

The African Commission's Guidelines on Pre-trial Detention: Implications for Angola and Mozambique

Tina Lorizzo¹

1. Introduction

On 8 May 2014, in Luanda (Angola), the African Commission on Human and Peoples' Rights (ACHPR) adopted the Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (hereafter the Guidelines).² The Guidelines represent an important milestone in addressing three of the most vulnerable phases of the criminal justice process faced in African countries: arrest, police custody and pretrial detention.

The Guidelines add to the body of regional soft law (e.g. the Robben Island Guidelines) and seek to guide states on the rights of arrested and detained persons. In this regard African states face significant implementation challenges.

Shortly after the adoption of the Guidelines, the Civil Society Prison Reform Initiative (CSPRI) of the Community Law Centre at the University of Western Cape (South Africa) co-hosted on 21-22 May 2014 a workshop in partnership with the Mozambican Institute of Legal Aid (*Instituto de Patrocínio e Assistência Jurídica*, IPAJ), in Maputo. Within the project

¹ Tina Lorizzo is a Ph.D. student at the Center for Comparative Law in Africa at the University of Cape Town (UCT). She holds a LLM in Criminal Justice from the same University and a BA and LLB in Law from the University of Bologna, in Italy. Her current interests are in prison reforms and the dynamics between the justice system and customary law in Portuguese-speaking African countries. Her doctoral research focuses on the non-judicial mechanisms of conflict resolution and their relationship with the justice system in a comparative study between Maputo, Luanda and Bissau. She is also involved in issues of pre-trial detention and the prohibition of torture and other ill treatments, in Mozambique. She has worked as a lawyer for the Institute for Legal Aid (*Instituto Patrocínio e Assistência Jurídica*, IPAJ) in Maputo, and collaborated as an intern at the Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape.

² See <http://ppja.org/regional-information/africa/ACHPR%20submission%20on%20PTD%20120710.pdf> (Accessed on 4 July 2014).

"Promoting Pre-trial Justice in Africa", CSPRI took the opportunity to begin a debate on the implementation of the Guidelines in Mozambique and Angola. Lusophone African countries are often excluded from the Anglophone- and Francophone- dominated human rights discourse and the workshop was thus an attempt to address this situation. Symptomatic of this exclusion is the fact that a Portuguese version of the draft Guidelines were not available when they were tabled for adoption at the ACHPR session in May 2014 in Luanda.

CSPRI made available an unofficial Portuguese translation³ to the 26 workshop participants and the workshop therefore presented an opportunity to review the Guidelines within the context of these two countries.⁴ This paper highlights some of the issues discussed during the workshop and notes some of the similarities and differences between Angola and Mozambique with regard to arrest, police custody and pre-trial detention.

The first part of this paper looks at arrest and police custody. This section is divided into four subheadings which assess statistics, the rights of an arrested person, safeguards and access to justice regarding arrest and police custody.

The second part of this paper focuses on pre-trial detention, illustrating the similarities between the Angolan and Mozambican law and the difference that a recent legal development has brought to Mozambique on the issue.

The last two parts of the paper review the conditions of detention in police custody and pre-trial detention and the procedures to be followed in cases where there are grounds to believe that serious human rights violations have occurred during detention. The paper concludes with some general observations.

³ Available at <http://ppja.org/regional-information/africa/directrizes-sobre-o-uso-e-as-condicoes-de-detencao-custodia-policial-e-prisao-preventiva-em-africa-ppja-translation/view> (Accessed on 6 July 2014).

⁴ Among the Mozambicans there were judges, prosecutors, as well as representatives of the Academy of Police Sciences (*Academia Ciências Policiais*, ACIPOL); members of the Human Rights League (*Liga dos Direitos Humanos*, LDH), the Center of Applied Psychology (*Centro de Psicologia e Exames Aplicados*, CEPEAP) and of the Service of Legal Medicine (*Serviço de Medicina Legal*). The Italian NGO Mlal (who works in Mozambique) and a number of members of IPAJ also attended the workshop. Among the Angolans, there were members of the organization Maõs Livres, the Association Justice, Peace and Democracy, as well as a representative from the Open Society Initiative for Southern Africa (OSISA).

