



PUNISHED FOR BEING POOR: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences

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1 Introduction

The Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa of 2003¹ endorsed recommendations calling for reducing the size of prison populations in Africa. The Plan of Action recommended the '[d]ecriminalisation of some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents' as a strategy to reduce the prison population. More than a decade has passed and few countries have made any progress in implementing this strategy endorsed by the African Commission on Human and Peoples' Rights (ACHPR). Many of the offences identified by the ACHPR as ripe for repeal amount to nothing more than the criminalisation of poverty, homelessness, and unemployment. Certain offences, such as loitering and being a 'rogue' and 'vagabond', date back to colonial times and have no place in Africa anymore. They must be repealed. Their continued enforcement is disproportionately experienced by the poor and marginalised populations, including persons with disabilities. The existence of these laws, and their enforcement, are justified by proponents with unsubstantiated arguments based more on anecdote and bias than fact. Such proponents argue, for example, that arresting people for loitering prevents crime and has a deterrent effect on would-be criminals. It is similarly argued that arresting street children and persons with intellectual and psychosocial disabilities in so-called sweeping operations encourages them to return to their homes and families and relieves the public of the burden and inconvenience of such persons. There is no evidence to support these claims.

This paper sets out the arguments and evidence for the decriminalisation and declassification of petty offences. In brief, these are as follows:

- These laws are enforced in a discriminatory manner and frequently result in arbitrary and unlawful arrests targeting the poor and other marginalised groups.
- These laws and their enforcement do not promote public safety and may even be counter-productive.

¹ ACHPR /Res.64 (XXXIV) 03: Resolution on the adoption of the 'Ouagadougou Declaration and plan of action on accelerating prison and penal reform in Africa' (2003).

- The enforcement of such laws contributes to the number of people in pre-trial detention and thus adds to already overcrowded prisons, which of itself has negative consequences for detainees and an adverse socioeconomic impact on their families.
- The enforcement of such laws is highly discretionary, thus facilitating the extortion of bribes, and excessive violence is often associated with arrests.
- High volumes of arrests for such offences have adverse consequences for police-community relations.

Fundamentally we must ask: what is the purpose of these laws and their enforcement? How does it contribute to making society safer and what is the evidence for this? These laws and their enforcement must also be assessed against key human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (AChHPR). It is in particular articles 6 and 7 of the AChHPR that are relevant, protecting the right to be free from arbitrary arrest and detention and the right to a fair trial. More than ten years ago the Ouagadougou Declaration already confirmed that these laws and their enforcement are an affront to the AChHPR and should be repealed. The AChHPR clearly requires equal treatment before the law and in practice; this means that people should not be targeted by the police because they are poor and powerless.

The AChHPR states that every individual shall have the right to the respect of the dignity inherent in a human being and prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.² Human dignity is a basic right to which all human beings are entitled without discrimination.³ Moreover, the AChHPR also prohibits discrimination, amongst other things, based on national and social origin and fortune. Targeting poor people for the enforcement of trivial offences may thus amount to discrimination based on social origin and fortune. The ACHPR stressed that inhuman and degrading treatment includes actions that not only cause serious physical or psychological suffering but which humiliate or force the individual against his or her will or conscience.⁴ Arbitrary confrontation by the police and the unlawful arrest of an individual is a demeaning and humiliating

² Article 5, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR), para. 57.

⁴ *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR), para. 36.

experience. This is even more so if it is for a minor offence which is not a threat to public safety and which targets vulnerable and poor people. The arbitrary arrest and subsequent detention of children in appalling conditions are tantamount to exploitation, and amount to cruel, inhuman and degrading treatment, which is a violation of article 5 of the AChHPR.

The AChHPR furthermore guarantees everyone the rights to freedom of movement,⁵ liberty and the security of his or her person. In particular, no one may be arbitrarily arrested or detained.⁶ The mere fact that it is an offence to loiter or be a ‘rogue’ and vagabond restricts a person’s freedom of movement, while the arbitrary and violent arrest of persons and the extortion of bribes by law enforcement officials deny persons all the aforementioned rights and freedoms.

The United Nations Committee on the Elimination of Racial Discrimination (CERD) expressed concern that laws which prohibit begging and loitering effectively criminalise homelessness and that such laws have a disproportionate effect on vulnerable groups, such as racial and ethnic minorities in the United States.⁷ Vagrancy and nuisance-related offences are used almost exclusively against the poor and marginalised and target persons due to their status in society and not because of their actual conduct, or conduct that poses a threat to public safety.⁸

The recently adopted United Nations Sustainable Development Goals (SDGs) provide targets for governments to address extreme poverty.⁹ Governments have a responsibility to end poverty in all its forms everywhere by 2030, particularly by ensuring that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources.¹⁰ Governments have a responsibility to build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to economic, social and environmental shocks and disasters. In line with

⁵ Art. 12(1) AChHPR .

⁶ Article 7 of the AChHPR also gives persons the rights: (1) every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

⁷ The Committee on the Elimination of Racial Discrimination, Concluding Observations (United States), CERD/C/USA/CO/7-9, 29 August 2014 at para. 12.

⁸ Zimmerman H ‘Louisiana Vagrancy Law – constitutionally sound’ (1969) 29(2) *Louisiana Law Review* 361, 363.

⁹ Sustainable Development Goals, <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

¹⁰ Goal 1, Sustainable Development Goals.

the SDGs, as adopted by the UN General Assembly by consensus in September 2015, governments must implement programmes and policies to end poverty in all its dimensions and create sound policy frameworks based on pro-poor and gender-sensitive development strategies to support accelerated investment in poverty-eradication actions.¹¹ Targeting poor and marginalised persons for the enforcement of petty and trivial offences is contrary to the SDGs.

The Protocol to the AChHPR on the Rights of Women in Africa¹² (Maputo Protocol) emphasises the rights of women to dignity,¹³ equal protection before the law,¹⁴ personal security,¹⁵ non-discrimination¹⁶ and all other fundamental freedoms. The Protocol calls on State Parties to: enact and effectively implement appropriate legislative or regulatory measures,¹⁷ take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist,¹⁸ and support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.¹⁹ Arbitrary arrests of women without reasonable suspicion of committing an offence, or for being at a specific location at a specific time of the day, violate their rights to dignity, equality, non-discrimination and fundamental freedoms. It is a duty of State Parties to ensure that such discriminatory practices cease.

The erratic and arbitrary arrests of street vendors for trying to earn a living wage, based on policies to clean up cities, do not support the goal of reducing inequality within a country,²⁰ nor do they promote inclusive and sustainable economic growth, full and productive employment, and decent work for all.²¹ Such policies do not support the SDGs to end hunger and promote well-being for all.²² Governments have a responsibility to make cities and human settlements inclusive and safe,²³ to promote peaceful societies for sustainable development, to provide access to justice for all and

¹¹ Goal 1, Sustainable Development Goals.

