

Mozambique

Thematic Report on the Implementation of the ICCPR in relation to criminal justice

**In preparation for the Civil Society Submission to the United
Nations Human Rights Committee**

By REFORMAR – Research for Mozambique

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Acronyms and abbreviations

ACJR	Africa Criminal Justice Reform
CAT	Committee against Torture
CPC	Criminal Procedure Code
CRM	Constituição da República de Moçambique - Constitution of Mozambique
DHD	Centro Direitos Humanos e Desenvolvimento - Centre for Human Rights and Development
FRELIMO	Frente de Libertação de Moçambique - Mozambican Liberation Front
GDP	Gross Domestic Product
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
IPAJ	Instituto Patrocínio Assistência Jurídica - Legal Aid Institute
LDH	Liga dos Direitos Humanos – Human Rights League
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
RENAMO	Resistência Nacional Moçambicana - Mozambican National Resistance
SERNAP	Serviço Nacional Penitenciário - National Penitentiary Service
SERNIC	Serviço Nacional de Investigação Criminal - National Criminal Investigation Service
UIR	Unidade Intervenção Rápida - Rapid Intervention Unit
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNSMR	United Nations Standard minimum Rules for the Treatment of Prisoners

Introduction

About the submission

In November 2017 Mozambique was due to submit the State Report on the Implementation of the International Covenant on Civil and Political Rights (ICCPR) for the period between 2013 and 2017. In preparation for the alternate report from civil society, REFORMAR (Research for Mozambique) collected data on the implementation of ICCPR in relation to criminal justice issues. While civil society submission to the Human Rights Committee is intended to respond to the State Report, the Mozambican government had not submitted the report yet. Therefore, the publication of this report is intended to draw attention to the absence of the State Report and place pressure on the government to comply with its reporting obligations and other substantive obligations as required by the ICCPR. We also hope that this report will help and contribute to future civil society submissions on the matter.

1.1. About the organisations submitting the report

This report is has been prepared by REFORMAR – Research for Mozambique with the support of Africa Criminal Justice Reform (ACJR).

ACJR is a project of the Dullah Omar Institute, at the University of Western Cape. ACJR engages in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. It supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. The work of ACJR is anchored in international, regional and domestic law. It promotes policy, law and practice reform based on evidence. ACJR have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty.

REFORMAR - Research for Mozambique is a research, training and advocacy organisation working in the sector of the criminal justice and human rights in Mozambique and in other Portuguese speaking African countries. Founded in 2015, it has been providing applied research; training and advocacy tools for governmental, international and civil society organisations.

2. General socio-political context

Mozambique has a population of 28.861.863 million people.¹ The majority of the population is young, with more than 10 million being children. Of the total, 46% are considered to be poor and 12% of the population is HIV positive.²

After gaining independence in 1975, Mozambique went through a war between the now ruling party, FRELIMO (*Frente de Libertação de Moçambique*), and the opposition RENAMO (*Resistência Nacional de Moçambique*), which ended with a new democratic constitution in 1990 and the signing of a peace agreement in 1992. The 1990 Constitution introduced a multiparty democracy, law reform and a considerable range of rights, duties, guarantees and fundamental freedoms that were reinforced with the approval of the 2004 Constitution. There is a separation of powers between the judiciary, legislative and executive branches and legal system is based on civil law.

However, after the peace agreement between FRELIMO and RENAMO, animosity between the government and the opposition remained, resulting in sporadic armed conflict. Recent years saw an increase in politically motivated crimes and abuses, including abductions, killings, summary executions and torture.³ Confrontations started in 2013 and escalated in 2016 in the rural areas of the central and northwest regions. The Amnesty Law was promulgated in 2014 but with no immediate outcome. Tensions came to an end in November 2016.

The country is facing serious problems such as corruption, severe poverty, widespread hunger and unfulfilled basic needs. This is despite economic growth, averaging at an annual rate of between 6% and 8% up to 2015, but slowing down to 3.5 % in 2016.⁴

¹ Available at <http://www.ine.gov.mz/operacoes-estatisticas/censos/censo-2007/censo-2017/divulgacao-de-resultados->

² The World Fact Book. 2017 Report, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/mz.html> (accessed 2 February 2018).

³ Human Rights Watch. 2017 World Report, available at <https://www.hrw.org/world-report/2017/country-chapters/mozambique> (accessed 2 February 2018).

⁴ The World Fact book. 2017 Report, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/mz.html> (accessed 2 February 2018).

3. SUBSTANTIVE ISSUES

3.1. Article 6 – Right to life

General Comment No. 6 on the ICCPR states that the “[Right to life] is the supreme right from which no derogation is permitted even in time of public emergency [...]. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.”⁵

However, in Mozambique arbitrary killings and extrajudicial executions have been a persistent problem and one of the most pressing concerns of human rights defenders in recent years. In 2016 Mozambique saw an increase in these killings due to the conflict between the government and the opposition party RENAMO. Members of the government security forces and RENAMO-linked armed groups continued to commit abuses with impunity during armed clashes that started in late 2014, which included killings, forced disappearances, kidnappings, arbitrary arrests, and destruction of property.⁶

The latest Human Rights Watch (HRW) report states that government security forces abducted and summarily executed at least 83 people in the provinces of Manica, Sofala, Tete and Zambezia between November 2015 and December 2016.⁷ The same concerns were raised by HRW the previous year⁸ and by other international organizations, such as Amnesty International,⁹ as well as national human rights organisations such as the Human Rights League¹⁰ (*Liga dos Direitos Humanos*, LDH) and the Centre for Human Rights and Development (*Centro Direitos Humanos e Desenvolvimento*, DHD). However, these reports are not new and were cited as examples of serious human rights abuses during the Universal Periodic Review (UPR) of Mozambique in 2011 and 2016.

⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, Available at: <http://www.refworld.org/docid/45388400a.html> (accessed 24 January 2018).

⁶ Mozambique: No Justice for Abuses Before Ceasefire. Prosecuting Security Force, Renamo Crimes Key for Enduring Peace, January 2018, Available at: <https://www.hrw.org/news/2018/01/12/mozambique-no-justice-abuses-ceasefire> (accessed 24 January 2018).

⁷ Human Rights Watch, *World Report 2017, Mozambique: Events of 2017*, Available at: <https://www.hrw.org/world-report/2018/country-chapters/mozambique> (accessed 24 January 2018).

⁸ Human Rights Watch, *World Report 2016, Mozambique: Events of 2016*, Available at: <https://www.hrw.org/world-report/2017/country-chapters/mozambique> (accessed 24 January 2018).

⁹ Amnesty International, *Mozambique 2017/2018*, Available at: <https://www.amnesty.org/en/countries/africa/mozambique/report-mozambique/> (accessed 24 January 2018).

¹⁰ Liga dos Direitos Humanos, *A Crise dos Refugiados Moçambicanos no Malawi*, 2016.

These crimes remain almost always unsolved and unaccounted for. The Government has been failing to thoroughly investigate, prosecute and punish those responsible. One of the reasons is the Amnesty Law 17/2014. The United Nations have condemned amnesty laws as a form of impunity.¹¹ Promulgated after the unrest, which destabilised the Sofala province,¹² the Amnesty Law does not contain any provisions providing for redress to the victims of these crimes.¹³

3.2. Article 7 – Torture and other ill treatment

Mozambique ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and its Optional Protocol (OPCAT).¹⁴ In addition, the national legislative framework, both in Article 40 of the Constitution of Mozambique (*Constituição da República de Moçambique*, CRM) and article 160(i) of the new Penal Code¹⁵ prohibit torture.

Civil society reports, specifically those submitted to the Committee against Torture (CAT) in response to Mozambique’s Initial Report submitted in 2013, list a number of documented cases of torture, including abuse, severe beatings and excessive use of force by police officers, as well as by members of the Rapid Intervention Unit (*Unidade Intervenção Rápida*, UIR) and various other forms of ill treatment in prison facilities.¹⁶

In 2015 the US State Department’s Human Rights Report on Mozambique stated that torture in police stations “remained a problem” and that police officers frequently used excessive force when apprehending, interrogating, and detaining criminal suspects and handling prisoners. One such example was reported by

¹¹ United Nations A/56/156 <http://www.un.org/documents/ga/docs/56/a56156.pdf> (accessed on 14 November 2017). See also: Mallinder, L. (2007). Can Amnesties and International Justice be Reconciled?, *International Journal of Transitional Justice*, Volume 1, Issue 2, Pages 208–230; Mallinder, L., McEvoy, K. (2011). Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies. *Contemporary Social Science* Volume 6, Issue 1, 2011.

¹² Available at: <http://www.dw.com/pt/tropas-moçambicanas-bloqueiam-acesso-a-sede-da-renamo-em-mar%C3%ADngué/a-17919033> (accessed 18 July 2018).

¹³ Available at: <http://www.portugues.rfi.fr/africa/20140821-lei-de-amnistia-esquece-vitimas-do-conflito-em-mocambique> (accessed 1 July 2018).

¹⁴ UNCAT was ratified in 1999 and the OPCAT in 2014.

¹⁵ Law 35/2014.

¹⁶ Liga Moçambicana dos Direitos Humanos, CEMO and Joint, Mozambique review of the provisions of article 19 on the Convention against Torture: Information for interactive dialogue, Maputo, October 2013, available at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MOZ/INT_CAT_NGO_MOZ_15464_E.pdf (accessed 12 January 2018). Article 5 Initiative, 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, http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MOZ/INT_CAT_NGO_MOZ_15428_E.pdf (accessed 12 January 2018); Amnesty International, Mozambique submission to the United Nations Committee against Torture. 51st Session of the United Nations Committee against Torture (28 October – 22 November 2013), http://tbinternet.ohchr.org/treaties/cat/shared%20documents/moz/int_cat_ngo_moz_15401_e.pdf (accessed 8 January 2018).

Amnesty International in May 2016 when Benedito Sabão, a peasant farmer from Manica Province, was arbitrarily arrested, detained, tortured in detention and later on shot by suspected secret service police.¹⁷ He survived, but the perpetrators have never been brought to justice.

In Maputo's prisons it was found that about 4% of pre-trial detainees had been assaulted (5% among men and 3% among women).¹⁸ Most commonly identified as the perpetrators were other detainees, followed by police (during the arrest or police detention). It is problematic that there are continuous reports of police maltreatment and abuse. Police (as well as prison officials) lack regular and comprehensive training on human rights and the prohibition of torture and other ill treatment. Police officials are trained, but it is done in an irregular manner, and without assessing the impact.¹⁹

3.3. Article 9 - Arrest

a) Arrest warrant

Judgment 4/CC/2013 of the Constitutional Council is considered to be ground breaking as it changed the legal framework regulating arrest and pre-trial detention.²⁰ The Council ordered that while anyone can arrest a person in the act of committing a criminal offense (*flagrante delicto*)²¹, only the judicial authority can authorise an arrest outside of *flagrante delicto*. Prosecutors, police officers and administrative chiefs were stripped of the power to arrest without a warrant, save for *flagrante delicto*.