2. Arrest and police custody

2.1 Statistics

In Angola there are no statistics publicly available on the number of people arrested and held in police custody. However, in Mozambique the number of people arrested by the Police of the Republic (*Polícia da República de Moçambique*, PRM) in the main cities of the country is reported in the media on a weekly basis and thus available to researchers and human rights advocates.⁵ This brings some measure of transparency to the situation.

2.2 Rights of an arrested person

The Penal Code (*Código Penal*, CP) and the Criminal Procedure Code (*Código do Processo Penal*, CPP), both dating back to the colonial-era are still applied in both Angola and in Mozambique.⁶ Importantly, they provide few procedural and substantive safeguards regarding the rights of arrested persons.

Guideline 4 of the Guidelines sets out twelve distinctive rights of an arrested person.⁷ Articles 60, and 63-68 of the Angolan Constitution provide only seven of these rights, omitting the right to humane and hygienic conditions of detention following arrest, including the right to adequate water, food, sanitation, accommodation and rest, as appropriate considering the time spent in police custody; the right to urgent medical

⁵ See *Boletim Seminal* (weekly newsletter) broadcasted by the main television channels such as STV (<http://stv.sapo.mz/>), TVM (<http://tvm.co.mz/>) and TIM (<http://tim.sapo.mz/>).

⁶ The Penal Code dates back to 1886 while the Criminal Procedure Code was promulgated in 1932. In both countries, a few articles have been modified, but the codes remain quite the same codes of the colonial time.

⁷ The right to be free from torture and other cruel, inhuman and degrading treatment and punishment; The right to be informed of the reasons for their arrest and any charges against them; The right to silence and freedom from self-incrimination; The right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions; The right to humane and hygienic conditions during the arrest period, including adequate water, food, sanitation, accommodation and rest, as appropriate considering the time spent in police custody; The right to contact and access a family member or another person of their choice, and if relevant consular authorities or embassy; The right to urgent medical assistance, to request and receive a medical examination and to obtain access to existing medical facilities; The right to information in accessible formats, and the right to an interpreter; The right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court; The right to challenge promptly the lawfulness of their arrest before a competent judicial authority; The right to freely access complaints and oversight mechanism; The right to reasonable accommodation which ensures equal access to substantive and procedural rights for persons with disabilities.

assistance, to request and receive a medical examination and to obtain access to existing medical facilities; and the right to reasonable accommodation which ensures equal access to substantive and procedural safeguards for persons with disabilities.

There is also incongruence between Article 63(c) of the Angolan Constitution and Article 3 of the Law 18-A/92 of Pre-trial Detention in the Phase of Preparatory Instruction (*Lei da Prisão Preventiva em Instrução Preparatória, LPPIP*). While the provision in the Constitution states an arrested person has the right to notify his/her family and/or a lawyer of his/her detention, article 63(c) of the LPPIP states that an arrested person may not communicate with anyone prior to the first questioning, which can legally occur up to the fifth day after arrest.⁸ The same provision is provided by Article 311 (1) of the Criminal Procedure Code, lately abolished in Mozambique,⁹ but still applicable in Angola. The Articles of the Angolan law of pre-trial detention and the Criminal Procedure Code which permit incommunicado detention for up to five days depart from the Guidelines and are also in contravention of the Angolan Constitution and International Covenant on Civil and Political Rights (Art 10(1)), and should thus be declared unconstitutional. Moreover, the Special Rapporteur on Torture has been unequivocal in his condemnation of incommunicado detention: "Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention."¹⁰

Articles 40, 62, 64, 65, 66, 69, and 70 of the Mozambican Constitution set out fewer rights than the Angolan Constitution. They enumerate the right to be free from torture as well as the exclusion of evidence obtained through the use of torture, coercion, offences against the physical or moral integrity of the person in any proceedings; the right to legal assistance

⁸ Artigo 3º (Da Incomunicabilidade dos Detidos) 1. Os detidos não poderão comunicar com pessoa alguma antes do primeiro interrogatório. O Ministério Público poderá ordenar, em decisão fundamentada, que o arguido continue incommunicável depois de interrogado, contando que a incomunicabilidade não exceda cinco dias.

