ensure that the custodial staff adhere to the codes of ethical and administrative practice. Where discipline amongst staff is lax and where managers are incapable of taking or unwilling to take action against transgressors, the overall management of an institution is likely to be severely compromised. An erosion of disciplinary standards is likely to ensue, while the morale of staff who adhere to the rules is likely to be undermined. Where prison managers have developed the practice of regular visits and regular interaction with both custodial staff and offenders, they are more likely to develop a real understanding of the culture of the institution and of the extent to which prison policies are being implemented and national objectives met.

Linked to the need for leadership is the need for the effective management of budgets and the control of resources. This is important as the misuse of resources, poor financial control and planning, and misappropriation of funds impact adversely on the functioning of any prison system. Conversely, effective budgeting, tight fiscal control and sound financial planning will ensure that prisons and their inmates at least have the basic resources and amenities to sustain themselves. In many countries, the poor financial management inherent in the public service as a whole is also readily apparent in the management of prisons. This frequently leads to a failure to order sufficient supplies and equipment and to repair or replace obsolete equipment, all of which, directly or indirectly, affect the welfare of prisoners.

Independent oversight of prison administration

A feature of militarised prison administrations in Africa has been a reluctance to open prison doors to independent oversight and scrutiny. Recognising the importance of independent oversight of prison activities, the African Charter on Human and Peoples' Rights makes provision for the appointment of a Special Rapporteur on Prisons and Conditions of Detention. The Terms of Reference for the Special Rapporteur stipulate that the incumbent of the post should 'conduct studies into the conditions or situations contributing to human rights violations of prisoners deprived of their liberty and recommend preventative measures'.[10] Visits by the Special Rapporteur to selected African states (including Zimbabwe, Mali,

Burundi, Mozambique and others) have led to a wider awareness of conditions in prisons in these countries and of the need for reform (Human Rights Watch 2001). Unfortunately, a lack of resources and political commitment has meant that tangible change has been slow in coming.

Despite the important work undertaken to date, the work of the Special Rapporteur is constrained by a shortage of resources (a small staff in particular) and by the fact that the consent of the states to be visited must be secured prior to a visit, a request which has sometimes been denied (Murray 2000). A further limitation is that the ACHPR is often unable to follow up on the recommendations of the Special Rapporteur, nor is it able to ensure compliance on the part of member states. Reporting by states on their compliance is often poor and the Commission relies largely on moral suasion and peer pressure as its only means of sanction. A further limiting factor in the work of the Special Rapporteur, and of the African Commission as a whole, relates to the fact that the minimum standards for the treatment of offenders, as well as their rights enshrined in the African Charter, are not well understood or accepted by prison officials or even by their political leadership (Murray 2000).

Responsiveness to independent prison visits is variable across the continent. In some countries, such as Malawi and South Africa, visits by church groups and religious workers (who visit regularly and often on a daily basis), as well as by the Inspector of Prisons (in South Africa; see Inspecting Judge of Prisons 2003) and NGOs, are common. In general, however, oversight by civil society organisations remains an intention rather than the practice. According to Achieng (1999), 'In some countries involvement of NGOs is welcome, whilst in others they are heavily discouraged, particularly when these organisations have a human rights orientation. Prisons are still no-go areas for NGOs in some African states.' Despite this negativity, however, there is evidence of a growing acceptance of the value of independent oversight, even in regions in which prison systems had, hitherto, been closed domains. Thus, in Libya the Gaddafi International Foundation for Charity Associations has been active in raising concerns about prison conditions (Norwegian Directorate of Immigration 2004), whilst similar roles are being performed by the Association of Friends of Reform Centres and the Moroccan Prison Watch in Morocco (Romdhane 2004).

Conclusion

It is evident that the conditions under which most prisons in Africa are run limit the possibility of good practice in most areas of operation. Thus, restricted budgets, the overcrowding of prisons and ensuing staff shortages compromise virtually every facet of prison governance, including the security of staff and inmates and the rehabilitation of offenders. It is also certain that offenders incarcerated under such circumstances are denied some of their fundamental human rights.

That stated, it is also certain that good governance of prisons is not necessarily a function of an abundance of resources and, inversely, poorly resourced prisons

are not necessarily corrupt or inefficient prisons. Thus, where best practices have been identified in prisons across the continent, they generally reflect sound prison management practices and innovation rather than the availability of additional resources. Overwhelmingly, the evidence points to the fact that good prison governance is distinguished more by the quality of the leadership in place than by the quality of facilities.

Improvements in the management of prisons will also, in large part, be determined by the manner in which custodial and administrative staff are recruited, trained and retained. In part this will entail recruitment of additional personnel, but it also implies systematic and ongoing training and, in particular, specialist training for staff dealing with specific categories of offender, such as children and women.

It is also important that staff disciplinary codes are made explicit and discussed thoroughly with all levels of the prison administration. As part of this process, it is of critical importance that disciplinary measures are systematically enforced throughout the correctional services.

A further dimension of the reform process, one which is often overlooked, is the need to integrate the process of restructuring with changes in other sectors of the criminal justice system. If this does not take place – and if, due to inadequate police work, awaiting trial detainees languish for long periods prior to their appearance in court; magistrates and justices persist in sending large numbers of minor offenders to prison; legislators insist on long mandatory sentences, and social welfare services are unable to support programmes of reform and rehabilitation – the prospects for meaningful prison reform are likely to be limited.

Similarly, greater civil society understanding of the role of correctional services needs to be promoted, both through direct engagement in service provision and oversight and through publicity. The image of prisons conveyed to society at large, by the media in particular, serves to shape public perception (including the perceptions of politicians) and influences the way in which the reform process is supported. In particular, the case needs to be made that the correction and rehabilitation of offenders is the responsibility of society as a whole. In the final analysis, there needs to be a better appreciation of the fact that the transformation of prison services in African countries, as is the case in most other sectors of their social and political economies, is a process which will take time to achieve.

Whilst prison governance remains a serious challenge for states across Africa, the evidence presented in this chapter reveals that some important steps have been taken in implementing prison reform. Although some of these measures have been localised in a single prison or in a single aspect of prison administration, others hold the possibility of more far-reaching reform. Thus the Ugandan Justice Law and Order Sector Programme (Edroma 2005), reform initiatives in South Africa and Ghana, and even the Algerian General Prison and Rehabilitation Direction (Romdhane 2004) hold the promise not only of the review of current prisons systems but also of their progressive improvement.

It is also certain that the international donor community can play a more constructive role in the process of prison reform in Africa. Historically, support for judicial reform in developing states has been focused on promoting access to legal support and judicial reform. Whilst this support has been valuable, Piron (2005) points out that there is a need for donor support that recognises that the promotion of justice is a sectoral issue which requires strengthening links and improving coordination between all actors (including those in civil society), in what is essentially an integrated sector. Meaningful reform of the justice sector in Africa, she asserts, 'Must be seen as a pro-poor, long term developmental endeavour that can contribute to the realization of human rights' (Piron 2005: 10). In that respect, it is of critical importance that those prison reform measures which are underway are supported and prison authorities are encouraged to advance these programmes still further. The work of international NGOs such as PRI and the International Centre for Prison Studies (ICPS) and others has been highly commendable, but it is certain that still further support is required from the donor community if the process of prison reform in Africa is to become irreversible.

Notes

1 On this theme, see UNODC (2005a).

2 I am indebted to Andrew Coyle (2002a, b), from whose two excellent texts on prison management a number of the ideas in this section of the chapter have been derived.

3 The exceptions to this trend have been the US and to a lesser extent Canada, where an increase in prison populations has been accompanied by an overall decrease in crime (see Shaw et al. 2000). The costs of imprisonment are, nevertheless, in both financial and social terms, high in the US. With just under 5 per cent of the world population, the US has 23 per cent of the world's prison population (Coyle 2002a: 33).

4 It is estimated that 80 per cent of all disputes in Africa are resolved through non-state channels.

5 The Ouagadougou Plan of Action, available at <http://www.penalreform.org/english/pana_plan.htm>, accessed on 3 March 2006.

6 See IRIN Plus News, 'Swaziland: Condoms refused in prison, despite high risk behaviour' (17 January 2006), available at <http://www.plusnews.org/webspecials/HIV-in-prisons/Swaziland.asp> and IRIN Plus News, 'Malawi: HIV/AIDS project reaches out to prisoners' (17 January 2006), available at <http://www.irinnews.org/AIDSreport.asp?ReportID=1509>, accessed on 17 January 2006.

7 UN Inter-regional Crime and Justice Research Institute.

8 For a more detailed discussion of these programmes, see Muntingh (2004).

9 Florence Gbolu, 'Ghana's prisons are choked – says senior prison officer', available at <http://allafrica.com/stories/200611070367.html>, accessed on 27 November 2006.

10 Terms of Reference for the Special Rapporteur on Prisons and Conditions of Detention in Africa, 20th and 21st Ordinary Sessions, Annexure VII (ACHPR 1996–97). Available at <www.achpr.org/english/_info/index_activity_en.html>, accessed on 16 September 2005.

4 Overcrowding in African prisons

Victor Dankwa

> Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for such special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.[1]

Though in violation of UN standards, prisons across Africa force prisoners to suffer in extremely overcrowded facilities. Judge Bertelsmann, while presiding over the trial of Winnie Madikizela-Mandela, said of prisons in South Africa:

> During September 2004, our prisons that were built to house 113,825 prisoners, had 186,546 inmates, which meant that they were overcrowded by more than 63%. Most of our prisons are therefore forced to house prisoners in conditions which are indubitably in conflict with the aspirational values of the Constitution. In most prisons, inmates are crammed into cells designed many years ago for virtually half their number. Beds are placed bunk style on top of one another, with only a few inches separating them. Prisoners are locked up for 23 hours per day, with sanitary facilities which are by definition overburdened and consequently in regular state of disrepair. The same holds good for the warm water supply, electricity and other creature comforts. It is no exaggeration to say that, if an SPCA were to cram as many animals into a cage as our correctional services are forced to cram prisoners into a single cell the SPCA would be prosecuted for cruelty to animals. The crisis in our prisons has huge constitutional implications for the whole criminal justice system, and urgent steps need to be taken to address our entire sentencing and prison regime.[2] (Inspecting Judge of Prisons 2004a: 11, 2005a: 11)

South African prison cells 'are grossly overcrowded, the facilities are outdated and unhygienic. There is no mess hall where the prisoners can eat and the toilets which they use are inside the cells and stand open. As a result the prisoners eat, sleep and perform their basic bodily functions in small overcrowded cells' (Inspecting Judge of Prisons 2004a: 12).[3]

Overcrowding is not defined in the Standard Minimum Rules for the Treatment of Prisoners (SMR), but it should be understood to cover situations where the number of prisoners in a cell or dormitory exceeds the maximum capacity planned for it.

For example, in a January 2005 observation of the 10 worst prisons in South Africa, the extent of overcrowding was based on a comparison of the maximum planned capacity and the actual capacity (Inspecting Judge of Prisons 2004a: 13); the greater the number of prisoners in excess of the maximum capacity of a cell or dormitory, the more overcrowded the holding place. As Rule 9(1) of the SMR implies and Rule 9(2) explicitly states, prisoners may be accommodated in dormitories. However, various specifications about the accommodation – the care with which the dormitory occupants are to be selected,[4] health requirements,[5] sanitary installations,[6] adequate bathing and shower installations,[7] and providing an environment conducive to living and working – support the prohibition against overcrowding.

Although deprived of their liberty and granted limited freedom of movement and association as a result of their conviction, prisoners nevertheless have rights which must be respected. Through legislation, treaties and other legal instruments, states and the international community seek to meet these obligations. But the gulf between the ideal and the reality of prison conditions in Africa, particularly with regard to accommodation, is captured by the standards set out in the SMR, as well as by the situation described above of prisons in South Africa, the most developed and richest country in Africa.

Scarce resources, both human and material, and the low priority accorded prisons in the national budget are the principal factors leading to overcrowding in our prisons (Tkachuk & Walmsley 2001). Intermittent pardons and amnesties reduce the prison population, but with no dent in the level of crime – and in some cases an increase in criminality – the reduced number is restored to the pre-amnesty levels in no time. Non-governmental organisations, human rights activists and others in civil society who advocate for alternative sentences and the restricted imposition of custodial sentences have made little impression on the criminal justice system of most African countries. Nevertheless, it is imperative that we constantly examine ways of reducing overcrowding in our prisons and bring pressure to bear on the appropriate organs of government to deal with what has become a perennial problem in our prisons. The SMR objectives reflect good principle and practice in the treatment of prisoners and the management of prisons and, as part of the international community for whom these standards have been set, Africa should aim to meet them.

Problems caused by overcrowding

Overcrowding is undesirable and even dangerous for many reasons. It dehumanises prisoners; encourages the spread of communicable diseases (Human Rights Watch 2002); hinders the supervision of prisoners; impedes the categorisation of prisoners; encourages sexual relations and the attendant spread of diseases such as HIV/AIDS (*Africa News* 3 December 2005[8]); burdens prison staff; exacerbates security concerns, such as the escape of prisoners and outbreaks of violence; renders unattainable international standards relating to hygiene, sanitation, sufficient food and accommodation (Tkachuk & Walmsley 2001), and facilitates the transfer of

criminal skills. To stem the tide of overcrowding, its root causes[9] must be identified and addressed. Each society must undertake this exercise for itself but the extant literature indicates factors which lead to overcrowding. My experience as Special Rapporteur on Prisons and Conditions of Detention in Africa of the African Commission on Human and Peoples' Rights (ACHPR) provides lessons which all criminal justice systems in Africa should keep in mind.

Causes of overcrowding

Unnecessary arrests

Police powers should be focused on serious crimes such as armed robbery and trafficking in drugs, women and children. Minor offences which do not have serious consequences for society should not result in the arrest and detention of the offenders. For example, teenagers eking out a living by selling goods in the streets of the quiet town of Nampula, Mozambique, faced legal consequences, while their counterparts in the bustling capital of Maputo engaged in the same conduct without interference from the police. In the same vein, offences such as drunk and disorderly conduct, indecent behaviour in a public place,[10] theft of low-value items, such as a few fingers of plantain or banana,[11] and irreverent or insulting behaviour at or near a funeral or public burial ground during the burial of a body[12] should not automatically result in arrest and detention. To create the impression of strong opposition to criminal conduct, the police occasionally conduct swoops and detain many suspects. Some of these detainees are actually innocent of any wrongdoing, as the courts eventually declare.

Unlawful detention

In addition to unnecessary arrests, unlawful detention also contributes to overcrowding in African prisons. Suspects are sometimes detained beyond lawful periods. To illustrate, offenders are sometimes held over the weekend to defeat the 48-hour limit[13] – or a lesser period[14] – for pre-trial detention.

Stiff bail conditions

Instances abound where the police and the courts set bail conditions which suspects, accused persons, or convicts cannot meet, resulting in imprisonment and considerable cost to the state. To illustrate, the Special Rapporteur noted in the Draft Report on Prisons in South Africa a case in which a convict could not pay a fine of R50 and was sent to prison, where the state spent R114 per day on him.[15]

Long sentences

The imposition of long sentences when shorter sentences would have been appropriate aggravates the problem of overcrowding. The legislature's prescription

of minimum sentences of imprisonment leaves the court with no option but to send a convict to prison for a certain period of time, even though the judge may have been disposed to passing a shorter sentence. A related problem is the legislature's prescription of only custodial sentences (Steinberg 2005), when legislation provides for a minimum sentence of imprisonment for acts for which the court might have imposed a non-custodial sentence. Equally, where legislation stipulates that a minimum sentence must be served before a prisoner can be placed on parole, a prison will have to accommodate inmates who might have been sent back to the community before the end of the statutory minimum sentence, because the court might have imposed a shorter sentence. South Africa's Correctional Services Act No. 111 of 1998 is an unfortunate illustration of some of these problems. Section 73(6)(a) states that a prisoner must serve half of the sentence before he or she can be considered for parole. With regard to Section 73(6)(b)(v), a prisoner who is sentenced in accordance with Section 51 or 52 of the Criminal Law Amendment Act No. 105 of 1997 must serve at least four-fifths of the sentence – and not half, as for all other prisoners – before being considered for parole (Inspecting Judge of Prisons 2004a: 28). Sections 73(6)(iv) and 78(1) ensure that prisoners sentenced to life imprisonment cannot be placed on parole before serving a minimum of 25 years. The previous position, in which a prisoner would be considered for parole after serving 10 years, had the merit of creating space in an overcrowded prison.

In countries such as South Africa where the death penalty has been abolished, the tendency is for the police to demand, and the judiciary to impose, long sentences in cases in which the death penalty used to be the punishment, making overcrowding a long-term problem (Mnyani 1995).

Remand

Many prisons in Africa house a high percentage of people awaiting trial. A few illustrations will suffice. In Zimbabwe in March 1997, out of the total prison population of 16 000, 4 500 were on remand (ACHPR 1997a: 10). In August 1997, 80 per cent of the inmates at Bamako Central Prison in Mali were remand prisoners (ACHPR 1997b: 11). In other prisons in Mali, the proportion of remand prisoners out of the total prison population was sometimes as high as 90 per cent (ACHPR 1997b: 15). Finally, Maputo Central Prison in Mozambique, with a maximum capacity of 800, housed 2 000 inmates in 1997, 1 100 of them on remand (ACHPR 2001b: 27). If there were speedy trials, remand prisoners who were not guilty of the offences for which they were being held would be released, so relieving the overcrowded conditions in many of the prisons.

Wilson Mutimumwe, a Zimbabwean soldier who was arrested in August 1985 on charges of murder and assault with intent to cause grievous bodily harm, languished in prison for over 20 years and eventually died there on 26 March 2006 without ever having been tried. This shows how slow the African judicial process can be and how, quite apart from the unnecessary swelling of prison populations, people may lose

their lives in prison without their guilt having been established.[16] Implementing a stronger investigative mechanism, adding adequate staff to process prisoners for trial, providing vehicles to transport prisoners to court, and ensuring efficient, fair and just[17] prosecutions and judiciary Acts would combine to help Africa achieve shorter remand periods and the incarceration of fewer innocent prisoners.

Non-custodial sentences

Most criminal justice systems in Africa have no alternative to imprisonment in many areas of the criminal law. Even in the areas with other options, the pressure on the police to be seen to be tackling violent crimes and the increase in criminal activity may lead prosecutors to demand custodial sentences. Regrettably, some judges and magistrates share this view.

Politics

Although in principle more prisons should not be constructed for the purpose of housing the increasing numbers of prisoners, in many cases the overcrowding in prisons is so acute that additional structures are required to meet regional and international standards for the accommodation of those prisoners already incarcerated. As noted, budgeting for prisons is not a priority and even in countries such as Ghana, where past leaders spent time in prison,[18] neither prison reform nor the allocation of more resources to prisons has been a matter of serious concern for governments (Tkachuk & Walmsley 2001). Admittedly, this situation arises from limited resources, largely as a result of poverty, but governments should resolve to tackle the problem over time.

Awareness of prison conditions

Prisons are so secluded from society that their harsh conditions are not known to the general public. If the conditions inside prisons were well publicised, it might deter criminal behaviour in some who end up there. Furthermore, judges and magistrates may be less likely to impose long sentences, or any sentence at all, on some of the offenders who appear before them – as in the case of Judge Bertelsmann and Judge Makobe's sentencing of Winnie Madikizela-Mandela. It is also possible that the police would demand fewer sentences of imprisonment were they aware of prison conditions. Exposing police and judges to the conditions inside prisons might limit the number of convicts who end up overcrowding prisons.

Pardon and the death penalty

As evidenced by the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty,[19] there is great disapproval of capital punishment and states are encouraged to end it. Partly as a result of this objective, pardons are occasionally granted to some convicts on death

row; most have their sentences commuted to life imprisonment or long terms. Ironically and cynically, the implementation of the death sentence would ease overcrowding in prisons, but it is a worse evil that also demands serious attention.

Overcrowding figures for some African prisons

Overcrowding in African prisons can be traced back to before the date of the grim picture of prisons in South Africa described earlier by Judge Bertelsmann and Judge Bozalek. The 1996 Kampala Declaration on Prison Conditions in Africa acknowledged that the level of overcrowding in prisons in many African countries was inhumane (PRI 1997). In 1993, some prison cells in Senegal originally designed for 10 inmates held 21 prisoners. In Egypt at that time, cells constructed to hold a maximum of 3 people held 7. The situation in the Ivory Coast was worse: a new prison constructed to hold 1 500 prisoners held 4 034 in 2006. There was a similar situation in Uganda in 1995 – Upper Prison had an excess of 908 prisoners while Marchison had 794 in excess of the maximum number originally planned to be held there (PRI 1997: 24).

The reports of the Special Rapporteur regrettably contain similar examples of prison overcrowding in Africa. In Mali, for instance, Bamako Central Prison, which was built for a maximum capacity of 400, housed 1 025 prisoners in 1996 (ACHPR 1997b: 15). In Benin the situation was no different: Porto Novo Prison, which was built for 300 inmates, had 603 in 1995 (ACHPR 2000c: 12); Abomey Civil Prison held more than three times the maximum capacity for which it was constructed: instead of 200 prisoners there were 679 (ACHPR 2000c: 18); Natitingou housed 219 prisoners in 1995 in a facility that was meant to hold only 100 prisoners (ACHPR 2000c: 38), and Cotonou Civil Prison had similar figures: in 1995, 1 422 prisoners occupied a space intended for 400 (ACHPR 2000c: 24). Although the problem of overcrowding persists, a new prison under construction in Porto Novo for 600 prisoners will make a welcome improvement.

The Special Rapporteur, on a mission to Ethiopia in 2004, observed that 'apart from the Diredaw Prison all the other detention facilities visited including the police stations [were] overcrowded, some holding inmates more than thrice their capacity' (ACHPR 2004a: 24). In South Africa in June 2004, out of the country's 238 prisons, 67 had overcrowded cells of between 101 per cent and 149 per cent of capacity; 53 had overcrowded cells of between 150 per cent and 174 per cent; and 85 had overcrowded cells of between 175 per cent and 370 per cent. To be fair, it must be noted that four prisons were closed temporarily for renovation and repairs.

Measures of hope

As deplorable as the situation of overcrowding in African prisons is, there are rays of hope. At the national and regional levels, meetings are being held and research is being undertaken to find ways to improve the situation. The Kampala Seminar

was preceded by a Seminar on Prison Conditions in Africa, held on 2–4 July 1993 in Banjul, The Gambia. Penal Reform International (PRI) has championed the introduction of non-custodial sentences in the form of community service. These sentences are well established in Zimbabwe and replicated to a lesser extent in countries such as Kenya and Rwanda (PRI n.d.). National human rights institutions in Ghana, Cameroon and South Africa have undertaken prison visits with a view to ensuring an improvement in the conditions in prisons, overcrowding being of prominent concern. In Ghana, a collaborative effort of NGOs with an interest in prison reforms, spearheaded by the Legal Resources Centre, has undertaken thorough fieldwork under its Prison Project. Nigeria, Zimbabwe and South Africa have granted amnesty to a large number of prisoners who are either infirm or have served long sentences and pose no threat to society.

The Kampala Declaration on Prison Conditions in Africa called for the establishment of the position of Special Rapporteur on Prisons and Conditions of Detention in Africa (UN Economic and Social Council 1996). Shortly after the Declaration, the ACHPR, which is the regional body charged with responsibility for the promotion and protection of human rights in Africa, took up this challenge and appointed the present writer to this position (ACHPR 1996–97). He was succeeded by Dr Vera Chirwa (ACHPR 2000–01) and then Dr Mumba Malila (ACHPR 2005b). Such were the constraints on the resources of the African Commission that the first Special Rapporteur undertook his first country visit of prisons in Zimbabwe alone, and he personally paid the secretarial and communication expenses of the office of the Special Rapporteur. The invaluable assistance of PRI eased the burden of the Special Rapporteur in diverse ways, including through the provision of interpreters and, during the latter part of his term in office, the raising and allocating of resources to cover the expenditure of the office. Financial assistance from the Norwegian Agency for International Development Co-operation (NORAD) enabled the general public to see overcrowding in African prisons through the eyes of the first Special Rapporteur throughout his term, and into part of the term of the second Special Rapporteur. The reports of the Special Rapporteur, which in part draw attention to overcrowding in prisons in Africa, have been published and circulated widely throughout Africa, mainly with the assistance of NORAD, whose pioneering effort has been followed by other donors. The recommendations contained in these reports have sometimes been implemented by the host countries – examples include the construction of new structures in the prison farm of Bagueineda in Mali and the movement of females from Bamako Central Prison to a newly constructed prison. The improvement in prison conditions in Maputo after the Special Rapporteur's mission in 1997, noted by NGOs working for penal reform, is also worth mentioning.

The African Commission is using some of its other mechanisms to deal with overcrowding and other poor conditions in our prisons. Each of the 11 commissioners is assigned a number of countries to visit for promotional activities and to seek improvements in prison conditions. State reports submitted to the Commission in accordance with Article 62 of the African Charter on Human and Peoples'

Rights are expected to highlight steps taken to keep prisons within internationally accepted standards.

Not all the prisons in Africa are overcrowded. The State Central Prison (Mile 2) of The Gambia, which was built for a maximum of 500 prisoners, is home to only 324 (ACHPR 1999b: 22). Janjangbureh Prison, also in The Gambia, with a maximum capacity of 80, held only 64 prisoners in 1998 (ACHPR 1999b: 26, 28). In Kadoma Prison in Zimbabwe, a female section with a holding capacity for 30 had 17 prisoners in 1995. In the same prison, 564 male prisoners occupied space for 670. In 2001, Malawi had a low number of remand prisoners (35%) in comparison with other African countries. On feast days and independence day in Malawi, pardon is granted to some prisoners, which helps to keep the prison population numbers within the international standards. An amnesty in Zimbabwe in 1995 reduced the prison population of 22 000 to 16 000. It was anticipated that the prison population in Zimbabwe would probably have risen to about 26 000 if it had not been for the amnesty (ACHPR 1999b: 26, 28).

International instruments

African countries need to make a serious effort to bridge the gap between law and practice relating to prisons, with particular reference to overcrowding. Beyond the provisions of the SMR, which have been noted,[20] prison regimes in Africa should seriously consider Article 5 of the Universal Declaration of Human Rights (1948): 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Of no less importance is Article 7 of the International Covenant on Civil and Political Rights (1966), which states again that, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Article 10 of the same instrument underscores the imperative of not having overcrowded prisons: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' Article 5 of the African Charter (1979) similarly states: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

Conclusion

As part of the international community, we in Africa must observe international standards, particularly those created by treaties to which we are party and those based on customary international law. Equally, we have to honour our obligations arising out of our regional instruments. To this end, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the SMR and the African Charter on Human and Peoples' Rights – all of which prohibit overcrowding in prisons – must be brought to the attention of all authorities involved in the arrest, detention, prosecution, sentencing and imprisonment of offenders. But such is the

gulf between the standards on prisoner accommodation set in these instruments and the reality in African prisons that it is with despair that those who work in prisons or areas connected with prisons have responded to the provisions in the SMR. However, efforts towards this end, as outlined in this chapter, will draw us closer to the goal of keeping prisoners in Africa in cells and dormitories that offer cleaner, safer and more humane living conditions. This reduction in overcrowding will bring African prisons into compliance with the norms dictated by the international community.

Governments should accept that prisoners are as important as any other group of people. Adequate resources from the national Budget must therefore be allocated to the criminal justice sector in general, and prisons in particular, to ensure, inter alia, that overcrowding is kept under control.

Great caution must attend the prescription of statutory minimum sentences, especially long ones, as well as the imposition of long sentences where the judge has the discretion to determine the length of sentence.

Notes

1 Standard Minimum Rules for the Treatment of Prisoners, adopted by the first UN 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, Rules 9(1), 9(2), 10.

2 Judge Bertelsmann is speaking of South African prisons and explaining why he did not pass a custodial sentence on Winnie Madikizela-Mandela on 11 February 2005.

3 Judge Bozalek's observation after a visit to a prison in South Africa.

4 Standard Minimum Rules for the Treatment of Prisoners, Rule 9(2): 'Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions.'

5 Standard Minimum Rules for the Treatment of Prisoners, Rule 10: 'All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space…and ventilation.'

6 Standard Minimum Rules for the Treatment of Prisoners, Rule 12: 'The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary in a clean and decent manner.'

7 Standard Minimum Rules for the Treatment of Prisoners, Rule 13: 'Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower…at least once a week.'

8 'Prisoners: the Forgotten HIV/Aids Risk Group', *The New Times* (Kigali) 3 December 2005. Available at <http://www.pronutrition.org/archive/200512/msg00007.php>, accessed on 12 March 2006.

9 See Kakooza (1996: 27–31) and ACHPR reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa.

10 Criminal Code, 1960, of Ghana, Act 29, Section 296(10): 'Whoever…is drunk and disorderly or behaves…indecently…in any public place…shall be liable to a fine…'; Section 297(2): 'Any person found committing an offence punishable under paragraphs (1) to (15), of section 296 may be taken into custody without warrant by any peace officer or health officer, or by the owner or occupier of the property on which or with respect to which the offence is committed…'. Also see Section 290 of the same legislation: 'Whoever, having been thrice convicted under the provisions of any enactment for having been drunk and behaving… indecently or in a disorderly manner is, within one year from the first conviction, found drunk, in any public place, shall be guilty of a misdemeanour.'

11 Criminal Code, 1960, of Ghana, Act 29, Section 124(1): 'Whoever steals shall be guilty of a second degree felony'; Section 125: 'A person steals if he dishonestly appropriates a thing of which he is not the owner'; Criminal Procedure Code, 1960, of Ghana, Act 30, Section 296(2): 'Where a crime is declared by any enactment to be a second degree felony, and the punishment for the crime is not specified, a person convicted thereof shall be liable to imprisonment for a term not exceeding ten years.'

12 Criminal Code Section 296(13): 'Whoever…behaves irreverently or indecently or insultingly at or near any funeral or in or near any public burial ground during the burial of a body shall be liable to a fine…'

13 Constitution of Ghana, Article 14(3)(b) (1992): 'A person who is arrested, restricted or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released, shall be brought before a court within forty-eight hours after the arrest, restriction or detention'; the Constitution of Uganda, Article 23(4)(b) (1995): 'A person arrested or detained upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.'

14 Constitution of Seychelles, Article 18(5) (1993): 'With qualification, holding period is limited to 24 hours.'

15 Mission to South Africa, 14–30 June 2004, p. 39, presented at the 37th Ordinary Session of the African Commission on Human and Peoples' Rights, 27 April–11 May 2005, held in Banjul, The Gambia.

16 International Bar Association, *Legalbrief Africa* Issue No. 159, 5 December 2005.

17 Working together or on their own, the prosecutor and the magistrate may keep offenders on remand unless money changes hands.

18 Almost 60 years ago, Dr Kwame Nkrumah left prison to become the first Ghanaian Leader of Government Business in Parliament, and subsequently the first prime minister of Ghana. Flight Lieutenant JJ Rawlings was spirited out of prison to lead the military government of the Armed Forces Revolutionary Council of Ghana in 1979.

19 Second Optional Protocol to the International Covenant on Civil and Political Rights, Article 1(1): 'No one within the jurisdiction of a State Party to the present protocol shall be executed'; Article 1(2): 'Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.'

20 See note 1.

5 Pre-trial detention and human rights in Africa

Martin Schönteich

International standards require that pre-trial detention be used only if there is a demonstrable risk that the person concerned will abscond, interfere with the course of justice, or commit a serious offence. They also mandate the widest possible use of alternatives to pre-trial detention. African jurisprudence and resolutions adopted by the African Commission on Human and Peoples' Rights (ACHPR) have confirmed the need for African states to be respectful of international standards and prevent the arbitrary and excessive use of pre-trial detention. Yet, in many parts of Africa, significant gaps exist between states' *de jure* and *de facto* compliance with international standards in respect of pre-trial detention.

African pre-trial detention rates are not particularly high by global levels. For every 100 000 people living in Africa, just under 50 are pre-trial detainees,[1] according to the available data. Pre-trial detention rates are at similar levels in Europe and are significantly higher in the Americas. Africa's low pre-trial detainee numbers are not the result of benign detention policies, however. With limited budgets and weak state infrastructures, many African countries have few, and generally badly paid and poorly equipped, police officers. This results in a small number of arrests and criminal investigations, limiting the pool of potential pre-trial detainees.

While the number of detainees in many African countries is relatively low, many pre-trial detention regimes on the continent are deplorable because the use of pre-trial detention is often arbitrary, the conditions of detention can be atrocious, detention is unduly prolonged, and vulnerable groups suffer disproportionate confinement. Compared to other regions, African prisons experience high levels of overcrowding. Of the ten most crowded national prison systems in the world, six are in Africa. Moreover, reports abound of pre-trial detainees in Africa who remain incarcerated for years awaiting trial, relying on friends and relatives to provide them with food and clothing to survive with some dignity.

There is a growing repertoire of practical interventions designed to improve pre-trial detention practices. In many parts of Africa, civil society organisations and governments work together and collaborate with their foreign counterparts to implement rights-based reforms. This is no easy task, however, and reforms which succeed in bringing about lasting change are rare.

International standards and guidelines

International human rights treaties emphasise the important distinction between people who have been found guilty, convicted by a court of law and sentenced to prison, and those who have not. Prisoners awaiting trial or the outcome of their trial are regarded differently because the law sees them as innocent until found guilty.

Pre-trial detention is covered by several international human rights treaties. Article 9(3) of the International Covenant on Civil and Political Rights states:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.[2]

International standards permit detention before trial only under certain, limited circumstances. In 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders established the following principle:

> Pretrial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are let free.[3]

One of the major achievements of the Eighth United Nations Congress was the adoption, by consensus, of the UN Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules).[4] In particular, these rules provide that:

- pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim;
- alternatives to pre-trial detention shall be employed at as early a stage as possible;
- pre-trial detention shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings;
- the accused shall have the right to appeal to a judicial or other competent independent authority in cases in which pre-trial detention is employed.

According to the UN Human Rights Committee, detention before trial should be used only where it is lawful, reasonable and necessary. Detention may be necessary 'to prevent flight, interference with evidence or the recurrence of crime' or 'where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner' (UN 1994: 14–15). The UN Human Rights Committee has also ruled that detention cannot be arbitrary: 'The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of

predictability and due process of law' (ACHPR 2005a: paragraph 6.1). As a result, pre-trial detention 'must not only be lawful but reasonable and necessary in all the circumstances' (2005a: paragraph 6.1).

African standards and jurisprudence

The ACHPR was established in 1986 by the African Charter on Human and Peoples' Rights.[5] The African Commission promotes and protects rights and interprets the African Charter, and a number of its decisions have touched on pre-trial detention issues.

Pre-trial detention hearing within a reasonable time

Article 7(1) of the African Charter provides that '[e]very individual shall have the right to have his cause heard'. This includes the right to be presumed innocent until proven guilty by a competent court or tribunal; the right to defence, including the right to be defended by counsel of one's choice; and the 'right to be tried within a reasonable time by an impartial court or tribunal' (Article 7(1)(d)). As support for these rights, the ACHPR cites its Resolution on Fair Trial, which states: 'Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released' (ACHPR 2000a: paragraph 45). In *Huri-Laws v. Nigeria*, the ACHPR found that detaining two applicants for, respectively, five months and a bit over one month without their being brought before a judge violated the right to be tried within a reasonable time by an independent court or tribunal (ACHPR 2000a: paragraphs 5, 7, 10, 46). In another ruling, the Commission held that detaining someone for seven years without a trial 'violates the "reasonable time" standard' under the African Charter (ACHPR 1996a: paragraph 12).

Appropriate tribunal

The ACHPR has stated that the requirements of a tribunal include 'fairness, openness, and justice, independence, and due process' (ACHPR 1998a: paragraph 44). A detainee must have 'recourse to national courts' to challenge detention (1995b: paragraph 9). Moreover, Article 26 of the African Charter, guaranteeing the independence of the courts, reiterates the Article 7 right to have one's cause heard, with the latter focusing 'on the individual's right to be heard', and the former on 'the institutions which are essential to give meaning and content to that right' (ACHPR 1998a: paragraph 16).

The Commission held that 'a military tribunal *per se* is not offensive', but warned of the lack of independence of the process when the military tribunal is under an 'undemocratic military regime' in which the military has subsumed the authority of the executive and the legislature (ACHPR 1998a: paragraphs 26, 44). The tribunal must not only be impartial but must also have the appearance of being impartial. In

Amnesty International and Others v. Sudan, in which national legislation permitted the president, his deputies and senior military officers to appoint individuals to the Special Courts, the Commission held that '[t]he composition alone creates the impression, if not the reality, of lack of impartiality' (ACHPR 1999a: paragraph 68).

Grounds for detention

Article 6 of the African Charter holds that 'every individual shall have the right to liberty and to the 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.'

The ACHPR has little jurisprudence for determining what classifies as arbitrary detention. The Commission held that holding detainees who had protested the annulment of the presidential elections in Nigeria in 1993, and who were detained without charges for over three years, constitutes 'an arbitrary deprivation of their liberty' (ACHPR 1998b: paragraph 55). In addition, arbitrary detentions include indefinite detention of individuals who protest against torture (1995c: paragraph 42), as well as detentions 'based on grounds of ethnic origin alone' (1996b: paragraph 28). The Commission has also held that a law allowing the government to detain people without any charges for up to three months violates the right not to be arbitrarily detained (1998c: paragraph 83).

Special circumstances do not justify a failure to comply with the African Charter. In *Alhassan Abubakar v. Ghana*, the ACHPR found violations of the Charter regarding a detainee who was arrested 'in the interest of national security' (ACHPR 1996a: paragraph 9). The Commission did not permit states to 'derogate from their treaty obligations during emergency situations' in a civil war in Chad (1995d: paragraph 21), and reconfirmed this position in a case stemming from detentions following a *coup d'état* in the Sudan in 1989 (1999a: paragraph 42).

Conditions of pre-trial detention

Article 5 of the African Charter holds that 'every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly…torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

The ACHPR adopted the view of the European Court of Human Rights in determining that the prohibited treatment under Article 5 is 'that which attains a minimum level of severity and…the assessment of this minimum is, in the nature of things, relative…It depends on all the circumstances of the case' (ACHPR 2000a: paragraph 41). The Commission held that the following can constitute cruel, inhuman and degrading treatment: torture (1999a: paragraph 54), life-threatening conditions (2000a: paragraph 40), arbitrary detention without knowing the reasons

for being detained (2000a: paragraph 40), an inability to communicate with family (1999a: paragraph 54; 2000a: paragraph 40), and a refusal to notify the family regarding the detention (1999a: paragraph 54). Moreover, Article 5 'includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience' (1996a: paragraph 79; 1998c).

African resolutions and declarations on pre-trial detention

The ACHPR has undertaken a number of steps to emphasise, clarify and monitor some of the provisions on pre-trial detention contained in the African Charter. The Resolution on the Right to Recourse Procedure and Fair Trial, adopted by the Commission in 1992, holds that the right to a fair trial includes the right of the detainee to be brought promptly before a judicial officer and to a trial within a reasonable time, or to be released (Viljoen 2005).

In September 1996, delegates from 40 African countries met in Kampala, Uganda, at the first Pan African Conference on Penal and Prison Reform in Africa. The conference produced the Kampala Declaration on Prison Conditions in Africa, which was adopted by consensus at the conference and at the Sixth Session of the UN Commission on Crime Prevention and Criminal Justice in 1997.

According to the Kampala Declaration, 'in many countries in Africa the level of overcrowding in prisons is inhuman', and in most African prisons 'a great proportion of prisoners await trial, sometimes for several years' (UN Economic and Social Council 1996). To address the pervasive use of pre-trial detention on the continent, the signatories to the Declaration recommended that judicial investigations and proceedings ensure prisoners are kept in remand detention for the shortest possible period, and that there should be a system of regular review of the time detainees spend on remand.

Pursuant to the Kampala Declaration, the ACHPR established the position of Special Rapporteur on Prisons and Conditions of Detention in Africa in late 1996. The mandate of the Special Rapporteur is 'to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights' (Viljoen 2005: 131).

In 2002, the Commission adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines). While focusing on the prohibition of torture, the Resolution deals extensively with procedural safeguards of persons deprived of their liberty and conditions of detention. Specifically, the Resolution admonishes states to ensure 'that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel'.

In addition, all detainees have the right to 'challenge the lawfulness of their detention' (ACHPR 2002: Article 27).

The second Pan African Conference on Penal and Prison Reform in Africa, held in 2002 in Ouagadougou, Burkina Faso, reiterated the need to reduce prison populations and the idea that reduction strategies should be 'ongoing and target both sentenced and unsentenced prisoners'.[6] The conference adopted the Ouagadougou Plan of Action,[7] addressed 'to governments and criminal justice institutions as well as to non-governmental organisations and associations…to be a source of inspiration for concrete actions'. In late 2003, the ACHPR adopted the Ouagadougou Plan of Action, which sets out a number of strategies for reducing the number of unsentenced prisoners.[8] Included in the Plan of Action are cooperation between criminal justice agencies to ensure speedy trials and a reduction in delays; use of detention as a last resort and for the shortest time possible; good case-file management and regular review of the status of remand prisoners, and greater use of paralegals in the criminal process.