The decision was meant to put an end to arbitrary arrests and other abuses of power by enforcement agents. Therefore, the detention authorisation was placed on the judiciary as an only independent body with autonomous decision making (unlike hierarchical institutions such as police prosecutors). It also had a significant impact on victims' rights and the arrest of people against whom valid and well-founded criminal complaints have been brought. For example, if a victim was assaulted or witnessed a criminal offence, he or she can lay a charge at a police station but following the Constitutional Council judgement, the police officer cannot arrest the alleged offender before a judge issues a warrant of arrest. The speed with which the

¹⁷ Mozambique: accused of being opposition member, shot at: Benedito Sabão, available at: <https://www.amnesty.org/en/documents/afr41/4099/2016/en/> (accessed 24 January 2018).

¹⁸ Muntingh, L. and Redpath, J. The socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia, Dullah Omar Institute, 2016.

¹⁹ For an assessment of training at the Police Basic School of Matalane and ACIPOL, Adriano Nuvunga, Borges Nhamirre, Jorge Matine e Tina Lorizzo, Militarização da Formação Policial em Matalane e na ACIPOL é Preocupante, *Centro de Integridade Pública*, Newsletter 10/2016 – Maio.

²⁰ Available at: <http://www.osisa.org/law/mozambique/revolution-pre-trial-detention-laws-mozambique> (accessed 24 January 2018).

²¹ In the case of *flagrante delicto* arrest power does not rest solely with the police, but also any person who is witness to the commission of a crime.

warrant is issued is also of concern as there are only a limited number of judges responsible for criminal investigation (*Juízes de Instrução Criminal*).²² When there are no judges responsible for criminal investigation, the warrant can be issued by other judges. In the whole country of more than 28 million people, there are around 300 judges. Informal interviews with people who have been victims of crime and laid charges in Maputo confirmed that there were long delays due to a case backlog.²³ This means that victims are left behind whilst suspects remain free. The system fails to provide the necessary protection and justice to victims of crime.

Despite the judgement some police officers have continued to arrest people for offences not covered by *flagrante delicto*. It has been reported that some police officials conceal such unlawfully arrested people from prosecutors when they are monitoring arrests, as they are mandated to do by law.²⁴ Arrest without a warrant seems to happen even in cases involving children and juveniles. In 2015, research confirmed that the majority of detained juveniles surveyed were in fact arrested without a warrant.²⁵ However, there is a suspicion that police is simply acting based on their own understanding and interpretation of what in or outside *flagrante delicto* means, often without real understanding of the actual rules.²⁶

We refer to children as persons under the age of 18 years. In Mozambique the age of criminal responsibility is sixteen years old and particular measures are applied for persons between the age of 16 and 21. Therefore, we will use the term “juvenile” to refer to young people who are under the age of 21 (including children between 16 and 18 years old), who have criminal responsibility and are supposed to be treated differently by the criminal justice system.

b) Legalisation of detention

Article 311 of the Criminal Procedure Code (CPC) states that arrested persons should be brought to a judicial authority within 48 hours after arrest. The judicial authority will then legalise the detention, if all formal procedures are in place or release the person. With the legalisation, the permitted timeframes of detention should be respected depending on the type of case as prescribed by the CPC.²⁷

²² For example, in Maputo there are only two judges authorised for criminal investigation for a city of 1.1 million people.

²³ Informal interview with victims of crime. Maputo, March 2018.

²⁴ Informal interview with prosecutors. Maputo, November 2017.

²⁵ Centro Estudos Aquino de Bragança (CESAB) and Civil Society Reform Initiative (CSPRI) for the Attorney General’s Office 2015. Children in conflict with the Law- Searching for a Strategy of Protection in Mozambique. Unpublished report.

²⁶ Informal interview with a judge of the Supreme Court, Maputo, March 2018.

²⁷ According to the CPC there are three types of criminal procedure processes depending on the seriousness of the offences. These are *Processo Sumário* (which does not prescribe detention), *Policia Correccional* (offenses punishable by a prison sentence of more than one year, up to two years) and *Querrela* (offenses punishable by a higher prison sentence, from two years to the maximum penalty of 24 years).

Accurate and reliable data on compliance with the 48 hour rule is not available, but there are several reports and anecdotal evidence suggesting the frequent violation of this rule.²⁸ This was confirmed in other research that found that some children had been in police detention for more than 15 days before the legalisation of their detention.²⁹

A Prosecutor's Hotline service (*Linha do Procurador*) was established to assist people to report suspected unlawful detention to the Attorney General's Office, which is mandated to monitor detention. While prosecutors monitor detention on a daily basis, the Hotline was initially created to supervise admissions to detention at night and over weekends, since it is more likely that police officers would illegally or arbitrarily detain people over these periods.³⁰ The service now functions seven days a week and 24 hours a day.³¹

While the Prosecutor's Hotline service is a positive development, there is not enough performance information available on the service to assess its scope and effectiveness. It would be important and useful to know the number of calls attended to, the number of cases assisted, the number of charges against police officers, the number of police officials prosecuted and sentenced. It should be noted that Permanent Circular No. 1 / G / PGR / 2008 of the Office of the Attorney General, sets out precise guidelines on the action to be taken by prosecutors when screening cases. However, it appears that screening is not carried out with the required regularity, or the prosecutors are not sufficiently diligent and strict in complying with the relevant rules.³² It has been also alleged that in many cases of suspected unlawful detention prosecutors simply release the person without opening an investigation against the responsible officials as regulated by Article 484 and 485 of the Penal Code.³³ Articles 484 and 485 clearly prescribe the punishment of up to eight years' imprisonment for a public servant who conducts or orders the unlawful arrest and/or imprisonment. This is probably due to a fact that prosecutors and police officers work closely together, often establishing close professional relationships, which could be broken with the opening of an investigation against some of the agents.