⁹ Judgment of the Mozambican Constitutional Council (Acórdão) nº04/CC/2013 of 17 September 2013.

¹⁰ Special Rapporteur on Torture E/CN.4/1995/34 12 January 1995, para. 926(d).

and aid and to freely choose a defence counsel to assist in proceedings; the right to be informed promptly and in an understandable way of the reasons for the arrest and detention; and the right to communicate the detention to a relative or trusted acquaintance of the detainee. Finally, Article 70 states the right to *habeas corpus* and the right to challenge acts that violate the principles established in the Constitution and in subordinate laws.

However, as in the Angolan legal framework, there are no provisions that protect the right of an arrestee in Mozambique to humane and hygienic conditions of detention; and the right to medical assistance; nor are there procedural safeguards for persons with disabilities.

The only relevant articles that state the detainee's right to health in both countries are Articles 304 and 305 of the Criminal Procedure Code (*Codigo de Procedura Penal, CPP*). Article 304 prohibits the arrest of an ill person suspecting of having committed a crime for which bail is not allowed. A medical examination must confirm that detention will result in the deterioration of health, to the point of endangering the person's life. Furthermore, Article 305 states the circumstances in which a person cannot be arrested following the commission of a crime and for which bail can be allowed: illness, danger for a person's life; in the day during which the spouse or any other relative of the same degree died; and when the arrestee is taking care of an ill relative of the same degree as a spouse. Finally Article 306 prohibits any authority ordering the arrest, from mishandling or insulting or using violence on suspects; only in cases of resistance, escape or attempted escape, may the authority use the necessary force to effect the arrest.¹¹

While the use of force should be clarified in more detail, the provision is in conformity with the Guideline 8(c) that states that:

The lawful use of force and firearms shall be a measure of last resort and limited to

¹¹ Translation by the author from the Portuguese: Artigo 306 (Respeito pelos capturados). É proibida a toda a autoridade, encarregados de efectuar qualquer prisão, maltratar ou fazer qualquer insulto ou violência aos presos, e só no caso de resistência, fuga ou tentativa de fuga lhe será lícito usar a força ou dos meios indispensáveis para vencer essa resistência ou para efectuar ou manter a prisão.

circumstances in which it is strictly necessary in order to carry out an arrest.¹²

With the exception that incommunicado detention is permitted in Angola up to the fifth day after arrest, and the missing provisions described above which are lacking in both countries, the countries' legal frameworks to protect the rights of an arrested person conform to the Guidelines. However, challenges remain in the application of the Guidelines. It is well known that the police in Angola as well as in Mozambique have been the subject of national and international critique. Research reports and the media have reported extensively on the use of excessive force during arrest and police custody.¹³ The next section looks specifically at the safeguards that should be respected in relation to police custody.

2.4 Safeguards regarding police custody

With reference to the maximum duration of police custody prior to first appearance, Guideline 7 states that the

maximum duration of police custody, prior to the obligation to bring the arrested person before a judge, shall be set out in national law that prescribes time limits of no more than 48 hours extendable in certain circumstances by a competent judicial authority, consistent with international law and standards.