In 2003, the Commission adopted the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (ACHPR 2003). These reiterate the international norm that states must ensure that accused persons are not kept in custody pending trial, unless there is 'sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses, or posing a clear and serious risk to others' (2003: s. M.1(e)). According to the Guidelines, states must ensure, 'including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation' (2003: s. M.1(h)). A detainee's right to a trial within a reasonable time and to challenge the lawfulness of his detention is also provided for in the Guidelines (2003: s. M.3).

By themselves, international norms and standards on criminal justice do not provide effective guidance to efforts to improve practices in pre-trial detention. Most of the relevant rules of the UN and the ACHPR, for example, are sufficiently vague that countries can demonstrate both fidelity to and compliance with such norms without substantially rewriting their statutes or modifying practices.[9] Moreover, it is far from clear whether the adoption of such provisions even in the most faithful and literal manner actually improves practices. As Mark Kelly, a former employee of the Committee for the Prevention of Torture of the Council of Europe, has observed, 'paradoxically, many of the states which are the "worst offenders" in terms of excessive use of pre-trial detention have enacted – and purport to apply – national legislation which closely mirrors international presumptions against the use of pre-trial detention' (Kelly 2001: 4).

The African Charter, and a number of resolutions and guidelines adopted by the ACHPR, restate and broaden some of the international standards which seek to reduce and rationalise the use of pre-trial detention. Notwithstanding the standards

African states have committed themselves to observe, a number of regions on the continent have pre-trial detention rates in excess of the global average. The next section explores the available African pre-trial detention and incarceration data and analyses them in a global context.

Pre-trial detention and imprisonment in Africa

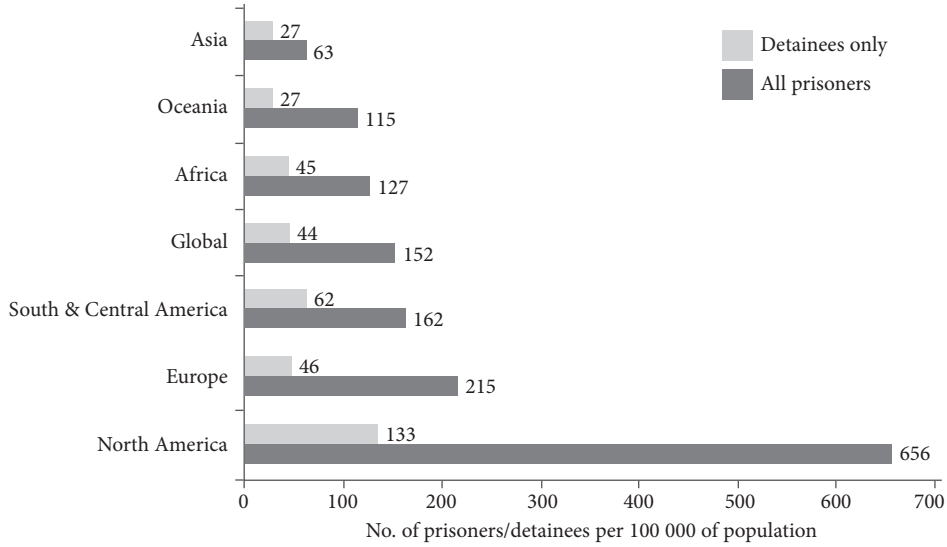
Like most statistics, criminal justice statistics need to be treated with caution. It stands to reason that statistical data are only as reliable as the people who collect them and as accurate as the systems that generate them. This is also the case with prison-related statistics. Some countries manually collate data on prisoner numbers and related information from every prison into one central database. Others collect data at irregular intervals, while some do not consistently gather any quantitative data at all.

Prison statistics do not, as a general rule, include persons who are detained in police holding cells. In countries with reasonably efficient criminal justice systems and adequate space in their prisons, this does not unduly skew prison population data. Accused persons are usually held in police cells for only 48 or 72 hours until their first court appearance and, thereafter, are transferred to a prison for pre-trial detainees. In countries with overcrowded prisons, where laws restricting the time accused persons may be held in police custody before appearing before a judicial officer are interpreted laxly, the number of persons held in police custody can be significant. Some African countries imprison a considerable number of pre-trial detainees in police cells because of a lack of prison space or because the nearest prison is too far removed from the courthouse to justify transporting an awaiting trial detainee between prison and court until the trial has come to an end. Consequently, only counting the number of detainees in Africa's prison systems may substantially undercount the real number of pre-trial detainees. Notwithstanding the gaps in the available information, the analysis which follows is useful to discern regional and sub-regional patterns and trends of prison overcrowding and the use and extent of pre-trial detention.[10]

Incarceration and detention rates

Measured as a rate per 100 000 of the general population, Africa's incarceration rate of 127 per 100 000 is slightly below the global average of 152 per 100 000, while the continent's pre-trial detention rate of 45 per 100 000 is marginally above the global average of 44 per 100 000 (see Figure 5.1). As a result of a very high incarceration rate in the US, North America has both the highest regional incarceration rate, 656 per 100 000, and pre-trial detention rate, 133 per 100 000.

Figure 5.1 *Incarceration and pre-trial detention rates per 100 000 of the population, regional averages, 2005*



Source: International Centre for Prison Studies

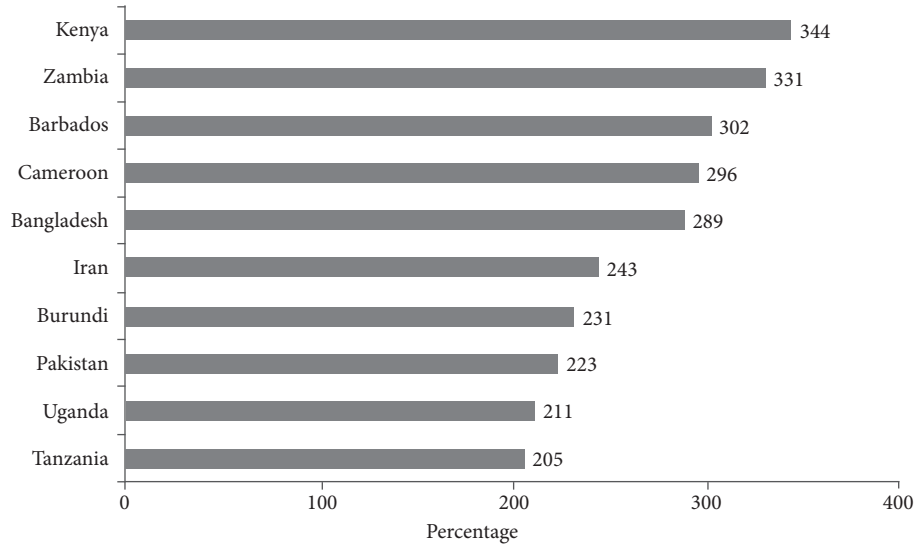
Comparatively speaking, Africa is not an over-incarcerated continent. African countries' incarceration rates are relatively low, with no African country in the global 'top ten', according to the International Centre for Prison Studies (ICPS). The ICPS's World Prison Population List, published in early 2005, ranks South Africa, with a prison population rate of 413 per 100 000, as the African country with the highest prison population rate at position number 15. The US comes first with 714 prisoners per 100 000 (Walmsley 2005a: 1).

Africa's relatively modest rates of detention and incarceration are intriguing given the high levels of violent crime afflicting many parts of sub-Saharan Africa (UNODC 2005b). This is at least partly the consequence of a lack of resources: many African countries are too poor to be able to afford spending sufficient resources on their criminal justice systems. Thus, Africa has the lowest rate of police officers to citizens compared to any other region (UNODC 2005b). Similarly, at three judges per 100 000 of the population, Africa has a much lower 'judicial' density than other regions, including Asia (six per 100 000) and Latin America and the Caribbean (eight per 100 000) (UNODC 2005b: 11). Countries with high crime levels but few police are unlikely to manage arresting and investigating a large number of suspects. Fewer judges mean that criminal cases are processed more slowly or not at all, resulting in relatively high proportions of pre-trial detainees in relation to sentenced prisoners (see Figure 5.3).

Overcrowding

On the face of it, Africa's relatively low imprisonment rate is encouraging from a human rights perspective. International human rights standards discourage the use of pre-trial detention and imprisonment, promoting instead the use of less restrictive alternatives to incarceration. A closer look at the data reveals a more ominous picture, however. Many of Africa's prisons are overcrowded. Of the 165 national prison systems whose occupancy levels are recorded by the ICPS, only about one in five are in Africa. Yet, as Figure 5.2 shows, of the ten countries with the highest prison occupancy rates, six are in Africa (International Centre for Prison Studies 2005b). Of the 20 countries with the highest prison occupancy rates, eight are in Africa. At the time of writing, Kenya's prisons had the highest occupancy rate of 344 per cent. In other words, Kenya's prisons were at 344 per cent of capacity, or every formal prison space was occupied by almost three-and-a-half inmates. Zambia had the second highest occupancy rate at 331 per cent. At the other end of the occupancy spectrum are 51 prison systems with occupancy rates below 100 per cent. That is, prison systems designed for more inmates than they were incarcerating at the time of writing. Of these, only five are in Africa.[11]

Figure 5.2 *Ten highest prison occupancy rates in the world, by country, 2005*



Source: International Centre for Prison Studies

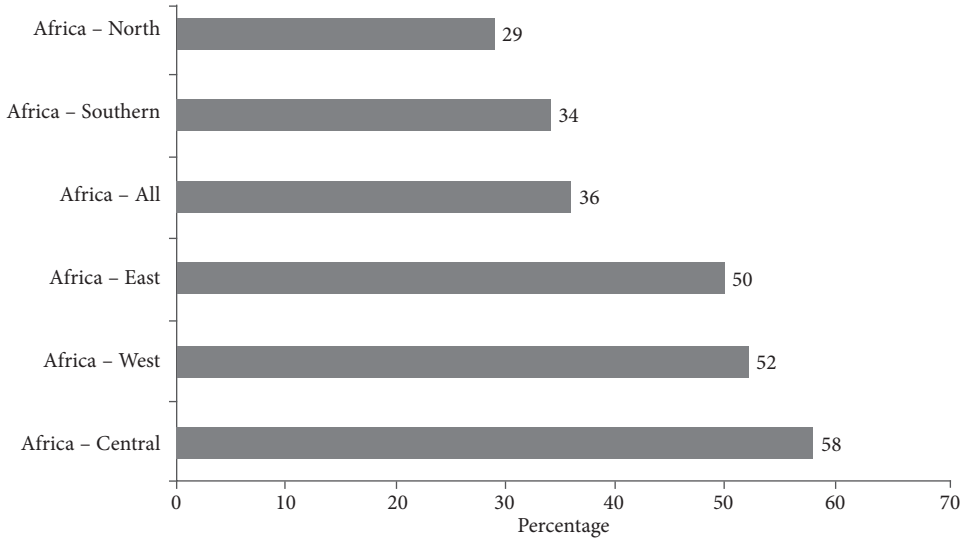
Excessive pre-trial detention

From a human rights perspective, pre-trial detention should be used sparingly and individuals should not be detained for excessive periods of time. Unfortunately, no comparative data exists on the length of time the average accused person spends in pre-trial detention in Africa's prison systems. One, albeit imperfect, proxy indicator

for the excessive use of pre-trial detention is the number of pre-trial detainees expressed as a proportion of all prisoners. Calculated in this way, Africa is above the global average. Around the world, 29 per cent of all prisoners are pre-trial detainees. In Africa, the proportion is over a third, at 36 per cent. Latin America and Asia, at 38 per cent and 42 per cent respectively, are the only regions that have a higher proportion of pre-trial detainees than Africa.

In Africa, Central and West Africa have the highest proportion of prisoners in pre-trial detention at, respectively, 58 per cent and 52 per cent. Both are significantly above the regional average of 36 per cent (see Figure 5.3). Some African prison systems contain an inordinately high proportion of pre-trial detainees. In Mozambique, for example, almost three-quarters (73%) of prisoners are awaiting trial. Other African countries with a high proportion of pre-trial detainees are Mali at 68 per cent, Madagascar and Cameroon at 65 per cent, Nigeria at 64 per cent, and Uganda at 58 per cent (International Centre for Prison Studies 2005b). With other factors remaining the same, a reduction in the use of pre-trial detention or the average length of detention in these countries would almost certainly decrease prison overcrowding levels.

Figure 5.3 *Proportion of prisoners in pre-trial detention, by African sub-region, 2005*



Source: International Centre for Prison Studies

Using the proportion of pre-trial detainees within a prison system as an indicator of excessive detention is not entirely satisfactory, however. There are a number of countries in Africa with extremely overcrowded prison systems and a relatively low proportion of pre-trial detainees in the prison population. For example, in Mauritania, which ranks tenth among African countries in terms of overcrowding,

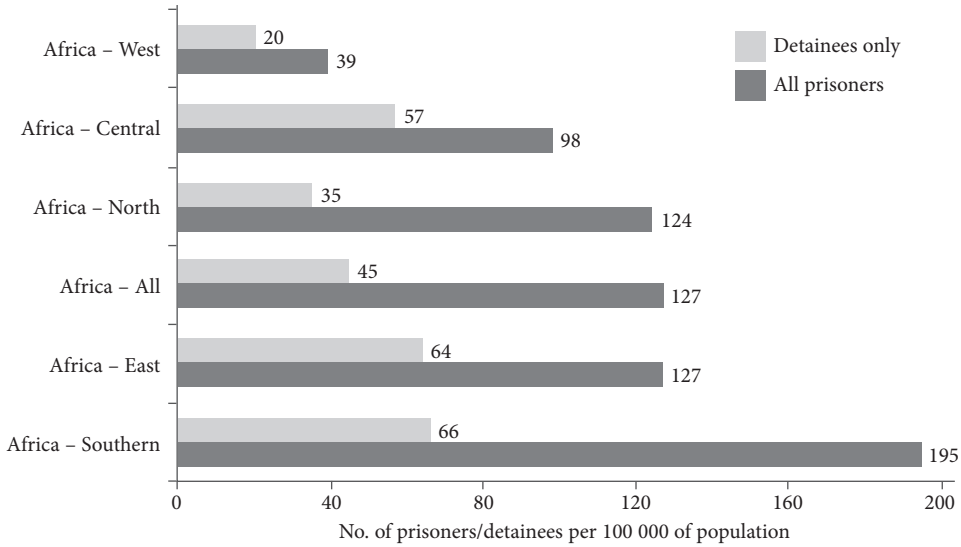
only 13 per cent of the prison population comprises pre-trial detainees. In Malawi, with an occupancy rate of 156 per cent (ranking thirteenth on the continent), just under a quarter of prisoners are pre-trial detainees.

A better indicator of the use of pre-trial detention – especially for comparative purposes – is the number of pre-trial detainees expressed as a rate of the general population. The pre-trial detention rate is unaffected by changes in the actual number of sentenced prisoners. Moreover, expressing the number of pre-trial detainees as a rate of the general population makes it easy to compare the extent to which detention is used between different countries.

Regional disparities in incarceration and detention

Focusing on Africa and its geographic sub-regions, it is possible to discern a significant disparity in incarceration and pre-trial detention rates. Southern Africa has both the highest incarceration rate, 195 per 100 000, and pre-trial detention rate, 66 per 100 000, significantly above the continental norm of, respectively, 127 and 45 per 100 000 (see Figure 5.4). In comparison, West Africa's incarceration rate is a fifth, and its pre-trial detention rate is less than a third, of southern Africa's.

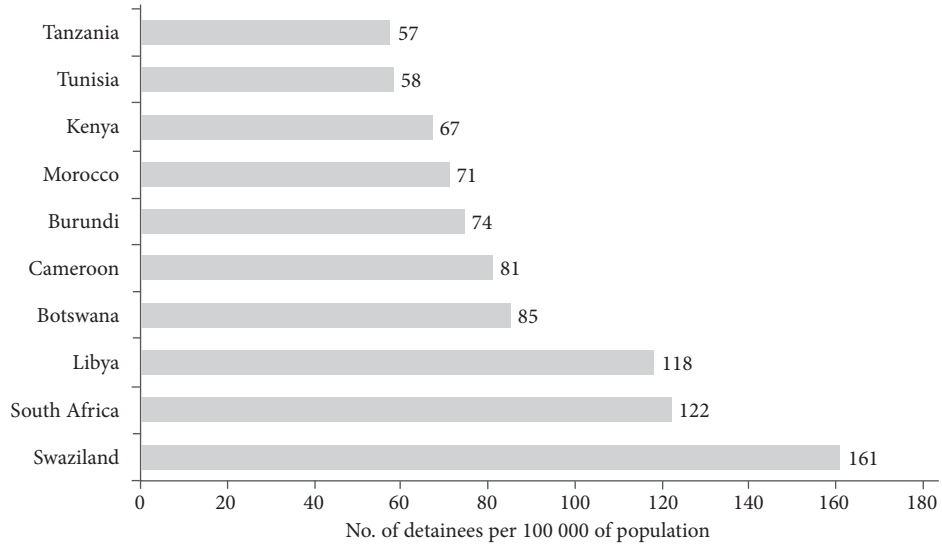
Figure 5.4 *African regional incarceration and pre-trial detention rates per 100 000 of the population, 2005*



Source: International Centre for Prison Studies

At the country level, Swaziland has the highest pre-trial detention rate in Africa, with 161 detainees per 100 000 of the general population (Figure 5.5). This is followed by South Africa at 122 and Libya at 118.

Figure 5.5 *Ten highest African national pre-trial detention rates, 2005*



Source: International Centre for Prison Studies

Generally, countries with high pre-trial detention rates also have high overall incarceration rates. The three countries with the highest overall incarceration rates in Africa – South Africa, Botswana and Swaziland – are also among the top four countries with the highest pre-trial detention rates. Criminal justice systems that fail to make use of alternatives to pre-trial detention are also unlikely to make much use of alternatives to imprisonment as a sentencing option. Punitive criminal justice policies are likely to favour pre-trial detention over release on bail and imprisonment over a non-custodial sentence. Moreover, defendants' pre-trial detention status can detrimentally affect their chances of being convicted and given a custodial sentence. In the US, it has been shown that, statistically, accused persons detained prior to trial plead guilty more often, are convicted more often, and are more likely to be sentenced to prison than are accused persons who are released prior to trial (see Rankin 1964; Gottfredson & Gottfredson 1988). No such research has been undertaken in an African country.

Pre-trial detention as a human rights issue

Unlike, for example, cruel and unusual punishment or torture, pre-trial detention does not, per se, constitute a human rights violation. International human rights norms recognise the need for pre-trial detention provided it is applied fairly, rationally and sparingly. Because pre-trial detention has some utility and constitutes a necessary evil in the criminal justice process, it is useful to reflect on the link between the excessive use of pre-trial detention in many parts of Africa and human rights.

Human Rights Watch (n.d.) ably sums up the key reasons why pre-trial detention is an important human rights issue:

> In numerous countries…unsentenced prisoners make up the majority of the prison population. Such detainees may in many instances be held for years before being judged not guilty of the crime with which they were charged. They may even be imprisoned for periods longer than the sentences they would have served had they been found guilty. This state of affairs not only violates fundamental human rights norms, it contributes significantly to prison overcrowding, a problem that is itself at the root of numerous additional abuses…Numerous authoritative international bodies have made it clear that unduly prolonged pretrial detention is a human rights violation.

Discrimination against the poor and powerless

In many African countries, the formal criminal justice system often fails to provide justice and security to the poor or to protect their rights. According to Vivien Stern of the ICPS, justice systems in poor countries exacerbate the poverty of the destitute 'by bearing down most heavily on them and subjecting them to gross injustices, whilst not providing them with the protection they need' (Stern 1999: 87).

Pre-trial detention regimes can be particularly discriminatory against the indigent. Poor people do not have access to private counsel, and many African countries lack a comprehensive legal aid system for accused persons too poor to afford their own lawyers. In countries where a rudimentary legal aid system operates, legal counsel is often provided only at the trial stage of legal proceedings, long after a decision has been made to detain an accused awaiting trial. A United Nations Office on Drugs and Crime (UNODC) study of justice system integrity and capacity in three Nigerian states in 2002 found that 38 per cent of awaiting trial prisoners had retained a lawyer and that only around 10 per cent of the respondents had been able to pay their lawyers' fees themselves, with the remainder being supported by their family, friends or the government (UNODC 2004: 76–77).

Unlike Nigeria, which has an estimated 28 000 lawyers,[12] large parts of Africa face an extreme shortage of legal professionals, so that many detainees – especially those situated in rural areas – are unable to gain access to professional legal services. For example, in 2001, Mozambique had some 200 lawyers servicing a population of about 17 million (ACHPR 2001b: 28). In 2004, the ratio of practising lawyers to the general population was 300 to 11 million in Malawi, 400 to 26 million in Uganda, and 400 to 35 million in Tanzania (PRI 2004). Moreover, lawyers in most African countries are heavily concentrated in urban centres, leaving the rural poor with virtually no access to professional legal representation. In Sierra Leone, for example, 95 per cent of the country's 125 lawyers, who serve a population of 5 million, are based in the capital, Freetown.[13]

In criminal justice systems in which corruption is pervasive, accused persons are likely to be released awaiting trial only if they have political connections or the means to bribe the arresting officer, prosecutor or judicial officer dealing with their application for pre-trial release. A 2002 UNODC study found that, on average, more than 70 per cent of lawyers surveyed in three Nigerian states had paid bribes in order to expedite court proceedings, including the implementation of bail orders, the commencement of trial, and the speeding up of trial proceedings. While most of these bribes were paid to court staff and police, a fifth of respondents stated they also had to make such payments to judges (UNODC 2004: 112–114). More than 40 per cent of court users surveyed experienced corruption when seeking access to the justice system, with a large proportion specifically stating that they paid a bribe to obtain bail (UNODC 2004: 115–116). According to the UNODC (2002), 'the assessment revealed that in particular the poor and uneducated, as well as ethnic minorities are more likely to be confronted with corruption…and to experience delays.'

In a 2000 visit to remand cells in Bangui in the Central African Republic, the Special Rapporteur found that 'police demanded money [from the detainees] before release' (ACHPR 2000b: 7). In a 2001 report on prisons in Malawi, the Special Rapporteur found that 'cases of ill-treatment and corruption…do not seem to be isolated cases' (ACHPR 2001c: 39). The Special Rapporteur, moreover, stated that:

> …prisoners reported that police officers were corrupt. They would ask for a 1 000 or 2 000 Kwacha bribe to ensure that a suspect is granted bail and is not sent to prison. A prisoner at Maula prison reported that he had paid 6 000 Kwacha to a police prosecutor to facilitate bail. (ACHPR 2001c: 40)

In Benin, a prisoner told the Special Rapporteur: 'The main problem is the judiciary. Prosecution in Abomey [a city in Benin] has become an avenue for getting money. If you do not have money, your case is never examined' (ACHPR 2000c: 20).

In cases where pre-trial release is granted with conditions, it is again often the indigent who have the greatest difficulty complying with such conditions. In many African countries, accused persons are granted bail whereby they are released awaiting trial provided they deposit a sum of money with the court. In a report on prisons in Malawi, the Special Rapporteur found that a reason for overcrowding of the prison system was that 'prisoners cannot pay bail or provide any surety' (ACHPR 2001c: 34). A 2004 investigation on overcrowding in Nigerian prisons found that 18.5 per cent of all pre-trial detainees had been granted bail but were unable to pay it.[14] In South Africa, about a third of all awaiting trial prisoners are granted bail but are unable to afford the amount set (pers. comm., Gideon Morris, Director: Judicial Inspectorate of Prisons, 18 January 2006). Another poignant example is James Fort remand prison in Ghana. An investigation in 2001 revealed that the former slaving centre was designed to accommodate 200 detainees but was holding 699, of whom 60 per cent had been granted bail by the courts (Othmani & Stapleton 2004: 7).

In cases where an accused is released awaiting trial on the condition that he report to a police station on a regular basis, individuals without access to private transport, too poor to afford the regular use of public transport, or who live in a rural area far from the nearest police station, find it difficult to meet such a condition. In a survey of rural inhabitants in South Africa conducted in the late 1990s, half the respondents indicated that they were between 11 and 30 kilometres from the nearest police station, with 12 per cent being more than 30 kilometres away. Just 6 per cent of the respondents indicated they were able to drive themselves in private transport to the nearest police station, and only 10 per cent said they could use a commuter bus because of the limited availability of public transport in South Africa's rural areas (Louw et al. 2000: 62).

Opportunity costs

Imprisoning people is an expensive undertaking for most states, especially for developing countries. For poor countries, where state budgets are rarely balanced and state funding to meet even the basic needs of all citizens is inadequate, expenditure on imprisonment represents a stark opportunity cost. Every bit of state revenue spent on imprisonment results in less money for crucial social services, health, housing and education. In his 2004/05 annual report, the South African Inspecting Judge of Prisons (2005b) revealingly points out:

> Prisons are expensive to build (R360 million each for four new prisons) and expensive to operate. The total budget of the Department of Correctional Services for the 2005/06 financial year amounts to R9.2 billion. That means an expenditure of about R25.3 million per day…within the next two years (2007/08) we will be spending more than R10 billion per annum on correctional services.[15]

Even for a relatively prosperous African country such as South Africa, spending R10 billion per annum entails a significant opportunity cost in terms of state spending foregone elsewhere. For example, an additional R10 billion would have permitted the South African Treasury to more than double its health-related expenditure or double its expenditure on social development and the provision of housing during its 2004/05 appropriation (National Treasury 2005: iv). Arguably more disturbing, from a human rights perspective, are countries which evade such costs by capping prison-related expenditure irrespective of the size of the actual prison population. As is pointed out elsewhere, this results in prisoners receiving only one meal a day and having to rely on relatives and friends for soap and clothing.

Imprisoning a large group of people is not only costly for the state but also has negative financial and social repercussions for society at large. Prisoners are unable to earn an income and cannot provide food or other necessities for their families. In many poor African countries, detainees' families suffer a double burden: not only do they have to forgo the support they may have received from the detainee, but they also often have to provide food, clothing and other necessities of life to the

detainee because the prison system fails to do so. The widespread use of pre-trial detention can consequently further impoverish poor and marginalised communities in particular.

Conditions of detention

For many detainees in Africa's prisons, who are compelled to spend long periods of time incarcerated under poor sanitary conditions, with inadequate nutrition, limited or no access to healthcare, and acute overcrowding, a period of detention 'can be a death sentence' (Stern 1999: 10; see also *New York Times* 6 November 2005[16]). Moreover, detainees infected with HIV/AIDS, tuberculosis or other communicable diseases are likely to pass these on to their families and communities after their release. In poor communities, where many rely on subsistence agriculture for their survival, the serious illness and incapacitation of even one or two adult household members can bring about a spiral of poverty as the household is forced to sell off the few capital assets it may possess in an effort to obtain medication and professional medical help for the ill.

In a 2001 report on a visit to prisons in Malawi, the Special Rapporteur found that 'in most prisons and police cells, prisoners and suspects have neither mattresses nor beds…prisoners receive only one meal per day. Meals are not balanced as prisoners eat the same thing every day' (ACHPR 2001c: 17–18). Visiting 13 prisons which accommodated 81 per cent of Malawi's prisoners at the time, the Special Rapporteur found that 49 per cent of prisoners had an average cell space of one square metre or less, with 88 per cent being crowded into an average cell space of two square metres or less (ACHPR 2001c: 10). In her report on Mozambique, the Special Rapporteur notes that overcrowding:

> …is probably one of the main causes [of] the deaths of about 100 prisoners in a police cell in Montepuez in November 2000. Police said the inmates had suffocated during the night. They had been put in a small cell (7m by 3m) and despite the deaths of ten prisoners the previous night, it was alleged that nothing had been done to prevent the second tragedy. (ACHPR 2001b: 27)

In a 2000 visit to remand cells in Bangui in the Central African Republic, the Special Rapporteur found that a cell measuring 5 metres by 7 metres contained 24 inmates. Of the inmates, some had mats 'while others slept on the floor. Food was brought by friends and relatives, who had to pay between 200 and 400 CFA to the guards before [permission was granted for] handing over food. As punishment visits and baths were denied' (ACHPR 2000b: 7).

Also in the Central African Republic, the Special Rapporteur found that remandees were kept in police holding cells for up to 18 months where they received food 'once a day in small quantities and of poor quality', received no soap, and could wash only once every two days. A 'leaking bucket in a corner served the purpose of the call of

nature' (ACHPR 2000b: 7). Unsurprisingly, many inmates had scabies, a contagious disease. In Benin, the Special Rapporteur received complaints from prisoners that they were forced to 'clean toilets with their hands' (ACHPR 2000c: 20). In respect of Malawi's prisons, the Special Rapporteur reported:

> Due to overcrowding, to the very poor hygiene partly linked to a lack of soap…illnesses such as scabies and tuberculosis are on the point of being endemic in Malawian prisons. Diseases like malaria, infections, pulmonary diseases and other digestive troubles are connected to the very unbalanced diet prevailing in all prisons. (ACHPR 2001c: 23)

Physical assaults against prisoners by police, or by other prisoners on the instruction of warders, appear to be commonplace in some African countries. The Special Rapporteur's report on prisons in the Central African Republic found that the Director of Police had ordered that prisoners 'be beaten and stoned if they begged for money from passers-by' as their cell door opened onto the street (ACHPR 2000b: 8–9). In Benin, the Special Rapporteur reported that 'many prisoners confirmed being beaten by guards' and that 'assault and battery by prisoners, at the command of the guards, was rife. This occurred on the least pretext, like an argument among inmates. 45 lashes with [a] baton was not uncommon' (ACHPR 2000c: 20–21).

As discussed earlier, many African prisons endure high levels of overcrowding. On balance, overcrowded prisons and their staff are less able to provide prisoners with adequate supervision, food, clothing, bedding, clean water and healthcare than those whose occupancy levels are at 100 per cent or lower. Good hygiene, opportunity for exercise, and a healthy diet, which are all essential to prevent the spread of communicable diseases, are more difficult to maintain if prisoners have to share beds, crowd ablution facilities, and are restricted to their cells for most of the time as warders are unable to cope with the number of prisoners in their care.

A lack of political interest in prisons, and the resultant small budgets available for the staffing of prisons in many African countries, has resulted in unfavourable staff to prisoner ratios. In a prison visited by the Special Rapporteur in Benin in 1999, for example, 397 prisoners, housed in a prison designed for 200 inmates, were being guarded by six warders (ACHPR 2000c: 43). In other words, the ratio of warder to prisoner was 1:66. In the Central African Republic and Burkina Faso, the nationwide ratios are, respectively, 1:72 and 1:38, while Malawi's ratio is 1:10 (PRI 2000). These may be extreme cases, although a dearth of data on staffing levels in African prisons makes this difficult to verify. In the relatively well-resourced South African criminal justice system, the warder to prisoner ratio was a bit over 1:6 in 2004 (DCS 2004: 45–46, 106). Even this ratio is high by European and Asian levels, however. Thus, in 2000, the ratio of warder to prisoner was between 1:1 and 1:3 in the majority of European countries (Social and Cultural Planning Office 2004: 219–220), and around 1:3 in many Asian and Pacific countries.[17]

Length of detention

In many parts of Africa examples abound of prisoners spending inordinately long periods in pre-trial detention. In a report on her 2001 visit to prisons in Malawi, the Special Rapporteur reported: 'Overstaying on remand is a serious question, some prisoners were found to be awaiting trial for many years…some for 4 to 10 years… one juvenile for 5 years' (ACHPR 2001c: 7). In Benin, the Special Rapporteur came across a number of prisoners who had been in pre-trial detention for seven years, including two individuals who had already spent 17 years in pre-trial detention at the time of his visit (ACHPR 2000c: 14, 31). In a prison in Abomey, a city in Benin, the Special Rapporteur visited a cell for older detainees and established that the inmates had been in pre-trial detention for between 4 and 10 years (ACHPR 2000c: 20). An audit of Nigerian prisoners in 2004 revealed that 3 007 pre-trial detainees, 14 per cent of the total, had been awaiting trial for five years or more.[18]

Protecting the rule of law and presumption of innocence

Most African countries have ratified international human rights instruments which allow the use of pre-trial detention only under carefully circumscribed circumstances. Many countries have, moreover, embedded the substance of such international instruments into domestic legislation. Yet, a significant number of criminal justice systems in Africa routinely contravene their domestic pre-trial detention laws and regulations.

In a country visit to the Central African Republic in 2000, the Special Rapporteur found that, while detention immediately after arrest by the police is statutorily limited to 48 hours, it can 'last for 6 months without it being taken into account in sentencing' (ACHPR 2000b: 10). In The Gambia, the Constitution limits the time period between arrest and an accused person's court appearance to 72 hours. At the country's police headquarters in Banjul, however, the Special Rapporteur did not find one arrestee who had been brought before a court within the 72-hour time limit. In fact, some arrestees claimed to have been in police detention for a number of months without being remanded by a judicial officer (ACHPR 1999b: 15–16).

Protecting the restrictions on the use of pre-trial detention, as well as the process leading up to a pre-trial detention determination, is vital to preserving one of the cornerstones of a rights-based criminal justice system: the presumption of innocence. That is, the right of accused persons to be presumed innocent of the allegations against them until found guilty by a competent court. Disregard for the rule of law and for the presumption of innocence can have a spillover effect on other areas of the law. This is exacerbated by the fact that the very agencies tasked to protect the rule of law – the judiciary, police and prosecution – are most likely to undermine it once the presumption of innocence is weakened. For example, in some countries where pre-trial detention is not used sparingly according to international norms, 'the use of force, sometimes amounting to torture, by investigating authorities such as the police is common in order to extract confessions' (International Centre for Prison Studies

2004: Guidance Note 5). Similarly, in systems where judges do not have to provide transparent and defensible reasons why an accused is being detained pending trial, the chances are high that some judges will accept bribes to release an accused from pre-trial custody.

The excessive use of pre-trial detention also undermines the presumption of innocence in other, less explicit ways. If an accused is ordered to be held in custody, or if money bail is set at an amount the accused cannot meet, several significant consequences may result:

- The accused who remains in prison may have difficulty participating in his own defence. An incarcerated accused person cannot look for friendly witnesses and may have limited contact with a defence lawyer.
- Accused persons held in detention often have a heightened incentive to plead guilty, even though they may have a valid defence, simply to gain their freedom – particularly if they can receive a sentence of 'time served' or receive credit for their jail time against a relatively short prison sentence.
- In some countries it has been shown that, statistically, accused persons detained prior to trial plead guilty more often, are convicted more often and are more likely to be sentenced to prison than those accused persons who are released prior to trial (see for example Rankin 1964; Gottfredson & Gottfredson 1988; Williams 2003). That is, the experience of pre-trial detention is known to undermine – through loss of employment, accommodation, family and other community ties – defendants' capacities to present themselves in a light favourable to receive a non-custodial sentence (Morgan 1994).

In contrast, accused individuals who are released can be in touch with a lawyer relatively easily and can assist in developing a defence to specific charges. They can continue working, paying taxes and supporting their families. They can also take steps to reduce the severity of a sentence if they ultimately are found guilty by, for example, getting or keeping a job, maintaining or re-establishing family ties and developing a record of complying with conditions of release.[19]

Developing solutions

While much of the above analysis makes for depressing reading, the conclusions to be drawn from it are not all negative. Notwithstanding poor, overcrowded and abusive conditions for many pre-trial detainees in Africa, the continent's pre-trial detention rate remains around the global average while overall incarceration rates on the continent are below those of most other regions. While this is partly a consequence of inadequate funding for criminal justice, it is also attributable to a cultural aversion to mass imprisonment in parts of Africa, coupled with a refreshing willingness of many Africans to experiment with, and develop, new solutions to pre-trial detention-related problems. Indeed, as Vivien Stern wrote enthusiastically in the late 1990s, there is a 'new movement in developing countries, particularly in Africa, to reform costly penal systems and find cheaper and more appropriate methods…replacing prison with viable alternatives' (1999: 11).

In a book on the history of imprisonment in Africa, Florence Bernault argues that prisons in sub-Saharan Africa are a colonial import viewed negatively by many Africans:

> Large components of African civil societies reject the idea of imprisonment as a legitimate form of punishment, thus shedding fresh light on the intricate ways in which Africans have reshaped colonial legacies. This paradox helps explain why today, from the shores of the Mediterranean to the tip of the Cape, prisons remain an inescapable element of African landscapes, while the ratio of imprisonment across the continent is one of the lowest worldwide. (2003: 2)

Bernault contends that in African societies many offenders or suspected offenders are managed within families and neighbourhoods or are dealt with at the local community level. This is a 'perpetuation of the rich layers of informal, hidden judicial tactics' (Bernault 2003: 32) by which communities do not rely on the state to investigate and address all forms of criminal behaviour.

There is a growing inventory of reform initiatives in pre-trial detention emanating in Africa. There are numerous countries which seek to improve pre-trial detention practices. Many of these efforts share a common humanistic goal – the amelioration of harm caused by detention – although they often pursue that goal in different ways. For example, some initiatives seek to reduce the extent of detention; others seek to reduce the duration of detention; still others seek to improve the conditions of detention and the associated risks to the health and physical safety of accused individuals (Stapleton 2005a; see also Chang et al. n.d.).

In an attempt to reduce the number of pre-trial detainees and the duration of detention, a diversity of civil society-driven initiatives – typically in collaboration with government agencies – have tested and implemented an array of interventions throughout Africa. Penal Reform International has compiled a useful catalogue of 'good practices' in reducing pre-trial detention, drawn from actual experiences in Africa.[20] The criteria used in selecting 'good practices' include those that are relatively inexpensive to implement, make a significant impact, involve partnerships between governments and civil society, catalyse reform processes and change institutional attitudes, conform to international human rights norms, seek to assist the vulnerable and poor, and are transferable from one country to another (Stapleton 2005a).[21]

- In Kenya, Malawi, Tanzania and Uganda case-flow management committees and court-user committees identify bottlenecks and propose solutions to problems and inefficiencies in the criminal justice process at the local, regional and national levels. The committees also identify cases which can be diverted from the formal justice system.
- In Senegal the General Inspectorate of the Judiciary, in collaboration with a local research NGO, designed software which alerts judges and prison officials every time a detainee remains incarcerated beyond the stipulated remand period.

- In Angola graduate lawyers interview arrestees at police stations and provide legal assistance to those detained illegally.
- In Benin, Kenya, Malawi, Tanzania and Uganda paralegals offer legal advice and assistance to those in conflict with the law in prisons, police stations and at court. This has resulted in an improved case flow, a judiciary which visits prisons more frequently to screen the remand caseload, and a sensitised police force that is less likely to detain offenders on remand pending lengthy investigations.
- In Namibia and South Africa an increasing number of juveniles are diverted, thereby avoiding standing trial and spending time in pre-trial detention.

Many of these reformist impulses are abetted by international legal and technical assistance of various sorts. It needs to be recognised, however, that the inventory of ready solutions, promoted by international donors and law reform specialists, to many of the problems in pre-trial detention is small, often highly specific and usually expensive. The history of specific legal transplants, whether in the form of statutory borrowing, constitution writing, or the adoption of international legal covenants, is full of instances of poor 'portability' and 'post-operative' complications (Watson 1974; Ajani 1995; Damaska 1997). Remedies devised for problems in one country are rarely transferable to others. Placing awaiting trial juveniles into the care of their parents or close relatives, for example, might not work in countries where extended family or social-support structures have been ravaged by civil war or HIV/AIDS. The reduction of backlogs through technologically advanced judicial administration or electronic case management tools, to take another example, might not work in countries where the supply of electricity is erratic or where most courts and prosecutors' offices have no functioning telephone, let alone access to email communication.

One way of constructing interventions to improve a country's pre-trial detention regime that is both politically acceptable and has the potential to encourage change is to identify virtues in current or past practices. In most, if not all, countries, there are practices worth replicating. Even in systems with horrendous prison conditions, excessive detention and lengthy processes, some cases are completed in a timely manner and some accused persons are treated fairly. Within the existing repertoire and capacity of states to administer criminal law, in other words, there is the potential for good justice. Identifying those practices as the norm and converting them into a standard that the system can, at least in some cases, achieve, will set realistic expectations about change that will have domestic champions and support (Foglesong 2002).

Complicating efforts at reforms designed to bring about lasting change is the fact that pre-trial detention has no single owner or respondent. In almost all countries, several different agencies can authorise first arrest and then detention. The population of detainees, accordingly, is created collectively, through the actions and interactions of multiple actors and agencies. Slow processing as well as inappropriate initial detention decisions result, typically, from ineffective interagency cooperation. They

are always aggravated, but not necessarily caused, by limited resources. Injustices, whether deliberate or unintentional, can either be rectified or compounded by subsequent decisions. Problems with custody are thus the common 'property' of the state, not the liability of any one agency. This perspective, a holistic approach to custody, may help to formulate a comprehensive and dynamic understanding of pre-trial detention and, thus, the design of more fruitful interventions.

The World Bank supports a holistic approach to criminal justice reform which is equally applicable to transforming the way justice systems deal with pre-trial detention. In a 2003 report on judicial and legal reforms, the bank concludes:

> Experience by other donors reveals that a reform effort focused on criminal justice cannot ignore the multiple organizational actors involved. If only the courts, or only the police, are improved, the result is likely to be a counterproductive imbalance, which in the end may encourage new problems on the part of the reformed entity. Not only is it important to work with all the actors in the criminal justice chain, it is also important to encourage coordination among them. (2003: 34)

A comparative study on foreign donor aid to the justice sector in developing countries by the International Council on Human Rights Policy (2000) also advocates a sector-wide approach – including strengthening links and improving coordination with civil society bodies – for effective criminal justice reform.

