

STATEMENT BY THE COMMUNITY LAW CENTRE SUBMITTED TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS AT THE 47TH ORDINARY SESSION, 12-26 MAY 2010, BANJUL, THE GAMBIA

This statement by the Community Law Centre focuses on pre-trial detention in Africa and is motivated by the plight of the large number of pre-trial detainees on the continent. Their situation warrants urgent action for a number of reasons.

- (1) Conditions of detention in pre-trial detention centres are frequently well below what can be regarded as acceptable at a minimum level. Access to health care, adequate nutrition, and other support services are frequently less favourable than for their sentenced counterparts. Conditions of detention are frequently so poor that they are life threatening.
- (2) Pre-trial detainees often remain in custody for lengthy periods (sometimes as long as ten years) without having been convicted of any offence.
- (3) Pre-trial detainees are particularly vulnerable to torture and other ill treatment. They are also vulnerable to corruption.
- (4) Large pre-trial detainee populations contribute to prison overcrowding which has a number of negative consequences in respect of limited resources, conditions of detention, the separation of categories, and safety.
- (5) The problem of pre-trial detention disproportionately affects poor and marginalised communities, whose members are more likely to be arbitrarily arrested and, unable to afford legal assistance, are most vulnerable to spending prolonged periods in pre-trial detention. When individuals are detained for excessive periods and lose their jobs, their families slip deeper into poverty, facing hunger and homelessness.¹

The scale of pre-trial detention in Africa is significant; see Appendix 1. In 30 of the 46 African states for which information is available, more than 30% of the prison populations in these countries are awaiting trial detainees. Many of them will remain in custody for long periods, often only to be released without their cases going to trial.²

Recalling that the African Charter articulates a number of rights that are of particular relevance to the situation of pre-trial detainees. These are: the right to be treated with dignity (Art. 4); the right to be free from torture and other ill treatment (Art. 5); the right to liberty and to the security of the person, and specifically the right to be free from arbitrary arrest and detention (Art. 6); and the right to have his or her case heard and specifically to be tried within a reasonable time by an impartial court or tribunal (Art. 7). Note is also taken of the 2003³ and 2007⁴ decisions by the Commission involving

¹ Open Society Justice Initiative "Global Campaign on Pre-trial Justice"

http://www.soros.org/initiatives/justice/focus/criminal_justice/projects/globalcampaign

² In South Africa there were 46 745 awaiting trial prisoners at the end of July 2009. Of this group 48.5% had already been in custody for longer than three months (Figures supplied by the Judicial Inspectorate for Correctional Services). Research in South Africa has also found that half of the cases against awaiting trial detainees at three metropolitan courts were withdrawn or struck from the roll [Karth, V. (2008) *Between a rock and hard place – bail decisions in three South African courts*, Open Society Foundation: Cape Town].

³ *Liesbeth Zegveld and Messie Ephrem v. Eritrea*, African Commission on Human and Peoples' Rights, Comm. No. 250/2002 (2003).

the state of Eritrea which found violations of Art 7(1) of the Charter; the right to be tried within a reasonable time.

It is submitted that the Commission should be guided by its resolutions and declarations, with specific reference to the Resolution on Prisons in Africa (1995)⁵, Robben Island Guidelines (2002)⁶ and the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa (2003) (the Ouagadougou Declaration).⁷ The 1995 Resolution is clear on what the Commission regarded as the key areas for prison reform in general: “Concerned 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, large percentages of persons awaiting trial, among others”. The Robben Island Guidelines focus on measures aimed at the prohibition and prevention of torture and other ill treatment and thus forms a critical component of protecting prisoners’ rights, including the rights of awaiting trial prisoners.

The African human rights system should also take note of developments in other regions and the Commission’s attention is drawn to a recent decision of the European Court of Human Rights (ECtHR) involving Russia.⁸ In this matter the Court investigated in depth the continued detention of an unsentenced prisoner and drew a number of noteworthy conclusions. Importantly, it found that the seriousness of the charge is of itself and over time not a sufficient justification for continued detention. The Court noted that “the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continue to justify the deprivation of liberty. Where such grounds were ‘relevant’ and ‘sufficient’, the Court must also ascertain whether the competent national authorities displayed ‘special diligence’ in the conduct of the proceedings.”⁹ ... “The Court finds, therefore, that by failing to address concrete relevant facts and by relying solely on the gravity of the charges, the authorities prolonged the applicant’s detention on grounds which cannot be regarded as “sufficient”.”¹⁰ The Court consequently found a violation of Art. 5(3) of the European Convention.¹¹ The right to review the legality of detention should not only guarantee that there is a legal basis for the detention, but should also ensure the detention is not unnecessarily or unfairly prolonged. Excessive length of pre-trial detention renders the detention unlawful and is furthermore in violation of the right to a fair and public hearing without undue delay or within a reasonable time.¹²

⁴ *Article 19 v. The State of Eritrea*, African Commission on Human and Peoples’ Rights, Communication No. 275/ 2003 (2007).

⁵ Adopted at the 17th Ordinary Session of the African Commission on Human and Peoples’ Rights, Lomé, Togo, ACHPR/Res.19 (XVII) 95.

⁶ Adopted at the 32nd Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, ACHPR/Res.61 (XXXII) 02

⁷ Adopted at the 34th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, ACHPR/Res.64 (XXXIV) 03.

⁸ *Bakhmutskiy v. Russia*, ECtHR Application no. 36932/02, 25 June 2009.

⁹ *Bakhmutskiy v. Russia*, Para 135.

¹⁰ *Bakhmutskiy v. Russia*, Para 142.