¹² African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003 (Maputo Protocol).

¹³ Art. 3(1) Maputo Protocol.

¹⁴ Art. 8 Maputo Protocol.

¹⁵ Art. 4 Maputo Protocol.

¹⁶ Art. 2 Maputo Protocol.

¹⁷ Art. 2(1)(b) Maputo Protocol.

¹⁸ Art. 2(1)(d) Maputo Protocol.

¹⁹ Art. 2(1)(e) Maputo Protocol.

²⁰ Goal 10, Sustainable Development Goals.

²¹ Goal 8, Sustainable Development Goals.

²² Goal 2, Sustainable Development Goals.

²³ Goal 11, Sustainable Development Goals.

to build effective, accountable and inclusive institutions at all levels.²⁴ Legal and policy reforms are needed that aim at limiting, if not ending, arrest and imprisonment for minor offences that do not have any effect on public safety. Law enforcement and the criminal justice system cannot operate as if they have no impact on poverty and marginalisation.

This report is divided into four main sections, each exploring a core thematic argument in favour of the decriminalisation and declassification of petty offences:

- Arrests for petty offences are often unlawful and discriminatory, criminalising socioeconomic challenges targeting the poor. This section pays particular attention to children, sex workers, street traders and the disabled.
- Arrests for petty offences do not promote public safety and the punishments are disproportionate to the offence.
- The enforcement of petty offences may result in pre-trial detention, adding to prison overcrowding. Pre-trial detention, regardless of the offence, has a severe socioeconomic impact on poor and marginalised households.
- The enforcement of petty offences is highly discretionary, frequently associated with the use of excessive violence by the police, and open to corruption and bribery.

It is important to note that in certain instances the arguments in favour of decriminalisation and declassification of petty offences focus specifically on these offences and the persons arrested and detained under them. However, in other instances, especially as it relates to pre-trial detention and its socioeconomic impact, persons detained for petty offences do not form a distinct group as pre-trial detainees and are by and large treated the same and suffer similar consequences. Nonetheless, decriminalisation and declassification may contribute, for example, to reducing prison overcrowding and thus the conditions of detention.

For the purposes of this report it is necessary to reflect briefly on the history of selected petty offences, which are also sometimes referred to as ‘outdated offences’.

²⁴ Goal 16, Sustainable Development Goals.

2 A short history of petty offences

It is indeed ironic that many of the offences that have remained on the statutes in African countries post-independence had as their express purpose the subjugation and humiliation of Africans by colonial authorities; however, the main colonising countries (the United Kingdom, France and Portugal) have repealed the laws criminalising loitering, begging and so forth, recognising their unjustness and problematic enforcement. Whatever the justification was for such laws, such justification has disappeared. Nevertheless, some backtracking has occurred in recent years, especially in France under a conservative government targeting the Roma people.

2.1 United Kingdom

English vagrancy offences date back to 1349 with the Statute of Labourers, which made it an offence to give alms to anyone who is able to work.²⁵ Initially, the law was intended to force anyone who was able to work to do so due to a severe labour shortage created by the migration of peasants to urban areas. In the 1530s the Statute was extended to punish ambiguously defined persons, such as ‘someone who is merely idle and gives no reckoning of how he makes his living’ or those considered to be ‘rogue[s]’.²⁶ Penalties for the latter offences included having an ear cut off, being whipped until bloody, or even facing the death penalty.²⁷

These laws were eventually codified in the English Vagrancy Act of 1824 (the 1824 Act)²⁸ which repealed all previous statutes on the subject, amended the definitions of idle and disorderly persons, rogues and vagabonds, and set out powers to search persons and premises.²⁹ The 1824 Act included new categories of offences, such as the offences of a kind that only ‘professional’ criminals might commit (for example, loitering with intent to commit an arrestable offence) and offences against

²⁵ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013)

²⁶ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

²⁷ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

²⁸ Banda C & Meerkotter A *Examining the Constitutionality of Rogue and Vagabond Offences in Malawi* (2014).

²⁹ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

public decency and morality (for example, offensive behaviour by prostitutes and indecent exposure).³⁰ The authority of the 1824 Act diminished in Britain over the years as various provisions were repealed or refined in line with changing notions of fairness and justice.³¹ It was only recently, in 2003, that the possibility of imprisonment for the remaining offences relating to being an idle and disorderly person or rogue and vagabond in Britain was removed.³²

2.2 Mozambique

In Mozambique, the old Penal Code³³ dating back to 1886 criminalised behaviours such as vagrancy and begging. The old Mozambican Penal Code dates back to when Mozambique was a Portuguese colony, but after independence it was kept in force by means of article 79 of the 1975 Constitution.³⁴ Fortunately, these behaviours have now been decriminalised by the new Penal Code, which entered into force in June 2015. During colonial times the Portuguese Penal Code applied to the colonies and loitering was criminalised in Portugal as well as the colonies. In Portugal, these behaviours were decriminalised in 1982³⁵ when a new Penal Code entered into force.³⁶

2.3 France

Until recently French law criminalised several petty offence, including begging and being a vagabond. The criminalisation of non-payment of debts was by and large decriminalised in the middle of the nineteenth century. The offences of being a vagabond and begging were criminalised by sections 269 to 282 of the 1810 Criminal Code. Both carried a penalty of imprisonment of between three and six months. A vagabond was defined as anyone without a known address or

³⁰ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

³¹ Banda C & Meerkotter A *Examining the Constitutionality of Rogue and Vagabond Offences in Malawi* (2014).

³² See Criminal Justice Act, 44 of 2003, Schedule 25, available at <http://www.legislation.gov.uk/ukpga/2003/44/schedule/25/2005-03-31>. Banda C & Meerkotter A *Examining the Constitutionality of Rogue and Vagabond Offences in Malawi* (2014).

³³ Arts. 49, 256-62.

³⁴ Reisman L & Lalá A *Assessment of Crime and Violence in Mozambique & Recommendations for Violence Prevention and Reduction* (2012) Johannesburg: Open Society Foundation.

³⁵ Dias JF 'As tendências recentes da política criminal e o novo código penal Português de 1982' (1982) in Fragoso HC (ed) *Revista de direito penal e criminologia* 11.

³⁶ Dias JF 'As tendências recentes da política criminal e o novo código penal Português de 1982' (1982) in Fragoso HC (ed) *Revista de direito penal e criminologia* 11.

means of subsistence and who did not have employment,³⁷ and until 1832 the state could detain vagabonds indefinitely.

Begging was not defined and was only criminalised if the beggar was begging in an area that had a ‘poorhouse’ (*dépôt de mendicité*), a public institution established to accommodate beggars. The beggar would be brought to the poorhouse after having served his or her prison sentence. If there was no such institution, only able beggars were to be arrested and sentenced to imprisonment.

