



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 in Mozambique

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Law reform to prevent arbitrary arrest

Introduction

This fact sheet deals with the power to arrest without a warrant in Mozambique and aims to provide a breakdown of the legal requirements that need to be met before making such arrests. 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.’¹

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.

Arrest and pre-trial detention generally place arrested persons at a high risk of human rights violations. Over a period of 20-years, civil society and human rights organisations in Mozambique have noted the high frequency of arbitrary and illegal detention, including other abuses by law enforcement officials.² Following a sustained advocacy efforts led by *Liga dos Direitos Humanos*, in 2013 the Constitutional Council of Mozambique made a decision that, among other things, changed the requirements for arrest without a warrant.

In the below a brief overview is given of what guidance can be gained from international and regional law regarding arrest without a warrant, followed by the Mozambican legal framework on the matter.

International law

The Universal Declaration on Human Rights (UDHR) guarantees the right to be free from arbitrary arrest, detention or exile.³ 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.⁴ 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.⁵

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.⁶

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).⁷

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.⁸

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”.⁹ 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”.¹⁰ 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.”¹¹ 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.¹² 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.¹³ 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.¹⁴ 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.¹⁵ 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.

Legal framework on arrest

The Constitution of Mozambique states that "[...] nobody shall be detained [...] except in accordance with the law."¹⁶ The Criminal Procedure Code further regulates arrest and pre-trial detention.¹⁷

Arrest (*detenção*) is the act of seizing someone and taking them into custody. Arrests can be made in three situations, being *flagrante delito*, *quase flagrante delito* or outside of (*fora*) *flagrante delito*. *Flagrante delito* is "... [a] punishable act that is being committed or has just been committed".¹⁸ The literal meaning of *flagrante delito* is "obvious offence". Arresting someone in *flagrante delito* would mean arresting someone in the act of committing an offence, or at the beginning, in the middle or at the end of committing it. *Quase flagrante delito* occurs when the suspect has been caught following a pursuit by law enforcement officials, the victim, or any other person whilst in possession of property not belonging to him or her. *Fora flagrante delito* are all other instances where the perpetrator had not been caught immediately. For example, when there are no witnesses to the crime, the case would clearly be *fora flagrante delito*. Even when there are witnesses, but they did not apprehend the suspect during or immediately after the act (or the offender ran away), and regardless of whether the suspect could or could not be immediately identified, the offence would still be considered *fora flagrante delito*.

According to the Criminal Procedure Code, an arrest can occur by apprehension (*captura*) or imprisonment (*prisão*). The arrest by *captura* occurs only with a written order or arrest warrant and is regulated by article 295 of Criminal Procedure Code.¹⁹ These arrests refer to crimes *fora flagrante delito* and *quase flagrante delito*.

Article 295 of Criminal Procedure Code sets out the specific procedures. The warrant of arrest must, firstly, identify the person, mentioning the name and possible location, address and other characteristics that could facilitate the correct identification and arrest. Secondly, the warrant must describe the facts justifying the detention and/or any other circumstances justifying the arrest.²⁰

For cases *in flagrante delito* and when the crime committed is punishable by a prison sentence, any public official or any individual, can arrest the suspected perpetrator without needing a warrant of arrest. If the crime is not punishable by a prison sentence (misdemeanour), only public agents can arrest the suspected perpetrator and only in cases when they cannot determine the perpetrator's identity and residence

(for example in the absence of an identity document or any other document to be presented).²¹

Prior to 2013 decision of the Constitutional Council of Mozambique,²² the Criminal Procedure Code listed the following individuals in addition to judges, which had the authority to issue warrants and detain suspects outside of *flagrante delicto*:

- prosecutors,
- officers of the Criminal Investigative Police (holding the rank of directors, inspectors, sub- inspectors);
- police officers;
- district administrators;
- chiefs of administrative areas;
- and chairpersons of Local Executive Councils where there are no police officers.²³

The 2013 Constitutional Council decision changed this and provided that arrest and pre-trial detention outside of *flagrante delicto* could only be executed on a written warrant from a judge. Other authorities listed above were consequently relieved of their powers to issue such warrants. Since then, limiting the freedom of a suspect accused of a crime outside of *flagrante delicto* is in the exclusive jurisdiction of a judge, and not any judge, but a Judge of Criminal Instruction.

In essence this means that when an offence outside of *flagrante delicto* did not result in the immediate arrest of the suspect(s) and is only afterwards reported to the police, the police must request a warrant for arrest from a Judge of Criminal Instruction.

