PROMOTING PRE-TRIAL JUSTICE IN AFRICA

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Editorial

In this edition of the PPJA newsletter, selected results from recently released Open Society Justice Initiative studies on the socio-economic impact of pre-trial detention in West Africa are discussed. In particular, the findings on conditions of release associated with bail being imposed, which appear to result in a significant proportion of detainees remaining in pre-trial detention, are considered. The studies appear to support the contention that it is ordinary people who are not wealthy who cannot secure release and who in turn suffer further socio-economic hardship.

The need for, and the process leading to, African Commission on Human and Peoples' Right's Guidelines on the Use and Conditions of Police Custody and Pre-trial Detention are discussed by Louise Edwards of the African Policing Civilian Oversight Forum (APCOF). APCOF has been highly instrumental in the consultative process which has lead to draft guidelines. A reminder also that comment on the guidelines can be submitted via the PPJA forum.

Without an evidence base, policy and interventions can be inappropriately designed, and their impacts difficult to measure. The Open Society Initiative for Southern Africa (OSISA) has made it a priority to conduct pre-trial detention audits in southern Africa to support policy development and to create a baseline from which change can be measured. Tina Lorizzo and Jean Redpath report on the progress being made - and challenges experienced - on the audit being carried out in Mozambique.

Finally, a reminder that pre-trial detention resources are systematically being loaded onto PPJA. We draw your attention to the final version of the UNODC-ILO-UNAIDS-UNDP-WHO e-book *HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions* now also available on PPJA.

Jean Redpath
PPJA Researcher

Pre-trial detention in West Africa

Three West African studies on the socio-economic impact of pretrial detention, produced by the Open Society Justice Initiative in collaboration with local partners, were released at the end of May 2013. The studies, conducted in Sierra Leone, Ghana and Guinea Conakry, document the impacts of pre-trial detention on detainees, their families and their dependants, and also provide insights into the functioning of the criminal justice systems of those countries.

According to the International Centre of Prison Studies, some 67% of Guinea's prison population, 57% of Sierra Leone's prison population and 22% of Ghana's prison population is held pre-trial.

The three studies found a range of similar socio-economic impacts of pre-trial detention on dependents of detainees, including loss of detainees' earnings and labour. Additional costs to families, for example through bringing food and medicine when visiting detainees, in seeking legal assistance, and in paying bail or bribe amounts were documented. The deterioration of detainee's health while in pre-trial detention was also observed in all three studies, as well as stigma and social isolation being experienced by detainees and their families.

The profile of detainees was generally similar to the profile of adult males in the three countries, suggesting the ordinary man is susceptible to pre-trial detention in West Africa. Given that the ordinary person is poor in these countries, it was found that detainees were also poor, with the poverty of their situations exacerbated by pre-trial detention. For a significant proportion, their poverty is also the reason they were unable to meet conditions of release set by the court.

Detainees unable to meet conditions of release

Some 18% of detainees in Sierra Leone, 17% in Ghana and 14% in Guinea said that they were granted conditional release (bail) by the courts before trial but they had not been able to comply with the conditions and thus were still in detention. Such conditional release frequently requires money amounts to be paid or secured, which is particularly difficult for poor persons.

Conditions of release in Sierra Leone

According to the Bail Policy of Sierra Leone, only persons held on serious offences must actually provide a cash deposit to secure bail. [1]In the remainder of cases it is the accused's surety who must, should the accused person fail to appear in court, pay the bail bond amount; a cash deposit is not required. This is referred to as a "bail bond" or "recognisance" or "pledge".

Common conditions of bail in Sierra Leone include requirements to produce two sureties, who are resident in the same city as the court, who are homeowners, and able to produce title deeds as evidence of home ownership. Given that the vast majority of detainees themselves do not own land, they are unlikely to have family or friends who own land who would be able to stand surety.

This raises the question as to the trends in the bail amounts among detainees not able to

meet bail conditions, and how they compare to the trends in relation to the earnings of detainees. The Sierra Leone study found that the average bail amount set for the 18% of detainees granted conditional release in custody was 25 times the average weekly earnings of detainees. In other words, the average bail amount of detainees unable to make bail was equivalent to just more than six months' of the average earnings of detainees.

It is unclear to what extent cash deposits were required in relation to these amounts. Even if cash deposits were not required, detainees' incomes are a reflection of the socioeconomic circumstances of detainees and of any likely sureties. Should bail amounts be set at a very high level, likely sureties may be unwilling to provide the necessary recognisances.

Bribes in Sierra Leone "cheaper" than bail

Some 13% of detainees in Sierra Leone said they had been asked for a bribe, and 90% of these cases involved the police asking for the bribe. The average bribe amount for all detainees was lower than the minimum unaffordable bail amount. Thus the average bribe amount actually asked is equivalent to four times the average weekly earnings of detainees, while the average bail amount is 25 times weekly earnings. This suggests that bribe amounts are "more affordable" than bail amounts in Sierra Leone, in line with them being solicited at police station level - a person paying a bribe at police station level will secure release from the police, before going before court, thus avoiding a higher bail amount.

