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**PRE-TRIAL DETENTION IN AFRICA [1]**

by Martin Schönteich [2]

**Introduction**

Many prisons in Africa are hopelessly overcrowded – a consequence of the excessive length and use of pre-trial detention. For many detainees, who are incarcerated under poor sanitary conditions with no access to healthcare a lengthy period of detention can be akin to a death sentence. According to the Universal Declaration of Human Rights, everyone charged with an offence has the right to be presumed innocent until proven guilty according to law in a public trial. The jurisprudence of the African Commission on Human and Peoples' Rights supports this view. The reality in many African states is very different, however. Fair and equitable pre-trial detention regimes not only require good laws, but also good government, stable institutions and well-trained lawyers.

**Extent of pre-trial detention in Africa**

At the beginning of 2005 more than nine million people were being held in penal institutions around the world, [3] of which an estimated one-third, or about 2.5 million people, are pre-trial detainees. [4]

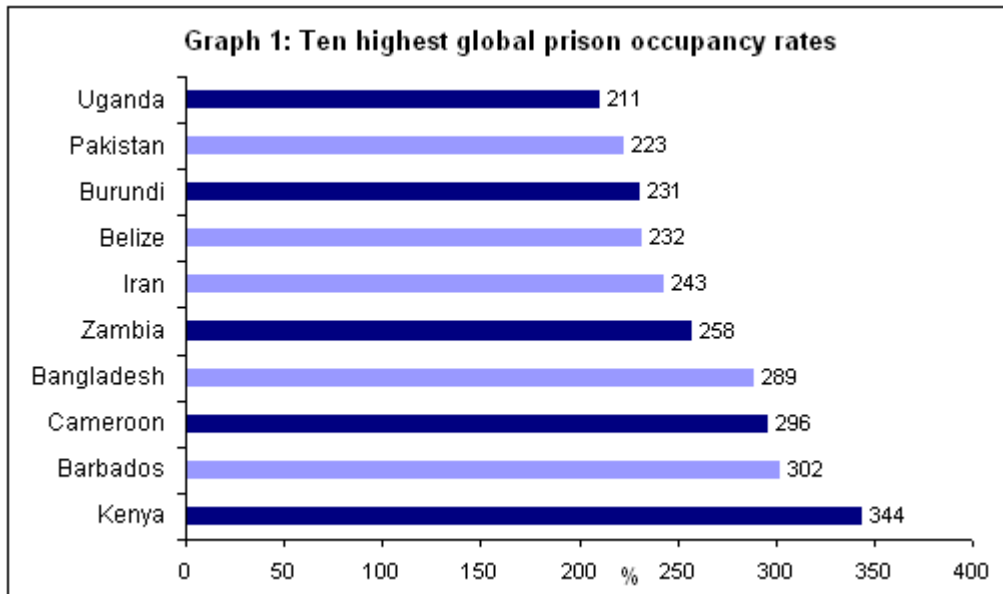
As is the case with general incarceration rates, pre-trial detention rates vary considerably between different regions of the world and between different countries of the same region. Globally, the number of pre-trial detainees as a proportion of all prisoners range from an incredibly high of 93% in Paraguay to a low of 1.3% in the Seychelles. [5] Regions with the highest proportion of prisoners in pre-trial detention are Latin America, West Africa, Asia and Southern Africa (Table 1).

**Table 1: Proportion of prisoners in pre-trial detention, by region**

<b>Region (no. of countries)</b>	<b>% of Prisoners in the pre-trial detention</b>
Council of Europe area (49)	19.9%
Caribbean (9)	30.9%
East Africa (4)	39.5%
Southern Africa (13)	42.9%
Asia (9)	46.8%
West Africa (11)	60.0%
Latin America (19)	60.4%

Figures for all regions are for 1999, except for the Council of Europe area which is for 2003.

The plight of many pre-trial detainees in Africa's prisons is exacerbated by slow-moving and inefficient criminal justice systems, with the result that many accused persons can spend years incarcerated awaiting trial. The situation is aggravated by the fact that Africa's prisons are overcrowded. Of the 165 national prison systems whose occupancy levels are recorded by the International Centre for Prison Studies (ICPS), close to one in five are in Africa. Yet, of the ten most overcrowded prisons recorded by the ICPS, half are in Africa.<sup>[6]</sup> Top of the list is Kenya with an occupancy rate of 344% (Graph 1).