The 1810 Criminal Code was repealed and replaced by the 1994 Criminal Code, in which none of these petty offences was reflected. From the 1980s, homelessness was increasingly perceived by society as being a socioeconomic issue requiring a response from state social services rather than law enforcement.³⁸

However, post-1995, several municipalities adopted by-laws prohibiting begging – especially in tourist areas – which is usually penalised by an administrative fine and not imprisonment. This being said, a 2003 Internal Security Act³⁹ was adopted by the (conservative) Sarkozy government and is largely regarded as reflecting a willingness by the government to be seen to be tough on crime. It creates a series of new offences and changes some conditions of police custody. Two new offences in particular can be seen as petty offences. First, the Act criminalises the fact of having established permanent or temporary residence in a private or public space. Basically, it criminalises Roma people (although large municipalities are obliged to make some terrains available for them), who increasingly are being seen by the majority of the population as outcasts. The punishment for this offence is six months imprisonment and a fine of €3 750.⁴⁰ Secondly, the Act re-criminalises the act of begging, if committed aggressively or with a ‘dangerous animal’, and carries a sentence of six months imprisonment and a fine of €3 750.⁴¹

3 Key concepts

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

³⁷ Section 270.

³⁸ Damon J « La prise en charge des vagabonds, des mendiants et des clochards : une histoire en mouvement » (2007) 43(6) *Revue de droit sanitaire et social* 933-51.

³⁹ *Loi du 18 mars 2003 pour la sécurité intérieure*.

⁴⁰ New section 322-4-1 of the Criminal Code.

⁴¹ New section 312-12-1 of the Criminal Code.

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.⁴²

Bail: The temporary release of an accused person from prison pending trial, sometimes on condition that a sum of money be paid to the Court to guarantee the accused person's appearance in court.

Bond: A written and signed promise to pay a certain sum of money on a certain date, or on fulfilment of a specified condition. For the purpose of this paper, a bond can secure the accused person's temporary release from prison pending trial.

By-laws: For the purposes of this report, these refer to laws made by a local government, such as a municipality, metropolitan authority or county.

Child's best interests: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁴³ When adults make decisions, they should think about how their decisions will affect children. Governments must ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures and ensure that the institutions, services and facilities responsible for the care or protection of children conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.⁴⁴

Declassification: This can happen in a number of ways. Even if an offence is not decriminalised, enforcement is curtailed through a number of mechanisms, such as prohibiting arrest for the offence (that is, the offence is classified as a non-arrestable offence and the person is warned) or requiring a certain number of warnings (over a specified period of time) before a person can be arrested.

⁴² [1984] AC 437, [1984] 1 All ER 1054, [1984] 2 WLR 660.

⁴³ Art. 3(1) Convention on the Rights of the Child.

⁴⁴ Art. 3(3) Convention on the Rights of the Child.

Declassification may also mean that an arrested person may not be detained awaiting trial for the offence and that transgressions must be summarily dealt with. Declassification may also mean prohibiting a sentence of imprisonment for the offence, making the offences an administrative offence instead and allowing diversion as an option for the offence.

Decriminalise: This refers to the process of removing an act that was criminal and its associated penalties from the statutes.

Disability: This is the consequence of an impairment that may be physical, cognitive, mental, sensory, emotional, developmental, or some combination of these.⁴⁵ Impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations.⁴⁶

Disability rights: These refer to the rights of a person with disabilities and the obligations imposed on State Parties as contained in the Convention on the Rights of Persons with Disabilities;⁴⁷ such rights do not exclude the human rights contained in all other binding international treaties, rights to which all persons have the same entitlement.

Discrimination: This refers to any act or omission, including a policy, law, rule, practice, condition or situation caused by the state, private person or juristic person which directly or indirectly - (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁴⁸

Fair trial rights: The right to a fair trial is a peremptory norm of customary international law⁴⁹ and is enshrined in article 14 of the International Covenant on Civil and Political Rights (ICCPR). Articles 9, 10 and 15 of the ICCPR inform the content of fair trial rights and establish that:

⁴⁵ World Health Organisation: Health Topics – Disabilities. Available at: <http://www.who.int/topics/disabilities/en/>.

⁴⁶ World Health Organisation: Health Topics – Disabilities. Available at: <http://www.who.int/topics/disabilities/en/>.

⁴⁷ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, 24 January 2007, A/RES/61/106.

⁴⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and section 9(3) and (4) of the Constitution of South Africa Act 108 of 1996.

⁴⁹ A peremptory norm is a fundamental principle from which no derogation is permitted. UN Human Rights Committee, General Comment 29, States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11 (2001), and UN Human

- Arrested or detained persons must be brought promptly before a judicial officer and be entitled to a trial within a reasonable time or to release;
- It must not be the general rule that persons awaiting trial are detained in custody, but release may be subject to guarantees to appear for trial;
- There must be a fair and public hearing by an independent and impartial tribunal;
- There must be equality before the courts and tribunals;
- There must not be arbitrary detention;
- There must be restriction of the use of *incommunicado* detention;
- Detainees have access to lawyers, doctors and family; and
- There is independent internal and external oversight over places of detention.⁵⁰

Violations of the right to a fair trial are likely to exacerbate the socioeconomic impact on detainees and their associated households. On the other hand, while strict adherence to fair trial rights may work to limit the negative socioeconomic impact of pre-trial detention, some impact is likely to occur even when fair trial rights have been observed. There is thus an argument that there is a duty to take into account socioeconomic rights beyond adherence to fair trial rights.

Impunity: The UN Commission on Human Rights defines impunity as the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.⁵¹

Rights Committee, General Comment 32: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32 (23 August 2007), [54].

⁵⁰ UN General Assembly *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/56/156, 3 July 2001, [34]. Articles 6 and 7 of the AChHPR reflect ICCPR safeguards, and the AChHPR has provided further guidance on the content of the right to fair treatment in the Resolution on the Right to Recourse and Fair Trial (Res.4 (XI) 92) and the Principles and Guidelines on Rights to a Fair Trial and Legal Assistance in Africa (see also *Rights International v Nigeria*, African Commission on Human and Peoples Rights, Communication no. 215/98, [29]).

⁵¹ E/CN.4/2005/102/Add.1 Definitions. This definition differs slightly from the one adopted in 1996 (E/CN.4/Sub.2/1996/18) by adding the words ‘if found guilty, sentenced to appropriate penalties, and to making reparations to their victims’.

Impunity therefore implies a political and social context in which laws against human rights violations are either ignored or perpetrators inadequately punished by the state.⁵²

Petty offence: There is no generally accepted definition of what a petty offence is, but it is perhaps best measured as relative to the sanction that may be imposed and the response from the state. Some petty offences may attract a term of imprisonment, which is by no means trivial. Such offences are usually also heard by the lowest order of court or a specialised court, such as a municipal court (for by-law offences) or traffic courts (for traffic offences). For example, under English common law and American federal law, petty offences are usually punishable by a relatively small fine and/or a short term of imprisonment. There is also a summary trial and the accused is not entitled to a trial by jury.⁵³ A petty offence, in principle, does not pose a serious threat to societal safety, any individuals or property.