Challenges in implementation

One of the challenges in the implementation of the Constitutional Council Decision is the capacity of the criminal justice system and particularly judiciary and police, to comply with the decision.

There are 18 Judges of Criminal Instruction in Mozambique and the rest are trial judges. It is the duty of the Judges of Criminal Instruction to issue warrants of arrests for offences falling outside of *flagrante delicto*.²⁴ It is clear that there are too few Judges of Criminal Instruction. For example, in Maputo city, with a population of some 1.1 million people, there are only three Judges of Criminal Instruction. In

Nampula province there are only two Judges of Criminal Instruction for a population of some 6.6 million people.²⁵

From this it is evident that it will be difficult, if not impossible, to comply with the Constitutional Council decision. This is especially the case in poor, remote and under-resourced areas. However, it must be noted that in districts where there are no Judges of Criminal Instruction (especially in rural areas), the same work is done by trial judges. This, however, creates two problems. The first concerns the impartiality of the judge, who oversaw the case during the instruction phase but then also sits as trial judge. It is likely that he or she would have formed an opinion of the accused during the initial phase of instruction and that this could influence subsequent decisions. The second problem relates to the requirement in law that Judges of Criminal Instruction should be specialised judges. If trial judges are also doing the work Judges of Criminal Instruction, it means that the law is not being properly complied with.

As noted, the 2013-decision curtailed police powers and non-compliance with the decision can result in disciplinary action for disobedience for abuse of authority.²⁶ With the limited number of judges discussed above, there is a real and obvious concern that there is insufficient capacity to respond timeously to all warrant requests. Regardless of possible delays, the police should have no other option, but to wait for a judge to issue a warrant of arrest. However, it has been reported that the police often feel that they are not in a position to wait for warrants.

In addition, prosecutors who are in charge of monitoring detention have reported that regardless of the new legal framework, unlawful arrests (including arrests without warrants) continue to happen.

Even with the full implementation of the decision by the police, other structural and institutional problems remain, such as a shortage of judges in certain areas and delays in issuing warrants, adding to frustrations within the police, and society's perceptions of the police and trust placed in the justice institutions.

Conclusion

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

² LDH representative, Alice Mabote, during a press conference in Maputo, on 26 September 2013.

³ Art.9 Universal Declaration on Human Rights (UDHR).

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.²⁷

There is no obligation to arrest and the objective is to ensure the suspect's appearance at court, which may be achieved by other means, such as a warning to appear in court. However, the discretion to arrest is frequently misused by police officers in Mozambique, resulting in claims of arbitrary and unlawful arrest. In order to limit or put an end to human rights violations conducted by police, Mozambican jurisprudence changed the "rules" of arrest. Unless the culprit is caught in the act of commission of a crime, arrest is legal only if it had been authorised (through warrant of arrest) by a judge.

REFORMAR – Research for Mozambique is a research, training and advocacy organisation working on criminal justice and human rights in Mozambique and in other Portuguese speaking African countries. Found in 2015, it has engaged in applied research, training and supporting advocacy by governmental, international and civil society organisations.

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⁴ CCPR/C/GC/35 para 10.

⁵ CCPR/C/GC/35 para 11. 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.

⁶ <https://www.merriam-webster.com/word-of-the-day/arbitrary-2017-08-02>

⁷ Fact Sheet No. 26, The Working Group on Arbitrary Detention, <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>

⁸ Trial International: <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>

⁹ Guideline 1(a).

¹⁰ Guideline 1(c).

¹¹ Guideline 2(a).

¹² Guideline 2(b).

¹³ Guideline 3(a).

¹⁴ Judgment No. 4/CC/2013 of 17 September DATE

¹⁵ Guideline 3(a).

¹⁶ Article 59(1) of the Constitution of the Republic of Mozambique.

¹⁷ Law Decree 19 271/1931 of 24 January.

¹⁸ Article 288 of the Criminal Procedure Code.

¹⁹ Article 295 of the Criminal Procedure Code – Requirements of warrant of arrest.

²⁰ Article 291 of the Criminal Procedure Code.

²¹ Article 287 of the Criminal Procedure Code.

²² Case 4/CC/2013 of 13 September 2013.

²³ Article 293 of the Criminal Procedure Code.

²⁴ Data from the Supreme Court, 2017.

²⁵ Data from Census 2017, available at:

<http://www.ine.gov.mz/operacoes-estatisticas/censos/censo-2007/censo-2017>

²⁶ Article 412 of the Penal Code. Article 484 and 485 of the Penal Code.

²⁷ Trial International: <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>