Statistics on the number of people arrested annually are not available. Due to the unknown number of arrests in the country, it is not possible to establish whether the number of cases, prosecutions and thus convictions is comparatively lower than the arrests made. This information would clarify whether all the

²⁸ US Department of State. Mozambique Human Rights Report 2015. Available at: <https://www.state.gov/documents/organization/252921.pdf> ; US Department of State. Mozambique Human Rights Report 2016. Available at: <https://www.state.gov/documents/organization/265494.pdf> (accessed 24 January 2018).

²⁹ Centro Estudos Aquino de Bragança (CESAB) and Civil Society Reform Initiative (CSPRI), 2015.

³⁰ Available at: <http://www.jornalnoticias.co.mz/index.php/capital/33368-nas-esquadras-da-cidade-de-maputo-linha-do-procurador-reduz-detencoes-ilegais.html> (accessed 24 January 2018).

³¹ There is no centralized system or unique number available nation-wide. Different numbers are available in different cities and provinces across the country.

³² Centro Estudos Aquino de Bragança (CESAB) and Civil Society Reform Initiative (CSPRI), 2015.

³³ Interview with a Prosecutor of the city of Maputo. October 2017.

arrests made are indeed necessary. Prosecutors and the National Criminal Investigation Service (*Serviço Nacional de Investigação Criminal*, SERNIC) should place less emphasis on arrest as a performance indicator and rather focus on effective and efficient investigations measured by convictions and the conviction rate.

c) Use of force

A further concern with regard to arrest is the excessive use of force by police officers. The Constitution protects the right to life and prohibits torture (Article 40) and the CPC regulates the use of reasonable force. However, Article 306 of the CPC and article 33(2)(c) of Police Act 16/2013 allow the use of force to detain and arrest a person without clarifying the level of force, giving the police too much latitude in the use of force and discretionary power to decide whether it is reasonable, necessary and proportional.

Article 33 of Law 16/2013 states that the police may use the necessary, proportionate and reasonable force to overcome unlawful resistance. The words such as necessity, proportionality, and reasonableness leave grey areas in the protection of human rights, considering that only a judge can determine how much force can be regarded as necessary, proportionate, and reasonable, and whether resistance by the suspect is unlawful. The law is not sufficiently clear to effectively limit the use of force and serve as a legal basis to determine the (un)lawfulness of the use of force.

There have been several reports on the excessive use of force by the police, including the deprivation of life. In March 2015 a police officer shot and killed an elderly man who didn't have a bicycle license and allegedly resisted when the officer wanted to confiscate the bicycle.³⁴

d) Right to privacy

Upholding the right to privacy also raises concerns. The Constitution guarantees the right to privacy at home. For the purposes of arrest it is possible to enter someone's home with a court order during the day, but at night it can only be done with the consent of the home owner or resident.³⁵ This is also reiterated in the CPC.³⁶ Article 7 of Act 16/2013 provides that in relation to search of persons, police agents can "require proof of identification and search any person or suspect's vehicle".³⁷ There are no provisions in law regulating the searching of persons with regard to pat-down searches, the removal of garments and body cavity searches. There are also no regulations regarding the information people should receive in advance

³⁴ US Department of State. Mozambique Human Rights Report 2015. Available at: <https://www.state.gov/documents/organization/252921.pdf> (accessed 24 January 2018).

³⁵ The Code however is not specific in terms of the exact hours on when the day starts and/or finishes.

³⁶ Articles 300, 301 and 302. Exception to this rule relates to crimes such as traffic and use of drugs (Article 66 of Law 3/97/).

³⁷ Lorizzo, T. Constitutionality of Criminal Procedure and Prison Laws in Africa – Mozambique, 2017.

when they are about to be searched, the records kept of searches and confiscated goods, as is set out in the Luanda Guidelines.³⁸

e) Police custody

Conditions of detention in police cells were found to be less than satisfactory with detainees kept in small and overcrowded cells with insufficient light and ventilation. Detainees are often permitted to leave the cells only once a day.³⁹ It was also found that while certain protections refer to all places of detention (e.g. protection from torture and the right to health), there are no regulations setting minimum standards in respect of access to food and sanitation in police custody.⁴⁰

3.3.1. Pre-trial detention

In this report we differentiate between arrest and pre-trial detention in order to distinguish between the detention that happens upon arrest and up until the legalisation of detention by a judicial authority, and the detention after its legalisation and while awaiting trial (hereafter 'pre-trial detention').

The Criminal Procedure Code sets the maximum periods for pre-trial detention. This period is determined by the type of charge against the accused, such as *Policia Correccional* (for offences punishable by a prison sentence of more than one year and up to 2 years) and *Querela* (for offences punishable by a prison sentence of more than two years). For offences under *Policia Correccional* pre-trial detention cannot exceed 20 days, 40 days for offences under *Querela*, and 90 days pre-trial detention for crimes falling under the exclusive jurisdiction of SERNIC.⁴¹ The second period sets the time limits from the notification of the charge up until the judgement is handed down by the Court (*Despacho de Pronúncia de 1ª Instância*).⁴² Table 1 summarises these permitted period:

³⁸ See Procedural Guarantees for Arrest in the Luanda Guidelines available at http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf (accessed 15 April 2018).