In both Angola and Mozambique domestic law is not in line with the 48-hour limit. Article 9 of the Angolan Law 18-A/92 states that the maximum duration of custody, in case of *flagrante delicto* (when someone is caught in the act), is five days.¹⁴ The person arrested in

¹² The Guideline states also that if the use of force is absolutely necessary: i) the level of force must be proportionate and always at the most minimal level necessary; iii) the use of force shall be strictly regulated under national law and in conformity with international standards, including the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

¹³ <http://www.amnesty.org/en/region/angola/report-2013> and http://www.amnesty.eu/static/documents/2008/B773Mozambique_licence_to_kill.pdf

¹⁴ Translation of the author from the following Portuguese text: A entrega dos detidos em flagrante delito ao Magistrado do Ministério Público competente deve ser feita no próprio dia em que foi efectuada a prisão, ou no mais curto espaço de tempo possível dentro do prazo máximo de 5 dias, quando a prisão tiver sido efectuada em local que não permita fazer a apresentação nesse dia.

flagrante delicto should be brought to the *Ministério Público* in the shortest possible time and not exceeding five days. The Mozambican law states that, while for the *flagrante delicto* cases, the person should be brought to the *Ministério Público* in the shortest possible time,¹⁵ in cases of *fora de flagrante delicto* (when someone is not caught in the act), the person should be brought to the *Ministério Público* between 48 hours and five days after arrest.

The Criminal Procedure Code and the Angolan Law 18-A/92 should be amended in order to conform with other non-binding standards¹⁶ and recommendations from the UN Human Rights Committee,¹⁷ all of which regard 48 hours to be the maximum duration of police custody prior to first appearance.

The next section assesses the differences in access to legal services in both countries.

2.5 Access to legal services

During the workshop held in Maputo an interesting discussion developed on the issue of access to legal services. Guideline 8 states that:

States should enact legislation to respect the right of any person to access legal services. States should create a legal aid service framework that includes service providers such as lawyers, paralegals and legal clinics. The service should then enable any person to access legal service without delay; the right of confidentiality of communication; to access the means to contact a lawyer or other legal service provider of their choice or one appointed by the state; to access case files and have

¹⁵ Article 290 of the CPP.

¹⁶ See for example African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

¹⁷ See HR Committee, Concluding Observations: Zimbabwe, CCPR/C/79/Add.89 (1998), at para. 17. See also Council of Europe, Recommendation 16/2006: The interval between the initial deprivation of liberty and this appearance before such an authority should preferably be no more than forty-eight hours and in many cases a much shorter interval may be sufficient.

adequate time and facilities to prepare a defense and if access to legal services is delayed or denied, the right to remedies and finally providers should possess the requisite skills and training to give legal assistance to any person.¹⁸

The situation in Angola appears to be substantially different from that in Mozambique. There are approximately 1000 lawyers in Mozambique¹⁹ and 700 in Angola²⁰ and both countries have similar populations of approximately 20 million people. This translates into a ratio of one lawyer per 20 000 people in Mozambique and one lawyer per 28 500 people in Angola. It then follows that legal representation, especially in criminal matters, is the preserve of a very few people.

There are also substantial differences in the laws providing for legal assistance to indigent persons. In Mozambique the institution assisting indigent persons is the Institute of Legal Aid (*Instituto Patrocínio Assistência Jurídica*, IPAJ), a state institution created by Law 6/94 to provide judicial and legal assistance. In 2011, IPAJ employed 38 lawyers and 85 paralegals. IPAJ assists vast numbers of people annually and in 2010 it was operating in 114 municipalities and it assisted 53184 cases, civil and criminal matters.²¹ Although IPAJ faces significant challenges (such as an insufficient number of lawyers and other human resources; inadequate salaries and lack of sufficient partnerships with other institutions), it has undergone important changes in recent years. IPAJ covers almost all municipalities in the country and the institute is increasing the number of paralegals through partnerships with university-based legal aid clinics and a new legal framework will soon be in place to

¹⁸ Guideline 8.

¹⁹ Statistics of the Bar Association Mozambique (<http://www.oam.org.mz/>).

²⁰ See UNDOC (2011), Survey Report on Access to Legal Aid in Criminal Justice Systems in Africa. Available at http://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf (Accessed 4 July 2014).