Poverty: The term ‘absolute poverty’ generally refers to a specific income threshold or a fixed amount below which individuals are unable to meet basic needs. By international standards, it is a ‘state in which a family earns less than a minimum amount of income – typically US\$1.25 per day per person in low-income countries’. In relative terms, individuals are considered poor when their financial position compares unfavourably with an average living standard in society – what the United Nations describes as the ‘inability of individuals, households, families, or entire communities to attain a minimum and socially accepted standard of living’. Relative poverty may also refer to the lowest income level of a society, that is, the portion of a population that earns the least. This creates a completely different characterisation of poverty: though absolute poverty may be eliminated as incomes grow, there will always be a lowest-earning group in any population and always a degree of relative poverty.⁵⁴

Socioeconomic impact: This report uses the International Covenant on Economic, Social and Cultural Rights (ICESCR) as a basic framework for understanding the socioeconomic status of individuals and their households, incorporating at least the following rights:

⁵² Jorgensen N ‘Impunity and oversight: when do governments police themselves?’ (2009) 8(4) *Journal of Human Rights* 384.

⁵³ Duhaime’s Law Dictionary, available at <http://www.duhaime.org/LegalDictionary/P/PettyOffense.aspx>.

⁵⁴ Africa Check, available at <https://africacheck.org/factsheets/factsheet-what-is-poverty/>.

- The right to equality between men and women to pursue economic, social and cultural rights (art. 3);
- The right to work and the duty of the state to take measures (for example, training programmes) to enable people to access gainful employment (art. 6);
- The right to just conditions of employment (art. 7);
- The right to social security (art. 9);
- The duty of the state to provide the widest possible protection to the family (art. 10);
- The right to an adequate standard of living and to be free from hunger (art. 11);
- The right to the enjoyment of the highest attainable standard of physical and mental health (art. 12);
 - The right to education (art. 13).

The nature of the obligations on states set out by the ICESCR is not that states must ensure that every person has employment, social security, and the like, but rather that states should ‘respect’, ‘protect’ and ‘promote’ these socioeconomic rights. The duty to ‘respect’ entails an obligation not to interfere with the resources of individuals, their freedom to find a job, their freedom to take necessary action and to use their resources to satisfy needs. This report argues that arrest and detention for petty offences is a disproportionate, unnecessary and avoidable interference in people’s lives and thus their ability to attain socioeconomic well-being.

Surety: It is a promise by a surety (guarantor) to pay one party (the *obligee*) a certain amount if a second party (the *principal*) fails to meet his or her obligation to pay in terms of a contract.

4 Arrests for petty offences are often unlawful, discriminatory and criminalise socioeconomic challenges, thus targeting the poor and marginalised

4.1 Legal framework and challenges

The ICCPR guarantees everyone the equal enjoyment of civil and political rights contained in the Covenant,⁵⁵ the right to liberty and security of person,⁵⁶ and the right not to be subjected to arbitrary arrest or detention.⁵⁷ The deprivation of liberty must be done in accordance with a procedure established by law.⁵⁸ All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person.⁵⁹ Regionally, everyone is entitled to the enjoyment of the rights and freedoms under the AChHPR without distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.⁶⁰ State Parties to the AChHPR have an obligation to ensure the elimination of discrimination against women, and the protection of the rights of woman and children, as stipulated in international declarations and conventions.⁶¹

The ACHPR Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (the Luanda Guidelines) provide that people shall be deprived of their liberty only on the basis of laws that are clear, precise and consistent with international standards and respect for the rights of the individual.⁶² Arrests may not be carried out on the basis of discrimination of any kind.⁶³ In some African countries, the police are allowed wide discretion to arrest people based on petty offence laws that are often vaguely defined or overly broad. In some cases, petty offences provide a tool for the police to arrest persons whom they think are engaging in or planning criminal conduct under circumstances when a charge under a substantive charge or offence cannot be supported.⁶⁴ Arrests are frequently unlawful as they do not meet the requirements

⁵⁵ Article 3, UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (ICCPR).

⁵⁶ Art. 9 ICCPR.

⁵⁷ Art. 9 ICCPR.

⁵⁸ Art. 9 ICCPR.

⁵⁹ Art. 10 ICCPR.

⁶⁰ Art. 2, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('African Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁶¹ 18(3) AChHPR

⁶² Art. 2(a) Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa.

⁶³ Art. 2(b) Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa.

⁶⁴ Banda C & Meerkotter A *Examining the Constitutionality of Rogue and Vagabond Offences in Malawi* (2014).

of having reasonable suspicion, assessing all the elements of the crime, and having an open mind to the guilt or innocence of the suspect. Further, the evidentiary requirements for an offence such as loitering or being a rogue or vagabond are uncertain, and people are convicted for such offences essentially based on the oral evidence of the arresting officer or an admission of guilt in order to bring the matter to a close.

Police officials have considerable discretion to arrest, especially when detection is dependent on police action.⁶⁵ For example, the enforcement of loitering offences is notorious in this regard, as it is an offence of questionable validity and highly dependent on who individual police officers define as persons eligible for arrest.⁶⁶ Non-judicial factors also play a role. A US study on arrest rates for public drunkenness provides a good example of the role of non-judicial factors. The study isolated three variables that will increase the risk of arrest where there is significant discretion at play.⁶⁷

First, the offence conspicuousness – is the person drunk in a place where he is visible to the public and the police, or is it out of the ‘public eye’? The more visible the offence (for example, drunkenness), the higher the chance of arrest. Secondly, the more powerless the offender is, the higher the likelihood of arrest. Being powerless should be understood in the sense that the arrest, if unlawful, holds risks for the arresting officer in the form of media attention, disciplinary action or litigation. Thirdly, the more disrespectful the offender is to the police officer, the more likely it is that he or she will be arrested, although being disrespectful to a police officer is not a criminal offence. It is notable that the three variables (conspicuousness, powerlessness and disrespect) are all non-legal in nature but play an important role in how the arresting officer exercises his discretion. Whether this analysis fits the African context requires further research, but it may be a useful starting-point.⁶⁸

There is a substantial body of evidence from Europe and North America that ethnic and racial minorities are at significantly higher risk for stop and search and consequently arrest.⁶⁹ In the African context, it appears that ethnic minorities are at a higher risk of arrest and ultimately pre-

⁶⁵ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

⁶⁶ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

⁶⁷ Lundman RJ ‘Routine police arrest practices: a Commonwealth perspective’ (1974) 22(1) *Social Problems* 127-41.