Source: International Centre for Prison Studies, World Prison Brief

For many detainees in Africa's prisons, who are compelled to spend long periods of time incarcerated under poor sanitary conditions, inadequate nutrition, limited – if any – access to healthcare, and acute overcrowding, a period of detention “can be a death sentence”.<sup>[7]</sup> Given the generally poor prison conditions and lengthy periods of pre-trial detention in Africa, it is instructive to present some of the key international covenants and guidelines, and the jurisprudence emanating from the African Commission for Human and Peoples' Rights, that seek to protect the rights of detainees.

### International covenants 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 (ICCPR) states that:

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, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

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

Pre-trial 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.<sup>[8]</sup>

One of the major achievements of the Eighth UN Congress was the adoption, by consensus, of the UN Standard Minimum Rules for Non-custodial Measures (the 'Tokyo Rules'). These stipulate that governments should make every effort to avoid pre-trial-detention as far as possible. In particular, these rules provide that:<sup>[9]</sup>

- 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 offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

According to the United Nations 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”.<sup>[10]</sup> The seriousness of a crime or the need for continued investigation, considered alone, do not justify prolonged pre-trial detention.

International standards further hold that pre-trial detention should not be ordered if the deprivation of liberty would be disproportionate in relation to the alleged offence and the expected sentence. The broad international consensus therefore is to discourage the use of pre-trial detention and, whenever possible, to encourage the use of “alternative measures, such as release on bail or personal recognizance, or also, in the case of juveniles, close supervision, intensive care or placement with a family or in an educational setting or home”.<sup>[11]</sup>

### **African Commission on Human and Peoples’ Rights**

Article 7(1) of the African Charter on Human and Peoples’ Rights provides that “[e]very individual shall have the right to have his case heard.” This includes “the right to appeal to competent national organs against acts violating his fundamental rights” under 7(1)(a) and “the right to be tried within a reasonable time by an impartial court or tribunal” under 7(1)(d). Article 5 of the African Charter prohibits “cruel, inhuman or degrading punishment and treatment.”

#### *Pre-trial detention hearing within a reasonable time*

As supporting Article 7(1) of the African Charter, the African Commission on Human and Peoples’ Rights cites paragraph 2 of the Commission’s Resolution on fair trials which states “[p]ersons 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.”<sup>[12]</sup>

#### *Appropriate tribunal*

The African Commission stated that the requirements of a tribunal include “fairness, openness, and justice, independence, and due process.”<sup>[13]</sup> The Commission stated 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.<sup>[14]</sup> The tribunal must not only be impartial, but must also have the appearance of being impartial.

#### *Onus of proof*

The African Commission stated that “[a]ccording to the Commission’s long-standing practice, in cases of human rights violations, the burden of proof rests on the government.”<sup>[15]</sup> As a result, “[i]f the government provides no evidence contradict an allegation of human rights allegation made against it, the Commission will take it as proven, or at the least probable or plausible.”<sup>[16]</sup>

#### *Conditions of pre-trial detention*

The African Commission applied Article 5 of the African Charter on Human and Peoples’ Rights to the detention of an individual who had not been convicted of a crime and the Commission held was detained arbitrarily.<sup>[17]</sup> The Commission held that the following can constitute cruel, inhuman, and degrading treatment: torture, life threatening conditions, arbitrary detention without knowing the reasons for being detained, an inability to communicate with family, and a refusal to notify the family regarding the detention.

### **Conclusion**

The aversion of international tribunals, including the African Commission, to the use of pre-trial detention is based on one of the cornerstones of the international human rights regime – the presumption of innocence afforded to persons suspected of, or charged with, committing a crime.

In many African countries, governments and prison administrations officially regard prisoners awaiting trial as innocent until proven guilty, and hold in principle to the view that such detainees should be held in conditions which minimise the restrictions to their freedom. Yet, conditions of detention for pre-trial detainees are often poor relative to convicted prisoners. In

practice, most prison administrations deny pre-trial detainees many of the facilities, rights and privileges granted to convicted prisoners. Special rights or facilities available to pre-trial detainees, often extensive on paper, are frequently all but non-existent in practice.[18]

The excessive use of pre-trial detention, and the long duration of the period of detention, has repercussions not only for the accused persons detained, but also for their families and communities and for the legal system that bears the costs of their detention.[19] Beyond personal and financial hardships, long-term pre-trial detention can have an impact on the fairness of an accused person's trial. Owing either to the accused person's inability to contribute fully to his defence, or the negative impression that pre-trial incarceration leaves on the sentencing judge, studies of prisoners have revealed that "the longer a defendant stays in pre-trial detention, the more severe the outcome of his case is likely to be". [20]