Conclusion

In no country is it easy consistently to make fair and effective decisions about pre-trial detention. Deciding to place in custody an individual suspected of committing a crime is a difficult and usually complex process. The ability to make appropriate decisions requires not only good laws but also good government, stable institutions, well-trained and conscientious legal officials, adequate criminal justice resources and an informed public.

The scale and sources of pre-trial detention problems and their solutions in Africa – as in many other regions – are highly varied. For example, some problems with pre-trial detention are truly grave, with thousands of people in dangerous and sometimes lethal conditions of custody. Other problems with pre-trial detention are moderate, in which smaller numbers or certain kinds of people are mistreated, inadequately supported or harmed more than is intended. Reforms to pre-trial detention can be ambitious, involving the replacement of entire codes of law and the building of new public institutions. Other reforms are modest, seeking mainly to make the current system work more effectively and less harmfully. There is also great diversity in the organisation of pre-trial justice systems, the types of legal rule that govern detention, and the character of the socio-economic and political conditions in which they operate.

A key impediment to identifying problems and devising solutions in the pre-trial detention field in Africa is a widespread dearth of reliable and useful information. Official data about detention are often inaccessible, or there exist justified doubts about their veracity and utility. Even where access to government information is possible, the official data can be skimpy or unhelpful. Official systems of recording decisions about pre-trial detention do not typically contain information that facilitates the detection of problems, their diagnosis, or the tracking of progress in their reduction.

To foster lasting solutions to many of Africa's varied pre-trial detention problems, it is crucial to produce new and reliable knowledge about pre-trial detention on the continent, and to reframe or redefine the problem of pre-trial detention as a human rights problem through the dissemination of such knowledge.

New and independent knowledge about pre-trial detention may be more credible to the public and less easily dismissed than government data. This may be especially true of knowledge that comes from non-state sources and is based on individual and personal experience. Estimates of the scale of problems in pre-trial detention based on statistics and aggregate data, as well as inferences about the sources of such problems, are often contested by academics and government researchers. But public officials may be less likely and under less pressure to deny reports based on experiences because the results might not directly contradict government accounts and might comfortably stand alongside official data.

Producing new knowledge will also broaden the size and profile of the audience that cares about and can participate in reform. As long as the discussion of reform to pre-trial detention takes place in the terminology of law and social science, the number of active participants and new ideas will be small. Locating the conversation about detention in terms of human rights, economic development, public health and effective public policy is a way to enfranchise populations and build constituencies.

Notes

1 Pre-trial detainees are prisoners who have been charged with a crime or crimes and are awaiting trial or the finalisation of their trial. The terms 'pre-trial detainee', 'unsentenced prisoner' and 'awaiting trial prisoner' are used interchangeably in this chapter.

2 International Covenant on Civil and Political Rights, available at <http://www.ohchr.org/english/law/ccpr.htm>, accessed on 11 June 2006.

3 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990, chapter 1, section C, paragraph 2(b).

4 UN Standard Minimum Rules for Non-Custodial Measures, adopted by General Assembly Resolution 45/110 of 14 December 1990, Rule 6, available at <http://www.ohchr.org.english/law/tokyorules.htm>, accessed on 11 June 2006.

5 ACHPR, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>, accessed on 17 August 2006.

6 The Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa.

7 The Ouagadougou Plan of Action, available at <http://www.penalreform.org/english/pana_plan.htm>, accessed on 9 April 2007.

8 The ACHPR adopted the Ouagadougou Declaration and Plan of Action on Accelerating Penal and Prison Reform in Africa at its 34th Ordinary Session held in Banjul, The Gambia, from 6 to 20 November 2003. See Pan African Conference on Penal and Prison Reform in Africa, available at <http://www.penalreform.org/english/theme_pana.htm>, accessed on 8 December 2006.

9 For example, Article 9(3) of the International Covenant on Civil and Political Rights stipulates that 'it shall not be the general rule that persons awaiting trial shall be detained in custody'. It is not clear how one could find practices in conflict with 'the general rule'. In few countries are more than half of all individuals charged with crimes placed in detention, and in countries where the 50 per cent mark is exceeded an increase in the total number of prosecutions alone could achieve compliance.

10 The data in this section are taken from Walmsley (2005a) and the International Centre for Prison Studies (2007). The data cover 176 countries, of which 40 are African countries.

11 In descending order of occupancy: Lesotho, Angola, Niger, The Gambia and São Tomé e Príncipe.

12 Advocates Africa, Nigeria, available at <http://www.advocatesinternational.org/pages/global/africa/nigeria.php>, accessed on 12 March 2007.

13 Estimate of the State Counsel in the Law Officers Department in Freetown, November 2003, as cited in James-Allen (2004).

14 Report of the Working Group on Prison Reforms and Decongestion (February 2005: 292). The report also found that 36 per cent of sentenced prisoners were incarcerated because they could not pay the fine imposed on them.

15 In late 2006, US$1 was equivalent to approximately R7.

16 Michael Wines, 'The Forgotten of Africa, Rotting Without Trial in Vile Jails'. *New York Times*, 6 November 2005.

17 Twentieth Asian and Pacific Conference on Correctional Administrators, Prison Statistics, Asia and the Pacific 2000 (November 2000), available at <http://www.apcca.org/Pubs/20th/appendixG.htm>, accessed on 8 August 2006.

18 Report of the Working Group on Prison Reforms and Decongestion (February 2005: 292).

19 For a discussion of the financial, social, legal and psychological costs associated with pre-trial detention, see Fitzgerald and Marshall (1999: 5–7).

20 All the examples are taken from Stapleton (2005a).

21 For a discussion of the challenges donors and African governments need to overcome to engage in effective criminal justice reforms, see Piron (2006: 281–297).

6 Children in African prisons

Julia Sloth-Nielsen

This chapter covers two discrete sectors of the prison population: children accused of committing offences or sentenced to serve a period of time in prison and young children and infants in prison with their mothers. The chapter refers only very briefly to the latter category of children. Primarily, the subject of children in conflict with the law will form the basis of discussion. 'Children', for the purposes of this work, are defined as persons below 18 years of age, a definition consistent with those contained in the UN Convention on the Rights of the Child (CRC) (1989) and the African Charter on the Rights and Welfare of the Child (OAU 1990: Articles 1, 2).

In the first section, this chapter examines the prevalence of child imprisonment in Africa. A brief synopsis of the international legal regime governing child detention in prisons follows. Against this backdrop, the third section describes common themes relating to prison conditions for both sentenced children and those awaiting trial. The fourth section describes positive developments concerning the incarceration of children in the African context, focusing on recent legal reform initiatives designed to minimise the use of imprisonment for children. The final section briefly reviews the case of children in prison with their mothers.

The prevalence of children in African prisons

Children in prison in Africa form a fairly small portion of overall prison populations. There are countries, according to the best available data, where there are no children in prisons, including Egypt and Botswana.[1] However, this is probably totally misleading, as a legal practitioner from Botswana, regularly called upon to provide legal representation for incarcerated children in the capital Gaborone, has confirmed the presence of children in prisons there. In other regions, the numbers of children expressed as a percentage of the prison population generally range between 0.5 per cent and 2.5 per cent, with Namibia's child prison population constituting the highest proportion in Africa at 5.5 per cent.[2] In Burkina Faso, for instance, in 2001 children constituted 2.4 per cent of the prison population of 2 800, that is 68 children. Similarly, of the 11 379 prisoners in Ghana in 2002, 1.3 per cent (or 148) were children. In Uganda, the Human Rights Commission found 173 children in prison in 2003, following legislation adopted in 1996 (Uganda Children's Statute) which outlawed completely the use of imprisonment for children

(Odongo 2005: 391). In Mali, according to a 2004 report on the situation of Malian children drafted by the National Documentation and Information Centre on Women and Children, 72 children were placed under a committal order.[3] In Somalia, increased incarceration of juveniles has been facilitated by the request of families to have their children disciplined (US Department of State 2006).

There are, however, other examples which indicate that, despite the small proportion of prison populations, the actual number of children in prison is significant. A recent estimate suggests that more than a million children languish behind bars internationally (Defence for Children International 2006: 9). Thus, although child prisoners in South Africa represent only 1.9 per cent of the prison population of around 186 000 (as at 2004), this translates to 3 600 or more children, possibly the largest contingent of child prisoners in Africa.

Data on the numbers of children held in African prisons are not uniformly available and there are a number of countries on the continent for which this information is unknown, for example in Mozambique, Nigeria and Ethiopia. The existence of child offenders in prisons in these countries is nevertheless highly likely. A recent situational analysis confirmed the presence of children in prison in Mozambique (Save the Children Norway 2003; see also Ehlers & Mathiti 2003; Ehlers 2005). Similarly, a recent review of the juvenile justice system in Nigeria included site visits to prisons, which revealed a large number of children being held, often in detention with adults.[4] In its concluding observations in the third periodic report of Ethiopia, the UN Committee on the Rights of the Child highlighted the general lack of data on children involved in the justice system and also expressed specific concern over the large number of young children, including infants, in prison with their mothers.[5]

In an analysis of child prison populations in Africa, the point must be made that, due to the absence of birth registration and proper identification systems in most African countries, it cannot always be accurately determined who is a child and who is not. In addition, in some countries officials, such as police officers, augment the ages of accused persons to ensure that they can be legally detained. In Malawi, for instance, recent media reports show that some police officers – apparently to escape the long process of prosecuting juveniles – force child suspects to cheat their age so that they are tried and sentenced as adults (*The Daily Times* 27 September 2006[6]). Moreover, in Mozambique, where the legal minimum age of criminal capacity is 16 and the minimum age for imprisonment is 18, those detained and sentenced to imprisonment are frequently officially recorded as being 18 years or older, despite their obvious tender age. In October 2003, a consultation in two Mozambican prisons revealed that of the 20 children interviewed, 60 per cent were 17 years of age, 30 per cent were 16 years of age, and the remaining 10 per cent were younger than 15 years of age. A human rights activist working with prisoners in Uganda confirmed the prevalent practice of inflating children's ages (pers. comm., Jamil Majuzi, 22 September 2005).[7] A comprehensive research survey of the juvenile justice system in Nigeria found:

> [I]n order to accept young persons into the prison the police have designed an ingenious means of circumventing the problem [namely the absence of a borstal or remand home within or around the territory] by exaggerating or falsifying the ages of the suspects who are juveniles so that they can be remanded in prison custody. This was corroborated by the finding of the relatives. Most of them actually confirmed that their ages were exaggerated, others said they were compelled to exaggerate their ages and when they refused to do so the police just inserted any age above 20 years for them. (CRP 2003: 110–111)

The effect of this reality is that, in all probability, available statistics regarding children detained in prison in Africa significantly under-report this segment of the prison population. That we do not know how many children are detained in prisons is exacerbated by the failure of prison authorities to identify and classify child inmates separately and by the overall poor quality of data on prison populations in Africa generally.

In a number of countries, children are detained in special juvenile facilities, which are sometimes managed by prisons departments.[8] In Swaziland, for example, children on remand or sentenced children are held at the Juvenile Industrial School, a facility which falls under the auspices of the Department of Correctional Services (see Gallinetti 2004). As of 10 September 2004, 38 children were accommodated at the school for offences ranging from housebreaking and theft to murder. They serve a maximum of two years before being released. Similarly, in Lesotho sentenced children are held in a separate institution, the Juvenile Training Centre, which is on the same grounds as the central prison in Maseru and whose staff comes from the prison ministry (Malea & Stout 2003). The South African Department of Correctional Services has a slightly different arrangement, having designated one or more youth correctional facilities in each province to accommodate sentenced persons aged between 16 and 21 years. Since these establishments, although separate, are nevertheless prisons, their inmates form part of the overall statistical records that this department keeps, and are therefore included in this study.

It can be concluded from the above that it is difficult to obtain reliable statistical evidence portraying the extent of child incarceration in prisons in Africa. It comes as no surprise, therefore, that the 'number of children in detention' has been regarded as one of the four core indicators for measurement of a country's juvenile justice system by UNICEF (the United Nations Children's Fund) and the United Nations Office on Drugs and Crime (UNODC) (UNODC/UNICEF 2006). It appears, though, that even applying this indicator could pose problems in many jurisdictions.

International standards applicable to children in prisons

International law governing the detention of children generally, and detention in prison specifically, is well developed.[9] The first important principle, established in the 1995 Standard Minimum Rules for the Treatment of Prisoners (SMR) (Rule 8)

and thereafter confirmed in numerous international documents, relates to the compulsory separation of children from adults whilst in prison.[10] This applies to pre-trial detention as well as to any imprisonment for the purposes of serving a sentence. The Commentary to the UN Standard Minimum Rules for the Administration of Juvenile Justice (1985; hereafter the Beijing Rules) explains that the motivation for this principle lies in the danger of contamination of young people by adult offenders, and that children in prisons should not be detained in circumstances where they are vulnerable to negative influences from adult detainees.

A second cardinal principle, articulated first in the 1985 Rules for the Administration of Juvenile Justice and thereafter elevated to a principle of international law in the UN CRC, requires that any form of deprivation of children's liberty be used as a matter of last resort and, when so used, it must be for the shortest appropriate period of time. That this principle applies to deprivation of liberty in institutions other than prisons – borstals, remand homes, secure care facilities and reform schools – has been confirmed by the Committee on the Rights of the Child, the body which receives country reports on the implementation of the CRC.[11]

A third key principle affecting pre-trial detention of children specifically is the right to a speedy trial. This right is reflected not only at the international level via Article 10(2)(b) of the International Covenant on Civil and Political Rights, but also has been rendered of special significance to children deprived of their liberty in Africa through the right to a speedy trial provided for in Article 17(c)(iv) of the African Charter on the Rights and Welfare of the Child.[12] The relevant text provides that every child accused of infringing the penal law 'shall have the matter determined as speedily as possible'. This entails a pace that is over and above that applicable to adults, according to Chirwa (2002).[13]

Fourth, the prohibition against torture and other forms of inhuman and degrading treatment or punishment is to be found in a wide range of international human rights instruments[14] and is regarded as constituting *ius cogens* (peremptory provision) in international law. As regards children in prison in Africa, it is worthy of mention that the African Charter on the Rights and Welfare of the Child refers to this prohibition expressly in the context of children who are detained, imprisoned or otherwise deprived of their liberty,[15] which may indicate that the drafters were aware of the special risks to physical integrity faced by children deprived of their liberty in this context.

Fifth, mention must be made of the standards set in international law concerning deprivation of liberty. The CRC lays the basis for the approach that requires that any deprivation of liberty, and indeed the juvenile justice system as a whole, must aim to promote the child's sense of dignity and worth, to reinforce the child's respect for the human rights and fundamental freedoms of others, and to promote the child's reintegration into and assumption of a constructive role in society.[16] While the principle may find a wide array of applications in relation to different facets of the administration of juvenile justice, it is of special note in relation to incarcerated

children. The principle establishes the norm that the approach to children who have been recognised as having infringed the penal law must be aimed at rehabilitation and fostering a sense of accountability, and that a purely punitive system which does not entail reintegration and resocialisation is at odds with the required standard (van Bueren 1995; Sloth-Nielsen 2001b; Odongo 2005).[17] This principle has therefore been a key theme underpinning recent situational analyses that have formed part of research studies into the position of children in prisons in African countries. South Africa (Community Law Centre 1998), Mozambique (Save the Children Norway 2003), Malawi (PRI 2002b) and Nigeria (CRP 2003) all provide fairly recent examples in this regard. Lesotho's Juvenile Training Centre, in fact, provides no training or rehabilitation, and the facility is used only for the purposes of depriving children of their liberty, which is in conflict with the demands of international law (Odongo 2005).

Finally, and of specific reference to children deprived of their liberty, Article 37(c) of the CRC lays the basis for a consideration of the established conditions required for children in prison. The Article reads:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes account of the needs of a person of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered not in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

This Article highlights the need for institutional treatment to take account of children's ages and stages of development – a need that the Committee on the Rights of the Child has pointed out on numerous occasions, consistently recommending training in children's rights for all those officials involved in any form of restriction of the liberty of children (Newell & Hodgkin 2002).

In addition to the above cardinal principles drawn from the mentioned treaties, a range of other international instruments give guidance on both conditions of imprisonment of children, and on the aims of the criminal procedural and penal processes that can result in pre-trial detention in prisons or the imposition of prison sentences. Thus, mention can be made of the Beijing Rules, referred to above, as well as the Standard Rules for the Treatment of Juveniles Deprived of their Liberty. Of recent status is General Comment No. 10 (Children's Rights in Juvenile Justice), which was released by the CRC Committee in February 2007. This Comment elaborates extensively upon the standards expected of States Parties in the sphere of juvenile justice, and includes numerous standards relevant to the deprivation of liberty. Owing to the level of detail available in these documents, these minimum standards cannot be dealt with at any further length in this chapter.

Prison conditions in practice

Many common themes emerge in the available literature on child detention in prisons in Africa that are equally relevant to adult prisoners. In this section, however, the particular concerns of a child rights perspective are detailed.

Unsentenced versus sentenced children

It is routinely reported that a preponderance of children in prison are awaiting trial rather than serving sentences of imprisonment. In Mozambique, for instance, one study found that 60 per cent of the children interviewed in two prisons were not convicted (Ehlers & Mathiti 2003: 58). As at September 2005, there were more children awaiting trial in South African prisons than those serving sentences; the latest data reveal that 53 per cent of children in prison are unsentenced (Muntingh 2005a: 8). A visit to the Rumbek Central Prison in southern Sudan in April 2005 revealed that approximately one-third of the prisoners were clearly children, and none had been convicted or, evidently, brought before a court.

Unfortunately, it is a reality that the right to a speedy trial, as described earlier, remains elusive. Children interviewed in Mozambican prisons had been awaiting trial for periods up to 10 months (Ehlers & Mathiti 2003: 59). A Nigerian study conducted as a prelude to overarching juvenile justice reform led to the discovery of children who had been awaiting trial for periods of between four and eight years – more than the time required to complete primary education (Gallinetti 2003: 10). The South African data indicate that lengthy pre-trial detention is a frequent occurrence, also indicated by the fact that there are more unsentenced than sentenced children in prisons. Studies undertaken in eastern and Central Africa (Kenya, Uganda and Malawi) confirm that inordinate delays in finalising cases are the order of the day.[18] Not only does this expose detained children to other, possibly more hardened, offenders for protracted periods, but the absence of the right to a speedy trial inevitably compromises the children's right to education, to quality legal defence and to reintegration into their family and community. A crucial element in ensuring that deprivation of liberty is 'for the shortest appropriate period' must involve expediting the machinery of justice to ensure faster processing of cases involving children.

Status offences

Research and fieldwork has exposed the reality that many children are imprisoned for petty offences that do not warrant the deprivation of liberty at all.[19] Thus, in Mozambique, although 40 per cent of the children consulted in the 2003 study were charged with serious offences, 25 per cent were detained for trivial offences such as vagrancy or not possessing identity documents. In southern Sudan, children found in prison were allegedly 'picked up in the market square for begging and loitering' (pers. comm., head of Rumbek Central Prison). One commentator notes that the use of imprisonment for children in these instances is linked to increasing

urbanisation across Africa, and to state and municipal responses to rising numbers of street children (pers. comm., Save the Children Sweden, Kenya office; see also Odongo 2005). Undoubtedly, the impact of HIV/AIDS in this equation cannot be discounted, as children are increasingly being orphaned or abandoned and having to migrate to cities in search of food and care.[20] It has been strongly argued that the arrest, detention and imprisonment of children who are actually in need of care and protection, rather than of being accused of specific offences, runs counter to international legal principles.[21] It is also, obviously, poor management, as these children contribute to the general overcrowding that pervades prisons in Africa.

Even more disconcerting is the widespread use of detention for status offences, that is, offences for which adults could not be charged or convicted. 'Truancy' and 'being beyond parental control' constituted the grounds for depriving children of their liberty in 60 per cent of the examples found in a Nigerian study conducted in 2003. Similarly, Odongo (2003) notes that in the context of the implementation of the 2001 Kenyan Children's Act and the establishment of a pilot juvenile court in Nairobi, 70 per cent of the children arrested by police were welfare cases, in other words, in need of care and protection, rather than having committed an offence. The Committee on the Rights of the Child has condemned the use of penal procedures for status offences.[22] In relation to Egypt's second report, for instance, the Committee responded that 'status offences such as begging and truancy…are in practice criminalised' and recommended the repeal of these laws.[23]

Separation of children from adults in detention

Many countries do not separate children from adults in prison. Djibouti is one example (US Department of State 2006). Ethiopia, which has only one juvenile home, which can accommodate only 150 children, is another (see Quere 2005). In Nigeria, in practice, women and juveniles are held with male prisoners, especially in rural areas (US Department of State 2006). In Tanzania, even though the Prisons Act 34 of 1967 requires prisoners to be separated based on age and gender, female prisoners are held separately from male prisoners but juveniles are frequently not separated from adult prisoners during the day due to a lack of juvenile detention facilities in the country (US Department of State 2006).[24]

Thus, widespread violation of this well-established international norm prevails. The question of how to address the matter, however, is less clear-cut. One possibility is to commission separate facilities to accommodate sentenced or detained children or to allocate portions of existing facilities to be used exclusively for children. This has, to some extent, marked developments in South Africa since 1996, as provincial Departments of Social Development have been confronted by escalating numbers of children in pre-trial detention and have established secure care facilities for this purpose. In Swaziland and Lesotho as well, separate accommodations, which fall under the auspices of the respective prison administrations, ensure the separation of (male) children from adults. In a variety of African countries, alternative

rehabilitation facilities exist; they are not administered by prison departments and frequently date back to colonial times. Mention should be made of Zambia, South Africa, Ghana, Ethiopia, Uganda and Kenya to illustrate this point. As indicated in the introduction, a review of the efficacy and conditions in these facilities will not be dealt with in this chapter. However, the establishment of such facilities can altogether obviate the need to resort to the imprisonment of children, an issue which is returned to later.

The question that then arises is, in the absence of such facilities during the pre-trial stage or when children are convicted of serious offences for which a prison term is possible, how should developing countries confront the need to separate children from adults? As pointed out above, in many countries in Africa the actual numbers of children subjected to imprisonment are very low, which forces the question of whether it is desirable for governments to devote (not insubstantial) resources to erecting facilities for imprisoned children.[25] Competing accommodation demands for other vulnerable groups, such as AIDS orphans, abandoned children and so forth, must surely be kept in mind. In relation to Mozambique, for instance, researchers undertaking a review of child laws contested proposals suggested by a donor to build a juvenile prison at vast cost because of the apparently low numbers of children in prison in the country and because of the far more urgent need to cope with the HIV/AIDS pandemic (Sloth-Nielsen & Gallinetti 2004b). Ideally, the answer is to promote alternatives that obviate the need for juvenile prisons or places of detention to the extent possible. This theme will be addressed again later.

Overcrowding and physical conditions of imprisonment

As with adult prisoners, children are frequently detained in extremely overcrowded conditions which violate their right to dignity and are not in accordance with the best interests of children. In Mozambique, children explained that there were not enough beds and that they were crammed into cells with 41 people. Generally, cells are small and poorly ventilated. In South Africa, juvenile prisons continue to experience severe overcrowding. Investigations carried out by the Law Society of South Africa in commemoration of Human Rights Day confirm this.[26] At the Krugersdorp Prison, it was recorded that 'the juvenile section was grossly overcrowded…up to 97 young persons were sharing a communal cell and there was hardly any space to put one's foot' (Law Society of South Africa 2004: 17). In a Nelspruit prison, appalling conditions were found; 55 children shared a cell with a maximum capacity of 28. The cell could not accommodate enough beds or bunks for all of the inhabitants. Overcrowding is, of course, a common problem for African prisons in general, but it is arguable that overcrowding compromises a whole gamut of children's other rights and needs,[27] to the extent that it may threaten the child's rights to survival and development, a pillar of the CRC.

The sexual abuse of children in South African prisons has been well documented. The 1997 situational analysis of children in prison in South Africa noted that

rape and forced sodomy were major problems in youth prisons (Community Law Centre 1998), a fact exacerbated by the dominance of prison gangs in South Africa. In 2005, in Liberia, it was reported that as there were no separate facilities for juvenile offenders, they were subject to abuse by other inmates (US Department of State 2006).

Reports of similar occurrences have been received in respect of Namibia and Botswana. In relation to Mozambique, it has been noted:

> The research report shows more reports of sexual abuse [in one prison than in the other]…Participants attributed this to the fact that adults have access to them during the day. In addition to sexual abuse, the participants reported that they were often forced to clean the latrines and cells for the adults…In instances of sexual abuse and forced labour, food is usually used as the bargaining tool. (Ehlers & Mathiti 2003; Ehlers 2005: 115)

In this context, children's rights to protection come to the fore, in particular their rights to be free from abuse, neglect, maltreatment and degradation.[28] It has also been pointed out that these rights are immediately enforceable and not subject to resource constraints or progressive realisation (see Sloth-Nielsen 2001a).

Nutrition and healthcare

Across Africa the nutrition available to incarcerated children is frequently poor or non-existent. In Mozambique children reported receiving decaying and maggot-infested food (Ehlers & Mathiti 2003). In Rumbek, southern Sudan, no food is provided unless prison administrators dig into their own pockets. In Gabon it is reported that food, sanitation, and ventilation were poor, and medical care was almost non-existent (US Department of State 2006). Implementation of the right to adequate healthcare is largely lacking altogether and, as has been documented in South Africa,[29] children are especially vulnerable to infestations of lice, scabies, tuberculosis and assorted other maladies and illnesses. Owing to the fact that children are still developing physically, the lack of adequate nutrition and healthcare may disproportionately affect their growth and potential to develop properly as adults.

Education and access to programmes

Children consulted in two prisons in Mozambique reported that there was a dire lack of educational and recreational facilities in both prisons (Ehlers 2005). In South Africa, the position is extremely uneven – some prisons have full-time schools that provide schooling up to Grade 12, some training, and some vocational skills programmes, whilst in other instances the provision of education or vocational training has been described as 'totally inadequate' (Law Society of South Africa 2004: 12). In Sierra Leone, juvenile detainees do not have adequate access to education or vocational training (US Department of State 2006).

Children in prison in Lesotho, however, do receive vocational training as well as basic literacy skills. In Swaziland, where, according to one report, 38 children were detained in the juvenile prison facility, the NGO Swaziland Association for Crime Prevention and the Reintegration of Offenders provided life-skills programmes and the children attended school in the mornings (Gallinetti 2004). Overall, there appears to be a dire need for effective reintegration programmes for children deprived of their liberty in African prisons, for programmes that are tailor-made for children[30] and that include appropriate educative interventions.

Positive aspects of African approaches to incarceration

Although the situation for children who are in prison in Africa is extremely bleak,[31] there are a number of positive developments, good practice examples and other features of African initiatives regarding incarceration that are worthy of mention. These include the development and growth of diversion, legislative reform in the child law sphere, a notable tendency to focus broader criminal justice reform projects around child- and youth-related issues, and increasing regional and continental collaboration in sharing promising practices. These will each be discussed briefly in turn.

Diversion, which channels children away from formal court procedures, is mandated by Article 40(b) of the UN CRC, which has elevated this developing practice to a norm of international law. Diversion is premised on the avoidance of incarceration, both in pre-trial phases and as a possible sentence. The practice has been given a regional stamp of approval by way of references to the need to promote diversionary alternatives for juveniles contained in the Ouagadougou Plan of Action adopted at the second Pan African Conference on Penal and Prison Reform in Africa in 2002.[32] Although the use of diversion has been most frequently articulated in the South African context thus far (see for example Sloth-Nielsen 2001b; Wood 2003; Sloth-Nielsen & Gallinetti 2004a), promising initiatives can be found elsewhere on the continent. Namibia piloted diversion programmes starting in the early 1990s, for instance, and by 1999 diversion was available in nearly every district in the country (Mukonda 1999). Diversion is at the centre of the Zambian 'child-friendly courts' project (described in Sloth-Nielsen & Gallinetti 2004a; see also Muntingh 2005b) and is advocated for juveniles in numerous community service programmes introduced on the continent.[33] Diversion projects in Kenya, among other things, are serving to decongest government institutions, as children are repatriated to their families when they come into contact with the law.[34] Diversion training was initiated in Ethiopia as part of a criminal justice review process, and the author was commissioned to provide training on diversion to the judiciary in Somaliland in 2006.

In connection with diversion, a point worthy of mention is that children in conflict with the law may be dealt with via customary law or traditional structures, especially in rural areas, and thus may not end up in prison. A good example can be found in Malawi, where community-based programmes, such as the Community Crime

Prevention Committees, are promoted as part of a return to traditional ways of dealing with children's issues in a restorative manner. When a child from the community comes into conflict with the law, the Community Crime Prevention Committee tries to solve the matter within the community itself without resorting to police or prison officials (McCarney 2006). Lesotho is another country in which restorative justice alternatives are promoted to reduce reliance on incarceration.

Law reform throughout the continent in the area of child justice, as well as in relation to childcare and protection, holds considerable promise for reducing child detention in prisons. Starting with Uganda in 1996, a veritable wave of legislative review projects was completed or is currently underway throughout the continent. Limiting the use of imprisonment in accordance with the principles of the UN CRC is common to all these endeavours. Two examples illustrate the extent to which legislative reform can be regarded as a key strategy to limit institutionalisation. First, Ghana's 2003 Juvenile Justice Act (No. 653) and the Kenyan Children's Act No. 8 of 2001 completely prohibit the use of imprisonment for juvenile offenders, requiring instead that custodial sentences be served in alternative institutions, such as borstals or juvenile correction centres, and provide maximum time limits on such deprivation of liberty (see Odongo 2005). Second, in what can be held up as a best-practice model, the Lesotho Child Care and Protection Bill of 2004 not only details an impressive array of community-based, restorative justice alternative sentencing options, but reinforces this by requiring a minimum age of 16 for any sentence which confines a child.

In addition, where deprivation of liberty is permitted, there exists a commendable practice of putting a limitation on the maximum length of imprisonment to be imposed on children. For instance, in Mali, life imprisonment for children is restricted to 10–12 years in prison.[35] In Burundi, the maximum imprisonment period for a child cannot exceed 10 years (African Child Policy Forum 2006a). In Comoros, a child between the ages of 15 and 18 cannot be sentenced to more than half of what an adult would have been sentenced to (African Child Policy Forum 2006b).

Third, where broader criminal justice reforms have been initiated, juvenile offenders have frequently been identified as key beneficiaries. Nigeria provides an excellent example, as the juvenile justice review took place within the framework of a broader criminal justice reform process. The same occurred recently in Ethiopia (Mezmur 2006).

Fourth, a marked tendency in this millennium towards increased regional cooperation and sharing of best practice in the child law area, particularly in relation to the child justice sphere, can be identified. The Lesotho law reform process was accompanied by site visits to Ghana and South Africa. Role-players from Ethiopia and southern Sudan have, in turn, visited Lesotho. Diversion training has been effected on a regional basis, marked by the sharing of skills and lessons learned (see Sloth-Nielsen forthcoming). In Kenya, visits to Egypt preceded the drafting of the Children's

Act No. 8 of 2001. Zambian and Mozambican delegations visited South Africa to develop diversion skills in 2005 (pers. comm., UNICEF, Zambia, Project officer, October 2005). Although regional support is not solely aimed at addressing the plight of children in prison, the overall thrust, aimed as it is towards enhancing access to diversion, will surely have a positive impact on rates of imprisonment and conditions of detention.

The above factors indicate that there is reason for optimism regarding the incarceration of children in the African context and that juvenile justice may not in future be the stepchild of children's rights programming that it is elsewhere in the world (Abramson 2001).

Children of imprisoned mothers

Unfortunately, there are those children who end up living in prisons despite never having committed – or having been accused of – a crime. This is the case for children living with a convicted or detained parent, particularly their mothers (LICADHO 2002). While the number of children living with incarcerated parents is not extraordinarily high, it is neither uncommon for children to accompany their mothers to jail nor for women to give birth during their time in prison. For instance, in Djibouti in 2005, it is reported that children under the age of five were sometimes allowed to remain with their mothers (US Department of State 2006). In Burundi during 2005, according to the Ministry of Justice, 7 969 persons were held throughout the country, of whom 39 were children accompanying their convicted mothers (US Department of State 2006).

Article 30 of the African Charter on the Rights and Welfare of the Child introduces a special provision that aims to protect the infants and young children of imprisoned mothers and the unborn children of expectant imprisoned mothers. This has been described as a unique feature of the African Charter (Chirwa 2002; Gose 2002), which finds no counterpart in the international Convention on the Rights of the Child, and has been ascribed to the fact that the mother is considered the primary caretaker in most parts of Africa (Gose 2002). Article 30 provides that:

> States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
> (a) ensure that a non-custodial sentence shall always be first considered when sentencing such mothers;
> (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
> (c) ensure that a mother shall not be imprisoned with her child;
> (d) ensure that death sentences shall not be imposed on such mothers;
> (e) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

The normative framework suggested in Article 30 mirrors that contained in the CRC,[36] insofar as both require compulsory consideration of alternatives to custody to ensure that deprivation of liberty is used only as a last resort. It can be deduced, furthermore, that this approach arises not from concerns for the mothers in question, but rather from apprehension regarding the potential for violation of the rights of the affected children.

An interview with a young female prison inmate in Nigeria, sentenced to imprisonment with her one-year-old baby, highlights the need for special measures of protection for this subset of prisoners:

> I feel very bad and the suffering is much, I have four [other] children. When they come to see me, the prison officers refused them to come in and see me. Her father [the father of the baby imprisoned with her] abandoned the whole family before I was accused and arrested. So presently my other four children are living under the care and supervision of our neighbours…My small baby is suffering because I do not have a means for getting her food; she normally takes custard and milk. The government should please provide baby food for this poor girl who has not committed any crime. (CRP 2003: 131)

Other female inmates interviewed in the same study alluded to poor health conditions for the detention of small children, leading to ailments such as colds, coughs, constipation, rashes and difficulty in breathing. They called for food, drugs, warm clothing and toys to be made available (CRP 2003).

In an interesting example of existing practice, the draft Zambian Constitution of 2005 (which did not pass a referendum, but may in future be reconsidered) contained a provision in the children's rights clause for the right of the child 'not to be incarcerated on account of the mother's incarceration'.[37] Usually, it is expected that infants and babies will be imprisoned together with nursing mothers, and the South African policy in this regard is fairly representative of the usual practice.[38] Section 20 of the Correctional Services Act (No. 111 of 1998) of South Africa provides that infants and young children may remain with their imprisoned mothers until five years of age, and that they preferably be accommodated in mother and baby units. The Correctional Services Amendment Bill No. 32 of 2007 seeks to lower the period of time that babies can stay in prison with their mothers to two years, but it is unclear whether this provision will be accepted. The current Act also spells out that the Department of Correctional Services bears responsibility for food, clothing, healthcare and facilities for the sound development of the child for the period that the child remains in prison.

A signal issue relating to the incarceration of nursing mothers in the African context is the criminalisation of adultery in some states (for example Sudan, Somalia, Ethiopia and Eritrea), a practice which not only violates equality and sexual autonomy rights, but is one which disproportionately disadvantages young women. Advocacy efforts

should focus on the decriminalisation of offences that offend the equality rights of women in this way.

Conclusion

Both categories of prisoner discussed in this chapter – children and infants imprisoned with their mothers and children imprisoned on their own – represent but a fraction of Africa's prison populations. Nevertheless, they constitute the most vulnerable groups, as international and regional treaty law has recognised. Moreover, as was discussed, their special needs are rarely recognised in the prison environment. However, in relation to children in conflict with the law, there are promising indications of reform efforts in law and in practice to minimise the deprivation of children's liberty in penal institutions. Where legislation to give effect to a child rights-based juvenile justice system is still under discussion or in draft form, as in Lesotho, Namibia and South Africa, advocacy initiatives should focus on getting these laws passed as a prelude to institutional reform.

Notes

1 This is based on figures given for 2002 and 2004 respectively (available at <www.kcl.ac.uk/deptsta/rel/icps/worldbrief/africa.html>, accessed on 13 September 2005). The International Centre for Prison Studies records that, in Egypt, 673 children were detained in Punishment Institutes, of which there are 28 such facilities with accommodation for 883 inmates. This does not mean that the situation in Egypt is a shining example for other countries – a 2002 study by Human Rights Watch revealed flagrant use of torture and beatings administered to arrested children whose chief 'crime' was being deemed vulnerable to delinquency, that is, for begging, truancy and homelessness (see Human Rights Watch, available at <www.hrw.org>, accessed on 27 September 2005).

2 5.5 per cent of a prison population of 4 814 in 2001, that is, around 260 children (see <www.kcl.ac.uk/depsta/rel/icps/worldbrief/africa>, accessed on 13 September 2005). This authoritative source does not detail whether these figures relate only to children in trouble with the law or whether they include children and infants in prison with their mothers, although it is likely that the latter category are not included. This deduction is based on the South African statistics, with which the author of this chapter is very familiar.

3 Second periodic report of Mali by the UN Committee on the Rights of the Child, September 2005. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/419/56/PDF/G0641956.pdf?OpenElement>, accessed on 10 October 2006.

4 Sixty-eight institutions, including juvenile detention centres, police cells and prisons, were visited as part of this review (Gallinetti 2003: 10–11).

5 Concluding observations in third periodic report of Ethiopia by the UN Committee on the Rights of the Child, paragraphs 18 and 49. Available at <http://www.ohchr.org/english/bodies/crc/docs/co/CRC_C_ETH_CO_3.pdf>, accessed on 10 October 2006.

6 'Treat children as they are', available at <http://www.dailytimes.bppmw.com/article.asp?ArticleID=2611>, accessed on 27 September 2006.

7 Similar communications were made by a judge from the Ivory Coast during September 2006.

8 This chapter will not examine children deprived of their liberty in alternative institutions not managed by prisons or corrections departments, such as borstals, reform schools and the like (see Cappelaere et al. 2005).

9 For a comprehensive analysis of the international standards and UN bodies tasked with aspects of oversight in this area, see Cappelaere et al. (2005).

10 See the International Covenant on Civil and Political Rights, Article 10(2)(b), which provides that '[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication'. United Nations Convention on the Rights of the Child (1989) Article 37(c) provides, inter alia, that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so…' See, further, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985), Rule 13.4, and African Charter on the Rights and Welfare of the Child, Article 17. It has been noted, though, that a number of countries entered reservations to Article 37 of the Convention on the Rights of the Child, based on the impracticality of detaining separately small numbers of children. In the recent South African case of *S v. P* (unreported), expert evidence was presented to the court that the prison administration would not be able to detain a young girl of 14 years old convicted of murder separately from adult female prisons at the local facility, and it was argued that the imposition of a sentence of imprisonment would, in the circumstances, be unconstitutional (South African Constitution, 1996, Section 28(1)(g)). The sentencing court accepted, amongst other reasons, that the inability to separate the child from adult prisoners should be a consideration informing the choice of sentence and imposed a non-custodial sentence. On appeal, however, the Supreme Court of Appeal declined to explore the relationship between the imposition of sentence and the conditions under which it would be served. A non-custodial sentence was nevertheless imposed.

11 See, too, the definition of 'deprivation of liberty' contained in UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) Article 11(b).

12 The wording in this document is slightly different, and in my view stronger, than the text of the Convention on the Rights of the Child, which provided for the child's right to have the matter determined 'without delay' (Article 40(2)(b)(iii)). See, for a similar view, Chirwa (2002).

13 Chirwa also points out that the Human Rights Committee has taken the stance that the duty to bring a juvenile for adjudication as speedily as possible is an unconditional duty which is not dependent on the availability of resources.

14 See for example the International Covenant on Civil and Political Rights, Article 7; the UN Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which came into force on 26 June 1987; and various regional treaties in this regard.

15 African Charter on the Rights and Welfare of the Child Article 17(2)(a) requires State Parties to 'ensure that no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment of punishment'. The provisions of Article 37(a) of the Convention on the Rights of the Child (1989) also

constitute a ban on torture or other cruel, inhuman and degrading treatment or punishment, but do not expressly link this to children who are in prison or are otherwise deprived of their liberty. Since the remainder of Article 37 does indeed deal with deprivation of liberty, one line of reasoning might suggest that this be reasonably inferred in relation to Article 37(a). However, Detrick (1999) does not confine her discussion of the *travaux preparatoires* to children deprived of their liberty in her examination of this provision, which in turn suggests otherwise.

16 This is taken from the text of Article 40 of the Convention on the Rights of the Child, which in turn is based on the Beijing Rules for the Administration of Juvenile Justice.

17 See also African Charter on the Rights and Welfare of the Child, Article 17(1), which provides not only that children have the right to special treatment under penal law but also that the essential aim of this treatment is the child's 'reformation, reintegration into his or her family and social rehabilitation'. It has been noted that underlying the idea of 'treatment', therefore, is the idea of restoring a child to his or her family and society (Sloth-Nielsen & Gallinetti 2004a).

18 See Odongo (2005: 347) and references cited there. A similar reason is provided for in the context of Ethiopia (see Quere 2005: 26).

19 In this regard, the Beijing Rules for the Administration of Juvenile Justice (1985) provide that a child should not be deprived of liberty unless convicted of an offence which is both serious and violent.

20 The Mozambique study found that 70 per cent of the children in the prisons that formed part of the study no longer lived with a parent (Ehlers & Mathiti 2003: 58).

21 Accordingly, the Committee on the Rights of the Child does not accept that deprivation of liberty should be used for children in need of protection. See, for a discussion of this jurisprudence, Newell and Hodgkin (2002: 552).