⁶⁸ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

⁶⁹ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

trial detention than was found to be the case in Kenya,⁷⁰ Malawi⁷¹ and Zambia.⁷² Although it is not certain whether ethnicity plays a role, certain groups such as homeless persons, street children, persons with psychosocial and intellectual disabilities, intoxicated and drug-affected persons, street vendors and sex workers in particular contexts are evidently disproportionately targets for arrests for petty offence such as loitering, nuisance, being a rogue and vagabond, and other minor municipal offences.⁷³

The African Charter on the Rights and Welfare of the Child (AChRWC) guarantees the child a host of rights. Prosecuting the child on the basis of his or her 'homelessness' is in violation of the non-discrimination clause in the AChRWC.⁷⁴ Moreover, the detention of a child for being homeless is not in line with the principle of the best interests of the child.⁷⁵ State Parties should ensure to the maximum extent the protection and development of children.⁷⁶ The detention of children for petty vagrancy offences does not promote their development, leisure recreation and cultural activities⁷⁷ as they are confined to places of detention or prisons. Nor does the detention of children in appalling conditions protect their right to health.⁷⁸ The abuse of children in detention and their detention under inexcusable conditions are tantamount to inhuman or degrading treatment and a violation of article 16 of the AChRWC and article 16 of UNCAT. Such treatment is also not in line with article 17(1) of the AChRWC, which guarantees

children accused or found guilty of having infringed a penal law the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

Moreover, article 17(2)(a)-(b) of the AChRWC requires State Parties to ensure that children deprived of their liberty are not subjected to torture, inhuman or degrading treatment or punishment and are detained separately from adults in detention. State Parties have an obligation to protect

⁷⁰ Muntingh L & Redpath J *The Socio-Economic Impact of Pre-Trial Detention* (forthcoming).

⁷¹ Redpath J 'Case flow management' in Muntingh L & Redpath J *Audit of Pre-Trial Detention in Malawi* (2011).

⁷² Redpath J 'Case flow management' in Muntingh L & Redpath J *Audit of Pre-Trial Detention in Malawi* (2011).

⁷³ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

⁷⁴ Art. 3 ACRWC.

⁷⁵ Art. 4 ACRWC.

⁷⁶ Art. 5 ACRWC.

⁷⁷ Art. 12 ACRWC.

⁷⁸ Art. 14(2) ACRWC.

children against sexual exploitation.⁷⁹ Sexual abuse and exploitation of children in detention by officials after arrests for minor offences violates the state's duty under article 27 of the AChRWC. Where it is found that children are forced to work in prisons, this is not in compliance with article 15 of the AChRWC which requires every child to be protected from 'all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development'. State Parties have an obligation to take special care of refugee children⁸⁰ and children separated from their parents.⁸¹ Instead of arresting homeless and refugee children for vagrancy offences, State Parties have a duty to reunite them with their families and ensure their physical and mental well-being and development.

The above issues are explored further in the remainder of this section.

4.2 Arresting children

Children who spend time on the street are frequent targets of police arrests, especially those living and working in public spaces. A number of reports document the arbitrary arrest and abuse of children by police officials for various petty offences. Rounding up street children when dignitaries visit or prior to major events (for example, the 2010 Soccer World Cup in South Africa)⁸² is also not unheard of. In respect of the DRC, Human Rights Watch reports that roundups of street children are likely to occur when crimes happen in areas where such children are known to congregate, the victims of the crime are politically connected or when considerable amounts of money or goods were taken.⁸³

A 2012 research report documents that there were more than 150 children in conflict with the law in South Sudan's prisons⁸⁴ and that few services were available to them.⁸⁵ They were removed from their families and from school to await trial for extended periods, and sometimes given long sentences for petty offences such as low-value theft.⁸⁶ There are no alternatives to imprisonment

⁷⁹ Art. 27(1) AChRWC.

⁸⁰ Art. 23 AChRWC.

⁸¹ Art. 25 AChRWC.

⁸² Tolsi N 'Rounded up and shipped out' *Mail and Guardian* 22 January 2010.

⁸³ Human Rights Watch *What Future? Street Children in the Democratic Republic of Congo* (2006) 24.

⁸⁴ Human Rights Watch *'Prison is Not For Me': Arbitrary Detention in South Sudan* (2012).

⁸⁵ Pedersen L & Muntingh L *Assisting the process of prison reform in Southern Sudan: Building leadership capacity within the Prisons Service and addressing the circumstances of prisoners with specific needs (Phases I and II)*, Final Evaluation (SDNT19 and SDNU48) (2010).

⁸⁶ Human Rights Watch *'Prison is Not For Me': Arbitrary Detention in South Sudan* (2012).

in South Sudan, and in all the prisons Human Rights Watch visited, children were housed alongside adults; a child as young as 13 years was found in prison, even though domestic law allows imprisonment only from the age of 16 years.⁸⁷

In Kenya, there have been many incidents of street children being arrested and detained for loitering and other vagrancy offences.⁸⁸ Research conducted by Human Rights Watch⁸⁹ finds that street children in Kenya are subject to frequent arrest simply because they are homeless. ‘Vagrancy’ (being without a fixed abode) is a criminal offence under Kenyan law. Children reported that on the street they are often harassed and beaten by police, and have to pay bribes in order to avoid arrest for vagrancy.⁹⁰ Female street children reported being sexually propositioned or raped by police in order to avoid arrest or to be released from custody.⁹¹ Twenty-five out of 45 children interviewed after being arrested said they had been beaten by police at the time of arrest and/or at the police station.⁹² Once arrested, street children were held in deplorable physical conditions in crowded police station cells, often without toilets or bedding, with little food and inadequate supplies of water. They are almost always mixed with adults, beaten and harassed by police at the station, and held for periods extending from several days to weeks without any review of the legality of their detention by judicial authorities.⁹³

Street children in Uganda also face abuse and arbitrary arrest.⁹⁴ Police and officials threaten them at night and beat them with batons, whips or wires to extort bribes or as a punishment for

⁸⁷ Human Rights Watch *‘Prison is Not For Me’: Arbitrary Detention in South Sudan* (2012).

⁸⁸ *Daily Nation* ‘700 children arrested for loitering’ 17 February 2014; *Irin News* ‘Youth in crisis: coming of age in the 21st century Kenya: Nairobi’s street children: hope for Kenya’s future generation’ February 2007.

⁸⁹ Human Rights Watch *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997).

⁹⁰ Human Rights Watch *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997).

⁹¹ Human Rights Watch *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997). Often regarded by police as petty criminals, or vagrants at best, street children are often rounded up for no reason other than the fact that they are on the streets. Human Rights Watch noted in its report that although police and government officials state that street children are rounded up for the alleged purposes of identifying and reuniting children with their families or placing them in appropriate institutions for their care, the manner in which the children are subsequently treated, both by police and within institutions, belies such intentions; these children are arrested and dealt with as criminals.