Fair and equitable pre-trial detention regimes not only require good laws, but also good government, stable institutions and well-trained lawyers. Most of the relevant rules and recommendations of the United Nations, 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. Moreover, the point has been made that, "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".[21] [22]

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## SA PRISON AT A GLANCE

Category	Feb-05	Aug-05
Functioning prisons	233	240
Total prisoners	186823	155858
Sentenced prisoners	135743	110994
Unsentenced prisoners	51080	44864
Male prisoners	182652	152664
Female prisoners	4173	3214
Children in prison	3035	2204
Sentenced children	1423	1047
Unsentenced children	1612	1160
Total capacity of prisons	113825	114522
Overcrowding %	164	136
<i>Most overcrowded</i>		
Feb '05: Durban Med C	388%	
Aug '05: Middelrift		365%
<i>Least overcrowded</i>		
Apr '05: Emthonjeni	28%	
Aug '05: Wepener		26%
Awaiting trial longer than 3 months	23132	20818
Infants in prison with mothers	228	116

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### New paper

One new research paper has been added to the CSPRI publications list on the website and is available in PDF.

- C Tapscott (2005) A study of best practice in prison governance (Research paper no. 9)

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End notes

[1] This is an abridged version of a paper presented by the author at a session on 'Human Rights in Prisons' at the International Human Rights Academy, 21 October 2005, President Hotel, Cape Town.

[2] The author is the Senior Legal Officer: National Criminal Justice Reform, Open Society Justice Initiative, New York.

[3] R Walmsley, *World Prison Population List* (6<sup>th</sup> edition), International Centre for Prison Studies, London, 2005, p 1.

[4] Prison services distinguish between two categories of prisoners: sentenced and unsentenced prisoners. The latter category, which is often used interchangeably with pre-trial detainees includes prisoners whose trials have commenced but have not been finalised because (1) no verdict has been reached; or, (2) the accused have been convicted but not sentenced.

[5] International Centre for Prison Studies, *World Prison Brief*, <<http://www.prisonstudies.org/>>, (31 August 2004).

[6] International Centre for Prison Studies, *World Prison Brief*, <[http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world\\_brief.html](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html)>, (22 November 2005).

[7] V Stern, *Alternatives to prison in developing countries*, International Centre for Prison Studies and Penal Reform International, London, 1999, p 10.

[8] *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).

[9] Rule 6, *United Nations Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules), Adopted by the General Assembly on 14 December 1990.

[11] *Human Rights and Pre-Trial Detention. A Handbook of International Standards relating to Pre-Trial Detention*, Professional Training Series no. 3, United Nations, New York, 1994, pp 14-15.

[12] *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, op cit, chapter 1, section C, paragraph 2(e).

[13] *Huri-Laws v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 225/98 (2000) at para 45.

[14] *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998) at para. 44.

[15] Ibid, at para. 26, 44.

[16] *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999) at para. 52.

[17] Ibid.

[18] See, *Huri-Laws v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 225/98 (2000).

[19] F Dünkel and J Vagg (eds.), *Waiting for Trial. International Perspectives on the Use of Pre-Trial Detention and the Rights and Living Conditions of Prisoners Waiting for Trial*, Max-Planck-Institut, Freiburg, 1994, p xiv.

[20] *Safety, Security and Accessible Justice: Putting Policy into Practice* 47, Department for International Development, London, 2002, p 45.

[21] S H Clarke, 'Pre-trial Release: Concepts, Issues, and Strategies for Improvement', *Research in Corrections*, Vol. 1, Issue 3, 1998, pp 16-17.

[22] M Kelley, *Limiting the Use of Pre-Trial Detention*. Discussion paper presented to COLPI, 10 September 2001.

[23] Web sources consulted for this paper:

- International Covenant on Civil and Political Rights, [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)
- African Charter on Human and Peoples' Rights, [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf)
- Universal Declaration of Human Rights, <http://www.un.org/Overview/rights.html>
- The United Nations Standard Minimum Rules for the Treatment of Prisoners, [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm)

Human Rights Committee of the ICCPR, <http://www.unhchr.ch/html/menu2/6/hrc.htm>

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