



Africa Criminal Justice Reform  
 Organisation pour la Réforme de la Justice Pénale en Afrique  
 Organização para a Reforma da Justiça Criminal em África

# ARREST WITHOUT A WARRANT

## Guidelines against arbitrary and unlawful arrests

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### Introduction

This fact sheet deals with the process of arrest without a warrant and aims to provide guidance on how police officers should test and use their discretion when contemplating an arrest without a warrant. The fact sheet is not country specific and describes the overall and generally accepted requirements for arrest without detention. In some instances, this is supported by examples or comparisons from Kenya, Malawi, South Africa and Zambia. The scope here concerns ordinary day-to-day law enforcement and thus excludes states of war, states of emergency or other highly unusual situations. Police officials are often the officials who perform the overwhelming majority of arrests although other state officials also may have the power to arrest without a warrant, e.g. prison officials. The focus here is on police officials.

Arrest is understood to mean the following, as per *Holgate-Mohammed v Duke*:

‘First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody (sc. by action or words restraining him from moving anywhere beyond the arrester’s control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate’s judicial act.’<sup>1</sup>

Police officials are entrusted with the power to arrest a person without having obtained a warrant of arrest from a judicial

officer. It is necessary for the police to have this far-reaching power as the requirements of their work (e.g. to stop a person from committing a crime) necessitate that. However, the deprivation of liberty is a serious intervention in a person’s life and the authority to arrest without a warrant must therefore be used in a lawful manner and not to intimidate, scare or punish people.

In the below a brief overview is given of what guidance can be gained from international and regional law regarding arrest without a warrant. The following section deals with police discretion and this is followed by a review of the typical offences for which an arrest can be executed without a warrant. This will naturally differ from jurisdiction to jurisdiction, but will serve as a guide in this regard.

### International law

The Universal Declaration on Human Rights (UDHR) guarantees the right to be free from arbitrary arrest, detention or exile.<sup>2</sup> The International Covenant on Civil and Political Rights (ICCPR) in Article 9(1) reads:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The article acknowledges that the deprivation of liberty may be necessary in certain circumstances but that it must not be arbitrary and be done with respect for the rule of law.<sup>3</sup> It is noted in General Comment 35 that the two prohibitions in Article 9(1) overlap in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Moreover, arrest or detention that lacks any legal basis is also arbitrary.<sup>4</sup>

The Merriam -Webster Dictionary defines arbitrary as: depending on individual discretion (as of a judge) and not fixed by law; autocratic, despotic; based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something; existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will.<sup>5</sup>

The UN Working Group regards deprivation of liberty as arbitrary in the following instances:

- When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
- When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (category II);
- When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
- When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
- When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).<sup>6</sup>

To summarise, arrest and detention are arbitrary if:

- the grounds for the arrest are illegal
- the victim was not informed of the reasons for the arrest
- the procedural rights of the victim were not respected
- the victim was not brought before a judge within a reasonable amount of time.<sup>7</sup>

## Regional law

The African Commission on Human and Peoples' Rights adopted the *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (Luanda Guidelines) in 2014 following extensive consultation. The Guidelines has a narrower definition of arrest than cited above, referring to it as "the act of apprehending a person".<sup>8</sup> The Luanda Guidelines also encourages the diversion of cases away from the criminal justice system, the use of alternatives to arrest and the use of arrest as "an exceptional measure of last resort".<sup>9</sup> Furthermore, the grounds for arrest must be established in law, as is the case with the ICCPR Art. 9(1).

Moreover, the Luanda Guidelines set this requirement so that "Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual."<sup>10</sup> It is furthermore noted that arrest must not be executed on the basis of discrimination of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status.<sup>11</sup> It should be noted that the Guidelines do not specifically name gender orientation as a basis for discrimination, but it can be read into "or any other status".

The Luanda Guidelines limit the powers of arrest to police or by other competent officials or authorities authorised by the state for this purpose.<sup>12</sup> In some jurisdictions it is only a judicial officer (judge or magistrate) that can issue a warrant of arrest, but in other (e.g. Mozambique until recently) this power was extended to a wide range of officials, such as prosecutors and even administrative heads in rural areas.<sup>13</sup> Further, an arrest shall only be carried out if authorised by a warrant of arrest or when there are reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence.<sup>14</sup> This fact sheet will focus on the power to arrest without a warrant, in other words where the arresting officer

must have reasonable grounds to suspect that a person has committed an offence or is about to commit an offence.

## The use of police discretion to arrest without a warrant

In the enforcement of especially petty offence laws, arrest and detention are frequently used to remove ‘unwanted’ or perceived to be problematic people from the streets. Whether there is a real intention on the part of the arresting officer to pursue a criminal prosecution is often not clear.<sup>15</sup> It is because arrest is such a drastic intervention in the rights of the individual that this power should be exercised with caution.