⁹² Human Rights Watch *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997).

⁹³ Human Rights Watch *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997).

⁹⁴ Human Rights Watch ‘Uganda: Homeless Children Face Violence, Exploitation’ 16 July 2014. Human Rights Watch interviewed more than 130 current and former street children from December 2013 to February 2014 in seven town centres throughout Uganda. Human Rights Watch also interviewed 49 members of organisations providing assistance to street children, health-care workers, international humanitarian and children’s organisations, police, and local government officials.

vagrancy.⁹⁵ Children have sometimes been detained in police stations with adults and mistreated by cellmates. Many were released back to the streets after several days, or in some cases weeks, often only after paying a bribe or being forced to do work for the police.⁹⁶ In Malawi in March 2012 more than 30 children were arrested in Kasungu, Malawi, for ‘loitering around town without proper reasons’,⁹⁷ and in June 2013 Malawian police arrested 47 people aged 14 to 40 years for loitering in Balaka town in an effort ‘to curb criminal activities’.⁹⁸

Research in Egypt clearly indicates targeted arrest campaigns against children by the police. The director of Cairo Governorate Police Directorate’s al Azbekiya juvenile lockup, Brigadier Yasir Abu Shahdi, gave his interpretation of these arrest powers:

“We arrest kids in parks who look like they are homeless. We arrest kids selling tissues in the street. These kids become known to us, so it isn’t hard. [Sometimes] we arrest kids walking down the street during school hours with their school books, but I don’t have enough officers to make as many of these arrests as I would like. I am asking for more officers, because in the future we want to conduct campaigns to search for and arrest truants.” While some of these arrests involve small numbers of children, more often they take the form of arrest campaigns involving tens of children in a targeted neighbourhood. “Our daily work is to gather up children from the streets and arrest any who are in violation of the law,” Abu Shahdi said. “[In contrast,] the arrest campaigns last three or four days and are more specialized. For example, if we learn that the number of children who sell tissues in a particular neighbourhood has increased, I conduct a campaign in that neighbourhood.”⁹⁹

There is no substantive evidence that children commit a disproportionate amount of crime. Instead of arresting children for petty offences, governments have a duty to ensure to the maximum extent possible their protection and development.¹⁰⁰

⁹⁵ Human Rights Watch ‘Uganda: Homeless Children Face Violence, Exploitation’ 16 July 2014.

⁹⁶ Human Rights Watch ‘Uganda: Homeless Children Face Violence, Exploitation’ 16 July 2014.

⁹⁷ *Zodiak Online* ‘30 children arrested for loitering’ 24 March 2012.

⁹⁸ *Nyasa Times* ‘Malawi police arrest 47 for loitering in Balaka town’ 21 June 2013.

⁹⁹ Human Rights Watch *Charged with Being Children: Egyptian Police Abuse of Children in Need of Protection* (2003).

¹⁰⁰ Art. 5 ACRWC.

4.3 The arbitrary arrest of poor and vulnerable persons for petty crimes such as loitering, vagrancy, being a rogue and vagabond, being a public nuisance, and public drunkenness

This section shows that there is ample evidence of arbitrary and unlawful arrests targeting poor persons. Incidents are also reported of police arrests of street vendors as well as women being rounded up by police officials, detained and/or charged unlawfully under public nuisance or vagrancy laws as a means to punish them for alleged sex work.

A 2008 report from Kenya noted that in the poorest areas, the police methodically undertook night patrols, rounding up poor people, women, hawkers and street children. They then proceeded with mass arrests for disparate charges such as drunkenness, disorderliness, prostitution, vagrancy or simply the suspicion of being an illegal alien.¹⁰¹ Those who were arrested were unable to access legal assistance as they lacked financial means and/or because they were unaware of their rights.

While not all pre-trial detainees are charged with petty offences, the overwhelming impression is that it is the poor who end up in prison. In 2007, a survey conducted by the Independent Medico-Legal Unit (IMLU) confirmed that the majority of those serving prison sentences in Kenya were the poorest and most economically disadvantaged, and were more commonly individuals with lower levels of education who were less aware of their rights.¹⁰² The data illustrated that the ability to obtain legal services is low for all categories; even amongst those employed, only 34.3 per cent were able to obtain legal assistance.¹⁰³ The cost of legal services are beyond the financial abilities of ordinary Kenyans. The research also found that the lower the level of education of the detainee, the less likely it is that there will be an application for bail.¹⁰⁴ Poor people arrested for petty offences will not have the means to access legal representation in order to challenge the charge, and their detention results in continued detention even if they are eligible for conditional release.

¹⁰¹ World Organisation Against Torture (OMCT), International Commission of Jurists – Kenya (ICJ) and Independent Medico-Legal Unit (IMLU) *Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture* (2008).

¹⁰² World Organisation Against Torture (OMCT), International Commission of Jurists – Kenya (ICJ) and Independent Medico-Legal Unit (IMLU) *Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture* (2008).

¹⁰³ World Organisation Against Torture (OMCT), International Commission of Jurists – Kenya (ICJ) and Independent Medico-Legal Unit (IMLU) *Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture* (2008).

¹⁰⁴ World Organisation Against Torture (OMCT), International Commission of Jurists – Kenya (ICJ) and Independent Medico-Legal Unit (IMLU) *Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture* (2008).

The deliberate practice by the Rwanda National Police of rounding up ‘undesirable’ people and arbitrarily detaining them at an unofficial detention centre (known as Gikondo Transit Centre) in Kigali has been documented by Human Rights Watch.¹⁰⁵ Reports indicate that there was no lawful basis for depriving the majority of the detainees of their liberty, and no judicial process or oversight mechanism regulating their detention.¹⁰⁶ The research, conducted between 2011 and 2015 in Kigali, also describes human rights abuses at the centre that holds street children, street vendors, sex workers, homeless people, suspected petty criminals and suspected serious offenders.¹⁰⁷ The majority of those detained were poor, homeless or otherwise marginalised or vulnerable who were arbitrarily rounded up by the police.¹⁰⁸

From Kenya there are recent reports that high numbers of arrests of Muslim refugees and asylum seekers for loitering are common in Kenya after attacks by Al Shabaab militants.¹⁰⁹ Ethnic profiling in relation to terrorism following the Westgate Mall attack in Nairobi in 2014 has emerged as a trend. Somali refugees were rounded up and returned to refugee camps, and similar tactics are reportedly used in the Mombasa area where the police, searching for Al Shabaab fighters, are targeting Muslims.¹¹⁰ The overall impression is that petty offence laws are used to target people regarded as ‘undesirable’ and unwanted, not because they pose a threat to public safety, but rather because they are powerless and ‘do not belong’.