³⁹ Centro Estudos Aquino de Bragança (CESAB) and Civil Society Reform Initiative (CSPRI), pg. 57. 2015.

⁴⁰ Lorizzo, T. Constitutionality of Criminal Procedure and Prison Laws in Africa – Mozambique, 2017.

⁴¹ Article 19 of Law 16/2013 states that "SERNIC's responsibility is to conduct the investigation of crimes such as forgery of documents, kidnapping, trafficking in persons, corruption, production, growth, trade and illicit trafficking in plants, ...] applicable to drug trafficking and consumption [...]".

⁴² The Court of the *1ª Instância* is the court where the case has been opened. It does not refer to a decision of a Court of Appeal.

Table 1

	1° period	2° period	Total duration
<i>P. Correccional</i>	20 days	3 months	3 months and 20 days
<i>Querela</i>	40 days	4 months	5 months and 10 days
Preliminary Investigation of SERNIC	90 days	3 months if <i>P. Correccional</i> 4 months if <i>Querela</i>	6 months 7 months

These requirements are complicated and confusing even to legal practitioners and judges who must enforce them. There is anecdotal evidence suggesting that some judges do not properly consider the separate time periods set out in Table 1, but rather the overall period to base their decision-making on.

International legal instruments advise that pre-trial detention should occur only when absolutely necessary and where no other alternatives are available.⁴³ This is echoed in the Luanda Guidelines, as well as article 9(3) of the ICCPR, which provides that it shall not be the general rule that persons awaiting trial are detained, and release may be subject to guarantees to appear for trial at any stage of the judicial proceedings. The Penal Code introduced in 2015 alternative measures to pre-trial detention strengthening the overall legal framework to avoid pre-trial detention. However, some judges are not yet applying the alternative measures arguing that they are awaiting the Code on the Implementation of Custodial and non Custodial Penalties and Measures (*Código de Execução de Penas e Medidas Privativas e não Privativas de Liberdade*)⁴⁴ which is currently before Parliament, whilst others have taken the initiative and are already applying them, although inconsistently and based on their own interpretation.

The latest data from the National Penitentiary Service (*Serviço Nacional Penitenciário*, SERNAP) in February 2017 indicates that 36% of the total prison population are in pre-trial detention.⁴⁵ There was a slight increase in pre-trial detention numbers in recent years. In 2015, 32,5 % of prisoners were pre-trial detainees⁴⁶ a slight increase from 31 % in 2014.⁴⁷

⁴³ Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment are few of the international legal instruments.

⁴⁴ Available at <http://www.oam.org.mz/wp-content/uploads/2017/07/C%C3%93DIGO-DE-EXECUCAO-DAS-PENAS-Anteprojecto-1-de-Junho-de-2017.pdf> (accessed 20 April 2018).

⁴⁵ Serviço Nacional Penitenciário (SERNAP). Pela Humanização do Sistema Penitenciário. Hotel Radisson. Maputo, 24 Fevereiro 2017.

⁴⁶ Available at: <http://www.prisonstudies.org/country/mozambique> (accessed 24 January 2018).

⁴⁷ US Department of State, Human Right Report 2016. Mozambique. Available at: <https://www.state.gov/documents/organization/265494.pdf> (accessed 24 January 2018).

There is a limited research with reliable data on the average duration of pre-trial detention in Mozambique. However, several reports point out that the duration of pre-trial detention remains a problem.⁴⁸ A study on conditions of detention in ten Mozambican prisons found many cases of pre-trial detainees in custody for more than a year. This is partly due to the inadequate number of judges and prosecutors. For example, not all districts in the country have permanent magistrates, which not only prolongs detention, but also weakens the capacity to assess the lawfulness of their continued detention.

Research findings from 2014 observed that the time from confirming charges against a detainee to going to court varied from nine to 854 days based on a sample from four courts, in the city of Maputo.⁴⁹ Almost one quarter of the cases took longer than 90 days, the maximum period for the first phase. In at least 3% of cases where a person was detained, the prosecutor decided to withdraw the case. Other research noted that in the provincial courts of Beira, Maputo, Nampula, Tete and Gaza the conviction rate was 70% with 30% of defendants being acquitted. Even though the conviction rate is relatively high, efforts should be made to ensure that in the remaining 30% due process was followed, evidence was solid and pre-trial detention was indeed used as a measure of last resort, without violating the right to freedom.⁵⁰

It is also of concern that detention is often used for summary crimes (*Sumário Crime*). Summary crimes are supposed to be heard immediately and a court may not order detention. However, even in the case of juveniles, where courts should generally be more lenient, summary crimes involved pre-trial detention. Even more worrying is the length of pre-trial detention in these cases. Two examples were found where juveniles were awaiting judgment for more than 480 days. Other examples included a case of pre-trial detention of 180 days and one of 90 days.⁵¹

Long pre-trial detention not only compromises the right to a speedy and fair trial, but has significant social and economic consequences. It has been confirmed there is a significant socio-economic impact on detainees, their families, and associated households in Mozambique.⁵² Impact may have enduring negative consequences from which a household struggles to recover. Where the detainee is female, the impact on her children can be severe.⁵³

Interviews with detainees at “*Estabelecimento Penitenciário Provincial de Maputo*” and their visitors revealed that prior to detention detainees tended to reside with their families and were integral to their families’ emotional, social and economic well-being, many of which were responsible for the entire

⁴⁸ Liga Moçambicana dos Direitos Humanos, CEMO and Joint, 2013. Article 5 Initiative, 2013. Amnesty International, 2013.