As a general rule, the purpose of an arrest is to secure the attendance of the suspect at his or her trial and that the purpose is not to ‘punish, scare or harass such person’.<sup>16</sup> There are various ways to secure the attendance of a suspect at trial in most jurisdictions and because an arrest ‘constitutes one of the most drastic infringements of the rights of an individual,’ a police official should therefore regard it as a measure of last resort.<sup>17</sup>

The second important issue is that most jurisdictions require reasonable suspicion or grounds for arrest.<sup>18</sup> Police Standing Orders may further expand on this, requiring that a police officer must *really* believe or suspect that the person has committed or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn which any reasonable person in view of the same facts would draw.<sup>19</sup>

As already noted, the ACHPR Guidelines state that arrests must not be carried out on the basis of discrimination of any kind.<sup>20</sup> Such an arrest would be arbitrary and unlawful.

From the above it can be accepted that current legal frameworks provide adequate guidance on arrest without a warrant. Moreover, the legal frameworks cited provide two levels of discretion, first noting that a police officer ‘may’ arrest and is not compelled to arrest, and secondly, the police officer must have a ‘reasonable suspicion or grounds’ that an offence has been committed or is about to be committed. In short, as a measure of last resort, an arrest without a warrant

may be affected if there is a reasonable suspicion or grounds to believe that an offence has been or is about to be committed.

The key issue remains the discretion exercised by the arresting officer and it has been noted that in addition to the suspicion being reasonable, (a) the arrester must have an open mind with regard to factors pointing to both innocence and guilt, (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested, and (c) for the suspicion to be reasonable, it must extend to all elements of the offence.<sup>21</sup>

Furthermore, when arresting without a warrant the arresting officer ‘would have to satisfy the court that he/she had considered and not merely paid lip service to, the rights of the suspect to human dignity and to freedom and had not relegated them to ‘a worthless level of subservience’’.<sup>22</sup> In short, the arresting officer must think twice before making an arrest without a warrant.<sup>23</sup>

Whatever the context, it appears that people around the world who are perceived to have less power are particularly at risk of arrest without a warrant.<sup>24</sup> The problem is enabled on the one hand by a myriad of seemingly antiquated laws, municipal by-laws and petty offences, and on the other hand, notions of social order that have their roots in the colonial era. Where the police have the power to arrest but lacks the integrity to uphold the law, extortion is commonly practiced as a way of avoiding arrest; but those with the least power are frequently unable to avoid arrest or draw attention to unlawful and arbitrary arrest. Moreover, it is difficult to find evidence to support reasonable suspicion and the enforcement of these laws has little bearing on overall public safety.<sup>25</sup>

## What are the typical offences?

### General offences

It seems to be the case in several countries that the applicable legislation will have a broad provision, often linked to a schedule of offences,<sup>26</sup> authorising police officials to arrest without a warrant if the person committed the offences in their presence or there is a reasonable suspicion that the person committed the offence. In Kenya and Zambia reference is made to a ‘cognizable offence’ and in Malawi reference is made to an ‘arrestable offence’. In all three instances these are

listed in a Schedule to the Act. These schedules are lengthy and contain numerous offences and also prescribe the punishment which is in the overwhelming majority of instances imprisonment.

## Possession offences

Being in the lawful or unlawful possession, as the case may be, of equipment, goods, stock or produce is generally an offence for which an arrest may be executed without a warrant. For example, in South Africa being in possession of house or car breaking equipment is such a case if the person cannot provide a satisfactory explanation to the police official.<sup>27</sup> If a police officer has a reasonable suspicion that the person is in possession of stolen property or property dishonestly obtained, and whom the police official reasonably suspects of having committed an offence with regard to that property. The same would apply if the police official has a reasonable suspicion that the stock or produce was stolen.

## Offences relating to law enforcement, criminal procedure and sentencing

There are a number of offences relating to law enforcement where an arrest can be carried out in the absence of a warrant subject to the reasonable suspicion requirement. These are:

- a person who has escaped or is attempting to escape from lawful custody;
- a person wilfully obstructing a police official the execution of his/her duty;
- a person who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of a court;
- a person who fails to surrender himself to undergo imprisonment, including periodical imprisonment, when and where he is required to do so under an order of court or any law relating to prisons;
- a person who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under the applicable legislation.

## Past and future night time offences

A person who is found at any place by night in circumstances which afford reasonable grounds for believing that such person

has committed or is about to commit an offence may be arrested without a warrant.<sup>28</sup>

## Vices

The lawfulness of the possession of certain substances (e.g. cannabis or ammunition) vary from one jurisdiction to another. For example, a recent decision from the South African Constitutional Court effectively permits the possession and cultivation of cannabis for personal use.<sup>29</sup> Nonetheless, a person who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition, may be arrested without a warrant. Vices do not only concern possession, but also the locality, for example being at an unlicensed gambling place.