In Malawi, a court expressed concern that the charge of being a rogue and vagabond could be used to oppress disadvantaged persons who are not criminals. The court stated that the reality is that many persons in a developing country have no visible means of subsistence, and an offence that requires proof of subsistence to avoid arrest invariably discriminates against the poor and marginalised groups within society.¹¹¹

¹⁰⁵ World Organisation Against Torture (OMCT), International Commission of Jurists – Kenya (ICJ) and Independent Medico-Legal Unit (IMLU) *Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture* (2008).

¹⁰⁶ Human Rights Watch *Why Not Call This Place a Prison? Unlawful Detention and Ill-Treatment in Rwanda’s Gikondo Transit Center* (2015).

¹⁰⁷ Human Rights Watch *Why Not Call This Place a Prison? Unlawful Detention and Ill-Treatment in Rwanda’s Gikondo Transit Center* (2015).

¹⁰⁸ Human Rights Watch *Why Not Call This Place a Prison? Unlawful Detention and Ill-Treatment in Rwanda’s Gikondo Transit Center* (2015).

¹⁰⁹ *BBC News* ‘Kenyan Nairobi blasts: police arrest 627 in Eastleigh’ April 2014.

¹¹⁰ *News24* ‘Harassment haunts Somalis after Westgate’ 19 September 2014

¹¹¹ *Mwanza and Twelve Others v Republic* (1049 of 2007).

4.4 Arresting sex workers under loitering and public nuisance offences

Sex workers are often the target for arbitrary arrest by law enforcement officials. Vagrancy-related offences such as loitering and being a rogue or vagabond are used to arrest them. These laws allow police wide discretion to arrest persons, even where the conduct of the accused does not meet the legal requirements of having reasonable suspicion and without police officials having to assess all the elements of the crime. Such arrests are often carried out on a discriminatory basis, since many police officials view sex work as immoral and/or undesirable even if it is not criminal. In Malawi, the police often use vagrancy laws to arrest women suspected of being sex workers¹¹² in terms of section 184(c) of the Penal Code, which states that

every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, is deemed a rogue and vagabond.¹¹³

Such arrests are executed using rogue and vagabond offences under the penal code because of the difficulty of producing evidence for charging sex workers with sex work-specific offences.¹¹⁴ Women and Law in Southern Africa (WLSA) in Malawi found that many arrests and convictions under section 184(c) are irregular: that is, the alleged actions of the women simply did not correspond to the definition of a crime under section 184(c).¹¹⁵

A 2008 study conducted by the Federation of Women Lawyers in Kenya documents the arbitrary, unlawful and discriminatory practices of police of arresting and detaining women suspected of

¹¹² Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

¹¹³ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

¹¹⁴ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

¹¹⁵ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013).

loitering for immoral purposes based on mere observation of how the women dress, talk or walk.¹¹⁶ In Kenya, for example, two women were arrested and detained in police custody on the allegation that they had committed the offence of ‘loitering in a public place for immoral purposes contrary to section 258 (m) of the Mombasa Municipal by-laws’.¹¹⁷ They alleged that the police officers who arrested them had no search warrant and had no reason or basis to arrest them; when arrested they were not preparing to commit, nor were they in the process of committing, any cognisable offence.¹¹⁸ Reportedly, the police officers who arrested them ‘expressly told them that they were in possession of condoms [and] that they thought there was an offence being committed’.¹¹⁹

In this case, the Kenyan government’s response is perplexing. First, the government argued that they were charged under the General Nuisance by-law,¹²⁰ which provides:

any person who shall in any street or public place [m] loiter or importune for the purposes of prostitution [n] procure or attempt to procure a female or male for the purpose of prostitution or homosexuality shall be guilty of an offence.¹²¹

Secondly, the government justified that the by-law’s benefit ‘by far outweighs the alleged narrow interest of the petitioners ... it is aimed at prohibiting prostitution’ and ‘the by-law strikes a balance between the rights of the petitioners and the rights and values of the citizenry living in the Municipality.’¹²² Lastly, the deponent described prostitution as ‘a vice, which aids and abets the spread of HIV/AIDS, and is used as a medium for sexual exploitation by perverts and paedophiles.’¹²³

¹¹⁶ Federation of Women Lawyers (2008) ‘Documenting Human Rights Violations of Sex Workers in Kenya: A Report based on the Findings of a Study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi Towns in Kenya, p 40.

¹¹⁷ *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* petition 286 of 2009 (Mombasa Municipal Court Criminal Reg. No. 3560 of 2008).

¹¹⁸ *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* petition 286 of 2009 (Mombasa Municipal Court Criminal Reg. No. 3560 of 2008).

¹¹⁹ *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* petition 286 of 2009 (Mombasa Municipal Court Criminal Reg. No. 3560 of 2008).

¹²⁰ By-law 258 [m] and [n].

¹²¹ *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* petition 286 of 2009 (Mombasa Municipal Court Criminal Reg. No. 3560 of 2008).

¹²² *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* petition 286 of 2009 (Mombasa Municipal Court Criminal Reg. No. 3560 of 2008).

¹²³ *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* petition 286 of 2009 (Mombasa Municipal Court Criminal Reg. No. 3560 of 2008).

The arguments presented by the government outline the supposed moral and safety concerns presented around sex work, which in themselves are problematic, but fail to address the legal merits of whether the women's conduct was unlawful. In other words, they fail to address whether the women's 'loitering' was indeed for the purpose of prostitution, as required by the by-laws.

Sex workers are almost universally harassed by the police and suffer frequent arrests and adverse treatment;¹²⁴ more than a quarter of sex workers surveyed in a 2008 study in Cape Town were extorted for sex in exchange for release from custody.¹²⁵ Of 80 sex workers surveyed in 2013 in Johannesburg, 15 per cent said they had been arrested, with 10 per cent stating that they were held in cells without appearing in court.¹²⁶ Even off-duty sex workers in Cape Town are routinely arrested by the police.¹²⁷ Similar findings were also reported from Malawi, with coercion, violence and rape being perpetrated against sex workers.¹²⁸

The above describes the exploitative and discriminatory law enforcement tactics employed by police officials to arrest and detain women they suspect of prostitution.¹²⁹ It is also an example of the wide discretion afforded to police officials to arrest without a warrant and the adverse consequences thereof. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) emphasises women's rights to dignity,¹³⁰ equal protection before the law,¹³¹ security of the person,¹³² non-discrimination¹³³ and all other fundamental freedoms. It calls on State Parties to: enact and effectively implement appropriate legislative or regulatory measures;¹³⁴ take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;¹³⁵ and support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination

¹²⁴ Mgbako C 'Police Abuse of Sex Workers: A Global Reality, Widely Ignored' *RH Reality Check*, 15 December 2011.

¹²⁵ Gould C & Fick N *Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City* (2008) 56.

¹²⁶ PRAAG 'South African police "abuse sex workers"' 3 October 2013.

¹²⁷ Makwabe B 'Prostitutes sick of arrests when they're off duty' *Times Live* 30 April 2011.