²¹ Lorizzo, T. (2012) Prison Reform in Mozambique Fail to Touch the Ground - Assessing the Experience of Pre-trial Detainees in Maputo. *South Africa Crime Quarterly* Nr. 42.

further strengthen its role.²² Legal assistance is guaranteed to all people that provide an affidavit of poverty (*Atestado de Pobreza*) which is issued by municipality authorities and certifies the person's state of poverty.²³

While legal aid in Angola is considered to be a formal right, this is not seen in practice. Article 29 of the Angolan Constitution states that "To all is ensured access to the law and the courts, to defend their rights and legally protected interests; justice shall not be denied for insufficient economic means." Art 29(2) states that "Everyone has the right, under the law, to legal information and consultation, to legal aid and to be accompanied by a lawyer before any authority." Furthermore, Article 67 states the right to legal aid in criminal proceedings "No one may be detained, arrested or brought to trial if not under the law, being guaranteed to all defendants the right to defence, appeal and legal representation. Defendants or prisoners who may not be lawyers, for economic reasons should be ensured, under the law, adequate legal assistance."

Although the Constitution is clear on the issue and supported by Decree-Law 15/95, which created the Law of Judicial Assistance, access to legal aid in Angola, in practice, does not exist. The State has not created an institution responsible for rendering legal aid to any person, including indigent persons, nor has it provided financial resources to private lawyers willing to represent indigent persons. In practice, private lawyers may assist indigent persons *pro bono*. In the event that such *pro bono* lawyers are not available, indigent persons may turn to non-governmental organisations for legal assistance.

Maões Livres is such an organisation and employs lawyers and journalists. Its main activity is to assist people who cannot afford legal representation. In 2012, *Maões Livres* employed two

²² Ministerial Decree 15/2013 has approved the Statute of the Provincial and District Delegations of IPAJ. These organs will enhance the functioning and effectiveness of IPAJ by approaching the citizens in the neighborhoods where they live. To do so IPAJ have asked for the support of community courts.

²³ The Certificate of Poverty is released by the Chief of the Block or the District where the person live. It costs between 1.5 and 3 Dollars (50 and 100 Meticaís).

senior lawyers, 18 trainee lawyers, two journalists and 25 paralegals. Since 2000 it has assisted between 10 000 and 15 000 people per year and operates in nine provinces, being Luanda, Huambo, Kwanza Sul, Benguela, Muchico, Huila, Cunene, Cabinda and Lunda Sul.²⁴ The creation of a state-funded legal aid can improve the access to legal services for all in Angola. The current situation is not sustainable, nor is it capable of giving effect to the constitutional right to legal representation and the right to a fair trial.

The second part of this article looks at the similarities and differences between Angola and Mozambique with regard to pre-trial detention.

3 Pre-trial Detention

3.1 Statistics

According to the International Centre for Prison Studies, the Angola Prison Service, which falls under the Ministry of Interior, accommodates an estimated 21 634 prisoners (June 2013), of whom 47.7% are in pre-trial detention (November 2011).

Mozambique has a prison population of 15 663 of whom 32.6% are pre-trial detainees (September 2013). The Mozambican prisons system is the responsibility of the National Penitentiary System (*Serviço Nacional Penitenciário*, SERNAP), under the Ministry of Justice. Although both countries have relatively small prison populations, the proportion of pre-trial detainees is cause for concern.

3.2 Legal Framework

Both the Angolan and Mozambican legal systems are defined by the colonial-era Penal and Criminal Procedure Codes. The two codes contain the legal and procedural safeguards for pre-trial detention, although the Constitutions of the two countries establish the general principles, as described above.

²⁴ See the work of the Project Promoting Pre-trial Justice in Angola available at <http://ppja.org/countries/angola/maos-livres-prepares-for-angolas-first-pre-trial-audit> (Accessed on 4 July 2014).