⁴⁹ Centro de Direitos Humanos (CDH), 2014. Auditoria ao Regime e Práticas da Prisão Preventiva em Moçambique.

⁵⁰ Centro de Direitos Humanos (CDH), 2014. Auditoria ao Regime e Práticas da Prisão Preventiva em Moçambique.

⁵¹ Centro Estudos Aquino de Bragança (CESAB) and Civil Society Reform Initiative (CSPRI), 2015.

⁵² Muntingh, L. and Redpath, J. 2016.

⁵³ Muntingh, L. and Redpath, J. 2016.

household income.⁵⁴ The continued detention of the detainee, in the majority of instances, more than halves the family's income.⁵⁵ In addition it also burdens the family with additional costs associated with visiting detainees (transportation costs, food and other necessities that are brought to a detainee).⁵⁶ The right to education of children with imprisoned parents was clearly found to be affected by the detention, due to a loss of resources. Many mentioned their children having to relocate and now living with another relative or even with their neighbours. It was also found that incarceration affected relationships with family and friends, and both detainees and their families often suffer experience stress and depression.⁵⁷

3.3.2. Bail

In the previously cited study on the socio-economic impact of pre-trial detention it was found that 41% of detainees had not yet been to court to apply for bail. Some 29% said they “knew they could not ask for bail” or thought that “the charge did not allow for bail” and 16% said they could not afford bail, and that was why they were detained. It is problematic that bail amounts are excessively higher than median earnings, and as high as US\$ 8 000 while most of the detainees were earning the minimum monthly wage of US\$ 95.⁵⁸

3.3.3. Habeas Corpus and redress

Article 66 of CRM provides for the right to challenge unlawful detention and the timeframe within which the court must rule on such an application. The CPC sets out the motivations for a habeas corpus application, being: the arrest and/or imprisonment was ordered by someone who does not hold this authority; detention and/or imprisonment for an act that the law does not provide for detention and imprisonment; expired time limits for pre-trial detention and duration of sentence. It also sets out the elements that the written request should contain and that a decision must be made within eight days.⁵⁹ There is anecdotal evidence that since 2016 the number of habeas corpus applications have increased. Research need to be conducted to verify this.

In terms of compensation, Article 58 of CRM is rather vague, providing for the right to claim compensation generally related to ‘violations of [people’s] fundamental rights caused by unlawful acts of public agents’. In recent years reports by international and national organisations have repeatedly presented evidence that

⁵⁴ Muntingh, L. and Redpath, J. 2016.

⁵⁵ Muntingh, L. and Redpath, J. 2016.

⁵⁶ Muntingh, L. and Redpath, J. 2016.

⁵⁷ Muntingh, L. and Redpath, J. 2016.

⁵⁸ Muntingh, L. and Redpath, J. 2016.

⁵⁹ Articles 312, 314 and 316 of the Criminal Procedure Code.

victims of human rights violations found it difficult to exercise their right to redress.⁶⁰ There is indeed no publicly available information on whether there have been successful civil claims for unlawful arrest and detention.

3.4. Article 10 - Treatment of people deprived of their liberty

There are several issues in the implementation of states' legal obligation to provide humane and dignified conditions of detention. It should be emphasised that the revised UNSMR have brought much greater clarity on this issue in the event that the domestic legislation is not clear.

3.4.1. Overcrowding

Overcrowding continues to be a serious problem in many Mozambican detention facilities. In November 2016 the average level of occupation was 206.3%.⁶¹ In some facilities the situation is even worse: at Xai-Xai prison, which held 406 prisoners in a facility built for 50 people, or an occupancy level of 812%. At Lichinga it was 736%, at Tete it was 610%, and at Sofala in Beira 604%.⁶² At Xai-Xai there were reportedly 58 prisoners detained in a cell that measured 12m², or less than 0.3m² per prisoner, while the minimum recommended standard is 3.5m².⁶³ Reasons for overcrowding are the slow judicial processes, the large number of illegal detentions, and a lack of alternative forms of punishment for petty crimes.⁶⁴

3.4.2. Segregation of prisoners

Contrary to the rules, sentenced and unsentenced prisoners are often not segregated and they are subject to the same poor conditions of detention. This is reportedly due to inadequate prison infrastructure.

In addition, it has been reported that at some facilities (e.g. Nampula and Xai-Xai) juveniles are not separated from adults - a serious violation of international standards and norms. It was also reported that there are no specialized programmes for juveniles.⁶⁵

⁶⁰ Available at: http://www.amnistia-internacional.pt/dmdocuments/Mocambique_Obstaculos_Justica.pdf (accessed 10 August 2018).

⁶¹ Serviço Nacional Penitenciário (SERNAP), 2017.

⁶² Serviço Nacional Penitenciário (SERNAP), 2017.

⁶³ Centro de Direitos Humanos (CDH), 2014.

⁶⁴ Human Rights Watch, World Report, 2016.

⁶⁵ Muntingh, L. and Redpath, J. 2016.