"Expensive" bribes in Guinea may buy "cheap" bail from judicial officers

In Guinea, by contrast the average bail amount set for pretrial detainees in custody was only 1.4 times the average weekly earnings of pretrial detainees for whom bail was set. In other words, the average bail amount of detainees unable to meet bail requirements was equivalent to only about ten days' average earnings of those pretrial detainees. However, the average bribe amount was equivalent to 5.4 times the average weekly earnings of detainees from whom a bribe was solicited, or almost a month and a half of earnings – compared to 10 days of earnings for the average bail amount.

This is in line with magistrates being the main requestors of bribes (more than 50% were sought by investigating judges or magistrates, and only 15% by police). A possible interpretation is that the bribe must be paid to ensure that bail, with an associated affordable bail amount, is set (or for bail actually to result in release) by the judicial officer, and that the bribe amount plus the bail amount together were together not affordable for detainees still detained. The median amount cited for bribes is approximately equivalent to the weekly salary of a magistrate in Guinea.

Conditions of release in Ghana

In Ghana, conditions of release mentioned included "bail bond" (a promise to deposit an amount of money with the court) and "indenture" (a legal contract between two parties in relation to land). In situations where indenture is used as a bail bond, the surety or accused is expected to show the court clerk the original copy of the indenture and for investigations to be conducted regarding its authenticity before being admitted before court.

Bribes in Ghana

Almost a quarter of detainees (24%) in Ghana said that a state official had suggested they pay a bribe to secure release, with 27% if these saying the bribe was asked by police, 9% by a clerk, and 9% by a magistrate. Those who were asked to pay a bribe were more likely to say they had been tortured than those who were not asked for a bribe. Among those to whom a bribe was suggested, 64% were tortured, compared to 32% who were not offered a bribe.

Torture in Ghana
The Ghana study was the only study of the three which enquired into the extent of torture. As many as 40% of all detainees said they had been tortured by a state official since their arrest. Almost a third (27%) said they suffered permanent physical injury as a result, while 24% said they suffered body pains. If one restricts the analysis to men (none of the women said they were tortured) the proportion claiming to have suffered torture rises to almost half (49%), with a third suffering permanent physical injury. Among those tortured, some 74% indicated that the reason for the torture was in order to extract a confession.

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[1] Morgan, M. Summary of the Bail Policy for the Judiciary of Sierra Leone, Centre for Accountability and the Rule of Law, 5 August 2010

Jean Redpath
This article is based on three reports produced by the Open Society Justice initiative and local partners, available here.

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African Commission guidelines on the use and conditions of police custody and pre-trial detention in Africa

The challenges confronting police in the context of pretrial justice, as well as the barriers to effective pretrial justice administration experienced by other institutions in the criminal justice system, has recently become a focus for the African Commission on Human and People's Rights (the African Commission).

Approximately 43.3% of detainees across Africa are pre-trial detainees, with figures ranging from 7.9% of the total prison population in Namibia, to 88.7% in Libya, according to the International Centre for Prison Studies. These figures are unlikely to include detainees in police detention facilities, and the proportion of people detained pre-trial may therefore be significantly higher.

Pre-trial detainees often exist in the shadows of the criminal justice system, as their detention and treatment are not generally subject to the same levels of judicial and other oversight as sentenced prisoners. Overall, pre-trial detainees experience poorer outcomes than sentenced prisoners in relation to conditions of detention, the risk of torture and other ill-treatment, susceptibility to corruption, and experience conditions of detention that do not accord with the rights to life, humane treatment, and the inherent dignity of the person.[1] Pre-trial detention has a disproportionate impact on the most vulnerable and marginalised, with pre-trial detainees more likely to be poor and without means to afford legal assistance, or to post bail or bond.[2] The over-use of pre-trial detention, and conditions of detention that do not accord with internationally agreed minimum standards, undermines the rule of law, wastes public resources, and endangers public health.[3]

The role of regional standards
Over the last ten years, the African Commission has started to develop a body of regional standards that:

- help articulate standards for acceptable practice;
- provide a platform to encourage domestic law reform; and
- provide guidance for reporting by state parties, national human rights institutions, civil society organizations, and for the monitoring carried out by the Commissioners and Special Rapporteurs of the Commission.

The African Commission recently adopted Resolution 228 on the need to develop guidelines on conditions of police custody and pre-trial detention in Africa. Resolution 228 acknowledges the need to articulate a set of guidelines aimed at minimising the risk factors associated with excessive and arbitrary arrest and detention. While many of the obligations on States in relation to arrest and detention are contained in various instruments, such as the African Charter, the Robben Island Guidelines and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, collating these in a single instrument and outlining practical measures will be of significant value.

To promote the intention of Resolution 228, the African Commission has developed draft Guidelines on the Use and Conditions of Police Custody and Pre-Trial Detention in Africa (the Guidelines). The Guidelines speak to ensuring procedural safeguards for arrest and detention, and promote minimum conditions of detention that accord with regional and international standards.