22 Status offences contravene the provisions of the Convention on the Rights of the Child, specifically Article 40(2)(a), which provides that 'States Parties shall ensure that no child shall be alleged as, be accused of or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time the were committed'.

23 Egypt, second Report to the Committee on the Rights of the Child, Add. 145, paragraphs 53 and 54.

24 However, note should be taken that, as a good practice, the government considered prisoners between the ages of 18 and 21 'young prisoners' and required prisons to separate them from the older adult prison population at night.

25 In addition to building facilities, there are also concerns about staffing and maintaining them. This point is not made without authority: studies of children's alternative facilities in numerous African settings have found that remand homes, borstals, reform schools and such like, established often under colonial rule 50 years ago or more, violate the most basic children's rights standards due to their having disintegrated into a decrepit state; they are often without basic sanitation and a supply of clean water (pers. comm., A Skelton and LM Muntingh). In South Africa, instances have been recorded of newly built, but empty, alternative facilities for awaiting trial children, as the relevant departments did not have the necessary funds to employ staff.

26 This annual investigation and the resultant report compiled by the Law Society of South Africa has taken place since 2002.

27 Such as when overcrowding fuels the spread of infectious diseases, as has been noted in juvenile cells in South Africa.

28 See Committee on the Rights of the Child, Article 19, and the South African Constitution, Section 28(1)(d).

29 In 2000, an action was launched in the Cape Town High Court concerning the conditions in the juvenile section at Pollsmoor Prison outside Cape Town, in which affidavits were attached concerning precisely these health issues by a medical doctor. The matter was, however, settled out of court, meaning that no definitive judicial ruling was recorded.

30 It has frequently been observed that children who come into contact with the penal system also lag behind educationally and that conventional pedagogic approaches require modification in the institutional context.

31 It must further be pointed out that there are even children facing execution in African prisons (Amnesty International, *Livewire*, October 2005).

32 The Ouagadougou Plan of Action, available at <http://www.penalreform.org/english/pana_plan.htm>, accessed on 27 September 2005. Paragraph 1 refers to the use of alternatives to prosecution, such as diversion in cases of minor offences, with particular attention to young offenders, and paragraph 5 refers to the need to 'promote specific juvenile justice laws and systematic use of alternatives to imprisonment to deal with young offenders'.

33 In regard to which Penal Reform International has played a key role. See <www.penalreform.org> generally, accessed on 18 October 2005.

34 Second periodic report of Kenya on the CRC (2006), available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3408905184302c72c12570b200472849/$FILE/G0545052.doc>, accessed on 10 October 2006.

35 Second periodic report of Mali on the CRC (2005), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/419/56/PDF/G0641956.pdf?OpenElement>, accessed on 10 October 2006.

36 Convention on the Rights of the Child, Articles 37(b) and 40(3)(b), as discussed earlier.

37 Zambian draft constitution (2005), at the time Clause 42(5)(l).

38 In relation to a survey conducted in South Africa in November 2004, based on interviews with 1 756 female prisoners, there were 192 children in prison with their mothers (see Inspecting Judge of Prisons 2004b: 5). Of these, 90 were younger than one year old and eight were older than four years. The report notes that 'the centres which cater for women prisoners were not designed for the special needs of women. The facilities for women with babies are inadequate. In general, babies and children tend to stay with their mothers in the cells…However there are exceptions to this rule where mothers with children were mixed in with the general prison population' (2004b: 12–13).

7 The imprisonment of women in Africa

Lisa Vetten

Sometimes a footnote in an article, occasionally the subject of a paragraph or two, usually women are invisible and neglected in the writing and thinking on imprisonment. They constitute the afterthoughts of many prisons, their facilities not only being tacked onto men's prisons, but also inadequate for the needs of pregnant women as well as those with children. While a body of feminist scholarship and theory challenging this neglect continues to develop in Europe, North America and Australia (see for example Carlen 1983, 1988; Worrall 1990; Howe 1994; Heidensohn 1996; Kruttschnitt & Gartner 2003), little comparable work has been undertaken in Africa as yet. Indeed, such a project is made difficult not only by the fact that the African continent is extremely diverse in its politics, history and culture, but also that African women are equally heterogeneous. The culturally-specific nature of imprisonment as a form of punishment, as well as the diverse legal systems to which women in Africa are subject (including indigenous African law, religious law such as *shari'a*, and colonial systems inherited from the British, Germans, French and Portuguese), complicate not only what is classified as criminal but also the forms that punishment takes. In addition, because political beliefs that run counter to the state result in detention in a number of countries on the continent, it follows that what is seen as 'deviant' is culturally and situationally specific and will influence whether imprisonment, detention or tolerance is the consequence of a particular behaviour. Consequently, theoretical models developed in the west cannot be uncritically transplanted into Africa and its very different set of conditions. Thus, rather than proposing a grand theory of women's penality in Africa, this chapter confines itself to bringing women to the fore by providing a descriptive situational analysis of their imprisonment across the continent.

Such a review is complicated by a range of factors, not least being the paucity of information in this area. Many African governments have neither the infrastructure nor the resources to gather and publish routinely data on imprisonment. Some governments also do not welcome scrutiny of their prison systems. Further, criminology is rarely taught in African universities (South Africa excepted), and the opportunities for academic writing and publishing are limited in many countries, particularly those which have gone through long periods of conflict and civil war. Articles and reports published in francophone or lusophone Africa are rarely translated into English, and vice versa. This chapter is, thus, biased towards what is available from the English-speaking countries. It relies on the few available writings

by women prisoners, reports produced by organisations working in the areas of law and human rights, as well as the reports produced by the Special Rapporteur on Prisons and Conditions of Detention in Africa. While some of the information is both dated and anecdotal, it does begin to sketch a picture of women's imprisonment across the continent and point to where further investigation is required.

The first section of this chapter enumerates, using what limited data are available, the percentage of women imprisoned in different African countries. It also describes conditions in women's prisons and highlights where these must be distinguished from those of men. The section concludes by examining these conditions against the standards set by the Kampala Declaration on Prison Conditions in Africa and the UN Standard Minimum Rules for the Treatment of Prisoners (SMR). Both the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child, while not specific to the needs of women prisoners' circumstances, nonetheless set out measures which could be usefully applied to women in prison. The second section of the chapter examines what leads to women's imprisonment and begins setting out some of the social factors associated with women's incarceration. The final section returns to the points made earlier about crime and punishment being culturally and situationally specific. It also examines other forms of social control to which women are subject which, while not imprisonment, appear to demonstrate many of the characteristics associated with punishment and imprisonment. The chapter concludes with some thoughts on how to challenge the conditions of women in prison as well as to advance their rights.

The imprisonment of women across the African continent

The combined rates of imprisonment of both men and women vary across the continent. The combined median rate for western African countries is 52 per 100 000 while in southern Africa it is 324. South Africa imprisons the greatest number of people (male and female, at 413 per 100 000) and Burkina Faso the least (23 per 100 000) (Walmsley 2005a: 3).

Table 7.1 sets out women's imprisonment as a percentage of the total convicted prison population. As the proportions show, imprisonment in Africa is an overwhelmingly masculine phenomenon and experience, as is the case in North America, Europe and Australia. However, it also points to some variations across countries in women's imprisonment rates. Consistent with its low imprisonment rate generally, Burkina Faso also imprisons the smallest percentage of women on the continent. South Africa, however, would appear to imprison proportionally fewer women than men, with the percentage of women imprisoned in South Africa appearing at the lower end of this table. In relation to women specifically, Mozambique would appear to imprison the greatest percentage.

Table 7.1 *Women's imprisonment as a percentage of the total convicted prison population in African countries*

Female prisoners as a percentage of the total prison population	Countries
<2.0%	Burkina Faso (1.0%), The Gambia (1.2%), Malawi (1.2%), Mayotte (1.2%), Seychelles (1.3%), Sudan (c 1.7%), Namibia (1.8%), Nigeria (1.9%)
2.0%–2.9%	Mali (2.0%), Republic of Guinea (2.0%), Ghana (2.1%), South Africa (2.1%) (DCS 2006a), Ivory Coast (2.3%), São Tomé e Príncipe (2.3%), Togo (2.3%), Chad (2.4%), Burundi (2.5%), Lesotho (2.5%), Rwanda (2.6%), Zambia (2.6%)
3.0%–3.9%	Democratic Republic of Congo (3.2%), Angola (3.3%), Libya (3.3%), Morocco (3.3%), Tanzania (3.3%), Zimbabwe (3.3%), Madagascar (3.4%), Uganda (3.4%), Benin (3.5%), Kenya (3.6%), Senegal (3.7%)
4.0%–4.9%	Egypt (4.3%), Swaziland (4.6%)
>5.0%	Cape Verde (5.0%), Botswana (5.0%), Mozambique (6.3%)

Source: Compiled from data provided by the International Centre for Prison Studies (2005c)

There is some suggestion that women's imprisonment may be on the increase. Between 1995–96 and 2002–03, women's imprisonment in South Africa increased by 68 per cent whereas that of men increased by 69 per cent (Vetten & Bhana 2005: 259). Botswana also reports increases in their female prison population, although no figures appear to be available to illustrate the extent of this increase (cited in Modie-Moroka 2003). In contrast, Namibia's female prison population has remained relatively constant (Odendaal 2004).

Conditions in women's prisons

Prison conditions vary across prisons as well as across countries. The conditions of remand, or awaiting trial prisoners, are often worse than those of convicted prisoners, and many may be detained for very lengthy periods before being tried. Although this is not consistently investigated in the Special Rapporteur's reports, there is also a suggestion that police cells may be more inadequate than prison cells. For example, the Special Rapporteur noted that conditions for women held at police stations in Namibia were very poor, with the example offered (Wanaheda police station) noted as being very small, with poor ventilation and no sleeping facilities. Women prisoners had to sleep on the floor or a bench (if fortunate enough to find one) (ACHPR 2001d).

In all countries there are also fewer women's prisons than men's. Where no separate women's prisons exist, women may be held with men (and not always separately) or in temporary or makeshift spaces such as in Lilongwe, Malawi. In March 1995, 23 women and five children were held in a corrugated iron hut built 30 years earlier as temporary accommodation. Gaps in the iron, covered with barbed wire, served

as windows (Stern 1998). The women's wing of the Masaka Prison in Uganda was created from what were originally punishment cells for men who broke prison regulations. The ventilation was poor and the premises cold, with most of the women having no blankets. The knowledge that they were being housed in punishment cells compounded the women's sense of injustice (Tibatemwa-Ekirikubinza 1999).

As is the case with men's prisons, women's prisons are overcrowded, although not to the same extent. According to the Special Rapporteur, overcrowding is a phenomenon in the Central African Republic, Benin, Namibia and Ethiopia (ACHPR 2000b, 2000c, 2001d, 2004b). Overcrowding is also reported in South Africa (Inspecting Judge of Prisons 2006) and Egypt (HRAAP 2004). The Thohoyandou Women's Prison in South Africa, for example, reported a 242 per cent occupation rate in 2005 while the Durban women's prison reported a 159 per cent occupation rate in the same year (Inspecting Judge of Prisons 2006: 16). In the Kirikiri women's prison in Nigeria, overcrowding was calculated at 130.47 per cent (Agozino 2005: 195).

Many other adverse conditions flow from overcrowding, including insufficient and inadequate bedding, leaving women to sleep on the floor in the Central African Republic (ACHPR 2000b), Egypt (HRAAP 2004), Namibia (ACHPR 2001d) and Uganda (ACHPR 2001e). Overcrowding also places a strain on sanitation facilities and ventilation and worsens hygiene, creating an environment conducive to ill health and diseases such as tuberculosis. For example, in the Kaduna Prison in Nigeria, 18 women were reported to be sharing two cells and a bathroom with no running water.[1]

Menstruation in prison

Menstruation is a fact of life for all women at some point in their lives. Generally, it is a private – even hidden – matter which women manage themselves without the involvement of others. Managing menstruation in prison presents a very different set of problems and is certainly neither private nor managed independently. First, as women imprisoned in Zimbabwe (Samakaya-Makarati 2003), Ethiopia (ACHPR 2004b), Malawi (ACHPR 2001c), Mozambique (ACHPR 2001b), Nigeria[2] and Uganda (ACHPR 2001e) highlighted, they do not have easy access to sanitary towels and must either depend on others to supply this basic need or improvise. In Ethiopia, women were provided with cloths that they were expected to wash and re-use (ACHPR 2004b), while in Zimbabwe, women used alternatives such as newspapers, tissues and pieces of blanket or prison uniform (Samakaya-Makarati 2003). Difficulties with menstruation were also compounded in both Zimbabwe (Samakaya-Makarati 2003) and Uganda (Tibatemwa-Ekirikubinza 1999), where women did not have panties to wear during their periods.

Where women do receive sanitary wear from prison authorities, it is not always sufficient, with women in one prison in Zimbabwe reportedly receiving one or half a pad per day (Samakaya-Makarati 2003). Women at Kaduna Prison in Nigeria stated

that one pad had to be shared between two women every month, or sometimes even every two months.[3] A former South African political prisoner also described how some guards might demand to see soiled sanitary towels before issuing any more (Schreiner 1992).

The disposal of used sanitary wear presents women with other problems, particularly when no toilets are available and open buckets must be used. Women interviewed in Zimbabwe spoke of how, once they had been locked up for the day, they chose not to change pads or use the bucket so as not to expose fellow inmates to the smell of blood. Buckets could also overflow and users become splashed with bodily waste when using them. These open buckets also posed a risk to babies who crawled about at night (Samakaya-Makarati 2003).

For all these reasons, the absence of sanitation facilities, toilet paper and soap presents particularly acute problems for women.

Pregnancy, birth and children in prison

The absence of adequate healthcare and medication is highlighted in the Special Rapporteur's reports for Benin, Mozambique and Namibia (ACHPR 2000c, 2001b, 2001d). It has also been raised by South African women (Haffejee et al. 2006a), women in Egyptian prisons (HRAAP 2004), as well as those in Nigeria.[4] While little detail is provided as to the nature of this lack, it must surely imply questions about the quality of care provided to pregnant women. Certainly, in relation to Botswana, Modie-Moroka and Sossou (2001) noted that the requirements for a healthy pregnancy, such as adequate nutrition, exercise, fresh air and reasonably sanitary conditions, were not being met. While there is no information saying how frequently it occurs, accounts do exist of women giving birth in cells in Mozambique (ACHPR 2001b) and Zimbabwe (Samakaya-Makarati 2003).

Children are imprisoned with their mothers in Benin (ACHPR 2000c), Ethiopia (ACHPR 2004b), South Africa (Inspecting Judge of Prisons 2006), Zimbabwe (Samakaya-Makarati 2003), Mozambique (ACHPR 2001b), The Gambia (ACHPR 1999b), Sudan,[5] and Uganda (Tibatemwa-Ekirikubinza 1999). In South Africa, where children may remain with their mothers until the age of five years, 68 children were imprisoned with their mothers in 2005 (Inspecting Judge of Prisons 2006: 16). While children may remain with their mothers until the age of 18 months in Ethiopia, a 2004 visit by the Special Rapporteur noted children as old as eight years in one Ethiopian women's prison – these children were not attending school (ACHPR 2004b). Children of school-going age who are imprisoned with their mothers in Sudan receive no schooling[6] while incarcerated either.

Tibatemwa-Ekirikubinza (1999) notes that while there is an obligation on the Ugandan government to provide prisoners with clothing, no such duty exists in relation to children. She observed that the children born to poor women in prison who also did not receive family assistance were particularly disadvantaged by this state of affairs.

Of further concern is the lack of nutritious food for women imprisoned in the Central African Republic (ACHPR 2000b), Benin (ACHPR 2000c), Malawi (ACHPR 2001c), Namibia (ACHPR 2001d) and Egypt (HRAAP 2004). Both pregnant and nursing mothers require special diets to remain healthy and well nourished, as do their babies. However, this was not the case for women imprisoned in Zimbabwe (Musengezi & Staunton 2003), Mozambique (ACHPR 2001b) or Uganda (ACHPR 2001e). In the case of Uganda, some babies appeared to be getting the same food as their mothers.

In at least two African countries, some male and female prisoners appear to be released from their prisons during the daytime in order to work, often in exchange for food. Children beyond breastfeeding age do not appear to have ready access to food in prisons in Sudan. The only way mothers could obtain food for their children was to work as water carriers for vendors in the local market in exchange for food.[7] Although this was not explored by the Special Rapporteur, this may also be the case in the Central African Republic (ACHPR 2000b) where the prisons do not provide food. Instead, women are expected to feed themselves out of money earned from working outside the prison. If women are unable to venture outside of the prison, they will have no food.

Children outside prison

Women remain the primary caretakers of children in most (if not all) African societies and the imprisonment of mothers is likely to cause considerable disruption and hardship to those children left outside prison. Children in both Zimbabwe (Musengezi & Staunton 2003) and Uganda (Tibatemwa-Ekirikubinza 1999) have been forced to drop out of school when the family members and/or other caretakers in whose care they were placed could not afford school fees. Rape, physical abuse and neglect of children placed in the care of others have also been recorded (Tibatemwa-Ekirikubinza 1999; Bhana & Hochfeld 2001; Musengezi & Staunton 2003). Ugandan (Tibatemwa-Ekirikubinza 1999) and South African (Bhana & Hochfeld 2001) studies suggest that the likelihood of such ill-treatment is aggravated when the children go into the care of someone related to the victim the woman has either killed or injured.

Interviews with 80 women imprisoned at six prisons in Botswana found that 39 per cent of the women's children were being cared for by their mother (the children's grandmother), 13 per cent by people to whom they were unrelated (including neighbours), 13 per cent by fathers, and 9 per cent by other relatives (Modie-Moroka 2003: 156).

In a study undertaken in all three women's prisons in the province of Gauteng, 37 per cent of children were being cared for by their grandparents and 28 per cent by another family member. A further 22 per cent had been placed in other care arrangements, including foster care. Children were least likely to be in the care of the women's male partners (13%). One in three women had not seen their children since

coming to prison, while one in 10 saw their children once a year or less. Eight per cent of women said they saw their children at least twice a year and 16 per cent saw their children every two or three months. Only one in 10 women saw their children weekly (Haffejee et al. 2006b: 3).

Visiting conditions do little to promote mother–child bonds either. In South Africa, the number and nature of visits a prisoner may receive depends on their categorisation and record of behaviour in prison. The number of visits and their duration are both limited. Visits take place in communal visiting areas that offer limited opportunity for private conversation, while overcrowding ensures that there is no play area for children. The 45 hour-long visits permitted in one year under these conditions are inadequate to sustain a solid relationship with one child, let alone any others the woman may have (Vetten & Bhana 2005: 264).

All these problems are compounded by the fact that because there are so few women's prisons, many women are held in facilities that are some distance from their families and other support networks. Travel costs may prevent family and friends from visiting regularly, if at all, leaving women not only isolated but also bereft of material assistance. This is particularly likely to be the case where prison authorities expect family members to provide prisoners with food, soap, toiletries and clothing.

The Gauteng study in South Africa found that one in three women was visited by her parents, 39 per cent by their siblings, 25 per cent by friends, and 24 per cent by others, including religious workers (Haffejee et al. 2006b: 3). Women imprisoned in countries other than their country of origin also complained of difficulties in receiving visits from their relatives, according to the Special Rapporteur reports for Ethiopia (ACHPR 2004b) and Malawi (ACHPR 2001c). Further, as foreign women in Malawian prisons pointed out, visiting times were too short considering the distances their families had travelled to see them.

Relatives and friends may also be deterred from visiting by the behaviour of prison authorities. The Special Rapporteur reports that in the Central African Republic (ACHPR 2000b), relatives were being charged for permission to visit. In Malawi, money visitors brought for inmates was taken by prison officials, and the mothers of juvenile prisoners were sexually harassed by the prison officers (ACHPR 2001c). The Human Rights Association for the Assistance of Prisoners in Egypt states that visitors were so humiliated by the body searches conducted by the prison staff that they did not want to visit the prisons again. The food brought for prisoners was also confiscated. Consequently, women whose families did not visit were forced to work for other prisoners in order to obtain money for food and medicines (HRAAP 2004).

Violence and abuse within women's prisons

According to the UN SMR, women should be kept separate from men, as juveniles are from adults (Rule 8(a) and (d)). This does not appear to be the case in a number of prisons, according to the Special Rapporteur. In the Central African Republic,

elderly men were incarcerated with women at Bouar Prison (ACHPR 2000b), while in some Ugandan prisons women were not separated from male prisoners during the day but only at night (ACHPR 2001e). In Natitingou Prison in Benin (ACHPR 2000c), women and men used the same toilet and shower facilities. Mozambique constructed a new women's prison in 1999 which should have kept male and female prisoners separate. This did not, however, always appear to be the case. At one women's prison, both men and women were held together in the same facilities, and although the inmates were segregated at night, the door of the women's cell could not be locked (ACHPR 2001b).

Women should not only be kept separate from men but should also ideally be guarded primarily by other women.[8] This appeared to be the case in both Ethiopia (ACHPR 2004b) and The Gambia (ACHPR 1999b), as well as in at least one prison in the Democratic Republic of the Congo (OMCT 2006). In most prisons in Namibia, women, men and juveniles were held separately from one another and female staff guarded women prisoners. This was not the situation in the police cells. There, while women were segregated from men, the women were guarded by male prison staff (ACHPR 2001d), and cases of police officers raping women prisoners have been reported (Odendaal 2004). Cases of police officers raping women in police cells have also been reported in South Africa (*The Star* 27 October 2005[9]), the Democratic Republic of the Congo (OMCT 2006) and Nigeria (Agozino 2005). Within the context of the conflict in Sierra Leone, accounts also exist of women being raped in a prison run by the pro-government militia, the Civil Defence Force.[10] In his report on the use of torture by law enforcement officials in Kenyan prisons, the United Nations Rapporteur on Torture recorded at least 33 such cases, with at least 23 of this group of women having been subjected to sexual violence (OMCT 2003a: 29). Women held in Tunisian prisons have also been subjected to sexual violence, as well as electric shocks, beatings, cigarette burns and food and sleep deprivation (OMCT 2002). The Special Rapporteur's report for Malawi also noted that juveniles were sexually exploited (in some cases in exchange for food and a place to sleep) when transferred to adult cells (ACHPR 2001c).

Agozino (2005), writing on Nigerian women's conditions of imprisonment, states that the older inmates of cells extort 'state money' or taxes from new inmates, with refusal to pay resulting in physical abuse. While more common amongst male prisoners, such demands may also be extended to female prisoners who are threatened with being put into a men's cell if they refuse to pay. It has also been reported that women may be sexually assaulted during interrogation. Typically, this takes the form of inserting a candlestick or bottleneck into their genitalia to force them to 'confess' to their crimes.

Violence and abuse have also been recorded in women's prisons in South Africa. Findings from the three-prison survey in Gauteng showed that during the last 12 months of imprisonment, one in three (34%) women had experienced physical violence, 47 per cent some form of psychological abuse, and 3 per cent sexual abuse,

primarily at the hands of another prisoner. Eleven per cent reported having money or possessions taken from them or being prevented from working. These actions were most likely to be committed by warders (Haffejee et al. 2006a). The Special Rapporteur reported that women in Malawi (ACHPR 2001c) and Uganda (ACHPR 2001e) were physically abused by prison warders. Women in Namibian prisons reported verbal and physical abuse as well as racism, and also described the intimate body searches carried out on them as degrading and humiliating (this included being told to open their legs or crouch so that they could be searched) (ACHPR 2001d). Human Rights Watch (1996b) reports that Egyptian security forces have forced the female relatives of suspected Islamist militants to strip naked before placing them in closed rooms with naked male detainees. This is an attempt to degrade both the women and, by extension, their male family members.

Services to women in prison

Overcrowding often ensures that there is little or no space available in either men's or women's prisons for recreational and/or training facilities. This is the case in Ethiopia (ACHPR 2004b), Namibia (ACHPR 2001d), Malawi (ACHPR 2001c) and South Africa (Haffejee et al. 2006b). But it would also appear that women are offered fewer programmes than men, with that which is offered tending to reinforce existing gender norms. According to Modie-Moroka and Sossou (2001), women in Botswana's prisons are offered training in the areas of mat making, sewing and knitting, cleaning, floor scrubbing, vegetable gardening and, to a lesser extent, literacy and religious activities. Programmes offered to women are more elementary and participants are also not eligible for any kind of trade testing. Further, because the length of sentence determines the range of social services offered, access to skills-training programmes is inadvertently skewed in favour of men whose sentences are more likely to exceed three years. A similar point can be made about South Africa, where women are also provided with fewer work, education and skill-development opportunities. While men may participate in furniture making and timber, textile and steel enterprises, women have access to laundry work, hair salons and sewing (Haffejee et al. 2006b). Zimbabwean women are offered programmes in vegetable gardening, typing, sewing, knitting, cooking and dressmaking (Musengezi & Staunton 2003), and Ugandan women are trained in handicrafts, gardening, mushroom growing, poultry rearing and egg production (ACHPR 2001e).

Better access to mental and physical health services is another need for women. One in five (21%) of those women surveyed in three prisons in Gauteng, South Africa, described their health as poor. Of the women interviewed for this study, 5 per cent had attempted suicide and 2 per cent had tried to hurt themselves. Eleven per cent had used sleeping pills and 6 per cent anti-depressants or other medication to help them cope (Haffejee et al. 2006b: 3). Seventy-five per cent of 80 women in six Botswana prisons stated that they had some form of physical or mental health problem (Modie-Moroka 2003: 170). These included long-standing, untreated pelvic inflammatory disease (PID), chronic dysmenorrhoea, human papilloma virus,

hypertension, chlamydeous infection, anxiety and depression (Modie-Moroka & Sossou 2001; Modie-Moroka 2003). Early diagnostic and preventive services such as screening for breast, ovarian and cervical cancer or PID also did not appear to be readily available to incarcerated women. HIV and AIDS have been raised as health concerns by women in South Africa (Haffejee et al. 2006b), Botswana (Modie-Moroka 2003) and Namibia (Odendaal 2004).

While women prisoners may need better healthcare, prison authorities would not appear to have the resources to provide it. In Benin (ACHPR 2000c) an NGO was taking care of the medical needs of women and children and in Egypt women were expected to buy their own medication (HRAAP 2004).

There also does not appear to be a sufficient number of prison personnel qualified to provide mental health services. In their 2004/05 annual report, South Africa's Department of Correctional Services stated that they employed 25 psychologists, a number further supplemented by psychology students completing their compulsory year of community service. These psychologists and interns were to provide psychological services to the 135 120 men and women incarcerated around the country. No such services were available to awaiting trial prisoners (Haffejee et al. 2006b: 4). In Namibia in 1999 there were nine social workers, four vocational instructors, six nurses and one medical officer available to the 13 prisons around the country (Odendaal 2004: 69).

Concluding discussion

Conditions for both male and female prisoners in Africa generally fall short of both the Kampala Declaration and the SMR. But because overcrowding is not as severe in women's prisons as it is in men's, it is often assumed that women's conditions are better. However, such an assumption overlooks the distinctive aspects of women's incarceration, which include the marginal number of women in prison, women's gender roles and their reproductive functions. Indeed, some of these differences are not even adequately recognised by either the Kampala Declaration or the Standard Minimum Rules for the Treatment of Prisoners. Given that the latter apply internationally, these omissions will, to a greater or lesser degree, affect all incarcerated women and not only those imprisoned on the African continent.

To menstruate under the conditions described earlier must be considered a form of cruel, inhuman and degrading treatment. These conditions also cannot be compatible with human dignity. Yet, the section on personal hygiene in the SMR focuses on cleanliness and appearance alone (Rules 15 and 16). While noting that facilities should be available to enable prisoners to care for their hair and beard, and that men should be allowed to shave regularly, there is no recognition of the importance of providing women with sufficient sanitary towels. Rules 12 and 13, which refer to the sanitary installations of prison facilities, are similarly silent. The Kampala Declaration speaks only of women requiring 'particular attention', 'proper treatment' and having their 'special needs' recognised. Such language implies that

male prisoners and their needs represent the norm, while women's needs represent those of the 'handicapped'. It is also a guarantee that when resources are short, those whose needs have been defined as out of the ordinary, and thus requiring extra effort and special treatment, will be first to fall by the wayside.

Article 10 of CEDAW focuses on equality of educational opportunities for men and women, with subsection (e) focusing particularly on programmes of continuing education. The limited and stereotyped nature of training offered to incarcerated women outlined earlier would not appear to meet this standard. Indeed, these programmes are likely to perpetuate discrimination in women prisoners' lives post-release.

Both the Kampala Declaration and the SMR pay insufficient attention to the needs of children both inside and outside prison. Indeed, one may argue that, in many instances, the mother's punishment is being extended to her child(ren). This is in violation of Article 2 of the UN Convention on the Rights of the Child, which states that:

> States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.

The inadequate care provided to pregnant and breastfeeding mothers, as well as their infants, must also violate Article 6 of the Convention, which enjoins States Parties to 'ensure to the maximum extent possible the survival and development of the child'. The realisation of Articles[11] 18(2), 19, 20 and 24 is surely also compromised by the conditions of maternal imprisonment. Article 12(2) of CEDAW also obliges states to ensure that women have 'appropriate services in connection with pregnancy, confinement and the post-natal period…as well as adequate nutrition during pregnancy and lactation'.

Finally, the sexual violence, torture and abuse that detained women experience – which are not unique to the African continent (Human Rights Watch 1996a) – are in clear violation of all human rights instruments and demand urgent attention.

What leads to women being imprisoned?

Based on the limited empirical data available, this section details some of the characteristics of women in prison, the nature of their crimes, as well as the sentences meted out to them. It also highlights factors that contribute in some way to women coming into conflict with the law. While noting that women have been detained for their political beliefs and defence of human rights in Egypt,[12] Zimbabwe (Amnesty International 2005b), Ethiopia (Amnesty International n.d.), Eritrea (Amnesty International 2005c), Algeria (*The Independent* 30 October 1997[13]), Tunisia (OMCT 2002) and Kenya (OMCT 2003a), it is outside the scope of this chapter to provide a comprehensive overview of the suppression of political activity on the continent.

Who are the women in prison?

Women interviewed for the Botswana six-prison study ranged in age from 16 to 65 years. Respondents younger than 25 years were primarily in prison for infanticide, abortion, petty theft and 'stealing by servant'. (Most of these young women were domestic workers.) All but one of the women over the age of 50 were in prison for possession of dagga (Modie-Moroka 2003: 153). Overall, the Botswana sample comprised young, single or married mothers with dependent children and few job skills. Typically, they had dropped out of school, were unemployed and lived below the poverty line (Modie-Moroka & Sossou 2001).

Of the 66 women convicted of violent crimes in Uganda, the greatest proportion (35%) was between the ages of 20 and 29, with a further 29 per cent aged between 30 and 39. A further 15 per cent were 19 years and younger (Tibatemwa-Ekirikubinza 1999: 33). More than half of the women (52%) had no formal education, while 35 per cent had some primary school education. No women had completed their secondary education and the majority, obviously, were illiterate. Some two-thirds of the women were described as peasant farmers (Tibatemwa-Ekirikubinza 1999: 27). Since neither the Botswana nor the Uganda study compared their samples with the general female populations of their respective countries, it is difficult to say whether women in prison are poorer, less educated and/or more disadvantaged than their female counterparts outside of prison. However, the Gauteng, South Africa, study found that women in their sample were less likely than the general female population to have completed their secondary schooling (Haffejee et al. 2006b).

The majority of women in the Gauteng study came from deprived economic backgrounds. One in two either had no income at all or earned less than R500 per month prior to imprisonment. Only 38 per cent of the women were employed full-time before coming to prison (Haffejee et al. 2006b: 2).

Race and imprisonment

Black women are over-represented in the prison populations of North America, Britain and Australia (cited in Kalunta-Crompton 2004). However, with the possible exception of South Africa and its history of apartheid, it is likely that racially discriminatory patterns of imprisonment are considerably less prevalent in Africa than in Europe, North America and Australia. What may be more significant to explore is discrimination based on ethnicity, language or cultural affiliation, as well as political beliefs.

Race does, however, continue to be significant in South Africa. While the Gauteng three-prison study found little difference between the racial composition of the prison sample and the general female population of the province (Haffejee et al. 2006b), this picture changes once prisons nationally are examined. Women classified as 'coloured' by the former National Party government constituted 21 per cent of the female prison population in 2005, despite comprising only 8.9 per cent of

the population according to the 2001 Census. While white women comprised 9.0 per cent of the female prison population (which was equivalent to their presence in the population, calculated at 9.6 per cent by the 2001 Census), at 2 per cent of the male prison population, white men were completely under-represented in the prison system.[14] These percentages are based on the prison population as at December 2005. They would not appear to represent an aberration, given that an almost identical pattern was noted in 2003 (Vetten & Bhana 2005).

Women's crimes

The greatest proportion of women (37%) in the Gauteng study were imprisoned for murder or attempted murder, 18 per cent for robbery, 16 per cent for theft, 12 per cent for fraud and 9 per cent for assault. Drug-related crimes accounted for 8 per cent of women's imprisonment (Haffejee et al. 2006b: 2). Imprisonment for drug-related crimes also occurs in Botswana (Modie-Moroka 2003), Zimbabwe (Musengezi & Staunton 2003) and Namibia (Odendaal 2004).

Other crimes for which women in Namibia usually serve time include fraud and housebreaking. Of the 418 convictions in Namibia in 2000 for crimes such as rape, robbery, murder and culpable homicide, only eight involved women. Those convicted of murder or culpable homicide had killed an intimate male partner in self-defence, or killed another woman in the course of a quarrel about money or a lover, or committed infanticide (Odendaal 2004). Women are also imprisoned for procuring abortions or committing infanticide in Botswana (Modie-Moroka 2003), Uganda (where it may result in life imprisonment) (Tibatemwa-Ekirikubinza 1999), Mali (ACHPR 1998d), Zimbabwe (Musengezi & Staunton 2003) and Morocco (OMCT 2003b).

Offences against property and persons rank as the first and second major offences for both men and women in Botswana. Disturbing the public order through fights in bars and at drinking spots was the third most common offence. Other offences for which women were arrested in 1998 related to drugs (18%) and contravention of the Trade and Liquor Act (24%) (Modie-Moroka 2003: 148).

In addition to the crimes already mentioned, Zimbabwean women were also imprisoned for murder, fraud, shoplifting and witchcraft-related crimes (this included assaults on those they believed to have bewitched them) (Musengezi & Staunton 2003). Practising witchcraft also led to women's imprisonment in the Central African Republic, with all 16 women held at Mbaiki Prison in 2000 accused of witchcraft (one of whom had been an awaiting trial prisoner for four years) (ACHPR 2000b: 15).

In Nigeria, women may be detained by the police as hostages when husbands, boyfriends, sons or brothers wanted as suspects cannot be found (Agozino 2005). This also appears to be the case in Benin (ACHPR 2000c), Egypt (HRAAP 2004) and Tunisia (OMCT 2002).

Sentences handed down to women

Haffejee et al.'s (2006b: 3) Gauteng survey found that 10 per cent of women in their study were serving sentences in excess of 20 years, with 3 per cent sentenced to life imprisonment. More than half of the women (56%) were serving sentences of eight years or less. Nationally, the length of sentence handed down to women in South Africa is increasing. On average, women served sentences of three years and two months in 1995. This average was said to have risen to five years and ten months by 2004–05. The number of women's sentences in excess of seven years has increased by almost 300 per cent. Seven per cent of women imprisoned in 2004–05 had been sentenced to fines but were in prison instead, due to being too poor to pay their fines.

The majority of women in Botswana are diverted outside of the prison system, with only 20 per cent being sent to prison (Modie-Moroka & Sossou 2001: 12). The Botswana study conducted at six women's prisons found sentences to range between three months (for the use of insulting language) and 12 years (for possession of dagga) (Modie-Moroka 2003: 153).

Women have been sentenced to death in Botswana,[15] Rwanda,[16] Congo,[17] Egypt,[18] Uganda (Tibatemwa-Ekirikubinza 1999), Burundi (where four women were sentenced to death in September 2005; see APRODH 2005) and Nigeria (Amnesty International 2004).

In relation to Nigeria, of the 487 people awaiting the execution of their death sentences as at July 2003, 11 were female (Amnesty International 2004: p.1 of printout) and had been sentenced to death under all three of the legal systems applied in Nigeria: the Penal Code (northern states) Federal Provisions Act of 1959, the Criminal Code Act applied in the southern states in 1961, and the *shari'a* penal codes. In terms of both the Penal Code and the Criminal Code, the death penalty is prescribed for offences such as armed robbery, murder, treason and culpable homicide. Under the *shari'a* penal codes introduced in 1999, *zina* (depending on marital status, this is either adultery or fornication) carries a mandatory death sentence if the accused is married but 100 lashes if unmarried (Amnesty International 2004). As *zina* is discussed later, the remainder of this section looks at abortion-related offences.

The Nigerian Penal Code imposes a sentence of 14 years' imprisonment for a woman causing a miscarriage, while the Criminal Code imposes up to 14 years for women who procure their own abortions. In addition, any person who attempts to procure an abortion is liable for up to seven years of imprisonment under the Criminal Code. However, the women identified by Amnesty International (2004) had been charged not with these offences, but with culpable homicide, which carries the death penalty.

Amnesty International (2004), which carried out a mission to Nigeria in March 2003 to investigate the death penalty, concluded that those at particular risk of being

charged with capital offences were poor, illiterate, rural woman who did not conform to social norms and had a pregnancy outside of marriage.

Other institutions that are prison-like in nature and effect

Described very simply, imprisonment may be a means of punishing wrongdoers or detaining individuals. It may be characterised by confinement and the denial of liberty, as well as control of decisions, including the use of time and space, association with others, dress, appearance and diet. Prior to colonisation, it would also appear to have been largely unknown on the African continent. This section, which is by no means exhaustive, highlights other forms of confining women, illustrating the need to look beyond imprisonment alone if one is to arrive at a more nuanced understanding of punishment and control on the continent. It also explores relationships between women's imprisonment, their sexuality, and the violence and abuse within women's intimate relationships.

Trokosi

Ameh (2004) describes the practice of *trokosi* as the selecting of a child, usually a virgin and female, to serve in a shrine as reparation for crimes committed by other members of the family. It is an aspect of traditional religious and crime-control practices of the Dangme, Ewe and Fon ethnic groups located in the West African countries of Ghana, Togo and Benin. There is considerable variety in the practice and Ameh distinguishes between three categories of *trokosi* in Ghana, noting that only one of these is the focus of an anti-*trokosi* campaign (the other two categories, *dorfleviwo* and *fiasidis*,[19] are considered more 'humane'). This category of *trokosi* serve in shrines as atonement for crimes committed by other members of their families. These crimes range from stealing, adultery and failing to redeem a pledge to a deity to having sex with a *trokosi*.

In theory, while *trokosi* should remain at a shrine for only between six months and three years, depending on the gravity of the offence, they frequently remain there much longer. Given that they often become a source of stigma and are feared in communities, their families are reluctant to secure their release, with the result that girls may serve at shrines for the remainder of their lives or until they become sexually unattractive. Because *trokosi* offer free agricultural and domestic labour as well as sexual services to priests and other shrine functionaries, the practice has been likened to bondage or slavery. Arguably, it could also be seen as imprisoning, given that it essentially involves serving time for the commission of a crime (although someone else's), as well as the confinement of movement to the parameters of the shrine (unless given permission to move around elsewhere by the priests), and a restricted choice of clothing. *Trokosi* apparel is largely limited to blue–black cloth and an identification raffia necklace (Ameh 2004).

Social rehabilitation facilities for women and girls in Libya

In terms of an official by-law, Libyan women and girls who 'are vulnerable to engaging in moral misconduct' may be sent to social rehabilitation facilities. Women who fall into this category include homeless women; women abandoned by their families following their divorce or illegal pregnancies; adolescent girls who have been raped, or whose decency has been assaulted; and women accused of prostitution about whom the court did not make a decision. These facilities serve a twofold purpose: the protection of women and girls who have been threatened by their families, and the rehabilitation of women and girls who have either engaged in extramarital sexual relations or who have transgressed socially accepted norms (Human Rights Watch 2006a).

Human Rights Watch (2006a) has described these facilities as 'de facto prisons'. There are a number of grounds on which they could qualify as such. Placement in such a facility is made through the office of the public prosecutor, and there is no mechanism to appeal transfer into this facility. Once confined to such a facility, women and girls may not go outside their gates. Their release may be secured only by a male relative willing to take custody of them, or through marriage. Such marriages are often contracted with men who visit such facilities specifically to find wives. Those whose male relatives will not take custody of them, or who do not get married, may be detained indefinitely. Further, women and girls held in such facilities have said that they are subjected to solitary confinement for long periods, sometimes while handcuffed, for 'talking back'; and that they are subjected to invasive virginity examinations as well as tested for communicable diseases without their consent. Once in these homes, some have had their personal possessions confiscated.

Marriage, sex and women's imprisonment

Adultery is punishable in a number of African countries. Article 3 of the Penal Code of the Democratic Republic of the Congo stipulates that adultery committed by women is punishable under all circumstances, while men are punished only if they instigated the adulterous relationship. Men are not considered to be at fault under those circumstances where their wills or inhibitions have apparently been altered by married women (through the use of alcohol, for example). The sanctions applied to men and women for adultery are also unequal: six months to one year of imprisonment plus a fine for married women, while married men are punished only if their adultery is considered to have an 'injurious quality' (OMCT 2006: 11). Unless they can prove they were raped, single mothers in Morocco can be imprisoned for between six months and one year.[20]

New *shari'a* penal codes were introduced in northern Nigeria in 1999. It is these penal codes' punishment of *zina* that has particularly attracted international attention. According to BAOBAB for Women's Human Rights, a non-governmental women's human rights organisation,[21] while both men and women may be charged with *zina*, it is an offence for which many more women than men are prosecuted.