3.4.3. Hygiene, health care and food

The ageing and deteriorating prison infrastructure is negatively affecting conditions of detention. Seen together with serious overcrowding discussed above, in most prisons it is simply not impossible to meet minimum standards of humane detention. A 2014 report found:

- In some prisons it was reported that prisoners are not supplied with soap (Chibuto and Xai-Xai).
- In some facilities prisoners only have access to showers twice per week (Moatize and Tete). Rapale prison has an irregular water supply and water is fetched twice or thrice per week from a river.
- The number of meals served per day varies and at some prisons meals are served once or twice a day.
- Prisoners requiring a medically prescribed diet do not receive such a diet.
- Beds and bedding appears to be in general short supply or is not provided at all.
- Often it is reported that the prison health care service does not have access to the equipment and medicines required to provide adequate medical care.
- The quality of health care that prisoners have access to was generally assessed as inadequate.
- In respect of prisoners with physical disabilities, there is very little, if any, provision made to address their needs.⁶⁶

The mortality rate of prisoners at certain prisons (e.g. Nampula and Rapale) was found to be excessively high.⁶⁷ This would require further investigation into whether these incidents relate to poor access to health care and/or conditions of detention that could be addressed.

3.4.4. Punishment and ill treatment

Solitary confinement is often used as punishment. The duration of solitary confinement is reported to be excessive and in some instances can be as long as 120 days.⁶⁸ Even shorter periods of 15 days could be considered as inhumane punishment and ill treatment, as the UNSMR regulates this to be the maximum.⁶⁹

⁶⁶ *Condições de Detenção*, in Centro de Direitos Humanos (CDH), 2014. Auditoria ao Regime e Práticas da Prisão Preventiva em Moçambique.

⁶⁷ *Condições de Detenção*, in Centro de Direitos Humanos (CDH), 2014. Auditoria ao Regime e Práticas da Prisão Preventiva em Moçambique.

⁶⁸ *Condições de Detenção*, in Centro de Direitos Humanos (CDH), 2014. Auditoria ao Regime e Práticas da Prisão Preventiva em Moçambique.

⁶⁹ Rule UNSMR 44 states: "For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days" available at: <https://cdn.penalreform.org/wp-content/uploads/1957/06/ENG.pdf> (accessed 21 February 2018).

3.5. Article 14

3.5.1. Judicial integrity

Corruption is reported to be a significant problem in the judicial system and the Mozambique Corruption Report states that bribes and irregular payments are often exchanged in return for favourable court decisions.⁷⁰ The general perception is that the judiciary is politicized and often suffer from interference and control by the ruling party, FRELIMO. There is similarly a perception that judicial appointments are subject to confirmed affiliation to FRELIMO. Accordingly, 69% of Mozambicans perceive the judiciary to be corrupt.⁷¹

3.5.2. Right to be informed of the charges

The right to be promptly informed of the charges brought against a person who has been arrested and detained is indisputable and has been prescribed by both international and national legislation. However, this basic right is often not respected and individuals who are arrested and detained are not always aware informed of the reasons for their detention. A 2016 study found that, in Maputo, for 24% of detainees it took two days or more to be informed of the charges against them and for 5% it took a month or more. The longest time lapse before being informed of the charges was 90 days.⁷²

3.5.3. Right to legal representation

The law provides for citizens' right to access the courts and the right to legal representation, even if they cannot afford it. Not being able to afford private lawyers, many defendants frequently have no legal representation due to the shortage of staff at the state-provided legal aid. It was also found that 54% of detainees received legal assistance, mostly from the Legal Aid Institute (*Instituto de Patrocínio e Assistência Jurídica*, IPAJ) – the state-provided legal aid. IPAJ has increased its services in the last years and in 2014 IPAJ was operating in 140 districts and employed 38 lawyers and 485 legal assistants. It assisted 90 898 cases in court and mediated 47 123 cases.⁷³ In 2016 IPAJ assisted 183 242 cases, of which 70,221 were mediated. This represents an increase of 102% in total case load over two years. However, the accessibility of the service needs to improve to respond to the increasing needs of the population and meet the necessary

⁷⁰ Available at: <https://www.business-anti-corruption.com/country-profiles/mozambique> (accessed 21 January 2018).

⁷¹ Available at: <https://www.transparency.org/gcb2013/country?country=mozambique> (accessed 21 January 2018).

⁷² Muntingh, L. and Redpath, J, 2016.

⁷³ Interview with the Director of IPAJ, October 2017.

standards in relation to the rights of accused and detained persons. Bribing of IPAJ staff has also been cited as a concern, which affects perceptions that people have about IPAJ.⁷⁴

3.5.4. Right to be tried without delay

The previous section on pre-trial detention already indicated that in some instances there are indeed lengthy delays in finalising cases, which seriously compromises the right to a fair trial.

3.5.5. Juveniles in courts

Juveniles differ from adults in their physical and psychological development and, as well as their emotional and educational needs. These differences form the basis for their lower culpability when in conflict with the law and a reason for a separate juvenile justice system that would provide for a different treatment, bearing in mind the best interests of young people and emphasise rehabilitation and restorative justice objectives.

According to a 2015 study, the principles and the specific rules for the special protection of juveniles in conflict with the law in any legal proceedings, contained in Law No 7/2008 of 9 June, are still far from being observed.⁷⁵ An important concern raised is that many juveniles are tried as adults, rarely benefiting, for example, from the stipulation in Article 84 of the aforementioned law, allowing juveniles to receive alternative sentences and in particular suspended prison sentences. There have been cases where prison sentences were imposed when juveniles were first offenders, showed regret and the stolen goods were recovered.⁷⁶ These retributive measures clearly subvert the best interest of juveniles and ultimately have a significant impact on their well-being.

3.6. Article 25 – Right to vote

Article 25(b) of ICCPR prescribes that every citizen has the right to vote.

⁷⁴ Muntingh, L. and Redpath, J, 2016.

⁷⁵ Centro Estudos Aquino de Bragança (CESAB) and Civil Society Reform Initiative (CSPRI), 2015.