The Guidelines will provide a ready to use and consensus-built template for State Parties to the African Charter, National Human Rights Institutions (NHRIs) and civil society observers for reporting on these issues to the African Commission. Importantly, the Guidelines will also support the mandate of the Special Rapporteur on Prisons and Conditions of Detention in holding states to account in meeting legal standards, and form the basis of assessments of states' compliance with the Charter and Guidelines during country missions.

Opportunities to comment on the Guidelines

The draft Guidelines have been available for comment on the African Commission's website since May 2013, and on PPJA. APCOF and CSPRI invite interested stakeholders to make written comments on the Guidelines, either via the forum available on PPJA or via email. The written comments complement other consultation processes which have already occurred and will occur during 2013.

At the 52nd Ordinary Session of the Commission, APCOF, in partnership with the Special Rapporteur, held an experts' meeting to consult on the content of the Guidelines. Additionally, APCOF, in partnership with the Commission and the Southern African Development Community Lawyers' Association (SADC Lawyers), and with support from Open Society Foundation's Rights Initiative, Open Society Initiative for Southern Africa and the Open Society Foundation – South Africa, held a May 2013 regional consultation on the Guidelines in Johannesburg, South Africa. Consultations in west and central Africa, east Africa and northern Africa are planned for the second half of 2013.

The first two consultations provided an important opportunity for the Special Rapporteur to receive expert comment on the text, and to promote regional and local ownership of the initiative. The value of this process is in the adoption by the Commission of Guidelines that reflects the needs and aspirations of criminal justice stakeholders across Africa.

Sector-wide representation at the consultations has meant that state and non-state actors have been brought together to discuss the challenge of pre-trial detention in an environment that promotes collaboration, is non-confrontational, and promotes the development of mutually agreed standards in which the views of all parties are taken into account, within the constraints of international law. This is an important outcome, not just for strengthening the text of the Guidelines, but for promoting awareness of the problem of pre-trial detention, the potential of the Guidelines to address the issues, and opening up discussions between state and non-state actors about implementation at the regional, sub-regional and domestic levels.

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

Louise Edward, African Policing Civilian Oversight Forum (APCOF)

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Audit of pre-trial detention in Mozambique under way

Audits of criminal justice process and conditions of detention provide insights into the conditions of detention compared to international minimum standards, the composition of the pre-trial population, and compliance with national process requirements relevant to pre-trial detention. The insights obtained from audits suggest avenues for interventions and reforms, and provide a baseline from which to measure change. With a credible evidence-base, projects can be designed appropriately to improve conditions and criminal justice processes, and their impact measured.

For example, in Malawi, an audit finding that custody time limits – time periods beyond which detainees may not be held without the commencement of trial – are not adhered to in the criminal justice process, lead to a follow-up project seeking to understand possible ways to ensure compliance with Malawi's custody time limits. In 2013 the recommendations arising from this project are in the process of being implemented.

The Open Society Initiative for Southern Africa (OSISA) has previously produced two audits of criminal justice processes and conditions of detention in Southern Africa, in Malawi and Zambia, which were carried out by CSPRI in partnership with local organisations. A similar OSISA audit is in the field in Mozambique, which is being conducted by the Centre for Human Rights (Centro de Direitos Humanos, CDH) of the University Eduardo Mondlane in partnership with CSPRI.

To measure the duration of detention and to understand the case flow process, the audits have made use of official records in the form of registers and other official records maintained at prisons, at courts and at prosecutors' offices. A systematic random sample is drawn from these registers and relevant information, such as the date of arrest and offence with which the person is charged, recorded. The research is possible because Mozambique maintains a very good set of registers and case files which are properly (and legibly) completed and systematically archived.

This method, which was employed in Zambia and Malawi, will provide credible information on various aspects of the criminal justice process in Mozambique as well as provide a profile of the Mozambique pre-trial population. The audit also investigates conditions of detention through a systematic review of conditions of detention, using a monitoring tool based on the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Some of the challenges which are likely to be experienced by researchers became

apparent during the fieldworker training of the paralegals who will be conducting the research. The training, conducted in April 2013, incorporated practical data collection sessions at prisons and courts.

For the research it is necessary to know the total number of entries of accused or detainees into a court or prison in the year of interest. Unfortunately this cannot simply be ascertained from the final number in the year's register. This is because in prisons, for example, recidivist entries are registered with their old internal number relating to the first time they entered into the prison. Furthermore some entries which have been given register numbers are empty and other cases registered are *reentradas* (re-entries), which relate to those people who have been to court for few days before re-entering into the prison.

Given that the 2009 *Livro de Registo* of the Central Prison in Maputo registered more than 5000 entries, the need for manual counting consumed a significant amount of time during the training.

A further challenge increasing the burden of the research is that in recent years the registers have included less information than previously. This information then has to be found in the individual case processes (*processos individuais*) of each case selected. These folders need to be requested from the personnel working in the office, who must then locate the file in the archives.

Fortunately the Central Prison is the largest in Mozambique and the burden of counting is unlikely to be as high in other prisons. The paralegals trained are currently in the process of data collection across Mozambique, and it is hoped the audit will be completed toward the end of 2013.

Tina Lorizzo and Jean Redpath, CSPRI

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