## Status offences

A status offense is an action that is prohibited only to a certain class of people, and most often applied only to offences committed by children, e.g. being truant. However, with regard to adults being a prohibited immigrant or being a defence force deserter can also be grouped under status offences.

## Conclusion

By way of summary, the above covered international and regional norms on arrest and detention in order to prevent arbitrary detention emphasising that an arrest will be arbitrary if:

- the grounds for the arrest are illegal
- the victim was not informed of the reasons for the arrest
- the procedural rights of the victim were not respected
- the victim was not brought before a judge within a reasonable amount of time.<sup>30</sup>

It was also emphasised that there is no obligation to arrest, but that a police official may arrest to ensure the suspect's attendance at court. It is this discretion to arrest that if misused, or incorrectly applied, that can result in claims of arbitrary and unlawful arrest.

Further, there must be a reasonable suspicion or grounds for arrest. Apart from guidance in the applicable act, a police

officer must *really* believe or suspect that the person has committed or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn which any reasonable person in view of the same facts would draw.

In addition to the suspicion being reasonable, (a) the arrester must have an open mind with regard to factors pointing to both innocence and guilt, (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested, and (c) for the suspicion to be reasonable, it must extend to all elements of the offence.<sup>31</sup>

Ultimately, when arresting without a warrant the arresting officer would have to satisfy the court the above guidelines were complied with and that the arresting officer had truly considered the rights of the suspect.

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<sup>1</sup> *Holgate-Mohammed v Duke* [1984] AC 437, [1984] 1 All ER 1054, [1984] 2 WLR 660. See also CCPR/C/GC/35 para 13.

<sup>2</sup> Art.9 Universal Declaration on Human Rights (UDHR).

<sup>3</sup> CCPR/C/GC/35 para 10.

<sup>4</sup> CCPR/C/GC/35 para 11. 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.

<sup>5</sup> <https://www.merriam-webster.com/word-of-the-day/arbitrary-2017-08-02>

<sup>6</sup> Fact Sheet No. 26, The Working Group on Arbitrary Detention, <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>.

<sup>7</sup> Trial International <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>

<sup>8</sup> Guideline 1(a).

<sup>9</sup> Guideline 1(c).

<sup>10</sup> Guideline 2(a).

<sup>11</sup> Guideline 2(b).

<sup>12</sup> Guideline 3(a).

<sup>13</sup> Judgment No. 4/CC/2013 of 17 September DATE

<sup>14</sup> Guideline 3(a).

<sup>15</sup> *The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security and Others* (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009).

<sup>16</sup> SAPS Standing Order (G) 341 para 4(1).

<sup>17</sup> ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (para 2(b)); General Comment 35, Human Rights Committee, CCPR/C/GC/35; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of 9 December 1988; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Communication 339/2007: *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda; Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24, SAPS Standing Order (G) 341, para 3(1).

<sup>18</sup> See for example: Kenya Criminal Procedure Code, Section 29(a); Uganda Criminal Procedure Code Act, Section 10(a); South Africa Criminal Procedure Act Section 40(1).

<sup>19</sup> SAPS Standing Order (G) 341 para 2(2).

<sup>20</sup> ACHPR (2014) *Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa*, para 2(b).

<sup>21</sup> Plasket, C. (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 186.

<sup>22</sup> Plasket, C. (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 190.

<sup>23</sup> *Brand v Minister of Justice* 1959 (4) SA 712 (A) cited in Plasket C (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 187.

<sup>24</sup> Muntingh, L. (2015) *Arrested in Africa: An Exploration of the Issues*, CSPRI Research Report, Bellville, p. 32.

<sup>25</sup> Muntingh, L. and Petersen, K. (2015) *Punished for being Poor: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences*, Bellville: ACJR Research Report.

<sup>26</sup> See South Africa Criminal Procedure Act s 40(1)(b); Kenya Criminal Procedure Code, Section 29(a); Uganda Criminal Procedure Code Act, Section 10(a); Zambia Criminal Procedure Code Act s 26(a); Malawi Criminal Procedure and Evidence Code s 28(a).

<sup>27</sup> As contemplated in section 82 of the General Law Third Amendment Act, 1993 to be 'Any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor-vehicle or to gain unlawful entry into a motor-vehicle, and who is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding three years.'

<sup>28</sup> South Africa Criminal Procedure Act s 40(1)(f). Kenya Criminal Procedure Act 29(f). Zambia Criminal Procedure and Evidence Code 28(f).

<sup>29</sup> *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018)

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<sup>30</sup> <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>

<sup>31</sup> Plasket, C. (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 186.