⁷⁶ Centro Estudos Aquino de Bragança (CESAB) and Civil Society Reform Initiative (CSPRI), 2015.

Law no. 12/2015 of April 23,⁷⁷ on the election of President of the Republic and the Members of the Parliament, states in the Article 10: “Nationals of both sexes who, at the time of the election, are over eighteen years of age, regularly registered⁷⁸ and who are not covered by any disability provided for in this law have the right to vote.” Article 12 stipulates who is excluded from voting “a) those prohibited by a judgment and b) those recognised as insane, even if they are not prohibited by a sentence, the patients of a psychiatric establishment and those as such declared by a medical board.

However, the right to vote for prisoners is not happening, in practice. By comparison, neighbouring South Africa allows all prisoners to vote following two Constitutional Court judgements.⁷⁹ The only persons excluded from being registered on the voter’s roll are persons who have attempted to register or have registered by fraudulent means; persons declared of unsound mind, and persons held under the Mental Health Care Act.⁸⁰

4. CONCLUSION

Over the past three years, Mozambique has made significant progress in the development of the legal framework for the criminal justice system. The already progressive national legislation has been reinforced by the ratification of OPCAT and a number of state reports have been submitted to international treaty bodies. Some developments at the national legislative level are the new Penal Code, which criminalises torture and introduces alternatives to imprisonment as well as Judgment 4/CC/2013 of the Constitutional Council that regulates the arrest procedure. However, the full implementation of these mechanisms has yet to be seen. Reports by international and national organisations as well as studies in the area of criminal justice in the country reported considerable concerns and a number of human rights violations in the country.

The report has assessed the implementation of the ICCPR in relation to the specific phases of the criminal justice system such as arrest, pre-trial detention, sentencing and treatment and conditions in places of detention. Concerns on the use of force, torture and ill treatment, legalisation of detention and right to

⁷⁷ Law no. 11/2014 on the election of the members of the Provincial Assemblies and Law no. 10/2014 on election of the President of the Municipal Council and of the members of the Municipal Assembly present the same requirements of active and passive electoral capacity.

⁷⁸ In Mozambique, there is a legal requirement of registering in the voters’ register before every election and holding a newly issued voter card to be able to vote.

⁷⁹ *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC) and *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* 2004 (5) BCLR 445 (CC).

⁸⁰ Electoral Laws Amendment Act 34/2003 available at http://saflii.org/za/legis/num_act/elaa2003234.pdf (Accessed 15 April 2018).

privacy have been identified at the arrest's phase. While police are repeatedly criticised for its performance, prosecutors and the judicial authority also have responsibility for the respect of people's human rights.

Pre-trial detention is still used for summary cases and for minor offences where detention can be avoided. Research has shown the considerable impact of pre-trial detention on the socio and economic life of who is detained and their families. Bail is often not utilised and when granted, the amounts to be paid are excessive.

Finally, conditions in places of detention are worrisome, with severe overcrowding and poor sanitation being the biggest challenges.. Juveniles are often treated as adults, not only during trial but also in prison where often there is no segregation

Listed below are recommendations for the future development of civil and political rights related to the criminal justice in the country.

5. RECOMMENDATIONS

- Arbitrary killings, excessive use of force, arbitrary arrest and detention, as well as torture and other ill treatment must be prevented and perpetrators of these crimes held accountable. Police officers need to receive continuous training on the legal requirements for arrest and the impact of unlawful arrest and detention. Strict monitoring systems need to be instituted to prevent unlawful arrests. Prosecutors overseeing places of detention should as a matter of course investigate and prosecute officers who are not complying with the law. Overall, government accountability has to be addressed and improved, especially in relation to allegations implicating law enforcement agencies.
- All citizens should be made aware of their rights enshrined and guaranteed by the Constitution. Raising awareness through civic education campaigns would improve citizens' knowledge on their rights and responsibilities. Only informed citizens can invoke their rights and take the necessary steps to report rights violations in the criminal justice system.
- Courts need to give serious consideration in each case regarding the appropriateness of pre-trial detention and investigate all other ways to secure the attendance of the accused at trial. Courts need to be made aware of the inevitable and severe impact of pre-trial detention causing disproportionate harm to detainees and affected households when overused. Moreover, courts

must be encouraged and supported to use non-custodial sentencing options. This might require comprehensive and continuous training of prosecutors, judges and magistrates as well as informing accused persons of these sentencing options.

- Accused persons must be tried within a reasonable time so as to ensure a fair trial. This will require additional resources, training and more prosecutors and judges.
- Courts should ensure that bail is granted where all the legal requirements are met and that amounts do not exceed the financial means of accused persons.
- Conditions of detention must be improved. It is essential that measures are developed and implemented to reduce overcrowding in places of detention. The Ministry of Health should deploy more medical personnel in places of detention and self-sustaining agricultural projects should be created and implemented to improve the diet of prisoners.
- Reporting mechanisms need to be available to all persons wishing to report acts of torture and other ill treatment on their own or someone else's behalf. The crucial step in addressing ill treatment in places of detention is knowing where and under what circumstances it happens. Therefore, having accessible and safe avenues to report, and establishing an independent complaints system are key steps in preventing and combating torture and other ill treatment.
- With reference to juveniles there needs to be a strict limitation on the deprivation of liberty, especially prior to sentencing and that it must only be used as a measure of last resort. Educational and rehabilitation programmes have to be an integral part of all detention facilities, but particularly when detainees are young people.
- Ensure that all adults in detention have the right and possibility to vote in elections as provided for in law.