While the provisions of the Penal Code and Criminal Procedure are the only provisions that define pre-trial detention in Mozambique, in 1992, the Angolan Parliament promulgated Law n° 18-A/92 of 17 July under the title “Law of pre-trial detention in the phase of preparatory instruction (*Lei da Prisão Preventiva em Instrução Preparatória, LPPIP*). It mandates the authorities that can order pre-trial detention as well as the permitted time periods that should be respected. Pre-trial detention is ordered *em flagrante delito* by any person and *fora de flagrante delito*, with a legal warrant, by seven different authorities.²⁵

The law also states that the pre-trial detention process is divided into two main phases: the *instrução preparatória* and the *instrução contraditória*. While for the *processos sumários*²⁶ (summary processes), the *instrução* phase should not be relevant as such, for the processes of *policia correccional*,²⁷ only the *instrução preparatória* is compulsory. Instead, for processes of *querela*,²⁸ both phases are compulsory.²⁹ The first phase is conducted by the Criminal Investigation Police while the second by a judge. Time limits before first appearance should be respected in both phases, regardless of whether it is a *flagrante or fora flagrante delicto* case.

In Angola, in case of *flagrate delicto*, the *instrução* needs to be completed within eight days, beyond which the person in pre-trial detention should be released. In cases of *fora flagrante delicto*, the *instrução preparatória* should be completed within 45 days, while the period of

²⁵ Magistrate of the Prosecutor Office (Magistrado do Ministério Público); Chief of the National Directorate of the Criminal Investigative Police (Chefe da Direcção Nacional da Polícia de Investigação Criminal); Chief of the Criminal Procedural Investigation Police (Chefe da Direcção Nacional da Polícia de Investigação Processual); Chief of the National Directorate of the Inspective Police for the Economic Activities (Chefe da Direcção Nacional da Polícia de Inspeção das Actividades Económicas); Chiefs of the Provincial Directorates of the Criminal Invetigation (Chefes das Direcções Provinciais de Investigação Criminal); Chiefs of the Provincial Directorates of the Procedure Instruction Police (Chefes das Direcções Provinciais da Policia de Instrução Processual); and finally the Chiefs of the Provincial Directorates of the Inspection and Investigation of Economic Activities (Chefes das Direcções Provinciais da Polícia de Inspeção e Investigação das Actividades Económicas).

²⁶ Crimes punishable by imprisonment up to two years and misdemeanors caught in *flagrante delicto* can be tried as *Processos Sumários*.

²⁷ Crimes punishable by imprisonment between two and eight years can be tried as *Processos de Policia correccional*.

²⁸ Crimes punishable by imprisonment exceeding eight years can be tried as *Processos de Querela*.

²⁹ *Querela* processes are those processes for which the victim needs to report the case to the police and/or prosecutor's office. It can be against a known or an unknown person

the *instrução contraditória* depends of the type of the process. In case of a process of *policia correccional*, the *instrução contraditória* should be completed within 30 days, while in a *querela* process, it should be completed within 135 days.

In September 2013 the Mozambican Constitutional Council declared unconstitutional a number of provisions in the Criminal Procedure Code.³⁰ Following the judgment only the judiciary can order pre-trial detention, in line with Article 64 of the Constitution and thus invalidating Article 293(1-3) of the Criminal Procedure Code. Pre-trial detention can only be ordered when the prosecution has concrete evidence against the accused and there is a real risk that the accused will flee, interfere with the investigation or commit further crimes. The incommunicado detention of an accused person before their first interrogation, as stated in Article 311 of the Criminal Procedure Code, was also declared unconstitutional, as well as Article 308(3) and Article 311(1) of the Criminal Procedure Code, which permitted indefinite remand detention. The above must be regarded as important jurisprudential developments protecting the rights of arrested and detained persons in Mozambique.³¹

The permitted time periods for pre-trial detention in Mozambique are defined by Article 308(1-2). From the arrest to the notification of the charge to the defendant or to the request of the *instrução contraditória*, the following time periods may not be exceeded:

- 20 days for a processes of *policia correccional*
- 40 days for processes of *querela*
- 90 days for crimes whose *instrução* phase falls under the Criminal Investigation Police.