They also state that only women have been convicted of adultery, which carries the penalty of stoning to death. BAOBAB offers other examples of the discriminatory implementation of *zina*. By postulating that pregnancy outside of marriage is evidence of *zina*, women are held to a different standard of evidence than men (although this was reversed in the very important case of Amina Lawal, which attracted worldwide attention). Unmarried women are also required to provide proof of their innocence while men are not. If the prosecution cannot provide independent evidence of the adultery, usually in the form of four eyewitnesses to the sexual (mis)conduct, men, unlike women, are free to walk.[22]

BAOBAB suggests that charges of *zina* have had other effects. Unmarried women or commercial sex workers have been evicted, harassed, forced to leave their states of residence, and/or charged with *zina* or 'immoral behaviour' in the absence of either witnesses or confessions. Because rape is also treated as a form of *zina* by the *shari'a* penal codes, women run the risk of being charged with this offence if they cannot produce two male witnesses or a confession from the rapist. If they cannot produce such evidence, they may be convicted of *zina* or charged with false witness if accused men are not convicted.[23]

Sentences handed down to women convicted of *zina* have included whippings (and imprisonment in some cases) as well as stoning to death. However, where such sentences have been passed, they have been overturned on appeal.

Women and men in Sudan may also be imprisoned for adultery. In terms of customary law practised in Sudanese chiefs' courts, both men and women convicted of adultery are typically required to pay fines, with men usually paying both a heavier fine as well as compensation to the woman's husband. However, because the male head of the household exercises sole control over Dinka (the majority ethnic group in the area) family wealth, it is difficult for women to pay the fine without the help of their husband or other male relatives. As a consequence, while women might go to prison for up to a year, most men, except the poorest, are able to go free.[24]

Given the difficulty for women in traditional Dinka societies to secure divorces, there is some suggestion that women may turn to adultery (and prison) in an effort to provoke divorce. To obtain a divorce, they must enlist the support of their own relatives and preferably the support of the general community as well. Marriages will have typically been arranged between the man and the woman's families (rather than with her directly) and concluded with the exchange of a dowry of a head of cattle. At least some of this dowry will have to be returned on divorce. If women do not have the support of their family, they may then turn to adultery in order to prompt divorce. However, these efforts are frequently unsuccessful, with women having to return to those selfsame husbands on their release from prison. Such women may then commit adultery again, to be imprisoned once more.[25]

The case of 'Mary Deng', who was imprisoned for requesting a divorce, is also cited.[26] Although her husband had died, in terms of tradition she became the *de facto* wife of her husband's brother. 'Mary' asked for a divorce and was detained by the local chiefs'

court in an effort to get her to retract her request. This situation appears unusual, rather than typical, and 'Mary' was ultimately released and her divorce granted.

Cases of women being punished at the behest of their husbands by the local or chief's courts in Sierra Leone have also been recorded. Amnesty International cites the case of JK who, along with her 13-year-old son, was charged with witchcraft by her husband. Unable to pay the fine the chief imposed on her, she was sent to the 'tribal prison' (there is no explanation of what this is or how it differs from other types of prison). She was released only in order to find her brother to help her pay the fine (Amnesty International 2005d).

PP left her husband, who was sexually harassing her, to stay with her brother. She was sued by her husband through the local court, which resulted in her being fined for leaving the marriage without her husband's consent and for failing to perform her sexual duties as a wife. Her brother was also fined for assisting her to leave the marriage without her husband's consent (Amnesty International 2005d).

Violence and ill-treatment prior to imprisonment was a feature of many other women's lives in Uganda (Tibatemwa-Ekirikubinza 1999), Zimbabwe (Musengezi & Staunton 2003), Botswana (Walmsley 2005a) and South Africa (Haffejee et al. 2006a). Male partners, parents, mothers-in-law and co-wives (in polygamous relationships) featured as perpetrators and, ultimately, in a number of instances, became the victims of the women's defensive violence.

In Botswana, about 40 per cent of the women interviewed reported having been raped by strangers and almost all women (75 out of 80) said they had been physically abused by their intimate partners (Modie-Moroka 2003). Fifteen per cent of women in the Gauteng study had been raped before they were 15, meaning that they were seven times more likely to have been raped as children than the female population generally.[27] One in 10 women had been raped by a non-partner after the age of 15 and more than three-quarters (78%) of women had experienced some form of abuse in their last relationship before entering prison. Overall, close to nine in 10 women (87%) had experienced at least one form of abuse in their intimate relationships over the course of their lifetimes. This percentage was higher than that recorded for the female population generally (Haffejee et al. 2006a). Such violence may well play a role in women's conflicts with the law. The Gauteng study found a significant statistical relationship between the experience of sexual abuse at the hands of a current partner and the commission of murder or attempted murder. It found another such significant relationship between the experience of economic abuse and involvement in theft (Haffejee et al. 2006a).

Implicit and explicit comparisons between home and prison also exist in writings by and about South African women prisoners. 'Christina Snell', for example, who was convicted a few times for shoplifting and theft, explains that she initially saw prison as a means of getting away from her violent husband.[28] Annemarie Engelbrecht, who killed her abusive partner, observed that the nine years she spent in her abusive marriage prepared her well for incarceration; killing her husband had not ended the

coercive control she was subjected to but merely changed the source of that control (Vetten & Bhana 2005). She was, thus, very familiar with having someone else dictate her appearance, her use of time, her choice of friends, her freedom of movement, as well as her contact with the world outside the couple's home.

Sharla Sebejan, currently serving a 21-year sentence for her role in the murder of her abusive husband, makes some similar points:

> In this insane hell-hole, where I share a cell with thirty-five other women, I have actually found a little haven, for the hardships, suffering and emotional abuse I now undergo is nothing compared to living with my husband – being too afraid to talk, eat or even smile, being constantly crippled with fear that I might be doing something wrong, for which I'd get a beating and thrown out of the house, to spend the night in the car. (Vetten & Bhana 2005: 265)

There is a suggestion in the words of all three women that the difference between violent marriages and imprisonment may well be one of degree only. Sebejan and Engelbrecht's words in particular point to similarities between imprisonment and abusive relationships. Both are characterised by authoritarianism, marked power imbalances, violence, lack of freedom of association, the enforced restriction of movement and activities, and the enforcement of arbitrary and trivial demands. Denial of one's wishes and thoughts, compliance with others' demands, the suppression of feelings, and recourse to defensive violence – some of the strategies abused women may employ to cope with violence – often prove very necessary to surviving in prison (Vetten & Bhana 2005).

Conclusion

This review has begun the process of setting out what is known about the imprisonment of women across Africa. It highlights the need both for considerably more empirical research in this area, as well as theorising that adequately takes the heterogeneity of African institutions, politics, cultures, histories and practices into account. The outcome is likely to be a rich, comparative literature that would substantially enrich thinking around punishment, penality and crime, much of which is currently informed by writings and experiences from Europe and North America alone.

However, even in the absence of empirical information, it is clear that a number of the crimes for which women are imprisoned are closely related to the denial and neglect of their rights, specifically their sexual and reproductive rights, their right to equality as well as their right to be free from all forms of violence. Further, because some of the studies suggest that many women in prison come from backgrounds of social disadvantage, it must be asked whether imprisonment is an appropriate response to the conditions of women's lives. This question becomes more urgent when one considers the conditions in which so many women and their children are

held. These must only compound the original injustice of their imprisonment in the first place. Indeed, the goal of at least some women's imprisonment is not only to punish them for failing to adhere to oppressive gender norms, but also to school them once again in such norms through the programmes offered. As Modie-Moroka and Sossou have observed, the goal of prison programmes appears to be to 'train women to be better domestic workers and housewives or dressmakers' (2001: 15). Certainly, none of these activities is likely to generate women much income on their release, nor improve their economic circumstances –which frequently contribute to their breaking the law in the first place. Finally, if we are to understand the many ways in which women may be denied their liberty, then it is important to look at the operation of all the various legal systems applied on the continent, as well as the different institutions and practices that may be used to detain and confine women. This chapter suggests that imprisonment is perhaps the end point of a continuum of censure and regulations applicable to women's conduct.

Notes

1 IRINnews.org *NIGERIA: In overcrowded prisons, survival is a daily battle*, 11 January 2006. Available at <http://www.irinnews.org/print.asp?ReportID=51047>, accessed on 7 February 2006, pp. 2, 3 of printout.

2 *NIGERIA: In overcrowded prisons, survival is a daily battle*, p. 3 of printout.

3 *NIGERIA: In overcrowded prisons, survival is a daily battle*, p. 3 of printout.

4 *NIGERIA: In overcrowded prisons, survival is a daily battle*, p. 3 of printout.

5 IRINnews.org., *SUDAN: Women and children in prison*, 20 August 2003. Available at <http://www.irinnews.org/S_report.asp?ReportID=36081>, accessed on 5 October 2005, p. 2 of printout.

6 *SUDAN: Women and children in prison*, p. 2 of printout.

7 *SUDAN: Women and children in prison*, p. 2 of printout.

8 UN, Standard Minimum Rules for the Treatment of Prisoners, Rule 53(1), (2) and (3).

9 Janine Stephen, 'Police prison rape fury'.

10 Special Rapporteur on violence against women, its causes and consequences, *Mission to Sierra Leone (21–29 August 2001)*. UN Doc E/CN.4/2002/83/add.2, 11.

11 UN, Convention on the Rights of the Child, Article 18(2): 'States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.' Subsections (1) and (2) of Article 19 place a duty upon states to take all appropriate measures to protect children from all forms of violence, abuse, exploitation and mistreatment. These measures should also include effective programmes for the support and care of children in such circumstances. Article 20 deals with the protection and assistance states should provide to children temporarily or permanently deprived of their family environment. Article 24 sets out measures recognising children's rights to the enjoyment 'of the highest attainable standard of health'. This includes providing appropriate pre- and post-natal care to mothers.

12 Women living under Muslim laws, *Egypt: female activists continue to be held*, 22 May 2006. Available at <http://www.wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-537622>, accessed on 30 May 2006.

13 Robert Fisk, 'Witness from the front line of a police force bent on brutality'. Available at <http://www.algeria-watch.org/mrv/mrvtort/Dalila0.htm>, accessed on 31 October 2006.

14 All calculations based on data available from the DCS (2006b).

15 BBC News, 'Love-triangle murderer hanged', 2 April 2001. Available at <http://news.bbc.co.uk/1/hi/world/africa/1255678.stm>, accessed on 6 June 2006.

16 This execution in 1998 by firing squad was related to the Rwandan genocide. See *Female executions 1990 to date*. Available at <http://www.richard.clark32.btinternet.co.uk/women.html>, accessed 6 June 2006, p. 6 of printout.

17 These two executions in 1999 by firing squad were for murder. See *Female executions 1990 to date*, p. 9 of printout.

18 Three women were hanged between 1991 and 2000. See *Female executions 1990 to date*, p. 9 of printout.

19 *Dorfleviwo* (also known as *baviwo*) are offered by their parents to serve the gods in appreciation of the role of the gods in the child's conception and birth. *Fiasidis* may be given by their families, inducted by the deities, or voluntarily choose to serve in the shrines. Perceived as 'wives of the gods', the latter group is treated with respect by all in the community, may own property and are not considered poor by community standards, according to Ameh (2004: 25).

20 Special Rapporteur on the sale of children, child prostitution and child pornography, *Report on the mission of the Special Rapporteur on the issue of commercial sexual exploitation of children to the Kingdom of Morocco (28 February–3 March 2000)*, UN Doc E/CN.4/2001/78/Add.1, p. 8.

21 Established in 1996 to address women's legal rights under customary, statutory and religious laws in Nigeria, much of their current work focuses on defending women who have fallen foul of the *shari'a* Acts implemented from 1999 onwards. See <http://www.baobabwomen.org>, accessed on 31 October 2005.

22 BAOBAB, untitled report, 2003. See <http://www.baobabwomen.org>, p. 8 of printout.

23 BAOBAB, untitled report, p. 9 of printout.

24 *SUDAN: Women and children in prison*, pp. 2–3 of printout.

25 *SUDAN: Women and children in prison*, p. 4 of printout.

26 *SUDAN: Women and children in prison*, p. 1 of printout.

27 The South African Demographic and Health Survey found that 2 per cent of women had been raped before the age of 15 (DoH 1999).

28 ' "When Home is a Prison" Interview with Christina Snell' in Schreiner (1992: 260).

8 Rehabilitation and reintegration in African prisons

Amanda Dissel

The little information that exists on prisons in Africa is dominated by descriptions of poor, overcrowded conditions, brutality and suffering. Given that many prisons on the continent do indeed suffer from these problems, it is not surprising that there is very little discussion on what these prisons can do to help facilitate change in the prisoners with a view to helping them lead crime-free lives upon their release. Yet, rehabilitation and reintegration of prisoners is acknowledged as one of the key functions of the prison system, even in the countries of Africa. Regional instruments refer to it as one of the important aspects to consider in the treatment of offenders. It is, therefore, important to understand what rehabilitative efforts are occurring in the region and what impact they have on the successful reintegration of offenders. This chapter outlines some of these activities, but does so recognising that only limited information exists about rehabilitation in most parts of the region and that firm conclusions cannot be drawn about the impact of these interventions. The chapter also attempts to draw some lessons for good practice in rehabilitation. Finally, it poses the question of what would constitute appropriate rehabilitation and reintegration, given the constraints facing most prisons in Africa.

But first the chapter starts with an overview of rehabilitation, drawing on literature in the developed world to provide a common understanding of what is meant by rehabilitation and reintegration, as well as to outline what is understood as necessary for effective interventions.

Defining rehabilitation and reintegration

For society, the aim of punishment is not only to prevent offending and reoffending, even if viewed through the restrictive lens of incarceration, but also to send a strong message about society's public disapproval of an offence. A prison sentence, which deprives a person of liberty, is in most societies the ultimate penalty and represents the strongest mark of disapproval. In addition to this, there are several other functions that a sentence of imprisonment fulfils. These can broadly be grouped as follows:

- *Retribution*, or just deserts, imposes a symbolic punishment, in this case imprisonment, on the offender for a crime that has been committed. The term of imprisonment is meant to be proportionate to the crime or extent of harm inflicted.

- *Prevention or deterrence* aims to prevent the commission or recommission of crime through threat of the negative outcomes that may result from the commission of crime. However, research has not proven any significant impact of deterrence on crime levels.
- *Incapacitation* aims to prevent crime through rendering the offender incapable of committing further crime by his or her removal from society and incarceration in prison. However, this theory fails to take into account the possibility of committing further acts of crime within the prison community.
- *Rehabilitation* is a term that is broadly accepted to mean a planned intervention which aims to bring about change in some aspect of the offender that is thought to cause the offender's criminality, such as attitudes, cognitive processes, personality or mental health. A broad definition of rehabilitation refers to social relations with others, education and vocational skills, and employment. The intervention is intended to make the offender less likely to break the law in the future, or to reduce 'recidivism' (Cullen & Gendreau 2000).
- *Reintegration* is the process by which a person is reintroduced into the community with the aim of living in a law-abiding manner. Reintegration also refers to active and full community participation by ex-offenders. Preparation for reintegration can occur in prison. Rehabilitation and reintegration are sometimes used interchangeably in the literature.

These last two objectives speak to the potential of a prison sentence to change a person's behaviour or to have an impact on the factors that lead to crime or the recommission of crime.

Rehabilitation has been criticised for the moral implications associated with the term. It has often been associated with the belief that human behaviour is the product of antecedent causes that can be identified and that therapeutic measures can be employed to effect positive changes in the behaviour of the person subjected to treatment (Rabie & Maré 1994). In terms of this approach, a prisoner is regarded as having malfunctioned, or as being 'diseased', and capable of being 'treated' or 'cured', usually by a range of professionals within the criminal justice system. Rehabilitation treatment programmes can include educational and vocational training, individual and group counselling, and medical treatment. The rehabilitation ideal served as the basis for penal reform in the west until it was forced to re-evaluate the impact of this approach following Robert Martinson's startling conclusion to a study of 231 treatment programmes across the developed world. Martinson concluded that 'with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism' (2001: 270). Although Martinson hoped to provide evidence that imprisonment was an ineffective method of punishment and to promote non-custodial sentences instead, the 'nothing works' message was interpreted by conservatives in government as support for a more retributive approach.

Despite Martinson's criticisms, the rehabilitation ideal made somewhat of a comeback in the late 1980s and early 1990s, when studies using meta-analytical

techniques indicated that some treatment programmes may be effective under certain conditions (see Layton MacKenzie 2000; McGuire 2000). These studies reveal that the recidivism rate is on average 10 percentage points lower for prisoners going through treatment programmes, though sometimes the reduction in recidivism may be as high as 25 per cent (Cullen & Gendreau 2000: 110). Based on these studies, there is developing consensus that programmes and services that have the following features work best (McGuire 2000):

- *Theoretical soundness*: programmes are based on an explicit and well-articulated model of the causes of crime.
- *Risk assessment*: interventions should be targeted towards specific risk categories. Studies have also indicated that programmes provided for high-risk groups are most effective (Andrews et al. 2001).
- *Criminogenic needs*: the prisoners should be assessed to determine dynamic risk factors, such as attitudes, criminal associations, skills deficits, substance abuse, or self-control issues which are related to offending.
- *Responsivity*: more effective methods are those which are active and participatory.
- *Structure*: interventions should have clear objectives.
- *Methods*: the most effective methods are drawn from cognitive–behavioural approaches that focus on the interrelationship between thoughts, feelings and behaviour.
- *Programme integrity*: programmes should be delivered by appropriately trained staff who are able to deliver the intervention in its designed format.

However, research has also indicated which interventions appear to have no impact on recidivism rates, such as programmes emphasising structure, discipline and challenge, like boot camps. These studies have led to a more thoughtful, planned approach to rehabilitation, which acknowledges the difficulties of trying to bring about change in human behaviour and which is more sober about the prospects of bringing about lasting change in offending behaviour.

Martinson (2001) also argued that the theory of rehabilitation might be flawed as it overlooks the normality of crime in society, and that crime may be a very 'normal' response by people who are responding to the facts and conditions of our society. More recent approaches to rehabilitation view prisoners in relation to their families, communities and socio-economic backgrounds, and have a focus that is broader than the psychosocial. The Social Exclusion Unit in the office of the British prime minister has identified a number of risk factors prevalent in the offending population. These same risk factors contribute to the likelihood of a released prisoner reoffending, and these factors can be exacerbated by the imprisonment experience. The Social Exclusion Unit outlines how prison-based interventions can target these factors, ameliorate the impact of imprisonment, and deal with the problem through treatment and the creation of skills and awareness, and through facilitating contact in the community. These risk factors are mutually reinforcing and need to be addressed in an integrated manner. The risk factors identified are discussed briefly below (SEU 2002).

One factor recognised by the Social Exclusion Unit is the prevalence of low levels of education in the prison population. In prison, existing skills can be eroded or become outdated, and existing educational courses may be interrupted. Prison-based education and training programmes could give prisoners the skills needed to gain employment.

This emphasises a second risk factor, namely, employment. Many prisoners are unemployed at the time of arrest. In addition, imprisonment results in the loss or interruption of employment. Imprisonment could provide the opportunity to gain practical experience and set up contacts with potential employers.

A third risk factor is drugs and alcohol, as 60 to 70 per cent of offenders in the UK used drugs prior to their imprisonment. Drugs are often available in prison and habits may become entrenched. Prison could be an effective place to obtain drug treatment.

Mental and physical health is another risk factor, with over 70 per cent of prisoners suffering from mental health problems. These may be exacerbated by a lack of service provision, poor coordination and the prison environment. Prison could provide the opportunity for proper diagnosis and treatment.

Another risk factor is attitudes and self-control, because other prisoners may reinforce negative attitudes and behaviour. Prison programmes could help to improve prisoners' thinking skills and anger management to help mitigate this factor.

Imprisonment may also reinforce experiences of institutionalisation and heavily structured regimes, or a lack of activity, which can damage prisoners' ability to think or act for themselves. On the other hand, prison could provide a place to develop positive life skills.

Housing or accommodation can be lost on entry, and non-payment of rent could have knock-on effects for the prisoner's family. Appropriate support in prison could help prisoners to access housing subsidies and negotiate rent savings.

Debt can worsen during imprisonment, and prisoners are released without sufficient financial means to tide them over until they become re-established. Again, support in prison could help them to access financial support on their release.

The final risk factor is the impact on families, as imprisonment can damage positive links to families and contribute to financial instability among family members. On the other hand, prison could give families an opportunity to have input into the prisoner's rehabilitation needs, to deal with poor family relationships and to stabilise financial needs and concerns, as mentioned above.

Building on these ideas is the newly evolving notion of 'corrections of place'. This is a community-oriented approach which shifts the emphasis from the individual to the community to which the offender returns, with the aim of building capacity and enlisting community resources to assist in reintegration. This approach requires operational changes to facilitate the provision of a continuum of care from

imprisonment through to release and case management, balancing surveillance with support and building partnerships with all stakeholders (Borzycki 2005). Recognising the need for evidence-based correctional programming to deal with the aspects of an offender's life linked to crime, it also looks at factors in the broader social context which may have an impact on crime and on the offender's ability to reintegrate into society.

Most of these ideas have been developed and researched in the western world. In analysing their application and impact in the countries of Africa, it is useful to start off by looking at the regional instruments as an expression of intent on the continent.

Regional instruments

Several regional instruments deal with the rehabilitation and reintegration of prisoners. The Kampala Declaration on Prison Conditions in Africa, adopted in 1996,[1] is the primary document outlining rights for prisoners in Africa. Instead of listing ambitious goals for prisoner rehabilitation, the Declaration set a more realistic agenda for African states facing the high levels of overcrowding and under-resourcing prevalent on the continent. The Kampala Declaration made several recommendations, which include the following: that the detrimental effects of imprisonment should be minimised so that prisoners do not lose their self-respect and sense of personal responsibility; that prisoners should be given the opportunity to maintain and develop links with their families and the outside world, and that prisoners should be given access to education and skills training in order to make it easier for them to reintegrate into society after their release.

Despite the fact that situations in prisons had seen little improvement by the time of the next pan-African seminar held in Burkina Faso, in 2002, the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa[2] made more specific reference to rehabilitation in prisons. The Ouagadougou Declaration recommended promoting the reintegration of offenders into society. In doing so, it proposed that states should make greater efforts to use the period of imprisonment, or other sanctions, to develop the potential of offenders and to empower them to lead a crime-free life in the future. This, it stipulated, should include rehabilitative programmes focusing on the reintegration of offenders and contributing to their individual and social development.

The Plan of Action accompanying the Ouagadougou Declaration is addressed to governments and criminal justice agencies as well as to NGOs and associations, and it is meant to serve as an inspiration for concrete action. In particular, the Plan outlines the following strategies to promote rehabilitation:

- promoting rehabilitation and development programmes during the period of imprisonment or non-custodial sentence schemes;
- ensuring that unsentenced prisoners have access to these programmes;
- emphasising literacy and skills training linked to employment opportunities;

- promoting vocational training programmes certificated to national standards;
- emphasising the development of existing skills;
- providing civic and social education;
- providing social and psychological support with adequate professionals;
- promoting contact with the family and community;
- sensitising families and communities in preparation for the reintegration of the person into society and involving them in rehabilitation and development programmes;
- developing halfway houses and other pre-release schemes, and
- extending the use of open prisons under appropriate circumstances.

The Plan of Action refers to a broad range of approaches that can be used in reducing the criminality of released offenders and facilitating their entry into society. It places more emphasis on those skills that would assist with re-entry, such as the development of vocational and literacy skills. The Plan also recognises the important role that families and communities play not only in providing support to the prisoners while in prison, but also in accepting them back into their lives. The references to rehabilitation and development skills, as well as to social and psychological support from professionals, point to traditional notions of rehabilitation.

What is unusual is that the Plan of Action recommends that even unsentenced prisoners should have access to the programmes outlined, including rehabilitation and developmental programmes. This is contrary to convention, which holds that prisoners should only be engaged in 'rehabilitative' efforts once they have been found guilty of a crime. The Plan of Action promotes the use of less restrictive regimes for prisoners, particularly open prisons. As will be seen in later sections, some African states, such as Mozambique, do have open prisons. The establishment of halfway houses would be a new initiative in Africa.

The Central, Eastern, and South African Heads of Correctional Services (CESCA) have drafted an African Charter on Prisoners' Rights. This was to have been presented to the UN's African member states in 2002, and from there to the UN's bodies, but for unexplained reasons it did not make its way onto the agenda. The draft Charter sets out minimum standards for the treatment of prisoners.[3]

In a section dealing with the rehabilitation of prisoners (paragraph 14), the draft Charter provides that: programmes for physical and social rehabilitation and reintegration of prisoners into the community shall be provided; rehabilitation programmes shall involve, as far as possible, NGOs to run schemes in prisons, in cooperation with the prison administration; and approved religious bodies shall have free access to prisoners to dispense spiritual welfare to them.

While it does not have the depth of the Ouagadougou Declaration, the Charter elevates the role of religious workers and spiritual services to a central place in the vision for rehabilitation services.

Legislation and policy frameworks

Pinpointing particular influences of these instruments on any policy process of any country is always difficult. However, a survey of prison services in Africa compiled in preparation for the second Pan African Conference on Penal and Prison Reform, held in Ouagadougou in 2002, found that of the 27 countries responding to the survey, 11 had introduced new legislation since 1996, and some had presumably been influenced by the Kampala Declaration. Others indicated that they were in the process of reviewing legislation (PRI 2003). Given the dire prison conditions in many African countries, it is perhaps not surprising or inappropriate that only eight countries listed the improvement or introduction of rehabilitation and developmental programmes as best practices since 1996.[4] Most of the focus has been targeted towards introducing human rights standards, appropriate training for prison officials, and the improvement of prison conditions by various mechanisms.

There appears, however, to have been no impact on the legislative or policy framework of countries such as Benin, which still operates according to a decree of 1975, under which no explicit rehabilitative aim is provided (pers. comm., Penal Reform International representative, September 2005). Nevertheless, it does have a Centre for the Welfare of Juveniles and Adolescents in Aglanbanda; one of the Centre's responsibilities is to rehabilitate young offenders (ACHPR 2000c). Cameroon is another country without an apparent policy concerning rehabilitation (RODI 2004).

Most countries in the region have emerged from a colonial history in the past half-century, and some of them are still acting in terms of the colonial legislation and policies. Even while under the colonial regimes in some countries, one of the express aims of imprisonment was rehabilitation, and the prison systems were often used to procure labour for the growing industries.[5] The influence of the west continues in the current legislation in Africa, which often reflects European legislation of the late nineteenth and early twentieth centuries.

Information about rehabilitation is not very accessible for most countries in the region, and there is even less readily available information on legislation and policy frameworks. However, there is some information that indicates that many countries have included rehabilitation explicitly in the objectives for the prison service. The Botswana Prisons Service outlines that one of the purposes of the prison system is:

> the training and rehabilitation of all classes of sentenced prisoners in such skill and social behaviour as may be necessary to effect change in their social resettlement into the community on their release as law-abiding members of the community. (quoted in Frompong 2001: 83)

Uganda has also recently reconceptualised its prison services. According to the Uganda Prison Service Policy Document, *2000 and Beyond*, their mission is to encourage and assist prisoners in their rehabilitation, reformation and social reintegration as law-abiding citizens (pers. comm., Foundation for Human Rights Initiative, Kampala, Uganda, August 2005).

In 1998, South Africa revised its legislation to bring it in line with international human rights principles and correctional norms. The Correctional Services Act No. 111 of 1998, which was properly brought into effect only in 2004, identifies that the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society, and instrumental in this is 'promoting the social responsibility and human development of all prisoners and persons subject to community corrections' (Section 2).

While the Act was careful to avoid the term 'rehabilitation' and to frame the objectives in terms of minimum responsibilities, in 2005 the correctional services ushered in a more expansive set of objectives as set out in the White Paper on Corrections in South Africa (DCS 2005). This document outlines a 20-year vision in which rehabilitation forms the basis of all activities in correctional services. In terms of this document, the responsibility of the Department of Correctional Services (DCS) is first and foremost to correct offending behaviour in a secure, safe and humane environment, in order to *facilitate the achievement of rehabilitation, and avoidance of repeat offending* (my emphasis). This creates a greater responsibility on the correctional services to ensure that prisoners do not offend after being released.

On the other hand, while acknowledging that the purpose of penal legislation is to punish and to rehabilitate offenders, one senior official from Tanzania felt that the emphasis was more on the punitive side.[6] This is, perhaps, a reflection that whilst there are policy discussions about reframing imprisonment and transforming prisons, the day-to-day reality remains firmly locked into a punitive approach. It is also a reflection of the constraints faced in operating in severely overcrowded and under-resourced facilities.

The practice of rehabilitation and reintegration in African prisons

Even when countries aspire to bring about the rehabilitation or development of prisoners, the realities facing the prison system often make any attempt extremely difficult. Most countries researched for the purposes of this chapter are subject to high levels of overcrowding and inadequate resources and facilities. Extreme conditions of overcrowding, resulting in inadequate sleeping space, a lack of proper sleeping mats or beds, a lack of ventilation and lighting, and limited time out of the cell, were some of the factors mentioned in many of the reports of the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa. Concerns were also raised about excessive and inappropriate discipline and punishment, forced and hard labour, and paltry access to medical treatment. Another problem often mentioned is that the prison systems fail to separate prisoners sentenced for serious crimes from those convicted of less serious offences.[7] These factors have an impact on the mental and physical health of a prisoner and fail to create an environment conducive to rehabilitation.

Overcrowding also has a negative impact on the staffing and management of a prison. The UK's Chief Inspector of Prisons noted in his *2001/02 Annual Report*:

> Prison overcrowding is, however, undoubtedly making it more difficult to build and sustain progress [with assessing prisoners and placing them in appropriate programmes]. It is more difficult to get prisoners out of cell [sic] and into activities. Frequent prisoner movement makes the completion of courses and skilled-based qualifications much more difficult. (cited in Steinberg 2005: 15)

These concerns are more starkly illustrated on the African continent. The Special Rapporteur noted that in one prison in the Central African Republic inmates were not allowed out of the congested and poorly ventilated cell at all for fear that they would escape (ACHPR 2000b). In many countries, the prisons are understaffed and few personnel have received training that helps them to understand their role in terms of facilitating offender development and reintegration. Commenting on the calibre of correctional staff, the Commissioner of Correctional Services in South Africa was recently quoted as stating: 'Correcting inmates is an extraordinary responsibility [that] needs extraordinary citizens. I don't have extraordinary citizens as yet, at the moment we have got people that have got a matric and have got no criminal record.' He added that his staff had no respect for prisoners and still believed that they 'must lock them up and throw away the key' (*Pretoria News* 29 September 2005[8]).

In addition, most countries in Africa have no, or inadequate, numbers of professional staff, such as social workers, psychologists, educators and vocational trainers. In addition, the rehabilitation or reformation of prisoners is often viewed very narrowly, so that the provision of schooling, training or work opportunities is often seen as the full extent of rehabilitation, even when no other psychosocial aspects are catered for.

When programmes and facilities are available in prisons, they are most often targeted towards juvenile offenders and female offenders, which may be as a result of donor agendas in respect of these marginalised groupings.

The following section looks at how issues of rehabilitation and reintegration are interpreted and applied in Africa. The structure of the section loosely follows the outline of the Plan of Action to the Ouagadougou Declaration.

Promoting rehabilitation and development during imprisonment

It is interesting to note that most African countries focus on vocational training, education and spiritual development rather than on the psychosocial aspects and behavioural aspects of rehabilitation, which may be linked to the lack of professional staff in many of these countries. Even in cases such as Tanzania, where rehabilitation is understood to include the correction of offending behaviour, human development and the promotion of social responsibilities and values, opportunities are limited

to vocational and occupational training, with limited educational opportunities for young prisoners (pers. comm., Assistant Commissioner of Prisons [ACP], Tanzanian Prison Service, 6 November 2006). The degree of emphasis on rehabilitation also varies according to country but may, perhaps, be measured according to prisoner involvement in relevant activities. According to the Zimbabwean Commissioner of Prisons, 70 per cent of convicted prisoners are engaged in rehabilitation activities that include only literacy classes, skills training, and church services and counselling (pers. comm., 12 October 2005).

Access to development programmes for unsentenced prisoners

Rehabilitation and development programmes traditionally target only sentenced prisoners who are deemed to have acknowledged responsibility for their crimes. Yet in Africa many prisoners spend long periods awaiting trial. At the very extreme end, the Special Rapporteur found one woman in a Benin prison who had been awaiting trial for 18 years (ACHPR 2000c). Pre-trial prisoners also represent a large proportion of the imprisoned population. Prisoners awaiting trial constitute over 50 per cent of the prison population in 39 per cent of countries of the region. In Mozambique, 79 per cent of all inmates are awaiting trial prisoners (International Centre for Prison Studies 2006d).

The pre-trial period could be used for the development and skills training of prisoners. There are few countries, however, that make services and developmental or work opportunities available to pre-trial or unsentenced prisoners. In South Africa, Section 16 of the Correctional Services Act No. 111 of 1998 provides that the Department of Correctional Services *may* provide development and support services to unsentenced prisoners or, when it does not, should inform prisoners of services available from other agencies and put them in touch with such agencies. In its 2005 White Paper, however, the department excluded any mention of unsentenced prisoners, let alone including them in its mission to provide rehabilitation services. The department is advocating the removal of awaiting trial prisoners from its departmental and ministerial authority completely. Very few, if any, civil society organisations provide developmental services for these prisoners due to the instability of the population as well as the lack of facilities available in which to work. Prisoners are entitled, however, to register in externally provided educational programmes, in which they can learn and write examinations through correspondence.

Determining whether pre-trial prisoners have access to services is extremely difficult, as they are not distinguished from other prisoners in this regard in the reports of the Special Rapporteur. It would seem likely, however, given the appalling conditions in which many remand prisoners are held in police lock-ups and awaiting trial sections of prisons, that they are seldom afforded this access. It was mentioned that remand prisoners are required to work in Ugandan prisons, either in the fields or *shambas* or in keeping the prisons clean. Prisoners complained about the excessive harshness of the work and the long hours, indicating that the work was not of a rehabilitative nature (ACHPR 2001e).

Literacy training and education

The majority of prisoners throughout the world come from the most disenfranchised sectors of the community, where they often have a low level of educational attainment and access, and low levels of literacy. This is particularly pronounced in many countries in Africa which have very low education and literacy figures in the general population.[9] Prison-based education and literacy programmes, however, are limited in most countries or are available only to a small percentage of the sentenced prisoner population.

Schooling is available in some Ugandan prisons, but prisoners complained that access to higher education was lacking. No school or educational programmes existed at Masindi Prison, despite the fact that it was cited as a model prison. The country also experienced problems with low school attendance in the general prison population due to short terms of imprisonment.

Education classes are available only at a juvenile facility in Benin, while Maputo Central Prison in Mozambique provides academic and vocational training to prisoners. In the latter case, education is made available to students up to grade seven, but young adults are given preference in access to classes (ACHPR 1997c). Schooling, to a limited grade, is available in many Ethiopian prisons, although classes are often taught by prisoners (ACHPR 2004b).

Primary school education is provided at one facility for young prisoners in Tanzania who have not yet completed this education, and those who successfully graduate from the school may be released by presidential pardon so that they can complete their secondary education at schools in the community (pers. comm., ACP of Tanzanian Prison Service, 6 November 2006). In some rare cases, long-term prisoners may be helped to receive distance education at secondary or tertiary level.

In South Africa, Section 19 of the Correctional Services Act No. 111 of 1998 makes it a legal requirement for prison services to provide education programmes to all child prisoners who are the age at which they would be subject to compulsory education, and older children should be given access to educational programmes. Section 41(2) of the Act states that sentenced adults who are illiterate may also be compelled to undergo literacy training and may also have the right to participate in other available training programmes. The DCS emphasises the educational needs of prisoners so that they have the basic skills needed when they are released from prison. As in other countries in Africa, however, the provision of these services to prisoners falls short of the objectives. Only 5 per cent of the prison population was involved in adult basic education and training programmes and another 7 per cent in mainstream and correspondence education during 2003 (DCS 2006c: 35). Non-governmental organisations are often brought in by the department to assist with the delivery of training and educational programmes (DCS 2004).

In contrast, 13 per cent of prisoners participate in educational classes in Namibia. Here, most prisons provide literacy classes and primary- and secondary-level classes

recognised by the Ministry of Education. In Namibia, education is not free; prisoners are thus obliged to pay for their education and very few can afford higher-level education (ACHPR 2001d: 30).

Vocational skills training

The UN Standard Minimum Rules for the Treatment of Prisoners (SMR)[10] provide that vocational training should be provided to prisoners and that this should prepare prisoners for life after release, so that skills taught should be similar to those that are applicable outside of prison. The Rules also caution against vocational training for the primary purpose of making a profit for the prison out of prison labour. Although there are few opportunities for vocational training for prisoners in Africa, more prisoners are involved in this kind of training than in academic or literacy training. This is possibly due to vocational training's close relationship to useful prison labour. In some countries, work is a compulsory part of the sentence, and sometimes inmates are sentenced to hard labour. In these circumstances, the rehabilitative objectives are not always clear.[11]

Most of the countries referred to in this chapter offered some form of vocational training in various skills. In Kenya, for instance, training was available in carpentry, masonry, tailoring and agriculture (RODI 2004). In The Gambia, some prisoners were sentenced to hard labour on farms, which generates revenue for the prison (ACHPR 1999b).

In South Africa, where skills development is a national priority, the Department of Labour provided R13 million for occupational skills training, benefiting approximately 9 per cent of the prison population during the 2003 academic year. Vocational skills training was also made available to prisoners in terms of which prisoners are assessed and issued with qualifications by the Sector Education and Training Authority. Such skills training includes the building, metal and electrical trades. Twenty-five per cent of the sentenced prisoners were also involved in production workshops and agricultural activities aimed at supporting the development of their employment-related skills (DCS 2004: 32–33).

In Tanzania, prisoners serving long-term sentences may receive vocational training at a prison training college. The country boasts that over 6 000 prisoners took various trade tests in a 25-year period. On return to prison they can practise their building skills as part of the Prisons Building Brigade, which carries out building contracts. In addition, approximately 52 per cent of convicted prisoners participate in agricultural training and 24 per cent in industrial works. However, these programmes exclude female prisoners, those convicted of life sentences, and those awaiting the execution of the death penalty (pers. comm., ACP of Tanzanian Prison Service, 6 November 2006).

Prisoners often receive financial benefits from their work in prison, though this is not always directly from the prison services. In Benin, NGOs have helped some inmates

to establish tailoring shops or barber shops in the prison, where they can ply their trade to other prisoners. Other prisoners run market gardens, do basket weaving or set up small stalls to sell commodities in prison. These activities are encouraged by the authorities in the hope that the prisoners may learn a useful trade. They also reflect the recognition by the authorities that they are unable to provide for the basic subsistence needs of the prison community. In Ethiopia, prisoner-run committees allocate plots to prisoners so that they can run profitable small businesses. The committees also run a cooperative shop whose profits are used to buy basic necessities for the prison. Prisoners are paid for their work on prison farms, though the bulk of their earnings are paid to them on release (ACHPR 2004b).

Social and psychological support with adequate professionals

Rehabilitation programmes which are targeted at criminogenic causes of offending often require the services of properly trained professionals. These include programmes which target cognitive–behavioural functioning, substance abuse, psychosocial dysfunction, and the development of new attitudes. Social workers are also needed to facilitate reintegration into the community, particularly through re-establishing contact with the family and dealing with family difficulties. Many African prison regimes have recognised the importance of qualified social workers and other professional staff but all are still understaffed.

Mauritian professionals have recognised the need for a more holistic approach to dealing with offending that goes beyond the cognitive–behavioural approach. This holistic approach involves integrated collaboration across a number of different agencies and includes aspects such as substance abuse and mental health. In relation to young offenders, it focuses on developing a family- and community-centred approach to reintegration (Koodoruth n.d.). Four welfare officers are employed to assist with the process across the country.

With its small numbers of prisoners, the country has pioneered various approaches to rehabilitation and treatment in the region. Its Lotus Centre, situated within a high-security prison, offers treatment and rehabilitation of prisoners who are drug addicts. The centre uses a combination of treatment methods, including chemical treatment, relaxation, counselling, yoga and occupational therapy. Headed by a medical officer and staffed by 11 officials and a nurse, it accommodates a maximum of 25 prisoners. Building on the success of the project, the prison administration has plans to create other treatment centres for other categories of inmate.[12]

Botswana has a rehabilitation officer who heads the rehabilitation division. This includes adult education, chaplaincy, industries, and social work. The social work unit addresses the social, emotional and behavioural problems of prisoners, including counselling services and home visits for those experiencing problems in their homes (Frompong 2001).