¹¹ Art. 5(3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article 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 release pending trial. Release may be conditioned by guarantees to appear for trial.

¹² Art. 14(c) ICCPR and Arts. 6(1) and 5(3) ECHR.

It is against the background of the above that the Community Law Centre respectfully submits that States should be actively encouraged and supported by the African Commission to reduce the proportion, the actual numbers and duration of detention of awaiting trial prisoners under their jurisdiction. The *Special Rapporteur on Prisons and Conditions of Detention* and the *Committee for the Prevention of Torture in Africa* should give special attention to the situation of pre-trial detainees through their promotional work.

The following are proposed as measures that should be taken in this regard:

- Setting limits in law for the duration of pre-trial detention or alternatively, establishing in law a mechanism with clear guidelines to assess the cases of persons who have been in custody awaiting trial for longer than a set period.
- Measures should be taken to avoid the granting of unaffordable bail to suspects. The fact that bail has been offered already indicates that the court does not consider the person a serious threat to the community or the interests of justice.
- The cases of pre-trial detainees who have been in custody for longer than 3 months should be actively investigated to establish the reasons for their continued detention and to take the appropriate action.
- Legal advice should be made available to pre-trial detainees through the provision of legal aid and/or the services of para-legal workers. Pre-trial detainees should, as required by the Charter and the International Covenant on Civil and Political Rights, be in a position to challenge the lawfulness of their detention.
- Measures should be taken to enable proper case management with specific reference to the keeping of a proper register of detention as required by Rule 7 of the UN Standard Minimum Rules for the Treatment of Prisoners.
- Promoting transparency in the prison system by encouraging judges, magistrates and members of parliament to frequently visit places of detention as they are often mandated in law to do so.¹³ To this end, the Community Law Centre has developed a monitoring tool for visiting judges and magistrates in South Africa which can be adapted for other jurisdictions.
- State parties should be requested to report, as part of their periodic reports to the Commission, on measures taken to reduce the number and proportion of awaiting trial detainees. Particular attention should be paid in state reports on measures taken to improve conditions of detention to ensure that at least the minimum requirements are met pertaining to acceptable space, access to health care and the management of contagious diseases; adequate nutrition and access to clean water; and the separation of categories of prisoners. In this regard it is required at minimum to separate males from females, children from adults and sentenced from unsentenced prisoners.

¹³ For example, access to prisons are granted in law to judges and magistrates and certain members of Parliament in the following countries: South Africa - Correctional Services Act (111 of 1998); Botswana - Prisons Act, Chapter 21:03 of the Laws of Botswana, 1987 Revision, Part XVII, Arts. 131-133; Malawi - 2003 Prison Bill of the Malawi Prison Service, Part XII, Art. 114; Zimbabwe - Prisons Act, Chapter 7:11 (1956, amended 2004), Part VII, Arts. 44-50.

- Research and data collection should be undertaken to deepen our understanding of the problem but, more importantly, to identify cost effective solutions on the African continent. In view of this it is proposed that the Special Rapporteur on Prisons and Conditions of Detention develops a standardised report format focussing on a number of core variables to be used when visiting states. This will facilitate inter-state comparisons as well as comparisons over time to enable monitoring. It is furthermore proposed that core variables reflect at least the issues raised in the Ouagadougou Declaration and the Robben Island Guidelines.
- We encourage the Commission to support international initiatives by civil society organisation to address the situation of pre-trial detainees.
- The Commission should encourage states that have not done so, to sign and ratify OPCAT and establish National Preventive Mechanisms under the Protocol.

The Community Law Centre wishes to assure the Commission of its commitment to address the problems associated with pre-trial detention and will assist the Commission in its endeavours wherever possible.

Presented by:

Mr. Lukas Muntingh
Project Coordinator
Civil Society Prison Reform Initiative
Community Law Centre
University of the Western Cape
South Africa
lmuntingh@uwc.ac.za

Appendix 1 Proportion of pre-trial detainees of total prison population Africa.¹⁴

Ranking	Country	Percentage pre-trial detainees
1	Liberia	97.3%
2	Mali	88.7%
3	Benin	79.6%
4	Niger	c.76%
5	Congo (Brazzaville)	c.70%
6	Nigeria	69.3%
7	Burundi	68.0%
8	Cameroon	65.6%
9	Seychelles	63.0%
10	Angola	58.9%
11	Burkina Faso	58.3%
12	Chad	58.0%
13	Djibouti	57.2%
14	Uganda	56.0%
15	Togo	55.4%
16	Republic of Guinea	51.3%
17	Comoros	c.50%
18	Sierra Leone	49.2%
19	Tanzania	48.5%
20	Madagascar	47.9%
21	Libya	47.7%
22	Morocco	46.5%
23	Kenya	43.3%
24	Gabon	c.40%
25	Senegal	37.2%
26	Cape Verde (Cabo Verde)	36.5%
27	Zambia	35.3%
28	Sao Tome e Principe	c.34%
29	South Africa	30.8%
30	Mozambique	c.30%
31	Mauritius	29.9%
32	Ghana	28.6%
33	Cote d'Ivoire	28.5%
34	Swaziland	27.5%
35	Rwanda	26.9%
36	Zimbabwe	23.4%
37	Tunisia	22.7%
38	Gambia	18.5%
38	Malawi	18.5%
40	Botswana	17.0%
41	Lesotho	16.8%
42	Mauritania	c.13%
43	Algeria	11.3%
44	Sudan	c.10%
45	Egypt	9.9%
46	Namibia	7.9%

¹⁴ World Prison Brief, International Centre for Prison Studies, King's College, London.