From charging the defendant or to the request of *instrução contraditória* to the sentence, the following time periods may not be exceeded:

- 3 months for processes of *policia correccional*

³⁰ Judgment (Acórdão) n°04/CC/2013 of 17 September 2013.

³¹ Lorizzo, T. and Redpath, J. (September 2014) Revolution of Pre-trial Detention Law in Mozambique available at <http://www.osisa.org/law/mozambique/revolution-pre-trial-detention-laws-mozambique> (Accessed on 4 July 2014).

- 4 months for processes of *querela*.

The judgment of the Mozambican Constitutional Council has brought an important development in the pre-trial detention legal framework so that the judge is the only authority that can order pre-trial detention, in Angola the authority to order pre-trial detention is also with the police. While the countries prescribe different time periods, the implementation of limits has encountered obstacles in both countries. For example, while *habeas corpus*³² is the only right provided for people unlawfully detained persons, it is complicated and can only be brought to a High Court in both countries.

Pre-trial detention time limits are frequently not respected and *habeas corpus* applications are difficult to initiate, resulting in people remaining in pre-trial detention for long periods, often under deplorable conditions.

The next section looks at the conditions of detention in both police custody and pre-trial detention.

4 Conditions of detention in police custody and pre-trial detention

Part VI of the Guidelines sets down the principles applicable to conditions of detention in police custody and pre-trial detention in prisons. While the colonial Law Decree 26643/1936 defines the general guarantees for people subject to imprisonment in both countries, in Mozambique, the *Política Prisional* 65/2002 added important safeguards in line with the Kampala Declaration of 1996.³³ Although the *Política Prisional* is a brief policy document, it contains principles on the separation of detainee categories; the rights of a prisoner to communicate with his/her family and his/her lawyer, as well as the rights of access to recreational, vocational and rehabilitation services.

³² Article 68 of the Angolan Constitution and Article 66 of the Mozambican Constitution.

³³ ECOSOC Res. 1997/36.

Both countries should create a comprehensive national policy that, in conformity with international standards and in context with their geographic and socio-economic characteristics, sets out the conditions of detention in police custody and pre-trial detention. Conditions of detention in both countries vary and it will take a major effort from both governments consistently to meet standards consonant with human dignity.

5 Procedures for serious violations of human rights in police custody and pre-trial detention

Guideline 22 describes the procedures to be followed when there are reasonable grounds to believe that an act of torture or other cruel, inhuman or degrading treatment or punishment or other serious human rights violation in police custody and pre-trial detention have been perpetrated. In Angola, as is the case in Mozambique, torture is not criminalised in domestic law. While Mozambique has ratified the UN Convention against Torture (UNCAT) in 1999, Angola signed the Convention and the Optional Protocol against Torture³⁴ (OPCAT) on 24 September 2013.³⁵

Guideline 22 (a) states that:

All persons deprived of their liberty shall have the right to lodge a complaint with a competent, independent and impartial authority with a mandate to conduct prompt and thorough investigations in a manner consistent with the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.

³⁴ <http://www.irct.org/Default.aspx?ID=3843&PID=13717&M=NewsV2&Action=1&NewsId=3826> (Accessed on 6 July 2014).

³⁵ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (Accessed on 6 July 2014).

However, neither Mozambique³⁶ nor Angola has a competent, independent and impartial authority with a mandate to conduct prompt and thorough investigations into alleged acts of torture or other ill treatment.