South Africa also has a commitment to providing needs-based psychological services to prisoners in order to improve their mental health and emotional well-

being and to promote their rehabilitation and reintegration. In 2006, however, there were only 37 fully qualified psychologists employed in the prisons, with a ratio of one psychologist to 4 062 prisoners. There were more social workers, at the ratio of 1:342, who provided a range of programmes to prisoners, including programmes for drug and alcohol dependence, trauma, sexual problems, aggression management and life skills (DCS 2006c: 123). However, unless the numbers of staff are increased, South Africa will experience difficulties in implementing its plan to assess all sentenced prisoners and develop a needs-based sentence plan that deals with all their educational, skills development, psychosocial and reintegration needs, as set out in the 2005 White Paper on Corrections in South Africa (DCS 2005).

In addition, prisons often accommodate a substantial number of prisoners suffering from mental health disorders, ranging from stress disorders to serious personality or conduct disorders.[13] In the absence of sufficient institutions providing for the mentally ill, prisons are often responsible for their treatment and well-being. This was raised as a particular problem in Namibia, where there is a shortage of psychiatric staff in hospitals in the country. According to the Special Rapporteur, mentally ill prisoners, especially in the interior, had seen a psychiatrist only once or twice and sometimes it had been five years since the last visit. There were also delays in conducting legal assessments of accused persons to determine their status for trial, resulting in many mentally ill patients languishing in police stations for long periods of time (ACHPR 2001d).

Contact with the outside world

Since most prisoners will be released into the community from which they came, it is essential that their community and family ties are maintained and encouraged while they are in prison. The family and the community each has an important role in welcoming the prisoner back into the community, normalising him or her after the institutionalising experience of imprisonment, providing shelter and food, and offering support while the ex-offender attempts to procure gainful employment. Incarceration, however, often serves to break or damage these important relationships. Although the prisons in most countries researched did provide for regular visits to prisoners, the duration of these visits was often too short and visits were arbitrarily permitted. In many places, it was apparent that prisoners could not receive visits unless a bribe was paid to correctional officials. Many prisoners do not receive visits because relatives live some distance from the prisons, and travel is costly and time consuming. In order to facilitate visits by distant relatives, the Namibian authorities have relaxed the regulations to allow for longer visits which may occur less frequently. Despite this, prisoners complained that this relaxation was not always fairly applied. In one prison, staff shortages were cited as a reason why visits were sometimes restricted (ACHPR 2001d).

Prisoners are mostly allowed to write and receive letters. This right of access, however, is greatly prejudiced by the poor literacy rates among prisoners. Officers at one

police station in Namibia indicated that, due to staff shortages, they were not always able to allow prisoners to make or receive phone calls. Access to radio, television and newspapers is another form of maintaining contact with society. Prisoners in many countries, however, complained of a lack of access to these resources.

Here again, the role of social workers is important to help facilitate contact with the community and to reintegrate prisoners after their release.

Access to religious services

Rules 41 and 42 of the UN SMR provide that prisoners shall have access to religious practitioners of their choice, that they should be able to attend services of that person, and that they should be able to satisfy the needs of religious life. Religious workers also play an important role in the spiritual and moral development of prisoners, as well as in providing ongoing guidance and support.

In some countries, religious organisations provide support and materials for education, training and work opportunities. They may also provide an important link between the family and the prisoner. The role of meditation and yoga, as spiritual practices, has been found to be beneficial in countries such as Mauritius (Ragobur n.d.) and Senegal.[14]

Religious ministries and bodies are prolific in Africa, as they are elsewhere in the world.[15] They are often more visible in the prisons and have greater access than non-faith-based service providers. While they do provide badly needed contact with the outside world, as well as a range of services, supplies and support, they come with a particular religious agenda. Their acceptance by the prison authorities indicates greater faith in rehabilitation as measured through religious conversion rather than through dealing with the many other risk factors associated with offending.

Open prisons

The Ouagadougou Declaration encourages the use of open prisons in appropriate circumstances. These are institutions with a less restrictive regime, where the aim is to facilitate re-entry into the community. The literature revealed that open prisons were operating in Namibia, Mozambique and Mauritius.

Richelieu open prison in Mauritius accommodates 7 per cent of the prison population and has only a thin metallic boundary fence for security. It operates under a system of rehabilitation that is based on self-discipline and the development of the prisoner's sense of responsibility. Prisoners also have the opportunity to learn and be engaged in different jobs, as well as to work on the farm and learn skills in cattle and pig breeding.[16]

In Mozambique, the open prisons were developed in fulfilment of the colonial understanding that 'work and religious education are deemed the main instruments applicable to native convicts' (quoted in Mondlane 2001: 467–477).[17] Public work,

intended for rehabilitative purposes, was in reality a practice used to procure forced labour. The correctional camps were used to provide manpower for agricultural and manufacturing industries. Post-independence, in 1975, the prison system was reorganised to transform prisons into productive units and institutions where social and political reintegration of detainees could take place. Re-education centres, as they were now called, were established in almost every province. They generally accommodated a small number of prisoners who were engaged in farming activities and in providing food and income for the prisons, with a view to their re-socialisation. According to Mondlane, 'Most inmates entered the centre with no qualifications, but were released as skilled artisans in farming, plumbing, carpentry and painting' (2001: 467–477).[18] Prisoners who behaved well and those who had served one-third of their sentences in closed prisons were sent to the open prisons. Owing to the beneficial conditions and treatment, many prisoners refused to leave the camps once their sentences were completed, preferring to stay at the re-education centre.

The Mozambican civil war, however, destroyed this system, as the camps were difficult to access and the proliferation of landmines made farming hazardous. The floods of 2000 also destroyed many of the prisons in Mozambique, and a decision was made to rebuild more open prisons as opposed to closed prisons. By 2001, 40 open prisons were operating in the country.

The Mabelane Penitentiary Prison in Xai-Xai province in Mozambique, an open prison established in 1976 and rebuilt after the war, accommodates long-term prisoners sent there for good behaviour. Prisoners can work on the land or in workshops; part of the produce provides the prison's food while another part is sold on the open market. Prisoners are not paid directly but the prison does pay their bail when they are eligible for conditional release. At Chingozi Open Centre in Tete province, families of prisoners can stay at the centre, although they are not accommodated with the prisoners. The Special Rapporteur was satisfied with the prison conditions at both open prisons visited and, even more telling, prisoners themselves had no complaints. Prisoners often settle in the area after their release. Despite minimal supervision, escapes are rare and very few ex-prisoners who remain in the area reoffend (ACHPR 1997c).

Mozambique has also creatively responded to alternative systems of control. When many of the prisons were destroyed in the floods, some prisoners had to be released and were allowed to go home at night. They were still under the control of the prisons services and had to spend the day at a designated place where they were required to participate in services and work. The social control in the community was sufficient to ensure that they fulfilled their obligations (ACHPR 1997c).

These experiences indicate that a more relaxed prison regime is possible. When prisons provide services that prisoners recognise as valuable and conditions that are comfortable, as well as encourage substantial contact with families, prisoners are not

only more willing to abide by prison rules and regulations, but are apparently also less likely to offend on release.

Role of civil society

The Ouagadougou Declaration and Plan of Action encourage civil society groups to visit prisons, to work with offenders, and to assist with pre-release and reintegration programmes. In many African countries, it is civil society groupings that take up some of the slack in the prison service and provide services to prisoners that the system does not have the capacity or resources to fulfil. It is also often these groupings that develop, test and run the innovative approaches to rehabilitation in the prisons which sometimes find their way into mainstream practice.

The ability of NGOs and other civil society groupings to render services, however, is dependent on whether the prison services are prepared to grant them access to prisons. A survey of NGOs providing services in African prisons revealed that most NGOs' access was heavily restricted. Permission was sometimes granted by the heads of prisons while, in other cases, permission had to be obtained from a higher authority, such as the responsible minister. In some countries it was particularly difficult to obtain permission which, even if granted, was often arbitrarily withdrawn (Dissel 2002).

Some countries recognise the importance of civil society involvement in prison. In South Africa, the DCS sees corrections as a societal responsibility, in which the involvement of other government departments, social institutions, civil society organisations and private individuals is deemed essential (DCS 2005). Even here, however, NGOs still complain about the difficulty of gaining access to prisons.

Some organisations form a partnership with one particular prison, while others have more extensive provincial or national programmes. Many of the civil society interventions are run by religious organisations. Some organisations are involved in human rights work – monitoring, educating and giving direct assistance or legal advice to prisoners. Others are involved in work directed at the rehabilitation and reintegration of offenders. However, there are still few organisations in Africa which provide services to prisoners. Zimbabwe, for instance, lists only two civil society organisations providing prison-related services (pers. comm., Commissioner of Prisons, Zimbabwe Prison Services, 12 October 2005).

Rehabilitation services provided by NGOs include the education and training of prisoners, counselling, social services, religious care and services, awareness programmes, craft making, life skills, and sports, art and cultural activities, as well as assistance with the resettlement of offenders after release. Services are often targeted at one sector of the prison population – often women or children and young prisoners.

Increasingly, NGOs are trying to strengthen the impact and effectiveness of their interventions. A recent conference attended by prison administrations and NGOs

in Africa held in Nairobi, Kenya, identified good practices in offender reintegration. These practices included:

- better coordinating of activities between civil society service providers to avoid duplication and to encourage sharing of information;
- providing vocational training to industry standard and issuing certificates that are independent of the prison administration;
- encouraging restorative justice practices, including victim compensation;
- preparing prisoners for release;
- involving local organisations (churches, traditional leaders) in the reception of prisoners on release and so helping alleviate the stigma of imprisonment;
- assisting offenders with work opportunities and finding housing; and
- civil society organisations working to promote alternatives to imprisonment to reduce levels of overcrowding (RODI 2004).

Reintegration into the community

Perhaps the greatest challenge for offenders lies in the period immediately after release when they attempt to reintegrate into the community and re-establish their lives. Inevitably, when people are released from prison, the socio-economic circumstances that existed prior to their arrest continue to exist, as do their lack of job-related skills and work opportunities in the community. They are also burdened with the stigma of their incarceration, and thus often find it even more difficult to find employment. Therefore, the work of rehabilitation and reintegration needs to continue after their release. There are several NGOs which offer support to released prisoners through training, finding employment, and offering interim financial support. Others offer counselling and education, particularly about HIV and AIDS.

The impact of rehabilitation and reintegration services on prisoners

Prisons are not the best institutions in which rehabilitation may take place, and they do not produce the best results. The available information tends to suggest that African countries are, on the whole, not succeeding in contributing to the reduction of repeat offending through the use of imprisonment. Although only 7 per cent of those of the Namibian prison population sentenced in one year are recidivists (ACHPR 2001d: 11),[19] in Mauritius there is a recidivism rate of between 61 per cent and 74 per cent among male prisoners and between 47 per cent and 67 per cent for females.[20] While there is no empirical evidence of the extent of recidivism in South Africa, estimates put the recidivism rate at between 66 per cent and 94 per cent (Muntingh 2001: 54). While these figures are high, they are also an indication that rehabilitation has not been a focus in these countries nor has it been achieved. Even when states have accepted the vision of rehabilitation, they have, perhaps, been consumed by more urgent concerns, such as daily living conditions in prisons. Given these enormous odds, the project of rehabilitation is an ambitious one for the continent.

Although the ultimate aim of rehabilitation is to make offenders less likely to reoffend on their release from prison, the intervention also aims to have an impact on offenders' attitudes and behaviours that impact on reoffending and on their social interaction with others. As researchers Mathews and Pitts have noted:

> [I]t is necessary to move away from a zero-sum conception of rehabilitation and from the notion that the aim of rehabilitative programmes is to turn bad people into good people or committed criminals into law abiding citizens. The aims of rehabilitative programmes must be more diverse and more modest. They need to be designed to achieve a number of different objectives at a number of different levels, since even gains at the margins are gains. (quoted in Lomofsky & Smith 2003: xiv)

Even in terms of this modest framework, not much information on how success is understood, how it is measured, and what contributes to successful interventions is available on the continent.

Most of our knowledge about the impact of rehabilitation programmes comes from studies in the developed world – the US, the UK, western Europe and Australia. Only more recently have some regional organisations begun to write up their interventions with offenders, with most of this taking place in South Africa. These programmes have been informed by the international theory but adapted to the realities experienced by prisoners in South Africa, as well as influenced by the policy environment. These few studies have begun to show promising results. Two examples of work with young offenders are illustrated below.

One example was the evaluation of the Tough Enough Programme implemented by the National Institute for Crime Prevention and Rehabilitation of Offenders. This reintegration programme for young offenders focuses on developing skills, building and improving relationships, and developing potential and motivation for action.

The programme runs for three to six months in prisons and continues for up to nine months after release. It encourages participants to take responsibility for those factors that lead them to engage in crime in their lives. An evaluation consisting of interviews and surveys with released prisoners, their families and service providers found that the programme was effective in addressing three key factors related to the risk of recidivism: improved personal empowerment, increased ability to deal with the experience of stigmatisation and, to a lesser extent, improved economic empowerment (Lomofsky & Smith 2003).

Another example is provided by a Johannesburg consortium of seven organisations, which piloted what they see as an integrated approach to dealing with young offenders. The Integrated Young Offender Programme targets prisoners convicted of serious violent offences. The programme was built on the theory of risk and resilience and incorporates an understanding of the socio-economic dynamics that affect a young person and influence offending behaviour. In acknowledging that a

complex coexistence of risk factors impinges on a young person, the programme aims to target these through a number of different interventions that build on each other and that help participants understand their engagement in crime and make informed choices in the future. The specific objectives of the programme are to:

- address an individual's attitudes and responses towards education, development and employment, and assist in opening up opportunities to access employment and other opportunities;
- develop conflict management and problem-solving skills to support successful interpersonal relationships;
- reintegrate into the family and rebuild family relationships and networks while in prison and after release;
- enable participants to make informed decisions about healthy living in relation to drug and alcohol use, HIV/AIDS and sexual relationships;
- address issues of taking personal responsibility and recognising the impact of their actions, through restorative justice processes and other interventions; and
- develop the social, behavioural and socio-economic skills to enable the young person to resist risk factors and develop internal resilience to face up to the difficulties that life throws their way.

An evaluation of the programme indicated that it had a positive impact on the participants in meeting the expected outcomes. It was found that there was a change in attitude towards the key factors the programme aimed to address, namely, education, employment, personal responsibility for their lives, improved life and coping skills, and internal resilience to confront the difficulties they may face (Roper 2005a). Programme evaluations have also indicated a positive impact on the ways prisoners conduct themselves while in prison, which in turn has a larger impact on the prison population where these prisoners are accommodated (Roper 2004, 2005a).

Based on these and other evaluations (Roper 2005b), some common themes emerge as to what contributes to a programme's success, such as:

- flexibility to cater to individually identified needs;
- careful maintenance of the balance between quality and quantity;
- greater focus on addressing employment-related skills;
- the need for ongoing monitoring and follow-up;
- the need for integrated and multidimensional services that address a range of factors associated with offending;
- the importance of working with families, improving relationships, establishing support networks and facilitating reintegration after release;
- the need for a restorative justice component focusing on acknowledgement of responsibility for the crime and possibly victim–offender-mediated processes; and
- programmes of medium-term duration of nine months to a year.

It should be noted that inmates' experiences in prison and opinions of the criminal justice system will also impact on their ability to participate meaningfully and to reintegrate successfully into the community. When the prison experiences are

particularly negative, for instance in badly overcrowded prisons, when there is prison violence and brutalisation, inadequate medical treatment or food, and a number of other problems, the impact of any programmatic intervention is likely to be lessened. Therefore, any prison wanting to introduce meaningful rehabilitation initiatives for prisoners will also have to attend to some of these fundamental problems in the prison.

Conclusion

Prisons are one of the inheritances of colonialism in Africa but their continued existence is entrenched in our present and is likely to stretch a good way into our future as well. And here, the prison ideology continues to be influenced by the ideas of the developed western world. The rehabilitation ideal, imported from the west, has, over the last five years, become entrenched in regional instruments and legislation and is making itself felt in practice. The conditions, culture and resources available in African prisons, however, are vastly different from those where these ideas have been developed and tested. A key challenge, then, is to develop an approach to rehabilitation that is realistic and appropriate to the circumstances of the country and the prisons, recognising that, even within Africa, vast differences exist between countries.

We need to learn from and build on some of the interesting and positive initiatives that have emerged from the continent, such as the open prisons of Mozambique and the interventions with young prisoners in South Africa. Specifically, we need to encourage the many existing small initiatives that go a long way to helping prisoners, which serve to undo some of the damage done to prisoners through the experience of institutionalisation, and which teach them some of the basic skills needed to survive when they are released from prison.

In order to strengthen the impact of interventions, a number of recommendations are made. First, imprisonment is not effective as a form of rehabilitation and, therefore, should not be looked to by the criminal justice system to fulfil this particular role. Imprisonment should be used sparingly and only for those offenders that are deemed to be the highest risk to society.

Second, rehabilitation and reintegration interventions should be informed by relevant and appropriate theoretical frameworks and supported by institutional arrangements in the prison.

Third, prison staff should be trained to understand their role and duties within a human rights perspective, and they should facilitate prisoners' involvement in reintegration initiatives.

Finally, civil society initiatives tend to focus on the psychosocial aspects of rehabilitation, while state initiatives are more rooted in vocational and educational development. It is time that government and civil society joined hands in developing an effective and sustainable solution to the problem of reoffending.

Greater collaboration between the two sectors can bring about a more cohesive and integrated approach to rehabilitation that tackles all the risk factors of offending.

Notes

1 Available at <http://penalreform.org/English/pana_declarationkampala.htm>, accessed on 7 April 2004. It was adopted by ECOSOC Resolution 1997/36.

2 Available at <http://www.penalreform.org/english/frset_pre_en.htm>, accessed on 7 April 2004. The Declaration and Plan of Action of the conference were adopted by the African Commission on Human and Peoples' Rights in its thirty-fourth session.

3 Adopted at the fifth CESCA Conference, September 2001.

4 Chad, Ivory Coast, Guinea Conakry, Mali, Mauritania, Niger, South Africa and Uganda, in their individual country responses to the survey conducted in preparation for the Ouagadougou conference. See PRI (2003).

5 See Mondlane (2001: 467–477); see also van Zyl Smit (1992: 10), concerning the relationship between labour and imprisonment in South Africa.

6 The Deputy Commissioner of Prisons, quoted in RODI (2004: 7).

7 See the reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa for Benin, The Gambia, Mali, Mozambique, Central African Republic, Uganda, Malawi, Cameroon, Namibia, South Africa and Ethiopia, available at <http://www.penalreform.org/>.

8 Moshoeshoe Monare, Our prisons are in a mess. Available at <http://www.iol.co.za/index.php?art_id=vn20050929061036528C729375&set_id=1&click_id=13&sf=>, accessed on 10 October 2005.

9 There are large differences between and within countries, but in sub-Saharan Africa about 70 per cent of adult men and 50 per cent of women are literate. There are marked disparities in access to primary education within countries by income, urban/rural location and gender. See the World Bank Group, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:20264715~menuPK:535759~pagePK:146736~piPK:226340~theSitePK:258644,00.html>, accessed on 9 October 2005.

10 High Commissioner for Human Rights, Standard Minimum Rules for 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 Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rules 71 and 72.

11 For example, the Zambian Penal Code and Constitution allow for prisoners to be sentenced with or without hard labour. They may also be placed out with a public or private company or state corporation for work purposes. In this case it provided that prisoners should be paid for their labour, but state resources do not allow for it. See the initial report of the Republic of Zambia to the ACHPR, available at <http://www.achpr.org/english/state_reports/40_Zambia%20initial%20report_Eng.pdf>, accessed on 18 October 2006.

12 Mauritius Prison Services, available at <http://www.gov.mu/portal/site/prisons/menuitem.c9a355ecf9be5d2ff4a9e75b0bb521ca/>, accessed on 18 October 2006.

13 A comparative study conducted in the UK suggests that the prevalence rates of mental health issues among young prisoners range from 25 per cent to 81 per cent, compared with 13 per cent in the general population (Hagell 2002).

14 Between 1987 and 1989, more than 11 000 inmates and 900 correctional officers and prison administrators in 31 of the 34 prisons in Senegal were instructed in the transcendental meditation programme. Rule infractions decreased, medical expenses went down 70 per cent, and recidivism dropped from 90 per cent in the pre-meditation period to less than 3 per cent after the programme was established. See the transcendental meditation programme in the Senegalese penitentiary system, available at <http://www.istpp.org/rehabilitation/14.html>, accessed on 10 October 2005.

15 See for example the website of the International Network of Prison Ministries, available at <http://prisonministry.net/directory/categories/africanpm/index.htm>, accessed on 18 October 2005.

16 Mauritius Prison Service website, available at <http://www.gov.mu/portal/site/prisons/menuitem.afd6bdec4142042ff4a9e75b0bb521ca/#Richelieu%20Open%20Prison>, accessed on 18 October 2006.

17 Decree No. 39.997 of 29/12/54.

18 Decree No. 39.997 of 29/12/54.

19 Among those sentenced during 2000, 11.8 per cent of the population were termed second offenders, while 7.0 per cent were said to be recidivists.

20 Statistics for the period 1999 to 2001. See Koodoruth (n.d.).

9 Alternative sentencing in Africa

Lukas Muntingh

Whilst alternative sentencing options have a long history in Europe and North America, they have found limited application in Africa. It is only more recently, since the early 1990s, that these sentencing options have been actively promoted by international NGOs in a number of African countries. Significant advances were made in some countries, whilst progress was slow in others. This discussion is based on the available evidence from a number of countries and therefore does not constitute a status report on alternative sentencing for all African countries.

Generally, expectations of alternative sentencing are high and claims are made that this approach would achieve a number of objectives. Zvekic argues:

> The arguments for non-custodial sanctions are essentially the mirror image of the arguments against imprisonment. First, they are considered more appropriate for certain types of offences and offenders. Second, because they avoid 'prisonisation', they promote integration back into the community as well as rehabilitation, and are therefore more humane. Third, they are generally less costly than sanctions involving imprisonment. Fourth, by decreasing the prison population, they ease prison overcrowding and thus facilitate administration of prisons and the proper correctional treatment of those who remain in prison. (1997: 23)

The following five key themes emerge from analysing the available information from the past 15 years in Africa:

- prison reform priorities were developed and articulated as declarations in the mid- to late 1990s, reflecting efforts on the continent to become part of a global human rights culture;
- prison reform priorities made a link between overcrowding (as a central reason for the conditions in Africa's prisons) and alternative sentencing options, with specific reference to community service orders as a solution to overcrowding;
- socio-economic conditions in different countries had a direct impact on the ability of the state to deliver on and sustain criminal justice system reform initiatives, with specific reference to alternative sentencing;
- broader issues of governance emerged as a key influence on the sustainability of alternative sentencing options, and
- progress with regard to the introduction of alternative sentencing options has been variable over the 15-year period.

This chapter presents a critical review of alternative sentencing in the African context. Given the state of Africa's prisons and the levels of overcrowding, it asks whether the 'alternative sentencing project' failed or, rather, whether this was the right answer to the wrong question. Based on an analysis of the above five themes, the chapter concludes with an assessment of the future of alternative sentencing options. I conclude that three conditions must be met in order to see growth in this field: demonstrating the effectiveness of alternative sentencing options, achieving the 'right' objectives, and transcending the dichotomy these sentencing options have with imprisonment.

The availability and accessibility of information on criminal justice reform and, more specifically, on alternative sentencing in Africa, is problematic. Whilst there may be promising practices, these are either not documented or not accessible through normal research practices. A further limitation is that very few studies on alternative sentencing in Africa have assessed the impact of reform measures. In view of this, the chapter focuses on information accessible through available documented sources and so the scope is necessarily limited.

The framework for and origins of alternative sentencing in Africa

The history of alternative sentencing in Africa over the last 15 years was influenced by four major thrusts. The first was the success achieved in Zimbabwe in the 1990s with the introduction of community service orders. The second was the Kampala Declaration (UN Economic and Social Council 1996) on prison and penal reform in 1996 that reflected a shared concern about prison conditions. The third was the Kadoma Declaration on Community Service Orders[1] of 1997, and the fourth was the Ouagadougou Declaration on Accelerating Penal and Prison Reform[2] in 2002. These are discussed below. This is followed by a presentation of numerical data on alternative sentencing, and conclusions are developed based on the data.

Defining alternative sentencing is necessary before continuing with the analysis. The Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) form the basis for international law on alternative sentencing.[3] The fundamental aims are to:

- provide a set of basic principles for promoting the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment;
- promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as promote among offenders a sense of responsibility towards society;
- take into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system when implementing the rules;
- ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention;
- develop non-custodial measures within member states' legal systems to provide other options, thus reducing the use of imprisonment, and

- rationalise criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

The discussion that follows will place particular emphasis on community service orders as a form of alternative sentencing. Community service, used in this manner, refers to the substitution of a prison term with the performance by the offender of a service to the benefit of the community, without payment or compensation, in the offender's leisure time, and for a fixed number of hours spread over a specified period of time.

The Zimbabwean experience

The development of community service orders in Zimbabwe had a formative influence on the strategy pursued for the expansion of alternative sentencing in other parts of Africa. Stern (1999: 28–52) provides a detailed description of the Zimbabwean experience, which is summarised below.

After initial discussions among high-level officials, a National Committee on Community Service (NCCS) was formed in 1992, and the Secretary for Justice, Legal and Parliamentary Affairs was elected chairperson. The Committee membership was made up of representatives from the police, prisons department, and Attorney-General's office. In August 1992, Parliament passed a legislative amendment that made provision for community service orders as a sentencing option. The NCCS enjoyed wide support, particularly from the Chief Justice.

Logistically, once background information on offenders had been collected and submitted to the court, the court staff would make the orders. A national coordinator and 12 regional assistants handled the day-to-day management and supervision. They were all assisted by other social agencies as well as by the institutions where offenders would perform their community service. Penal Reform International (PRI), an international NGO, also raised funds for the scheme from the European Union and the Department for International Development to fund the remuneration costs, capital expenditures and operating costs of the regional assistants and the national coordinator. The appointment of staff and the development of a national network consisting of provincial and district committees enabled community service orders to become part of the Zimbabwean criminal justice system. On 1 August 1997, the government formally took over the scheme from the NGOs, and in the following years the government made good on its promise to appoint more staff to the scheme.

The scheme's professional staff, known as Provincial Community Service Officers, are accountable to the magistrates. The officers fulfil a range of tasks to ensure the smooth functioning of the sentencing option. They visit offenders for assessment and monitoring purposes, visit courts, present reports before the court, orientate newly placed community servers regarding their duties and responsibilities, and

even involve the victim and family, if required. The officers have access to vehicles, basic administrative resources and an information collection system.

From 1992 to 1997 the results were impressive, with a total of 16 000 offenders receiving community service orders. In a speech commemorating the government's formal adoption of the scheme, the Minister of Justice, Legal and Parliamentary Affairs attributed the reduction in the prison population to the success of the community service orders scheme.

The African declarations

In September 1996, representatives from 40 African countries gathered in Kampala with a shared concern for prison conditions on the continent. The result was the Kampala Declaration on Prison Conditions in Africa (UN Economic and Social Council 1996).[4] The Declaration represented a significant attempt by the continent to acknowledge the problems in prisons and to propose measures to address these issues. The Declaration defined the problem as one of prison overcrowding, which gives rise to conditions that are in violation of prisoners' rights. The Declaration dealt with four broad areas, namely remand prisoners, prison staff, alternative sentencing, and the African Commission on Human and Peoples' Rights (ACHPR). A significant proportion of the Declaration addressed alternative sentencing, and the drafters regarded this form of sentencing as an important strategy to reduce overcrowding in African prisons.

The Kampala Declaration implies that the granting of amnesties or pardons and/or increasing capacity are not sustainable solutions or measures of lasting impact in the management of overcrowded prisons, and they are therefore not discussed further. The Declaration emphasises measures that 'replace custodial sentences'; two such measures are specifically identified, namely community service orders and the payment of compensation. The Declaration does not justify the selection of these two sentencing options compared to others, given the range of options identified in the UN Standard Minimum Rules for Non-Custodial Measures.[5] Under the heading 'Alternative Sentencing', the Declaration not only proceeds to provide guidance on how matters can be dealt with but also describes strategic and implementation issues, such as:

- petty offences should be dealt with according to customary practice, provided that this meets human rights requirements and those involved agree;
- whenever possible, petty offences should be dealt with by mediation and should be resolved between the parties involved without recourse to the criminal justice system;
- the principle of civil reparation or financial recompense should be applied, taking account of the financial capability of the offender or of his or her parents;
- the work done by the offender should, if possible, recompense the victim;
- community service and other non-custodial measures should, if possible, be preferred to imprisonment;

- there should be a study of the feasibility of adapting successful African models of non-custodial measures and applying them in countries where they are not yet used, and
- the public should be educated about the objectives of these alternatives and how they work.

In November 1997, 96 delegates from 15 African countries gathered in Kadoma, Zimbabwe, for an international conference on community service orders, hosted by PRI and Zimbabwe's National Committee on Community Service.[6] The conference produced the Kadomo Declaration on Community Service Orders in Africa as well as an accompanying Plan of Action. Amongst other matters the Declaration addressed these issues with regard to community service orders:

- overcrowding of prisons requires positive actions through the introduction of community service orders;
- community service orders are in conformity with African traditions;
- community service should be implemented and managed in an effective manner;
- governments, donors and civil society are invited to support research, pilot projects and community service initiatives;
- lessons learned from other jurisdictions should be acknowledged;
- the public should be educated and progress monitored through the development and use of a database, and
- countries that do not yet have community service orders are encouraged to develop them.

The Plan of Action in support of the Kadomo Declaration describes four areas of intervention: networking between stakeholders, developing a community service directory, publishing a newsletter, and further research on the issue.

If there was any doubt previously, by 1997 it was clear that the discourse on alternative sentencing in Africa was firmly focused on community service orders with the expectation that this would reduce prison overcrowding. This was brought about by essentially two developments. First, in 1992, community service orders became available to Zimbabwean courts as a result of close cooperation between the Zimbabwean judiciary and PRI, as described above. The Zimbabwean experience demonstrated at the time that alternative solutions to imprisonment were indeed possible and, more importantly, that the prison population could be reduced through the imposition of community service orders.[7] Second, based on the success in Zimbabwe, PRI actively promoted community service orders elsewhere as an appropriate strategy to address prison overcrowding. In the subsequent years, PRI engaged in various projects on community service orders in Kenya, Malawi, Uganda, Zambia, Burkina Faso, Congo-Brazzaville, the Central African Republic and Mozambique (PRI n.d.).

Five years later, from 18 to 20 September 2002, representatives from Africa gathered in Ouagadougou, Burkina Faso, for the second Pan African Conference on Penal and Prison Reform in Africa. The conference adopted the Ouagadougou

Declaration on Accelerating Penal and Prison Reform. The Declaration continued in the tradition of the preceding two declarations but some shifts in thinking were noticeable. The Ouagadougou Declaration acknowledged the achievements to date but also recognised the slow pace of penal and prison reform. The declaration also went a step further than the Kampala Declaration of 1996 and created a Plan of Action. Seven recommendations were made but only the first recommendation, which dealt with sentencing, is of relevance here. The Plan of Action unpacked this further and distinguished between strategies for the prevention of entry to the prison system, strategies for reducing the unsentenced prison population, and strategies for reducing the sentenced population. The measures proposed for preventing people 'coming into prison' do not, however, deal with alternative sentencing – this is dealt with in relation to reducing the sentenced prisoner population. The five measures proposed for preventing people from entering the prison system include: the use of diversion as an alternative to prosecution; the use of restorative justice options; the use of traditional justice mechanisms; the improved referral of cases from the formal to the informal justice system, and the decriminalisation of certain offences. The preventative measures therefore deal primarily with matters concerning the adjudication process and not with questions of sentencing.

The measures proposed in the Plan of Action for reducing the sentenced population are:

- setting a target for reducing the prison population;
- increasing use of proven effective alternatives, such as community service, and exploring other sanctions such as partially or fully suspended sentence, probation and correctional supervision;
- imposing sentences of imprisonment for only the most serious offences and when no other sentence is appropriate, that is, as a last resort and for the shortest time possible;
- considering prison capacity when determining decisions to imprison and the length and terms of imprisonment;
- reviewing and monitoring sentencing practice to ensure consistency;
- providing 'powers to courts to review decisions to imprison, with a view to substituting community disposals in place of prison', and
- allowing early and conditional release schemes, furloughs and home leave – criteria for early release should include compassionate grounds based on health and age.

The Plan of Action reflects a number of noteworthy shifts. The first is that other sentencing options, in addition to community service orders and restitution, are identified for further investigation. Second, a need is expressed for the review and monitoring of sentencing practices. It does not, however, go as far as suggesting the evaluation of the efficacy of different sentencing options. Third, the review powers of courts are noted as a resource, in an attempt to substitute custodial with non-custodial sentences. The Plan also, optimistically, requests sentencing officers to consider prison conditions and the capacity of prisons before imposing a prison

term.[8] The Plan of Action is silent on HIV/AIDS, although reference is made to early release due to ill health.

Alternative sentencing and prison overcrowding

Levels of overcrowding

Numerous reports on prisons in Africa describe the deplorable conditions under which people are detained as well as the excessively long periods that alleged offenders remain in custody awaiting trial, often for fairly minor offences. The country reports by the Special Rapporteur on Prisons and Conditions of Detention in Africa provide such information.[9] International NGOs, such as Human Rights Watch, the International Bar Association, and Amnesty International provide further descriptions of prisons and the human rights violations occurring within African prisons.

The overcrowding of prisons forms a central theme of these reports. The argument is made that there are simply too many prisoners and too few resources for the number of people in custody, resulting in a number of negative consequences, including the violation of human rights. While statistics on African prison populations are not always readily available, there is little reason to doubt these claims and recent figures (2004), made available by Stapleton (2005b) from PRI, confirm the common perception.

Table 9.1 *Level of prison overcrowding for selected African countries*

Country	Prison population	Prison capacity	Percentage occupation
Botswana	5 801	3 870	149.9
Cameroon	19 800	10 000	198.0
DRC	c. 50 000	NA	NA
Ethiopia	c. 65 000	NA	NA
Ghana	11 800	7 000	168.6
Kenya	50 000	14 000	357.1
Malawi	9 200	4 500	204.4
Niger	7 000	8 722	80.3
Rwanda	80 000	46 700	171.3
Senegal	16 993	7 000	242.8
South Africa	181 000	114 000	158.8
Sudan	12 000	5 000	240.0
Tanzania	43 902	22 699	193.4
Uganda	18 512	8 952	206.8
Zambia	13 500	5 357	252.0

Source: Stapleton (2005b: 6)

Whilst there is some debate as to how to measure overcrowding in prisons (see Muntingh 2005c), there is general consensus that overcrowded prisons invariably result in conditions of detention that do not meet international human rights standards. Table 9.1 reflects levels of overcrowding that, on average, exceed one-and-a-half times the capacity of prisons. Niger is the singular exception.

Despite the comprehensive framework of international law for the protection of prisoners,[10] the conditions in African prisons have not improved substantially and have in fact probably deteriorated over the past 20 years. Overcrowding seems to compound problems of poor management, limited capacity, the demise of physical infrastructure, limited resources and poor access to basic services in prisons.

Alternative sentencing and the link with overcrowding

Alternative sentencing should be assessed in terms of the complex relationship between sentencing and overcrowding. A range of factors influence sentencing and thereby the size of the prison population. These include the attitudes of sentencing officers, the mass media, and perceptions of crime (Coyle 2004). For example, in 1994 the Law Reform Commission of Tanzania listed nine reasons for prison overcrowding in that country, of which only two related to sentencing: the 'over-reliance on custodial sentences' and mandatory minimum sentences (Bakurura 2003: 83). The additional reasons related to a lack of physical capacity, the age of prison buildings, population growth, economic reasons, bail restrictions, underqualified personnel, slow investigations of crimes, and low disposal rates of cases.

When assessing the use of alternative sentencing to reduce overcrowding in African prisons, it should be acknowledged that imprisonment is not applied in a uniform manner across the continent and that there is, in fact, wide variation. Overcrowding of prisons is sometimes caused by factors other than sentencing, such as natural population growth or failure to construct new prisons for decades (Bakurura 2003).[11] Prisons may also become overcrowded as a result of government policy dictating longer prison sentences, as is the case in South Africa.[12] It would therefore be problematic to see the problem as a uniform one across the continent caused by the under-utilisation of alternative sentencing options. It is also true that prison conditions may be below international standards even if prisons are not overcrowded. Table 9.2 presents imprisonment rates per 100 000 of the population for the four African regions; the differences are obvious.

Table 9.2 *Imprisonment rates in Africa per region*

Region	Imprisonment rate per 100 000 of the population
West and Central Africa	50
Eastern Africa	122
Northern Africa	124
Southern Africa	362

Source: Walmsley (2003: 68)

The imprisonment rate per 100 000 of the population for southern Africa is seven times higher than that of West and Central Africa. Apart from this statistic, data on the sentence profiles of country prison populations are inaccessible, if not non-existent, with the exception of South Africa.[13] Southern Africa's high imprisonment rate is driven by and large by that of South Africa. South Africa has a long history of imprisonment, which has established the norm of a high rate of imprisonment. The country's particular history also ensured that imprisonment was used extensively for the provision of labour and for social control by means of the pass laws (Bernault 2003). More broadly, prisons symbolise in part the efforts of colonisers in Africa to organise the physical space of the colonies along racial lines (Bernault 2003). It is also noteworthy that the African countries with the highest imprisonment rates (South Africa, Botswana and Swaziland) are also the countries with the highest ratios of police per 100 000 people (Allen 2005; UNODC 2005b: 10).

Compared to Europe and North America, Africa has a significantly lower rate of imprisonment overall. However, this should be seen within the context of criminal justice system effectiveness, corruption and levels of urbanisation and poverty. Furthermore, since its introduction to Africa, the European prison model went through a reform process in Europe that did not impact on prisons in Africa (Bernault 2003). Whilst criminal justice control expanded in the developed world, it developed in a significantly different manner and often with different objectives in Africa. The lower imprisonment rates of Africa are not so much a function of existing alternatives to imprisonment as they are of a diminished ability to implement the European prison model in a vastly different context.

In many countries, overcrowded prisons are not the result of sentencing but rather of the significant proportion of unsentenced prisoners who remain in custody, often for months or years. Table 9.3 presents the proportion of unsentenced prisoners as a percentage of the total prison population. It is unlikely that alternative sentencing will make an impact when more than half of the prison population are unsentenced prisoners. The conclusion drawn from this is that, in some countries, it is not the type of sentence imposed that results in overcrowding, but rather that the criminal justice process is unable to facilitate the expeditious adjudication of cases. The development and use of alternative sentencing options may therefore have limited applicability under such conditions.

As noted above, data on sentence profiles are not readily available, with the exception of South Africa. Data from that country will be used to illustrate how sentence profiles may impact on the use of alternative sentencing to reduce prison overcrowding. The purpose is to show the importance of sentence profile data in the planning and development of alternative sentencing options. It is also noted that the data presented reflect only offenders who received a custodial sentence and do not include sentence data on offenders who received other sentences. On 30 November 2004, the prison population of South Africa was 186 053, with a capacity of approximately 114 000. Of this total, 137 601 were sentenced and 48 452 unsentenced.

Table 9.3 *Proportion of unsentenced prisoners as percentage of total prison population*

Country	Percentage
Mozambique	72.90
Mali	67.20
Uganda	65.70
Madagascar	65.40
Cameroon	c. 65.00
Benin	64.50
Nigeria	64.30
Burundi	63.40
Angola	58.90
São Tomé e Príncipe	58.50
Burkina Faso	58.30
Djibouti	57.20
Libya	56.80
Togo	55.40
Republic of Guinea	51.30
Comoros	c. 50.00
Swaziland	49.60
Tanzania	49.00
Morocco	40.70
Kenya	39.40
Zambia	38.60
Cape Verde (Cabo Verde)	36.50
Algeria	36.10
Ivory Coast	35.60
Lesotho	35.30
Senegal	33.10
Zimbabwe	29.60
South Africa	26.70
Botswana	25.10
Malawi	23.50
Tunisia	22.70
The Gambia	18.50
Egypt	16.70

Source: International Centre for Prison Studies (2006d)

In South Africa, the sentenced prison population is the driving force behind the growth in the total prison population, as the awaiting trial population has stabilised and even begun to decline recently. The sentenced prison population's sentence

profile is presented in Table 9.4. The profile illustrates that short-term prisoners comprise a very small proportion of the prison population. If all sentences of less than 12 months are replaced with non-custodial options, this will reduce the prison population by less than 10 per cent. If this is expanded to include those who are serving sentences of less than 24 months, the reduction would amount to 13.1 per cent. A focus on the two-to-five-year sentence category could potentially make a significant impact as it constitutes just over 25 per cent of the total population.

For alternative sentencing to have an impact under these conditions, realistic alternatives are required for prisoners who are serving sentences between two and five years. If the objective is to reduce the prison population, there are two possibilities. The first option is to develop alternatives for offenders serving sentences up to and including five years. The second option is a general reduction over time in sentence lengths of those offenders serving between two- and five-year terms to a more appropriate level that would impact on prison occupation levels. This would make this category eligible for non-custodial options, even if achieved through parole and intensive supervision options.

Table 9.4 *Sentence profile of the South African prison population as at 30 November 2004*

Sentence	Number	Percentage	Category	Description
0–6 months	5 783	4.2		
>6–12 months	6 160	4.5		
>12–<24 months	6 121	4.4	13.1	0–24 months
2–3 years	18 511	13.5		
>3–5 years	17 111	12.4	25.9	2–5 years
>5–7 years	12 349	9.0		
>7–10 years	21 494	15.6		
>10–15 years	22 957	16.7		
>15–20 years	10 534	7.7		
>20 years to life	14 929	10.8	50.8	7+ years
Other sentenced	1 652	1.2		
Total sentenced	137 601			

Source: Figures made available to the author by the Judicial Inspectorate of Prisons, Cape Town, South Africa

While short-term prisoners (under 24 months) make up a small percentage of the average prison population, their contribution to annual admissions is significant, as shown in Table 9.5. Just under 50 per cent of all sentenced offenders admitted to South African prisons in 2004 received a sentence of less than 24 months. Nearly 34 per cent of total admissions received a sentence of less than six months. Should these short sentences be replaced with other, non-custodial sentences, it would undoubtedly save the state substantially on an annual basis by reducing the number of offenders needing to go through the admissions process at prisons. However, as

noted, the impact on reducing overcrowding would be limited. The benefit would therefore not be concentrated on reducing the size of the prison population, but rather on providing the possibility for the reallocation of resources from managing the high turnover in admissions and releases to improving general prison conditions and staff-to-prisoner ratios.

Table 9.5 *Sentence profile of sentenced prisoners admitted in 2004, South Africa*

Sentence	Number	Percentage	Category
0–6 months	57 551	33.9	
>6–12 months	15 467	9.1	
>12–<24 months	10 050	5.9	48.9
2–3 years	24 253	14.3	
>3–5 years	15 796	9.3	23.6
>5–7 years	9 268	5.5	
>7–10 years	12 273	7.2	
>10–15 years	11 274	6.6	
>15–20 years	4 519	2.7	
>20 years	3 671	2.2	
Life sentence	2 574	1.5	20.2
Other	3 060	1.8	
Total admissions – sentenced	169 756		

Source: Figures made available to the author by the Judicial Inspectorate of Prisons, Cape Town, South Africa

When assessing overcrowding from a quantitative perspective, it follows that if alternative sentences are used with the intention of reducing levels of overcrowding, such an approach must be based on accurate data. In the first instance, it requires that the sentenced population constitute the overwhelming majority of the total prison population. Situations in which the unsentenced prison population constitutes more than 50 per cent of the total would not meet this requirement, and the emphasis should then be placed on case management in order to reduce levels of overcrowding. Second, alternatives to imprisonment must be used within those sentence categories that are regarded as the main drivers of the growth in the prison population. This requires a careful analysis of sentencing trends to ensure that alternatives are correctly formulated and applied. It is also possible, as is probably the case in the above example of South Africa, that alternative sentences for longer terms, such as two to five years of imprisonment, may not be feasible for a number of reasons, such as public opinion or the attitudes of sentencing officers. This obviously places a limitation on the utility of alternative sentencing in reducing prison overcrowding.

Proportionality and interchangeability of sanctions

In the preceding section, reference was made to replacing certain custodial sentences with non-custodial options, with the objective of reducing prison populations. Whilst there are offenders who pose a risk to society, it is also true that many offenders currently imprisoned present a low risk of reoffending and an even lower risk of causing significant harm (Couldsfield 2004). Alternative sentencing options are, therefore, relevant not only for reducing the prison population but also for avoiding the senseless, and potentially detrimental, effects of short-term imprisonment. Under ideal conditions, one would see a continuum populated with a range of sanctions from least restrictive to most restrictive (van Zyl Smit 1993). Unfortunately, this cannot be achieved by merely increasing the quantum of the same sanction, that is, increasing the number of hours of community service or the monetary value of a fine. According to von Hirsch et al., relative severity in punishment 'should be measured by way of the normative importance of the personal interest compromised by operation of the penalty. The more basic the interests infringed, and the greater the extent of the infringement, the more severe the penalty' (1992: 378). As such, alternative sentencing options need to reflect, in a qualitative measure, what society deems an appropriate punishment, and this implies that the alternative must be respectful of proportionality and, if present, victims' interests.

The case of community service orders in Zimbabwe presents a useful example for discussion. Stern (1999: 34) reports that it was initially agreed that a community service order would be considered if a prison sentence of less than 12 months was contemplated. Converting 12 months' imprisonment to a certain number of hours of community service posed a problem for sentencing officers, and a working group was appointed to address the matter. A guideline was suggested in which 30 hours of community service was equal to one month of imprisonment. In 1996, the matter was reviewed and the tariff was raised from 30 to 35 hours of community service as equal to one month's imprisonment, with a maximum of 420 hours for 12 months' imprisonment.

This approach runs into two sets of problems. The first is the question of proportionality, as it effectively equates 365 days in a prison to roughly 52 eight-hour days of community service spread over a year. In the reverse, it can be asked: if community service is considered equivalent to imprisonment, can the community service be replaced by periodic imprisonment of one day per week? The answer to this is no, based on the definition given by von Hirsch et al. above. Any custodial sentence is always more restrictive, invasive and extensive than a non-custodial sentence. The two cannot be equated, especially not through a simple mathematical conversion. At best, it can be an approximation that compromises on severity in order to serve a purpose other than merely the punishment of the offender.

Of further concern is the question of whether community service is only interchangeable with imprisonment, or whether it can be exchanged with other sentence options and, if so, what the basis for the exchange would be. The Criminal Procedure

and Evidence Amendment Act of 1997 (Zimbabwe) makes provision for the possibility of performing community service instead of the payment of a fine, but leaves it to the discretion of the court to determine the monetary value of community service. Clearly, this will create problems of consistency due to the lack of guidelines.

To summarise this section, a number of conclusions can be made. First, alternative sentencing options must be interchangeable with identified custodial options in a manner that is consistent, predictable and proportional. Second, there needs to be a multiplicity of sentencing options. An emphasis on one option, for example on community service orders, creates a dichotomy that limits the development of a rich range of options between the most and least restrictive options. The development of alternative sentencing options should be driven not only by the desire to reduce prison overcrowding, but also for the sake of making available to the courts a range of suitable sanctions that would assist in dealing with offenders outside of the prison, even if this does not reduce the prison population or results in net-widening (Morris & Tonry 1993). Third, and following from the previous, the current paucity of sentencing options also restricts the court in terms of back-up sanctions when the offender fails to comply with a non-custodial order, and imprisonment remains the only option left (von Hirsch et al. 1992). When offenders fail to comply with the conditions of a community service order, which may be as high as 55 per cent for certain age groups (Muntingh 1997: 47), and the order was made conditional on a prison term, it leaves the court little choice but to impose the prison sentence.

Social conditions and alternative sentencing

This section aims to describe and reflect on the importance of prevailing socio-economic conditions when undertaking criminal justice reform, in this case through the introduction of alternative sentencing options. The preceding section discussed the history of community service orders in Zimbabwe as it unfolded in the 1990s. As described, a number of significant role-players, including the government, cooperated towards the development and implementation of community service orders. At that stage, socio-economic conditions were generally favourable, and government had the ability to assume control over the service.[14] The Zimbabwean government's support, in tandem with that of the judiciary, the donor community and several non-governmental organisations, created very favourable conditions for the implementation and expansion of community service orders. The present situation in many African countries is materially different from the context of Zimbabwe between the early and mid-1990s.

Of the 42 Heavily Indebted Poor Countries in the world, 34 are in sub-Saharan Africa (IMF 2007). On a map, it would appear that a blanket of poverty and debt covers Africa south of the Sahara and north of the Limpopo and Kunene rivers.[15] Progress made towards achieving the Millennium Development Goals (MDGs) also sketches a grim picture for sub-Saharan Africa; a region, however, marked by progress when compared to regions such as South East Asia and Latin America (UN Secretary

General 2005). Poverty remains the scourge of Africa (UN Secretary General 2005)[16] and, coupled with the impact of HIV/AIDS, has resulted in sub-Saharan Africa scoring poorly on the Human Development Index – of the 31 countries ranked as 'Low Human Development', 29 are in sub-Saharan Africa (UNDP 2005).

Attempts at development and criminal justice reform should therefore be seen within the limiting constraints of this reality. Resources that may be assumed available in other jurisdictions are often entirely absent. Even the implementation of fairly uncomplicated sentencing options such as community service orders, and the deployment of staff to implement, manage and monitor offenders, can be demanding on a limited resource base. The unavailability of resources, such as information technology and transport, is a major obstacle to service delivery and ultimately undermines the effectiveness and acceptance of alternative sentencing options.

The impact of poverty and HIV/AIDS is all-pervasive and fundamentally affects the state's ability to deliver on democratic processes, and this kind of failure can become a threat to governance (Braimah 2004). The treatment of suspects and offenders reflects, to some extent, the state's relative ability to meet the requirements of a democratic society. Ensuring access to justice, maintaining reasonable compliance with human rights standards, and ensuring fair trials and appropriate sentencing all contribute to strengthening democracy. Adverse socio-economic conditions can have a severely detrimental impact on the state's ability to deliver on these priorities. The attrition of staff and consequent loss of skills as a result of HIV/AIDS has taken on alarming proportions. A comprehensive study undertaken in Malawi estimated the annual attrition rate to be 2.3 per cent in the public sector, with half of this figure due to mortality (Moran 2003: 5). The same study also found that there were higher mortality rates amongst professional staff than amongst junior technical staff. Under these conditions, the ability of the state to deliver services to its citizens is severely hampered, even if the political will to deliver exists. Furthermore, the manner in which governments have responded to this human resource crisis appears to have been somewhat misdirected, and has not focused on replacing lost skills (Braimah 2004).

Although there are no reliable data available at this stage on how the reduced capacity of criminal justice personnel impacts on access to justice, this can be inferred (Moran 2003). The situation is perhaps best summarised in the following: 'A lawyer in Gaborone (Botswana) complains that he can no longer count on the legal system to function because of absences of court officials – "What am I to do in the face of the legitimate demands from my clients for speedy redress through the courts?" ' (Braimah 2004: 13).

Seen collectively, poverty and HIV/AIDS have had a devastating impact on the human resource capacity of many African states to deliver services to their citizens. This is compounded by the fact that responses to the pandemic have not focused on the replacement of such skills. The MDGs, in response to the growing global poverty crisis, have redefined development priorities, with a particular focus on the core

issues that affect sub-Saharan Africa. In the framework of the MDG, criminal justice reform is not regarded as a high priority. Efforts at criminal justice reform have therefore been limited to, and often found expression in, the development of very specific initiatives, such as projects piloting community service orders in Heavily Indebted Poor Countries. In these instances, reform efforts were driven by donors and difficult to integrate into government expenditure programmes. For example, the community service orders projects in Uganda came to an effective end when the donor withdrew support in 2003 (Birungi 2005).

The challenges facing African criminal justice systems, which are most visible in the conditions of the prisons, should therefore not be seen as primarily the result of antiquated legislation, prison-centred sentencing and retributive attitudes. The socio-economic context has fundamentally changed in the past 20 years and has had a debilitating effect on justice systems across the continent. Loss of personnel, skills and knowledge and the appointment of inexperienced staff in overburdened positions have all contributed to the decline of criminal justice systems. The fact that alternative sentencing did not make significant inroads into prison sentencing on the continent should therefore not be regarded as a failure of alternative sentencing. Rather, contemporary structural attributes prevented some countries from making available the required resources that would sustain alternative sentencing initiatives, or at the very least made it extremely difficult for them to do so.

Alternative sentencing in the broader system of governance

The relationship between alternative sentencing and governance requires exploration for a number of reasons. First, it relates to access to justice and legal empowerment. Second, and more importantly, governance has a direct bearing on the sustainability of criminal justice reform and thus on alternative sentencing initiatives. How these options are managed in terms of accountability, application to offenders, perceptions by the public, and relationship with their environments become important issues in limited-resource contexts.

In this section, issues of broader governance and the variable performance of alternative sentencing initiatives are addressed. This is done by looking at National Integrity Systems (NIS) and at the evaluation results of community service order projects in Zambia, Kenya and Uganda.

National Integrity Systems

The receptiveness of a criminal justice system to reform initiatives and its ability to sustain reform are highly dependent on the integrity of that criminal justice system, the independence the judiciary enjoys, and the overall design and state of the NIS. The introduction of alternative sentencing into a particular context can be regarded as a development project and thus requires the same rigour in checks and balances, risk management strategies, resource management and sustainability questioning.

In situations in which accountability and transparency are low, the risks in terms of outcomes and operations are high. For example, will poor offenders be considered for community service or will it be reserved for those who can afford the bribe? Will the vehicle allocated to the project be used for visiting and monitoring offenders and sourcing new placements, or will it be used to transport officials to unrelated private engagements? These transgressions should be seen within the prevailing governance climate, specifically how adherence to good governance principles is promoted and demonstrated.

The NIS is a descriptive and analytical tool created by Transparency International to assess the broader structure and systems in a country and to develop an understanding of management and governance in that country. The NIS investigates and describes the functioning of institutions that would enable the state to deliver its mandate in a manner that is accountable and transparent, a process defined as:

> the sum total of the laws, institutions and practices in a country that maintain accountability and integrity of public, private and civil society organisations. The NIS is concerned with combating corruption as part of the larger struggle against misconduct and misappropriation, and with creating an efficient and effective government working in the public interest, supported by a vital, transparent civil society and private sector. (Transparency International n.d.)

The NIS consists of 11 key institutions: legislature, executive, judiciary, supreme audit institution, ombudsman, watchdog agencies, public services, media, civil society, the private sector and international actors. A lack of accountability, interference by the executive in the judiciary, bribery, and the range of known corrupt practices collectively undermine the purposes of the criminal justice system that ultimately should contribute, in conjunction with other components of the NIS, to sustainable development, the rule of law and quality of life (Transparency International n.d.).

A review of eight NIS country reports for Africa, prepared for Transparency International between 2002 and 2005, reveals that the judiciary and criminal justice systems in Africa are in many regards suffering from an integrity crisis.[17] The report on Zambia states:

> The Judiciary has not been able to recruit sufficient staff because of poor conditions of service. Magistrates and Local Court Justices are poorly remunerated and their conditions are linked to the Civil Service. They work in deplorable conditions, thereby making them highly vulnerable to corruption. There have been several cases of magistrates and local court justices being investigated or prosecuted for corruption. The support staff such as Court Clerks, interpreters, registry clerks, secretaries, marshals, etc., are on Civil Service Conditions of Service, which are extremely poor. (Doig & McIvor 2003: 28)

And, 'Apart from being starved of operational funds, the judiciary has also been subjected to verbal attacks by high-ranking members of the Executive after it passed decisions the Executive did not like' (Doig & McIvor 2003: 28).

The NIS report on Kenya reflects harsh views held by the public on the judiciary:

> Public concern revolved around issues of delay, expense and corruption, while lawyers' competence and lack of independence from the government were raised consistently. Specifically the Constitution of Kenya Review Commission Report noted that 'many people told us that they have lost confidence in the courts and wanted their disputes settled by their elders and in other traditional ways…many people and organisations, like the Law Society, recommended that the present judges should be removed'. (Doig & McIvor 2003: 36)

The NIS report on Malawi states: 'In a recent study on judicial corruption, 40% of respondents indicated that public prosecutors demand or expect bribes in return for services rendered while 39% indicated that judges demanded or expected bribes' (Doig & McIvor 2003: 43).

Whilst the eight country reports and the quotes above are not wholly representative, they do reflect some of the most pressing challenges for criminal justice systems in Africa. It should also be noted that not all criminal justice systems in Africa are severely compromised. Under such extreme conditions, however, criminal justice systems exist as brittle structures with low levels of functionality, resulting in well-documented human rights violations in a variety of forms.[18] Introducing alternative sentencing options under such conditions will be difficult, because the foundation is weak. Corruption, a lack of skills and resources, and a lack of public confidence in the criminal justice system will affect the acceptance and sustainability of alternative sentencing. Reforms introduced as pilot projects will make sense if there are long-term objectives and they relate to overall judicial reforms because, if successful, the pilot projects communicate a new vision for the criminal justice system (Dakolias & Said 1999).

Community service orders

While the sustainability potential of criminal justice reform in Africa must be critically examined, the analysis in this chapter focuses specifically on alternative sentencing. The approach advocated by corruption and integrity experts promotes comprehensive reform but realises that, in some instances, states requiring such reform may be too weak to implement complex transformation plans. The question then arises: how suitable are alternative sentencing programmes for countries suffering from substantial integrity weaknesses? Detailed impact evaluations on the alternative sentencing projects that were initiated in Africa over the last 10 years would assist greatly in answering this question, but such studies are not readily available. A 2003 report on the state of community service order projects in Zambia,

Kenya and Uganda reflects different situations with regard to the introduction of this alternative sentencing option in these countries (Rumin 2003). The three examples present different sets of challenges in terms of implementation and sustainability – these are not unique and will find applicability in other parts of the continent.

In Zambia, a legislative amendment providing for community service orders was passed in 2000. The legislation, however, did not meet the expectations of the already established National Community Service Committee, primarily because it placed community service orders under the authority of the Department of Prisons, an approach not supported by experiences in other jurisdictions. Furthermore, the Department of Prisons was allocated no additional resources to implement community service orders, nor were any staff assigned to the task. The National Community Service Committee then approached the Zambian Law Reform Commission to assist in drafting a legislative amendment to rectify matters but the latter was not allocated resources to do so. It is also alleged that there was a lack of political support for the project. Effectively, this hampered the community service orders from getting off the ground at all.[19]

In Kenya, community service orders were introduced in mid-1999 after Parliament passed a legislative amendment to provide for community service orders at the end of 1998. By January 2003, more than 120 000 orders had been made. The legislative amendment was ambitious in targeting all offenders eligible for three years' imprisonment. This turned out to be problematic, according to the evaluator, as it brought together in one category offenders facing only a few weeks in prison and those facing a three-year prison term.[20] The existence of a national probation service, totalling 295 probation officers nationally, greatly assisted the implementation of community service orders, and it was apparent that, as a profession, this group favoured and supported community service orders. Effectively, this meant that 295 probation officers were available to the approximately 10 000 offenders performing community service at any one time. There also appeared to be broad support and cooperation from other stakeholders, such as the magistracy, police, prisons department and civil society. Despite this, the Kenyan prison population continued to increase, and the approximately 35 000 offenders receiving community service orders annually made no impact on the prison population. Rumin (2003) attributed this essentially to three shortcomings. The first was an overemphasis on operational matters in the management of the community service orders project and the absence of a multi-year strategic plan with clearly articulated outcomes. Secondly, indicators and an information system that would have guided decision-making in relation to a strategic plan were absent. Thirdly, integrated planning, service delivery and monitoring were lacking and, broadly speaking, intersectoral cooperation was not facilitated effectively.

In Uganda, community service orders began in four districts in May 2000, after the Community Service Orders Act was passed in February of the same year. This was followed by Regulations in 2001. The legislation made provision for community

service as an alternative to imprisonment sentences of up to two years. Between May 2000 and December 2002 a total of 788 community service orders were made in the four districts, of which only 56 offenders did not comply with the order. In addition to these positive results, Rumin (2003: 30) reports that in the four districts where community service orders were implemented, the number of offenders serving custodial sentences decreased by between 40 per cent and 70 per cent, whilst the national prison population increased by more than 10 per cent from 2001 to 2002. However, it is also reported that when the national roll-out of community service orders was under discussion at a national workshop in 2002, fundamental strategic issues on the future remained unresolved. Owing to the lack of government support and the withdrawal of donor support (Birungi 2005), it appeared that the very promising achievements of the pilot phase were to be short-lived.

The three examples highlight some important lessons about the implementation of alternative sentencing options. The lack of progress on community service orders in Zambia should be examined against the backdrop of the country's socio-economic conditions, the status of the NIS, and a severe lack of resources in a development environment that prioritises socio-economic objectives. In this context, the legislative amendments were not only ill informed and lacking in support, but there was clearly no capacity to deliver on them. The capacity to deliver was present in both Kenya, through government support, and Uganda, through donor support for the pilot sites, which gave both endeavours a strong base from which to depart. Both examples illustrate the importance of having a clear strategic plan and the ability to monitor progress on that plan. The Kenyan example shows with greatest clarity the importance of accurate sentencing profile data and the need to utilise non-custodial sentencing options to target specific custodial categories. If such data were available, the utilisation of community service orders could have been monitored more accurately and the lack of impact on the prison population investigated at an early stage. The need for strategically integrated planning, delivery and monitoring is also reflected in the two examples, and perhaps more so by Uganda. Good results achieved in Uganda over a relatively short period were undone due to a lack of strategic clarity and the fact that government was not willing or able to take over the project.

Alternative sentencing options, such as community service orders, require a certain level of intersectoral cooperation for the purposes of planning, delivery and monitoring. They are inextricably linked to other components of the criminal justice system and other support services and are frequently highly dependent on them for delivery. A lack of accountability will ultimately have an impact on service delivery. It is also evident that such sentencing options cannot be separated from the NIS and that severely compromised integrity systems are not a favourable environment for the development, introduction and operation of alternative sentencing options. Legislative amendments fulfil a necessary but limited purpose and require careful planning and funding to ensure feasibility.

The future of alternative sentencing in Africa

For most countries where they were planned and implemented, alternative sentencing options have faced an uphill battle. The reasons for this are as diverse as Africa itself but some generalisations may be made. First, some countries are too poor to enable the implementation of criminal justice reforms at this stage. This has been exacerbated by the erosive effect of HIV/AIDS on the civil service and, ultimately, on governance. Second, national integrity systems and the ability of the state to develop, absorb and sustain reform processes are severely compromised in some countries. Third, in some countries, it is apparent that whilst outputs were formulated and sometimes achieved, the desired outcomes were rarely achieved, such as a reduction in the prison population. Fourth, alternative sentencing programmes were driven by external agents in some countries, and the reform process was very specific and did not necessarily enable a more inclusive approach to criminal justice or, specifically, sentencing reform. Despite these substantial challenges, alternative sentencing has a future in Africa provided that three broad conditions are met: how alternative sentencing is defined in prison reform discourse; the need to demonstrate effectiveness, and the need to ensure that the 'right' objectives are achieved. These are discussed next.

Defining alternative sentencing

Reviewing the extant literature, there is a sense that the discourse on alternative sentencing in Africa has had difficulty locating itself in a particular frame of reference, be that sentencing, prison reform or human development. Originating, as noted earlier, from an acknowledgement of prison conditions on the continent, with a particular emphasis on overcrowding, the size of the prison population seems to have been the fixation of the discourse on alternative sentencing. It is almost as if community service orders, as the focal point of alternative sentencing in Africa, have been proffered as the alternative to overcrowded prisons, and this expectation has not been demonstrated, in a rigorous and conclusive manner, as having been met. What does not seem to have emerged from the Ouagadougou Declaration, indicative of the current discourse, is the understanding that a fundamental reassessment of sentencing and punishment is required, for it is imprisonment itself that needs to be critically examined, not simply the alternatives to imprisonment or the duration of prison sentences. It is now accepted that imprisonment does not reduce recidivism and, in fact, the longer the prison term, the higher the risk of reoffending:

> 'Prisons should not be used with the expectation of reducing future criminal activity…therefore the primary justification for the use of prisons is incapacitation and retribution, both of which come with a "price", if prisons are used injudiciously' (Gendreau et al. 1999: 154).

It can therefore be stated as the first condition that the future of alternative sentencing does not lie in juxtaposing it with imprisonment, for it is a failed institution, but rather in asking: what are appropriate, just and feasible punishments

in a democratic society? Sentencing must be seen on a continuum from least to most restrictive, not through the 'prisons and alternatives to prison' dichotomy prevalent in the current discourse (see von Hirsch et al. 1992). This also implies uniformity in the principles underlying sentencing to avoid the sharp disjuncture often seen in the use of alternative sentences for special, privileged or unusual cases.[21]

Demonstrating effectiveness

The future of alternative sentencing will be determined by a demonstrable ability to achieve the stated objectives. Reliable information on what works and what does not is virtually non-existent for Africa. In this regard, a distinction should also be made between, on the one hand, what reforms can be effectively implemented and supported by governments and, on the other, the actual and proven effectiveness of those reforms to achieve the desired impact. The Kenyan example of community service orders referred to earlier illustrates the point well.

In many instances, reforms are based on unreliable, anecdotal and dated information regarding who is in prison, how long they have been there and why they are there. The state cannot deprive thousands of people of their liberty for years and refuse to be self-reflective or reply that it is too onerous a task. The unavailability and inaccessibility of even the most basic information reflects poorly on transparency and accountability. There is a need for far more comprehensive information on criminal justice systems and the sanctions imposed. Monitoring and evaluation must be an integral part of interventions and reforms and must inform future policy and legislative developments. In essence, an evidence-based approach is required, which necessitates that:

> [T]he advice and decisions of policy makers are based upon the best available evidence from a wide range of sources; all key stakeholders are involved at an early stage and throughout the policy's development. All relevant evidence, including that from specialists, is available in an accessible and meaningful form to policy makers. Key points of an evidence based approach to policy-making include:
> - Reviews of existing research
> - Commissions new research
> - Consults relevant experts and/or uses internal and external consultants
> - Considers a range of properly costed and appraised options.
>
> (Bullock et al. 2001: 14)

Achieving the right objectives

As the third condition, alternative sentencing options must be able to demonstrate that they are not only achieving the stated objectives but also that these are indeed the 'right objectives'. Knowledge-based strategic policy considerations, the opinion of the electorate, and resource constraints within a human rights framework should

help determine what the right objectives are. It may, for example, be possible to show that alternative sentencing options have reduced the prison population and that a substantial number of people who would have been in prison are now enjoying their freedom. Depending on circumstances, this may not necessarily make the public feel any safer or convince politicians that this is the right course of action. Whilst the public may have sympathy for prisoners in severely overcrowded prisons, and might not in principle object to remissions and amnesties aimed at alleviating overcrowding, public opinion is also highly critical when released prisoners reoffend, as was the case recently in South Africa.[22]

For alternative sentencing to have a future in Africa, policy development and approaches to sentencing need to transcend the dichotomy between alternative sentencing and prison overcrowding, and must be seen in the broader debate of sentencing and criminal justice reform. The performance of alternative sentencing options also needs to be rigorously evaluated against clearly articulated objectives, which have been demonstrated to be both attainable and the right objectives to pursue for greater public safety.

Conclusion

A number of recommendations can be made given the requirements stated above. The development of criminal justice reform and sentencing reform need not follow the route of European developments of the last 50 years, in which the state played a central role. What appear to be more promising in the African context are initiatives that build on community involvement in dispute resolution. The Gacaca of Rwanda, peace committees in South Africa and the Mediation and Defence Committees in the Democratic Republic of the Congo (in south Kivu) hold promise as legitimate means of resolving conflict at the local level without having to resort to the formal criminal justice system (Allen 2005). In many parts of Africa the majority of criminal cases are still dealt with by traditional structures, but their mechanisms and sanctions may not always meet constitutional and human rights requirements.[23] There is thus a need to help these structures comply with these requirements, as well as to include them more formally in the range of criminal justice adjudication mechanisms, rather than marginalise them. The use of paralegal officers can greatly assist in providing access to justice for these common-law courts and traditional structures.

Bridging the divide between the formal criminal justice structures and the traditional structures will also require a change in mindset. An inclusive approach need not mean the loss of power by the formal criminal justice system, and it will therefore be critical that judicial officers receive the necessary training to ensure that they understand how community-based mechanisms function and, more importantly, that they have confidence in them.

Notes

1 Kadoma Declaration, available at <http://www.penalreform.org/english/cs_kadomadec.htm>, accessed on 17 September 2005.

2 Ouagadougou Declaration on Accelerating Penal and Prison Reform, available at <http://www.penalreform.org/ouagadougou-declaration-on-accelerating-prison-and-penal-reform-in-a-2.html>, accessed on 1 September 2007.

3 UN, Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), Adopted by General Assembly Resolution 45/110 of 14 December 1990, available at <http://www.ohchr.org.english/law/tokyorules.htm>, accessed on 1 September 2007.

4 Less than a year later, the Kampala Declaration was adopted by the UN Economic and Social Council, Resolution 1997/36.

5 Article 8.2 (a–m) of the Standard Minimum Rules for Non-Custodial Measures lists the following options for sentencing authorities in the disposition of cases: verbal sanctions (such as admonition, reprimand and warning), conditional discharge, status penalties, economic sanctions and monetary penalties (such as fines and day-fines), confiscation or an expropriation order, restitution to the victim or a compensation order, suspended or deferred sentence, probation and judicial supervision, a community service order, referral to an attendance centre, house arrest, any other mode of non-institutional treatment, and a combination of these measures.

6 International Conference on Community Service in Africa, *Introduction*, available at <http://www.penalreform.org/english/cs_kadomaintro.htm>, accessed on 17 September 2005.

7 It should be noted that there are conflicting sets of data on the prison population of Zimbabwe from the early 1990s to date. Stern (1999) reports figures that are substantially lower than those reported by the International Centre for Prison Studies (2005b). The latest available figures from the International Centre for Prison Studies indicate a prison population of approximately 20 000 as at the end of 2003. More recent, but unconfirmed, reports estimate the prison population to be in the region of 25 000 prisoners (the Zimbabwe Situation website, available at <http://www.zimbabwesituation.com/may15_2004.html#link11>, accessed on 1 September 2007).

8 There is, unfortunately, little evidence to support this notion. When South African sentencing officers were asked if they consider prison conditions and the capacity of prisons when considering a term of imprisonment, more than 80 per cent replied 'never' and 'almost never' (Schönteich et al. 2000: 46).

9 These reports are available through the website of PRI at <http://www.penalreform.org>.

10 These are the SMR; Basic Principles for the Treatment of Prisoners; International Covenant on Civil and Political Rights; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; UN Rules for the Protection of Juveniles Deprived of their Liberty; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment; Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; safeguards guaranteeing protection of the rights of those facing the death penalty; and UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

11 Bakurura reports that 70 per cent of Nigerian prisons are more than 100 years old and that a large number of Tanzanian prisons were built before 1940. The author has also established, through interviews with prison officials, that in Zambia no new prisons were constructed after independence in 1964.

12 In South Africa, the Criminal Law Amendment Act (No. 105 of 1997) introduced mandatory minimum sentences for certain offences and the Magistrates Amendment Act (No. 66 of 1997) increased the jurisdiction of district and regional courts to impose substantially longer prison sentences than was previously the case.

13 The Special Rapporteur on Prisons and Conditions of Detention in Africa does not collect data on sentence profiles, although cursory comments are made with regard to sentence lengths.

14 After a strong growth period in GDP per capita in Zimbabwe from 1996 to 1999, data from the International Monetary Fund reflect a rapid decline thereafter (IMF 2005: 72). This trend is supported by the Human Development Index data (measuring life expectancy, educational attainment and real income) for Zimbabwe, which show a similar decline in the five-year interval from 1995 to 2000 (UNDP 2006).

15 Exceptions are Nigeria, Gabon and Eritrea.

16 From 1990 to 2001 the proportion of people living on less than US$1.00 a day increased from 44.6 per cent to 46.4 per cent in sub-Saharan Africa, whilst in all other regions this figure dropped, and significantly so in some regions. For example, in East Asia this figure dropped from 33.0 per cent to 16.6 per cent.

17 The countries are Botswana, South Africa, The Gambia, Ghana, Kenya, Malawi, Senegal and Zambia.

18 See, for example, the country reports by the Special Rapporteur on Prisons and Conditions of Detention in Africa as well as reports from human rights monitoring bodies such as Human Rights Watch and Amnesty International.

19 Recent communication by the author with a non-governmental organisation closely involved in the initiative to establish community service orders in Zambia confirmed that the situation has effectively remained unchanged.

20 The same report (Rumin 2003) also states that the majority of offenders in Kenya are arrested for very petty offences, such as illegal brewing, drinking illegally brewed beverages and public disorder.

21 Muntingh's (1997) study found an over-representation of middle-aged, middle-class, white males in a sample spanning 10 years, located in Cape Town, South Africa.

22 During a special remissions programme some 25 453 sentenced prisoners were released during July and August 2005. After one of the released prisoners was implicated in a

vicious rape of a young girl, public sentiment became less supportive of the remissions programme. See also *Minutes of the Portfolio Committee on Correctional Services* (23 August 2005), available at <http://www.pmg.org.za/viewminute.php?id=6158>, accessed on 1 September 2007.

23 Open Society Justice Initiative *Activity Report* (2003). Available at <http://www.justiceinitiative.org/publications/pubs>, accessed on 1 September 2007.

10 The African Commission's approach to prisons

Rachel Murray

Several international and regional institutions and organisations have developed a practice of examining the state of conditions in prisons and other places of detention. Some of these, such as the European Committee for the Prevention of Torture (CPT), the Inter-American Commission on Human Rights and, in particular, its Working Group on Prisons,[1] and NGOs such as Penal Reform International and the International Committee of the Red Cross (see Association for the Prevention of Torture 1997), have undertaken visits to prisons across the world and made recommendations to the authorities in respect thereof. The role that these institutions should play, however, requires some consideration when determining how they work, what methodology they adopt, and what the results should be of any visits taken. This chapter will examine the role that the African Commission on Human and Peoples' Rights (ACHPR) has played on the continent with respect to the examination of prisons and other places of detention.[2] I will argue that, while the African Commission has clearly paid the issue considerable attention and set some important standards, its approach has not been coherent nor has a clear policy been developed.

The role of international institutions in assessing prison conditions

What role should these international and regional treaty institutions begin playing in terms of conditions in prisons and other places of detention? The African Commission is an 11-member, supposedly independent institution, created under Article 30 of the African Charter on Human and Peoples' Rights. The African Charter includes a wide variety of rights, from civil and political rights – such as the right to be free from torture, cruel, inhuman and degrading punishment and treatment (Article 5) – to the right to life (Article 4), as well as economic, social and cultural rights, including the right to health (Article 16), the right to work and the right to education (Articles 15, 17). It also includes rights for a 'people' (Articles 19–24) and a list of individual duties (Articles 27–29). It has a wide mandate to promote and protect rights on the continent (Article 45) and operates in a number of ways. First, its promotional remit includes the adoption of resolutions on particular countries or thematic issues,[3] the holding of seminars, and its commissioners' undertaking promotional visits to states to highlight the work of the ACHPR and the content of the African Charter.[4] The

ACHPR also has the power to receive complaints from states, individuals, NGOs or groups alleging violations of the rights in the Charter (Articles 47–59) that have been committed by states parties to it. States are required, under Article 62 of the Charter, to submit reports to the Commission every two years detailing the legislative and other measures they have taken to implement the Charter.

With respect to examining the situation of prisons, the Commission has used the variety of methods at its disposal to elaborate on standards applicable to those detained and to examine the situation in particular countries. Numerous cases have been brought to the Commission alleging violations of rights with respect to those held in detention (see below). The Commission has adopted some resolutions relating to prisoners' rights,[5] and has asked questions of states in the examination of their Article 62 reports (see below). Its most significant contribution, however, is seen to be the appointment of one of its members as Special Rapporteur on Prisons and Conditions of Detention (see Evans & Murray 2002; Viljoen 2005). In 1996, the Commission agreed to create this position as a result of lobbying by, in particular, the NGO PRI, as well as other prison groups (ACHPR 1995–96). The position was first filled in October 1996 by one of the commissioners, Victor Dankwa, a law professor from Ghana.[6] Although initially appointed for two years, his mandate was extended further (ACHPR 1998–99: Annex IV).[7] In 2000 another commissioner, Dr Vera Chirwa – a renowned human rights activist and herself detained for many years, the subject of a communication before the Commission[8] – took over the position (ACHPR 2000d). She ended her mandate on the Commission in July 2005. Mumba Malila from Zambia has been appointed to fill the position.

The Special Rapporteur has focused his or her work on visiting places of detention in various African countries. Reports are compiled after each visit listing concerns of the Special Rapporteur and recommendations to the authorities of the country in question. By 2007, the Special Rapporteur has visited 13 countries,[9] including follow-up visits to three (Mali, Mozambique and Benin). The visits were funded and organised by PRI until 2003, when the organisation could no longer support the Commission. Since then, the Commission has received the assistance of the Foreign and Commonwealth Office of the British government, which has funded temporary secretarial support for the Special Rapporteur's work (ACHPR 2003–04). Despite the fact that the work of the Special Rapporteur would not have come to fruition without their support, it must be asked whether it is appropriate for such a position of a supposedly independent body to be dependent upon and so closely related to external bodies.

What is of particular interest is how this visiting mechanism fits in with the rest of the ACHPR's work on prisons and conditions of detention. Whilst one may hope that the work of the Special Rapporteur would be part of an overall strategy to examine prisons across Africa and to formulate a set of standards with which states should comply, the reality is far from this. The approach has, in fact, been ad hoc and, despite some valuable standards being adopted by the Commission through

its case law and resolutions, the standards used by the Special Rapporteurs on their visits have not been well articulated, clear or standardised.

Visits by the Special Rapporteur

Compared to the 'relatively precise' methodology and approach of institutions such as the European CPT (Morgan & Evans 1994: 155), the ACHPR approach is much less rigid. 'There is no standard criteria [sic] used in determining which country to visit' (ACHPR 2005c: paragraph 7) and this is usually determined by which country is willing to receive the Special Rapporteur. Likewise, although the procedure by which each visit has been carried out has been similar, no formal guidelines for these visits have been produced by the Special Rapporteur or the Commission, in sharp contrast to other international visiting mechanisms.[10] The visits usually take around 10 days and, until 2003, the Special Rapporteur was accompanied by a member of the Commission's secretariat, a representative from PRI and, on some occasions, a doctor.[11] The delegation usually begins the visit with meetings with government officials before going on to look at prisons in the capital and across the rest of the country. The number of persons and places of detention visited is usually around five to ten. At the prisons or detention facilities, the Special Rapporteur meets with the governor as well as with prison staff and then with prisoners, both with staff present and in private. Cells and other facilities, including any medical centres, workshops and farms, are also visited.

The Special Rapporteur then writes up the conclusions of the visit – those sponsored by PRI have been published by the NGO in a booklet – including a description of the places visited, followed by findings and recommendations, and the responses of the government. The Special Rapporteur also reports back to the African Commission's sessions on the visits he or she has made.

While the work of the Special Rapporteur has been applauded, and the industry and commitment of the three commissioners fulfilling this position cannot be doubted, how the function fits within the rest of the Commission's work and the methodology and approach of the Special Rapporteurs raise some cause for concern.

First, it is not entirely clear what the role of the Special Rapporteur is when visiting prisons. The Terms of Reference (ACHPR 1997d) provide for a very broad mandate, including investigative elements[12] and a preventative function.[13] There is also a suggestion that the role is punitive[14] and, indeed, that he or she should undertake more of a standard-setting role.[15] Indeed, as the Special Rapporteur has summarised, the main elements of her mandate 'include investigation, reporting, intervention, cooperation and coordination, assistance with communications, and promotion' (ACHPR 2005c: paragraph 3).

In contrast, the role of the CPT is more prescribed: 'to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons' from torture, inhuman or degrading treatment, or punishment. The

CPT has said that this is to increase 'the *cordon sanitaire* that separates acceptable and unacceptable treatment or behaviour'.[16] As Jim Murdoch (1994: 2) notes, the CPT is 'more that of an undercover squad than a high profile, front-line fighting unit', and it operates on the basis of 'cooperation and confidentiality'.

The lack of a clear role has an impact in terms of the methodology adopted by the ACHPR Special Rapporteur on the visits. As noted, with respect to the CPT, its preventive approach means that it has adopted a particular interpretation on the various elements of torture and inhuman or degrading treatment which differs from that adopted by the European Convention on Human Rights organs.

> While both treaties refer to 'torture' and to 'inhuman and degrading treatment', the thrust of CPT activity is pre-emptive action through non-judicial means, such as regularly visiting particular establishments. The CPT's focus is the present and future rather than the past, and its concern is with the establishment of dialogue rather than with the condemnation of state authorities. Preventive action may be difficult to shape, and there may be a tendency to advance approaches which are overly broad. Not all the Committee members are lawyers and the multidisciplinary composition reflects wider concerns. This more dynamic, critical and purposeful approach to prison conditions in turn calls into question some perceived failures of the Commission and Court [European Commission and Court] to deal with certain features of detention. For the Commission and Court, peaceful cohabitation may be difficult as the CPT may turn out to be an uneasy bedfellow. (Murdoch 1994: 21)

The CPT, as a result, collects some very precise data, including the 'amount of accommodation, the prisoner population, cell sizes and furnishings, sanitary arrangements, the daily routine, time spent in cells, opportunities for exercise, access to facilities, etc.', which results in its being able to 'move to findings, the basis of which is relatively clear' (Morgan & Evans 1994: 154). As a result, the CPT 'seems to be devising a coherent approach towards the development of appropriate standards which reflect the complex interrelationships of the factors involved. This, in turn, provides a solid base from which it is able to approach and influence governments' (Morgan & Evans 1994: 156).

An examination of the reports adopted by the Special Rapporteur in the African system and the approach to the visits indicates that the findings are more a reflection on what was seen rather than a clear analysis of the compliance of the places visited with a set of identifiable standards.

First, while the reports are often detailed in the issues that are covered, looking at, for example, how many prisoners are in each cell, what they are wearing and what they eat, there is no coherent standard applicable to each report. For example, while the Special Rapporteur noted that 'the quantity and quality of food for prisoners is worthy of attention' (ACHPR 2000c: 50(6)) in one prison, it was 'the quantity and quality of food and containers' (ACHPR 2001b: 38) and the 'balance, quantity, and

quality of food' (ACHPR 2001c: 44) in others that needed attention. There was no detailed way of assessing the real differences between the food provided in the different prisons under examination.