In both countries, concern has been expressed about the lack of investigations into alleged acts of torture and other ill treatment. Amnesty International has repeatedly reported that the lack of investigations for excessive use of force and arbitrary arrests and detention, as well as extrajudicial executions, specifically by the police, is a major concern in both countries.³⁷ In order to combat impunity for rights violations perpetrated by law enforcement officials, as is required by, amongst other international instruments, UNCAT, it is essential that independent oversight institutions with an investigative mandate and sufficient resources be established.

6 Conclusion

The Guidelines represent the first soft law document of the ACHPR on the issue related to arrest, police custody and pre-trial detention. In Africa, these three phases of the criminal justice system are the most vulnerable stages that any arrested person will confront. It is in these three stages that people's rights can be subjected to the most serious violations. The Guidelines thus contain provisions that specifically protect the rights of arrested persons during these three phases.

The Guidelines bring different challenges in their implementation in all African countries as well as in in Angola and in Mozambique.

³⁶ See Submission by the Article 5 Initiative on Policing and Imprisonment for the Review of the Mozambique Consolidated Report 1994-2010 to the UN Committee against Torture to be considered at the 51st Session of CAT. Available at

http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MOZ/INT_CAT_NGO_MOZ_15428_E.pdf (Accessed on 4 July 2014).

³⁷ <http://www.amnesty.org/en/region/angola/report-2013> and http://www.amnesty.eu/static/documents/2008/B773Mozambique_licence_to_kill.pdf

Dating back to the Portuguese colonial time, the Angolan and Mozambican legal framework for arrest, police custody and pre-trial detention are mainly represented by the Penal and Criminal Procedure Codes and are respectively from 1886 and 1932. However, the Constitution of Angola, promulgated in 2010 and the new Constitution of Mozambique of 2004, are the primary laws that provide for the rights of arrestees, detained in police custody and in pre-trial detention. Yet the Penal and Criminal Procedure Codes have not been harmonised with the more recently adopted constitutions in both states. Other relevant laws and judgements which require harmonisation are the Angolan Law 18-A/92 of Pre-trial Detention in the Phase of Preparatory Instruction and judgments such as the 04/CC/2013 of the Mozambican Constitutional Council.

In relation to police custody, incommunicado detention permitted in Angola up to the fifth day from the arrest by Article 3 of Law 18-A/92 does not respect the provisions of the Guidelines³⁸ nor Article 63 (c) of the Angolan Constitution. The article should thus be considered unconstitutional and an effort should be made to have it declared as such.

The maximum duration of police custody is 48 hours in terms of the Guidelines. However, the provisions of the Criminal Procedure Code, applied in Angola as in Mozambique provide for a duration of up to five days. Both countries should modify these provisions to conform to the Guideline.

With regard to access to legal aid, this paper has described that in Angola this right is provided for *'in the books'* but not in reality. In contrast to Mozambique, where IPAJ is improving access to justice for indigent citizens, in Angola legal aid is provided by private lawyers and NGOs without financial support from the state. The challenge for Angola is to improve access to justice and make state funded legal aid widely available.

In relation to pre-trial detention, the judgment of the Mozambican Constitutional Council has substantially altered the legal framework of pre-trial detention, removing the police

³⁸ Guideline 4(f).

power to order detention, while in Angola both the provision and the practice remain. Furthermore, both countries face the challenge of respecting time limits for pre-trial detention. For citizens detained beyond time limits, *habeas corpus* remains the only protection of their rights. However, this is a complicated legal action and people find themselves awaiting trial for lengthy periods often under deplorable conditions.

Prisons as well as police custody conditions are not regulated in neither Angola nor in Mozambique. While the Mozambican *Política Prisional* is a brief strategy, a comprehensive national policy should be drafted in the respect of international standards and national characteristics, in both countries.

The strategy should in addition condemn serious violations of human rights in police custody and pre-trial detention, and create a competent, independent and impartial authority with the mandate to conduct prompt and thorough investigations against acts of torture or other ill treatment. The Guidelines therefore present to both countries an important, clear and measurable agenda for reform. Moreover, this is an agenda endorsed by the ACHPR.