Second, the formats of the Special Rapporteur's reports are all slightly different. Some include recommendations on particular prisons (ACHPR 2001b), some have a separate section on findings before going on to recommendations, and some have 'areas of concern' as well as recommendations (ACHPR 2001c).

Third, the reports do not indicate a set of clear standards against which the prisons are being measured. On some occasions the Special Rapporteur refers expressly to Article 5 of the African Charter as well as to other international standards, including the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), and International Cooperation for the Improvement of Prison Conditions.[17] On other occasions the Special Rapporteur refers to only one of these,[18] and in some reports the text is even more vague, with reference simply to 'international standards' (ACHPR 2000b: 31). Some reports made no reference to any particular standards at all (ACHPR 2000c). It is not clear whether standards used by PRI, given that representatives from that organisation accompanied the Special Rapporteurs on their visits and made many of the arrangements for the visits to take place, are the ones adopted by the Special Rapporteur.[19] When questioned, the first Special Rapporteur, Victor Dankwa, stated that he did have a checklist when visiting prisons, which included: 'Food; clothing; accommodation (overcrowding); torture; hygiene; length of remand or imprisonment; punishment in prison; segregation and categorisation of inmates; relationship between prison officials and prisoners and that between prisoners and the outside world, including family and friends; recreation; education; and vocational training, for instance' (pers. comm., Victor Dankwa, 15 August 2005).[20] This is not particularly precise. In contrast, the CPT has a set of extensive and detailed standards that it applies to each visit.[21]

Consequently, some of the findings of the Special Rapporteur are vague and general. For example, in the report on the visit to Malian prisons, the Special Rapporteur noted that 'Mopti prison requires urgent and early attention. Cells 1 and 2 where inmates are held 24 hours a day except when they go out for shower or toilet should have windows to let in light and air. This regime should be improved upon' (ACHPR 1997e: 31(1)). What precise improvements were needed, however, were not identified. Further examples include calling for conditions to be 'as good as possible',[22] or putting a limit on how long prisoners should be detained for, but not saying any more precisely than that this should be for a 'maximum of a few hours'.[23]

The consequences of the lack of standards used by the Special Rapporteur in the African system are several. First, the findings in respect of one country cannot really be used with respect to another, as there is no measure of comparability. The reports cannot be used as an indication of clear standards, developed over a period of time,

which can be applicable to all prisons. They are, rather, no more than a reflection of what was seen with respect to that particular prison at that time; they are country specific and likely to be subjective. Despite some interesting comments being made by the Special Rapporteur on a range of issues from medical care[24] and the role of NGOs[25] to the treatment of female prisoners,[26] including those who are pregnant or who have children,[27] the reports have not received much attention or been used beyond that state and those places of detention visited. States expecting a visit from the Special Rapporteur are therefore unlikely to be able to predict with any great degree of detail what his or her findings might be.

Secondly, and more problematically, the relationship of this visiting mechanism with the rest of the Commission's work needs to be carefully examined. Unlike procedures such as that available under the CPT, in which the visits take place under a separate treaty by a separate body which does not have a protective mandate to receive complaints, the Special Rapporteur in the African system is him- or herself also a commissioner who sits in on cases which the Commission decides in its quasi-judicial function. This is in contrast to the CPT which, as Evans and Morgan note:

> aims to assist states to realise the obligations they have assumed under Article 3 of the ECHR [European Convention on Human Rights] rather than determine whether it has been breached. This is the province of the European Commission and the Court of Human Rights, which are masters of their own jurisprudence. If it were otherwise, there would be a danger that divergent strands of jurisprudence would emerge from within the Council of Europe. (Evans & Morgan 1997: 669)

This is what appears to be happening in the African system.

If the standards and criteria against which the state is being considered in the visiting procedure are not clear, yet the findings and experiences of the Special Rapporteur can feed directly into the communications mechanism before the ACHPR as a whole, this is of concern for the legitimacy and credibility of the Commission's decisions.[28] On the one hand, the visiting mechanism and the complaints mechanism should link well together. As Mark Kelly notes with respect to the CPT and ECHR:

> [T]his proactive non-judicial mechanism is designed to dovetail with the Council of Europe's reactive judicial mechanisms…Thus, although the case law of the Commission and the Court (under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) provides a source of guidance for the CPT, 'the Committee's activities are aimed at future prevention rather than the application of legal requirements to existing circumstances'. It follows that it 'is not the task of the Committee to condemn states for violations, but to cooperate with them in strengthening the protection of persons deprived of their liberty'. (1996: 287–288)

The ACHPR Special Rapporteurs, in their reports, have only rarely come close to actually condemning a state for violating the Charter[29] and, in practice, there has been no direct link, so far, between the prisons visited and any communications decided by the Commission.[30] On the other hand, there are several concerns with the way in which this operates under the African system. If the Special Rapporteur's reports and comments are not taken on board by the Commission in a formal way, there is a possibility that things seen by the Special Rapporteur during the course of his or her visits will be recounted when discussing and deciding the cases. Any finding in a case should be based on credible and appropriately collected evidence which is assessed against a set of clearly determined standards. The manner in which the visits are conducted and the manner in which the reports of the Special Rapporteur are concluded do not reflect the stringency required. Apart from the fact that the Special Rapporteur's visits are going to focus on 'the institution, rather than upon the individual detained' (Evans & Morgan 1997: 591), the same person who visited the prisons will also hear the cases. With the European system, although CPT reports are used by the European Court of Human Rights in their findings, the fact that they are institutionally separate means that there is a choice as to how they are used, and when they are used.

Indeed, the role becomes even more blurred as the Special Rapporteur has, on some occasions, used the visits to a country to ask about other obligations of the state under the Charter.[31] In addition, the Commission has now approved, in principle, the setting up of a 'hotline' (ACHPR 2006). This was proposed by the Special Rapporteur, Vera Chirwa, given that there were sometimes urgent requests to her (ACHPR 2005c),[32] and it was hoped that this hotline would 'facilitate easy access to and regular communication with the Special Rapporteur' (ACHPR 2006). Besides having a wider promotional aim, the hotline is also to be used by the public, detainees and former detainees 'to report cases of human rights abuses in prisons and other places of detention and allow the Special Rapporteur to make timely interventions' (ACHPR 2006). Giving this role to the Special Rapporteur may further blur the cooperative approach of this position with the more adjudicatory complaints mechanism of the Commission. In addition, whilst the independence of the commissioners who have so far acted as Special Rapporteur cannot be questioned, the independence of other members of the Commission has been an issue, with several simultaneously holding high-level governmental or ambassadorial positions.

It is worth considering whether there is a duty on the Special Rapporteur, as a member of the Commission, to respond to cases in which there is evidence of torture, cruel or inhuman or degrading treatment, or punishment contrary to the African Charter. In some situations, the Special Rapporteur noted evidence of violations on visits but made no strong response to them.[33] In their capacity as Special Rapporteurs this might be expected but in their capacity as commissioners, should they not be obliged to follow up on this information in some way? What these difficulties point to, therefore, is a need for the Commission to elaborate on, in more

detail, a consistent approach to its visits and to clarify the relationship between the mandate of the Special Rapporteur and the complaints mechanism.

Standards adopted by the Commission with respect to prison conditions

The rest of the ACHPR's work, beyond that of the Special Rapporteur, indicates that certain standards have been set with respect to prison conditions and other conditions of detention. The Commission made it clear that 'states assume responsibilities to look after the welfare of persons who have been deprived of their liberty including prisoners and detainees' (ACHPR 1994–95: Annex VIII) and monitoring of the state's obligations is to be achieved through Article 62 reports,[34] among other things.

Throughout its decisions, the ACHPR has referred to a number of international standards, including the UN Standard Minimum Rules for the Treatment of Prisoners;[35] the International Covenant on Civil and Political Rights (ACHPR 1994–95); and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the last of which has been applied in several cases.[36]

The way in which individuals are treated in detention in some of the countries visited has been held by the Commission to violate Article 5 of the African Charter, although it is not clear whether, in some cases, the particular types of treatment together or separately fall below Article 5 standards.[37] Thus, although the Commission has underlined the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment or punishment (ACHPR 2000–01),[38] it has made reference to European Convention jurisprudence on the 'minimum level of severity' required (ACHPR 2000–01).[39] In one case the Commission mentioned that an individual was held in irons, but it appeared to suggest that this might be justified in some circumstances (ACHPR 1998–99).[40]

In other cases, while being prepared to make a finding of torture, cruel, inhuman or degrading treatment or punishment, it has not defined specifically how Article 5 was breached.[41] On numerous occasions, the Commission has noted a distinction between 'physical' and 'psychological' or even 'moral' torture,[42] although this does not seem to have any implications for findings under Article 5 even though all are clearly covered. The Commission has made it clear, however, that 'the term "cruel, inhuman or degrading treatment or punishment" is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental'.[43] In some cases, the link between torture, cruel, inhuman and degrading treatment or punishment and the concept of dignity is interesting. Owing to the nature of the definition in Article 5, the jurisprudence of the Commission appears to have taken a broad interpretation of the types of treatment or punishment which will violate the provision by the use of the terms 'dignity', 'integrity' and 'welfare'. In a series of cases

against Rwanda, the Commission found that 'the conditions of detention in which children, women, and the aged are held violates their physical and psychological integrity and therefore constitutes a violation of Article 5' (paragraph 89).[44] The Commission has used Article 5 to cover instances which may 'humiliate' a prisoner or 'force him or her to act against his will or conscience' (ACHPR 1995–96).[45] In this respect, the Commission has linked Article 5 to Article 16 and an individual's right to health. Therefore, in a series of cases against Mauritania it held that:

> the State's responsibility in the event of detention is even more evident to the extent that detention centres are of its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritanian State is directly responsible for this state of affairs and the government has not denied these facts. Consequently, the Commission considers that there was violation of article 16.[46]

In general, the Commission does not appear to have applied a hierarchy of seriousness to the different elements of Article 5, as the ECHR organs have done (Evans 1969, 2002). The Commission simply finds a violation of the provision without stating what provision, in particular, was violated – whether it was torture, cruel, inhuman or degrading, for example. Some exceptions to this broad generalisation do exist, however. For example, in Communication 232/99, *John D. Ouko v. Kenya* (ACHPR 2000–01), it was alleged, among other matters, that Mr Ouko was detained in the cells of the Secret Service Department Headquarters in a two-by-three-metre cell in the basement, with a 250-watt bulb which was left on during his 10-month detention. The complaint also alleged that the prison denied Mr Ouko access to bathroom facilities and subjected him to both physical and mental torture. The Commission noted that the bulb, denial of bathroom facilities, and physical and mental torture were contrary to the right to respect of his dignity and constituted inhuman and degrading treatment under Article 5 and the UN Body of Principles, 1 and 5. It is thus not clear from the decision whether the size of the cell had an impact nor whether this amounted to a violation or not. Interestingly, the Commission then went on to state that '[a]lthough the Complainant has claimed a violation of his right to freedom from torture, he has not substantiated on this claim. In the absence of such information, the Commission cannot find a violation as alleged' (ACHPR 2000–01: paragraph 26). It was not clear whether this was referring to the 'physical and mental torture' alleged to have been suffered or whether the Commission was saying that the size of the cell, the fact that the light was on all the time, and the denial of bathroom facilities did not amount to torture. It is not clear whether this was what the commission actually intended or whether the decision simply does not supply sufficient information.

Denial of medical attention has been held to breach Article 5 of the Charter.[47] In addition, it is not just conditions of detention, per se, or the treatment an individual

receives in detention that can violate Article 5. The Commission has gone further to state that 'holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned'.[48] In some cases, this has been held to violate Article 18(1) of the Charter.[49] Detaining individuals incommunicado has been held to violate Articles 5 and 18(1) and the Commission has urged states not to use this practice.[50]

The ACHPR has also extended Article 5 to cover not just prisons but also other places of detention, including hospitals, and has in the process elaborated on other rights in the Charter for detainees. In one case, the Commission was asked to look at the conditions and grounds on which mental health patients were detained in The Gambia (ACHPR 2002–03). With respect to their right to vote, the Commission held that:

> [t]he right provided for under Article 13(1) of the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State. Legal incapacity may not necessarily mean mental incapacity. For example a State may fix an age limit for the legibility [sic] of its own citizens to participate in its government. Legal incapacity, as a justification for denying the right under Article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards.[51]

Noting other international bodies' reference to the need for 'objective and reasonable criteria' to justify interference with this right, the Commission held in paragraph 76 of Communication 241/2001:

> Besides the view held by the Respondent State questioning the mental ability of mentally disabled patients to make informed choices in relation to their civic duties and obligations, it is very clear that there are no objective bases within the legal system of the Respondent State to exclude mentally disabled persons from political participation.

The Commission has gone further on some occasions to hold that the manner in which individuals are held can also violate the right to life in Article 4: 'Denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death point to a shocking lack of respect for life, and constitutes a violation of article 4.'[52]

When considering whether the manner in which the individual has been treated and the conditions in which he or she has been held violate the Charter, the Commission looks first for evidence to support the allegations and, second, at the extent to which the government responds to them. The Commission appears to require that allegations should be 'substantiated' (ACHPR 1999–2000)[53] through reports from doctors and accounts from the victims and other authorities (ACHPR 2000–01).[54]

It has said that when there are no 'independent report[s] of torture' and 'without specific information as to the nature of the acts themselves', the Commission will not be able to find a violation (ACHPR 1999–2000).[55] If the government fails to contest the allegations, the Commission has stated on numerous occasions that it will find in favour of the complainants.[56]

On one occasion, however, the Commission appeared to be willing to conclude an amicable settlement despite findings of torture and other violations of Article 5. In Communication 133/94, *Association pour la Defence des Droits de l'Homme et des Libertés v. Djibouti* (ACHPR 1999–2000: Annex V), there were allegations of human rights violations against the Afar ethnic group by government soldiers in areas where they were fighting with the Front pour la Restauration de l'Unité et de la Démocratie, which was mainly ethnic Afar. 'There are reports on extra-judicial executions, torture and rape. The communication names 26 people, who have been executed, jailed without trial or tortured' (paragraph 1). The government gave the Commission documents 'strongly suggesting that arrangements aimed at obtaining a lasting settlement of the demands of the victims of the violations blamed on the armed forces had been established, and consequently calls on the Commission to declare the communication inadmissible' (paragraph 16). The Commission concluded that 'the meeting between the complainant and Commissioner Rezag-Bara while on mission to Djibouti, as well as the complainant's letter, received at the Secretariat on 30 March 2000, have clarified the situation and also confirmed the existence of the settlement reached between the two parties' (paragraph 17). The Commission therefore closed the case 'on the basis of the amicable settlement reached by the parties' (paragraph 17).

Other standard setting has been achieved through the Commission's adoption of resolutions and declarations. At its thirty-fourth session, the ACHPR adopted a Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Penal and Prison Reform in Africa (ACHPR 2003–04: paragraph 52), the result of the second Pan African Conference on Penal and Prison Reform in Africa which was held in Ouagadougou from 18 to 20 September 2002. This Resolution reaffirmed 'the necessity to promote and protect the rights of persons deprived of their liberty through penal reform' and adopted the Ouagadougou Declaration and Plan of Action (ACHPR 2003–04: Annex IV). The Special Rapporteur was requested to report on its implementation to the next session, and the Commission called for the Declaration and Plan of Action to be widely disseminated and publicised. The Declaration and Plan of Action make a number of recommendations relating to reducing the prison population, making African prisons more self-sufficient, promoting the reintegration of offenders into society, applying the rule of law to prison administration, encouraging best practices, promoting the African Charter, and advocating the development of a Charter on the Basic Rights of Prisoners under the UN. Practical steps to implement these goals include using alternative sentencing rather than imprisonment, recognising restorative and traditional justice, and enhancing the links between these methods and more formal criminal justice

referral systems. It also suggests that some offences should be decriminalised, and measures such as speeding up trials, making cost orders against lawyers for delays, and restricting the time in police custody to 48 hours could be used to reduce the number of those held on remand. With respect to the sufficiency of prisons, the Plan of Action urges increasing training for staff and involvement of prisoners in industries, enhancing prisoner literacy and therefore their employment prospects, and providing 'adequate social and psychological support' as well as contact with their family and community. Further recommendations with respect to the rule of law include ensuring that legislation on prisons is reviewed in the light of international human rights obligations and encouraging independent inspections. In combination with the Robben Island Guidelines,[57] these could form a more coherent basis on which the Special Rapporteur could assess prisons visited.

The Robben Island Guidelines were adopted by the Commission in 2002, as a result of a seminar and working group initiated by the NGO, the Association for the Prevention of Torture. The Guidelines were elaborated under Article 45(1) of the African Charter, '[r]ecognising the need to take concrete measures to further the implementation of existing provisions on the prohibition of torture and cruel, inhuman or degrading treatment or punishment' and '[m]indful of the need to assist African States to meet their international obligations in this regard'. The Follow-Up Committee, established in this Resolution, is then given the tasks of:

- disseminating the Robben Island Guidelines;
- proposing strategies to the African Commission for implementation of the Guidelines domestically;
- 'promot[ing] and facilitat[ing] the implementation of the Robben Island Guidelines within member states', and
- 'invit[ing]' NGOs and other actors to disseminate and use the Guidelines in their work.

The Guidelines (paragraph B.2) then specifically ask states to cooperate with the Commission's Special Rapporteur on Prisons, as well as with the Special Rapporteur on Extra Judicial Executions and that on the Rights of Women, among other things. It then sets out standards on the prevention of torture and safeguards for those deprived of their liberty, including notification of family, as well as pre-trial processes. The Guidelines are relatively detailed. There is the requirement that states 'ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody' (paragraph 16d). They also set out conditions of detention which include the requirement that they are compatible with minimum international standards and that conditions are improved. For example, pre-trial detainees should be held separately from those who have been convicted; the young, women and other vulnerable groups should also be held in separate facilities; and steps should be taken to reduce overcrowding through the use of non-custodial sentences (paragraphs 33–37). There are also requirements with respect to states supporting the independence of the judiciary, encouraging the involvement of legal and medical professionals in such issues, implementing measures for a complaint system and national human

rights institutions, allowing NGOs to visit prisons, ratifying the Optional Protocol to the UN Convention Against Torture, and 'examin[ing] the feasibility for developing regional mechanisms for the prevention of torture and ill treatment' (paragraph 44). There are other provisions on training, civil society empowerment and responding to the needs of victims.

Conclusion

Despite some important jurisprudence, the standards developed in the Commission's case law and through its resolutions have not been applied to the visits by the Special Rapporteur. The various difficulties that arise with having a visiting mechanism and a communication system in one institution have not been fully appreciated by the Commission. The Commission must now consolidate its approach and apply and develop common standards. The Special Rapporteur should identify the basis on which it is evaluating prisons and other places of detention and clarify more precise guidelines and standards when assessing prison conditions. The Special Rapporteur should exist more appropriately and cohesively with the other aspects of the Commission's work and be developed to ensure its applicability across all states, not just those visited.

Notes

1 The Inter-American Commission on Human Rights created a Working Group on Prisons in 1994 to look at prisons and places of detention and draw up guidelines. Some on-site visits were carried out in certain countries, including Jamaica, Venezuela and the US, although the reports were not made public. The Commission has carried out a number of on-site visits in respect to other aspects of its mandate.

2 Although other African Union organs also have some remit for human rights issues, they have not paid any real detailed attention to the issue of prisons or conditions of detention.

3 For example, the Resolution on Economic, Social and Cultural Rights in Africa ACHPR/Res. 73(XXXVI)04; the Resolution on the Situation of Human Rights in Nigeria ACHPR/Res. 70(XXXV)04.

4 In their promotional missions, commissioners have sometimes noted conditions in prisons and mentioned them. For example, in a promotional visit to Rwanda in 1999, the commissioner noted that the situation of detainees was 'alarming' and recommended to the Assembly of Heads of State and Government of the Organisation of African Unity 'to take appropriate measures for the provision of assistance with a view to accelerating the hearing of the cases occasioned by the genocide perpetrated in Rwanda and to support the country's efforts especially those directed at improving the prison conditions of the detainees' (ACHPR 1999–2000: AHG/222 (XXXVI), paragraph 22).

5 For example, Resolution on the Right to Recourse and Fair Trial (1992) ACHPR/Res. 4(XI)92; Resolution on Prisons in Africa (1995) ACHPR/Res. 19(XVII)95; Resolution Urging the State to Envisage a Moratorium on Death Penalty (1999) ACHPR/Res. 42(XXVI)99; Resolution on Guidelines and Measures for the Prohibition and

Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002), ACHPR/Res. 61(XXXII)02.

6 I am grateful to Victor Dankwa for the information he provided for this chapter.

7 Resolution on the Extension of the Mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa.

8 *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Eighth Annual Activity Report, Annex VI, Communication 64/92, 68/92, 78/92.

9 Zimbabwe, March 1997; Mali, August 1997 and December 1998; Mozambique, December 1997 and April 2001; Madagascar, February 1998; Benin, August 1999 and Jan/Feb 2003; Central African Republic, June 2000; The Gambia, June 1999; Malawi, June 2001; Namibia, September 2001; Uganda, March 2002; Cameroon, September 2002; Ethiopia, March 2004; and South Africa, June 2004.

10 When the Inter-American system makes visits to states, it does so under standardised procedures for missions.

11 'On my first four visits, I was accompanied by the Physician in chief, security and Prison Services, Guinea, Dr Diallo Sankarera. The team also comprised a representative of PRI and on three occasions (Namibia, Uganda and Cameroon) a legal officer from the Secretariat of the Commission. The other visits were undertaken without a physician' (ACHPR 2005c: paragraph 8).

12 'Make recommendations to the Commission as regards communications submitted to it, by individuals who have been deprived of their liberty, by their families or representatives, by NGOs or other persons or institutions' (ACHPR 1997d: 19).

13 To 'conduct studies into conditions or situation contributing to human rights violations of persons deprived of their liberty and recommend preventive measures' (ACHPR 1997d: 19). See also ACHPR (1997b: 33).

14 For example, 'Advocate adherence to the Charter and international human rights norms and standards…examine the relevant national law and regulations…and make appropriate recommendations on their conformity with the Charter and with international law and standards' (ACHPR 1997d). He or she can also 'propose appropriate urgent action'.

15 For example, 'To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights…studies and research such as a Special Rapporteur will undertake will contribute towards the solution of the problems' (ACHPR 1997d: 8).

16 CPT, *First General Report* Doc. CPT(91) 3, paragraph 3.

17 Although the latter was only with respect to remand, not more generally (ACHPR 1998d).

18 For example, with respect to discipline, 'United Nations Standard Minimum Rules for the treatment of offenders are observed. National rules are in conformity with the UN Rules' (ACHPR 1997c: 11). No other reference to these or other standards is made in the report.

19 PRI says on its website (http://www.penalreform.org) that visits are done in line with the UN Standard Minimum Rules for the Treatment of Prisoners. PRI's document, *Making Standards Work*, includes a broad set of relatively precise guidelines to apply to prison conditions. These appear to be a combination of international standards from human rights treaties and other documents and some added interpretation.

20 As to how this checklist was created, it was '[t]he above instruments and the innate sense of the African in how humanely people should be treated'.

21 These include a set of standards relating to police custody, imprisonment, healthcare, foreign nationals, involuntary placement in psychiatric establishments, juveniles and women deprived of their liberty, training of law enforcement personnel, and combating impunity *The CPT Standards* (2002) CPT/Inf/E (2002) 1 – Rev. 2004.

22 'Sleeping conditions should be as good as possible for all prisoners and damp-free sleeping accommodation should be ensured' (ACHPR 2001b: 38).

23 Cells at a police station 'are not suitable for the detention of someone obliged to stay in custody overnight; at the very most they might, if necessary, be used for temporary holding purposes (i.e. Detention for a maximum of a few hours), and this subject to the strict condition that they are equipped with adequate lighting and ventilation' (ACHPR 2001b: 41).

24 'Provision of basic over-the-counter medicine which relieves pain or which is used in first aid treatment will contribute towards improvement in prison conditions' (ACHPR 1998d: 45(viii)). 'Doctors should be recruited for longer periods in full-time positions and existing para-medical staff should be strengthened to ensure attendance by general practitioners amounting to the equivalent of a full-time doctor; assistance by an appropriate number of qualified nurses; and ready access for prisoners to a dentist' (ACHPR 2001b: 39).

25 'NGOs should be encouraged to visit prisons and pass on their recommendations to government' (ACHPR 1997e: 31(17)).

26 'Female guards should be trained to take over guard duties for women prisoners' (ACHPR 1997e: 31(16)).

27 'Expectant or breastfeeding mothers should not be sent to prison' (ACHPR 2001b: 40). 'Prison is not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mothers. However, it is possible to find solutions so that these women are not imprisoned: use of bail for remand prisoners, non-custodial sentences or conditional/early release, parole, suspended sentences for convicted prisoners' (ACHPR 2001c: 36).

28 '[P]articipants stressed the importance of establishing minimum ethical standards for carrying out such missions and visits so as to maintain their credibility and independence' (Association for the Prevention of Torture 1997: paragraph 4).

29 '[P]rison conditions in CAR [Central African Republic] are well below international standards, including the African Charter on Human and Peoples' Rights…The respect of the dignity inherent in a human being cherished by Art. 5 of the Charter is lacking in the prisons of CAR' (ACHPR 2000b: 31).

30 As Viljoen (2005: 136) comments, 'none of the communications finalized since its inception reflects any distinct role played by the SRP [Special Rapporteur on Prisons], despite the mandate allowing for such a possibility.'

31 For example, during the Central African Republic visit, the Special Rapporteur met with the High Commissioner for Human Rights and the Director General for Human Rights, and it was noted that 'the difficulties facing CAR account for the non-submission of a report

to the Commission. But for financial reasons CAR would have attended the sessions of the Commission' (ACHPR 2000b: 29).

32 Also recommended in paragraph 21 that this be extended to other Special Rapporteurs, not just that on prisons.

33 For example, 'Assault and battery of prisoners in Mopti prison should cease. An inquiry should be conducted into the conduct of guards at Mopti in relation to their treatment of prisoners for the necessary action to be taken. Guards should be trained to avoid assaulting prisoners' (ACHPR 1997e: 31(3)). In his recommendations, the Special Rapporteur then stated that 'torture and assault of prisoners should end' (ACHPR 2000b: 33). 'Many credible sources expressed concern about extra-judicial execution, especially of violent recidivists' (ACHPR 2000b: 33). The Special Rapporteur does not go on to say any more about this, however, even in the recommendations. In his findings in relation to prisons in The Gambia, the Special Rapporteur noted that 'there was credible evidence of assault of suspects by the police. Torture with torture scars, and cruel and degrading treatment complained of by some inmates of the Security Wing of the State Centre Prison (Mile 2) were credible enough to cause serious concern for members of the team' (ACHPR 1999b: 37). In his recommendations, he made a weak statement: 'a reminder to police and prison officials that suspects and prisoners are neither to be assaulted nor tortured should be issued. Offenders should be prosecuted to deter the commission of this crime' (ACHPR 1999b: 39).

34 The Commission urges states 'to include in their Article 62 reports to the AHCPR information on human rights of prisoners' (ACHPR 1994–95: Annex VIII).

35 As well as the Resolution of ECOSOC 1984/87 requiring states to inform the UN Secretary General every five years of progress they have made in implementing these rules (ACHPR 1994–95).

36 For example, Communication 224/98, *Media Rights Agenda v. Nigeria* (ACHPR 2000–01: AHG/229 (XXXVII), Annex V).

37 'The conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened this Article. Aspects of the treatment of Vera and Orton Chirwa such as excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care, were also in contravention of this Article' – Communications 64/92, 68/92, 78/92 (*Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Eighth Annual Activity Report, Annex VI, Communication 64/92, 68/92, 78/92, paragraph 7.

'Acts of torture include forcing detainees to lie on the floor and being soaked with cold water; confining four groups of individuals in cells 1.8 metres wide and one metre deep, deliberately flooding cells to prevent detainees from lying down, forcing individuals to face mock executions, and prohibiting them from washing. Other accounts describe burning with cigarettes and the deliberate banging of doors at frequent intervals throughout the night to prevent sleeping. Individuals were bound with rope such that circulation was cut off to parts of their bodies, beaten severely with sticks, and had battery acid poured onto open wounds. There is substantial evidence produced by the complainants to the effect that torture is practised. All of the alleged acts of physical abuses, if they occurred, constitute violations of Article 5' (ACHPR 1999a; 1999–2000: AHG/222 (XXXVI)Add, Annex V).

'The methods used include the so-called "Jaguar"…electric shocks to the genital organs, as well as burns all over their bodies. In February 1991, detainees in the J'Reida military camp were undressed, hands tied behind their backs, sprayed with cold water and beaten with iron bars. The "Jaguar" torture was also utilised. The detainees were burned with coal embers, or they had some powder spread on their eyes, causing a terrible burning sensation. Their heads were plunged in dirty water to the point of suffocation; some were buried in sand to their necks. They were permanently chained in their cells, without toilet facilities. Some were kept in underground cells or dark cells where it got very cold at night.' The Commission found that, 'Taken together or in isolation, these acts are proof of widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of article 5. The fact that prisoners were left to die slow deaths…equally constitutes cruel, inhuman and degrading forms of treatment prohibited by article 5 of the Charter' – *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v. Mauritania* Communications 54/91, 61/91, 98/93, 164/97–196/97 and 210/98 (ACHPR 1999–2000: AHG/222 (XXXVI)Add, Annex V, paragraph 118).

38 *Huri-Laws v. Nigeria*, Communication 225/98 (ACHPR 2000–01: AHG/229 (XXXVII), Annex V): '[T]he Complainant alleges a violation of article 5 of the Charter with respect to Mr. Ogaga Ifowodo only…It is alleged that Mr. Ogaga Ifowodo was detained in a sordid and dirty cell under inhuman and degrading conditions. Also that being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma. Moreover, added to this deprivation of contact with the outside world and health threatening conditions, it amounts to cruel, inhuman and degrading treatment.' The prohibition of torture, cruel, inhuman or degrading treatment or punishment is absolute.

39 As observed by the European Court of Human Rights in *Ireland v. United Kingdom* when called upon to decide on a similar provision of the European Convention on Human Rights, '…the treatment prohibited under Article 3 of the Convention is that which attains a minimum level of severity and…the assessment of this minimum is, in the nature of things, relative…It depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc.' (Judgement of 18 January 1987, series A No. 25 paragraph 162). See also the European Commission on Human Rights, *Jose Antonio Urrutikoetxea v. France* (5 December 1996: 157). The treatment meted out to the victim in this case constitutes a breach of the provision of Article 5 of the Charter and the relevant international human rights instruments cited above.

40 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, Communications 137/94, 139/94, 154/96 and 161/97, AHG/215 (XXXV), Annex V: 'International PEN alleges that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty, then denied medical attention, during the first days of his arrest. There was no evidence of any violent action on his part or escape attempts that would justify holding him in irons.'

41 The 'torture of 15 persons by a military unit at Kinsuka, near the Zaire river, as alleged in communication 25/89, constitutes a violation' of Article 5. Further, the 'indefinite detention

of those who protested against torture' violated Article 6 – *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire*, Communications 25/89, 47/90, 56/91, 100/93 (Joined) (ACHPR 1995–96: Annex VIII, paragraphs 41, 42).

42 In its *Report of the Mission to Mauritania Nouakchott, 19–27 June 1996* (ACHPR 1996–97: Annex IX), the Commission noted that black Mauritanians 'were submitted to physical and moral torture', and black Mauritanian prisoners died after torture and extrajudicial executions. There was 'regular torture' and other 'inhuman treatment' during detention – *Organisation Mondiale Contre La Torture and Association, Internationale des juristes Democrates Commission, Internationale des Juristes (C.I.J.) Union Interafricaine des Droits de l'Homme v. Rwanda*, Communications 27/89, 46/91, 49/91, 99/93 (ACHPR 1996–97: Annex X).

43 In Communication 224/98, the Commission noted: 'The Complainant avers that while Mr. Malaolu was in detention, he was subjected to such cruel, inhuman or degrading treatment, as having his legs and hands chained to the floor day and night. From the day he was arrested and detained, until the day he was sentenced by the tribunal, a total period of 147 days, he was not allowed to take his bath. He was given food twice a day, and while in detention, both in Lagos and Jos before he faced the Special Investigation Panel that preceded the trial at the Special Military Tribunal, he was kept in solitary confinement in a cell meant for criminals. The Complainant submits further that the treatment meted out to Mr. Malaolu contravened Article 5 of the Charter.' It found violations of Article 5, 'reinforced by the Basic Principles' (Communication 224/98).

44 Communications 27/89, 46/91, 49/91 and 99/93.

45 In Communications 137/94, 139/94, 154/96 and 161/97 it was alleged that detainees had been subject to torture in the army camp. The Commission found that: 'Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.'

46 Communications 54/91, 61/91, 98/93, 164/97–196/97 and 225/98.

47 Communication 225/98.

48 Communications 48/90, 50/91, 52/91 and 89/93 (ACHPR 2000–01: AHG/229 (XXXVII), Annex V). In addition, '[b]eing deprived of the right to see one's family is a psychological trauma difficult to justify, and may constitute inhuman treatment' – *Civil Liberties Organisation v. Nigeria*, Communication 151/96 (ACHPR 1999–2000: AHG/222 (XXXVI), Annex V).

49 'It is also a violation of Article 18 to prevent a detainee from communicating with his family' – *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communications 143/95, 150/96 (ACHPR 1999–2000: AHG/222 (XXXVI), Annex V, paragraph 29).

50 'Punishment of torturers is important, but so also are preventive measures such as halting of incommunicado detention, effective remedies under a transparent, independent and efficient legal system, and ongoing investigations into allegations of torture' – Communications 48/90, 50/91, 52/91 and 89/93 (*Huri-Laws v. Nigeria*). Further, 'Holding people in solitary confinement both before and during the trial, and during such detention,

which is, on top of it all, arbitrary, (paragraphs 5, 8, 10, 11 and 12) depriving them their right to a family life constitutes a violation of article 18.1' – Communications 54/91, 61/91, 98/93, 164/97–196/97 and 210/98 (*Malawi African Association et al. v. Mauritania*).

51 *Purohit and Moore v. The Gambia*, Communication 241/2001, noting Article 5 and its previous case law, states it should be interpreted in the widest possible manner, and although it did not say anything specific on the conditions under which they were detained, it held that, 'like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well established principle that all human beings are born free and equal in dignity and rights.'

52 Communications 54/91, 61/91, 98/93, 164/97–196/97 and 210/98 (*Malawi African Association et al. v. Mauritania*).

53 In *Kazeem Aminu v. Nigeria*, Communication 205/97 (ACHPR 1999–2000: AHG/222 (XXXVI), Annex V): 'it was alleged that Mr. Ayodele Ameen, a citizen of Nigeria was arbitrarily arrested, detained and tortured by Nigerian Security officials on several occasions between 1995 and the date of the complaint. The complainant alleges that Mr. Ayodele Ameen while in detention on one occasion was denied medical treatment and also subjected to inhuman treatment.' Further, '[t]he complainant had alleged that his client was tortured and subjected to inhuman treatment on several occasions by the Nigerian Security operatives. The allegation has not been substantiated. In the absence of specific information on the nature of the acts complained of, the Commission is unable to find a violation as alleged.'

54 Communications 48/90, 50/91, 52/91 and 89/93 (*Amnesty International et al. v. Sudan*).

55 It was alleged: 'that the Military perpetrated a reign of terror, intimidation and torture when it seized power. While there is evidence of intimidation, arrests and detentions, there is no independent report of torture. The complainant further alleges that detention of persons *incommunicado* and preventing them from seeing their relatives constitutes torture. The State has refuted this claim and has challenged the complainant to verify the truth from those who were detained. To date, the Commission has received no evidence from the complainant. In the absence of proof therefore, the Commission cannot hold the government to be in violation of Article 5. In this regard…the Commission is thus unable to find a violation of Article 5' (*Sir Dawda K Jawara v. The Gambia*, Communications 147/95 and 149/96).

56 Communication 154/96 Twelfth Annual Activity Report, 1998–99, Annex V, alleges that all the victims were manacled in their cells, beaten and chained to the walls in their cells. The government has made no written submission in these cases, and has not refuted these allegations in its oral presentation. It is well-established jurisprudence of the Commission that where allegations go entirely unchallenged, it will proceed to decide on the facts presented (see, for example, the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93). Thus, the Commission holds a violation of Article 5 of the Charter' – Communications 137/94, 139/94, 154/96 and 161/97 (ACHPR 1995–96). See also *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (ACHPR 1999–2000: AHG/222 (XXXVI),

Annex V): as the government did not contest the allegations, the Commission simply found a violation of Article 5. In *Rights International v. Nigeria*, Communication 215/98 (ACHPR 1999–2000), it was alleged that Charles Baridorn Wiwa 'a Nigerian student in Chicago was arrested and tortured at a Nigerian Military Detention Camp in Gokana'; further, that 'while in detention, he was horsewhipped and subjected to various forms of torture'. The Commission held that '[d]espite invitations to the Government of Nigeria for its response to the allegations in this communication, the Commission has received none. The Commission is, therefore, compelled to conclude the complaint on the facts in its possession, which are the allegations of the complainant.'

57 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.

Contributors

Victor Dankwa LLB (Ghana); BCL (Oxford); LLM, JSD (Yale) is a former chairperson of the African Commission on Human and Peoples' Rights and was the first Special Rapporteur on Prisons and Conditions of Detention in Africa. He was formerly an associate professor in the Faculty of Law, University of Ghana.

Amanda Dissel BA LLB (Wits) is the manager of the Criminal Justice Programme at the Centre for the Study of Violence and Reconciliation in Johannesburg, and formerly worked as an attorney. Her research interests lie in the fields of penal policy, interventions with young offenders, human rights, understanding violent crime and restorative justice. She has conducted research in these areas and published several papers, book chapters and journal articles on these subjects.

Lukas Muntingh is a University of Stellenbosch graduate and holds a Master's degree in sociology. He has worked in the criminal justice reform field since 1992, focusing on child justice, diversion, offender reintegration and prisoners' rights. He is project coordinator of the Civil Society Prison Reform Initiative, a project based at the Community Law Centre of the University of the Western Cape in Cape Town.

Rachel Murray is Professor of International Human Rights Law at the University of Bristol. Her specialist areas are human rights in Africa, particularly the African Charter and its Commission on Human and Peoples' Rights and the Organisation of African Unity/African Union. She has written widely in this area, including books and articles in leading legal human rights journals. She previously worked at the University of the West of England, Queens University Belfast, where she was also assistant director of the Human Rights Centre, and at Birkbeck College, University of London.

Stephen Peté BA LLB (Natal), LLM (Cape Town), M Phil (Criminology) (Cambridge) is an associate professor in the Faculty of Law, University of KwaZulu-Natal. He practised as an attorney of the High Court of South Africa in both the public and private sectors for many years. He has authored and co-authored a number of articles and textbooks in the fields of civil procedure, jurisprudence, criminology and human rights.

Jeremy Sarkin is Visiting Professor of Human Rights at the Fletcher School at Tufts University and Senior Professor of Law at the University of the Western Cape in Cape Town. He has a Master's degree in law from Harvard Law School and a Doctor of Laws degree from the University of the Western Cape. He is an attorney in both South Africa and the State of New York, USA. He has worked on constitutional and transitional issues in various countries, including Rwanda, the Democratic Republic

of the Congo, Sierra Leone, Angola, Namibia, Sudan and Burma. He served as an acting judge in the Cape High Court in South Africa in 2002 and 2003.

Martin Schönteich holds a Bachelor of Laws (LLB) degree from the University of KwaZulu-Natal, and a postgraduate degree in political science from the University of South Africa. He is Senior Legal Officer: National Criminal Justice Reform at the Open Society Justice Initiative in New York, USA. There he focuses on promoting alternatives to pre-trial detention and fostering mechanisms to ensure accountability for conduct by law enforcement, while simultaneously improving the effectiveness of law enforcement in providing safety to the public. He previously worked as a senior researcher for the Institute for Security Studies in South Africa, and as Parliamentary Affairs Manager for the South African Institute of Race Relations. He is an advocate of the High Court of South Africa.

Julia Sloth-Nielsen is a senior professor in the Faculty of Law at the University of the Western Cape in Cape Town. Her research interests include children's rights and prison law. She is the co-founder of the Civil Society Prison Reform Initiative, a project of the Community Law Centre at the University of the Western Cape.

Chris Tapscott is currently the dean of the Faculty of Economic and Management Sciences at the University of the Western Cape in South Africa. Formerly the founding director of the university's School of Government, he holds degrees from the universities of Cape Town and Birmingham and the London School of Economics, where he received a PhD in sociology. He has written extensively on the challenges of state and societal transformation in newly democratised societies and is currently engaged in research on issues related to prison governance and reform.

Lisa Vetten is senior researcher and policy analyst at the Tshwaranang Legal Advocacy Centre to End Violence Against Women in Johannesburg. She was previously the programme manager of the gender programme of the Centre for the Study of Violence and Reconciliation and prior to that worked for the Sexual Harassment Education Project, the South African NGO Secretariat for Beijing, and People Opposing Women Abuse. She has spent a number of years working with women who have killed their abusive partners, including appearing as an expert witness for such women and undertaking research, advocacy and writing in this area. She is currently completing her Master's degree in political studies at the University of the Witwatersrand.

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Index