¹²⁸ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013) 90.

¹²⁹ See *News24* 'Women can't be arrested for "loitering" – Zim constitutional court' 28 May 2015.

¹³⁰ Art. 3(1) Maputo Protocol.

¹³¹ Art. 8 Maputo Protocol.

¹³² Art. 4 Maputo Protocol.

¹³³ Art. 2 Maputo Protocol.

¹³⁴ Art. 2(1)(b) Maputo Protocol.

¹³⁵ Art. 2(1)(d) Maputo Protocol.

against women.¹³⁶ Arbitrary arrests of women without reasonable suspicion of committing an offence or for being at a specific location at a specific time, violate their rights to dignity, equality, non-discrimination and fundamental freedoms set forth in the AChHPR and the Maputo Protocol.¹³⁷ It is the duty of State Parties to ensure that such discriminatory practices cease.

4.5 Arresting street traders for violating municipal by-laws

Street trade accounts for a significant proportion of informal non-agricultural employment in Africa.¹³⁸ Many street vendors are poor, selling their products and produce to earn a livelihood. Rakodi defines a livelihood as comprising ‘the capabilities, assets (including both material and social resources) and activities required for a means of living’.¹³⁹ Authors identify access to public space as a key physical asset in the livelihood strategies of the urban poor.¹⁴⁰ The arbitrary enforcement of such by-laws on street vendors clearly results in social exclusion of street traders, generally poor people.¹⁴¹ A 2013 International Labour Organization (ILO) report indicates that in the sub-Saharan African countries for which data were available, informal sector trading employs the most people and women account for the majority employed in this sector.¹⁴² For many women the informal sector is the only means of generating an income.

The report of the Special Rapporteur on extreme poverty and human rights analysed several laws, regulations and practices that punish, segregate, control and undermine the autonomy of persons living in poverty.¹⁴³ In the report, the Special Rapporteur identifies the following four areas of concern: (a) laws, regulations and practices which unduly restrict the performance of life-sustaining behaviours in public spaces by persons living in poverty; (b) urban planning regulations and measures related to the gentrification and privatisation of public spaces that disproportionately

¹³⁶ Art. 2(1)(e) Maputo Protocol.

¹³⁷ Arts. 2, 3, 12, 18(3) and (4) AChHPR; arts. 2, 3, 4, 8, 25 Maputo Protocol.

¹³⁸ WIEGO (undated) *Street vendors*, <http://wiego.org/informal-economy/occupational-groups/street-vendors>.

¹³⁹ Rakodi C & Lloyd-Jones T *Urban Livelihoods: A People-Centred Approach to Reducing Poverty* (2002) cited in Skinner C *Street Trade in Africa: A Review* (2008) School of Development Studies Working Paper No. 51.

¹⁴⁰ Brown A & Lloyd-Jones T *Spatial Planning, Access and Infrastructure* (2002); Brown A & Rakodi C *Enabling the Street Economy* (2006) cited in Skinner C *Street Trade in Africa: A Review* (2008) School of Development Studies Working Paper No. 51.

¹⁴¹ The concept of social exclusion has not been applied to street trading issues directly, but has gained popularity in conceptualising urban poverty in general. De Haan defines social exclusion in its original formulation as ‘a rupture of social bonds ... a process through which individuals or groups are wholly or partly excluded from full participation in the society within which they live’ (Skinner C *Street Trade in Africa: A Review* (2008) School of Development Studies Working Paper No. 51).

¹⁴² International Labour Office *Women and Men in the Informal Economy: A Statistical Picture* (2013).

¹⁴³ A/66/265.

impact persons living in poverty; (c) requirements and conditions imposed on access to public services and social benefits which interfere with the autonomy, privacy and family life of persons living in poverty; and (d) excessive and arbitrary use of detention and incarceration that threatens the liberty and personal security of persons living in poverty.

Informal sector work in Kenya, such as hawking, street trade and other casual labour, constitutes an important economic source for the poorest of society. However, restrictive by-laws on urban trading dating back to colonial times make traders fair game for police harassment, arrest, extortion as well as excessive use of force.¹⁴⁴ In the city of Nairobi, Kenya, there are provisions for street-trading, but the General Nuisance By-Law is often used to override these provisions.¹⁴⁵ The General Nuisance By-Law was created during the colonial administration and allows city inspectors to arrest any individual that they deem is creating a ‘general nuisance’ in public spaces.¹⁴⁶

Inspectors in Nairobi, known as ‘askaris’, use this by-law to chase street vendors off the streets. The *askaris* are the same authority responsible for issuing street vendor licences.¹⁴⁷ Despite the fact that many Kenyans find their daily livelihoods and subsistence in a variety of informal economic activities,¹⁴⁸ street vendors and traders are often the target of erratic law enforcement and arrest by the police or *askaris* either because street vending is illegal or because street vendors are not permitted to trade in a specific area due to by-laws restricting such activities. The mere fact that street vendors pay their daily or annual licensing fee does not protect them from the *askaris*, as it is a common occurrence for the city’s *askaris* to come around to vendors’ sites and demand a

¹⁴⁴ Muiruri P *Women Street Vendors in Nairobi, Kenya: A Situational and Policy Analysis* (2010) 66. Munga M ‘Hawkers decry intimidation by council askaris’ *News24Kenya* 3 July 2014; Kiarie J ‘Brutality of “askaris” battling hawkers using knives’ *Standard Digital* 25 October 2014; ‘Gisesa N ‘Hawkers take police, county askaris to court over harassment’ *Standard Digital* 20 November 2014.

¹⁴⁵ Kamunyori SW *A Growing Space for Dialogue: The Case of Street Vending in Nairobi’s Central Business District* (unpublished MA thesis, Department of Urban Studies and Planning, Massachusetts Institute of Technology, June 2007).

¹⁴⁶ Kamunyori SW *A Growing Space for Dialogue: The Case of Street Vending in Nairobi’s Central Business District* (unpublished MA thesis, Department of Urban Studies and Planning, Massachusetts Institute of Technology, June 2007).

¹⁴⁷ Kamunyori SW *A Growing Space for Dialogue: The Case of Street Vending in Nairobi’s Central Business District* (unpublished MA thesis, Department of Urban Studies and Planning, Massachusetts Institute of Technology, June 2007).

¹⁴⁸ World Organisation Against Torture (OMCT), International Commission of Jurists – Kenya (ICJ) and Independent Medico-Legal Unit (IMLU) *Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture* (2008)

substantial fee even when street vendors have already paid their licensing fees.¹⁴⁹ Moreover, submitting to the *askaris*' unlawful demands by paying them is seen as a less expensive alternative, because if a street vendor is arrested and brought before a court of law, the process of pleading not guilty is too expensive for the vendor and vendors often have no choice but to plead guilty. Pleading guilty means they can get out of the judicial system faster and return to their businesses but their confiscated stock is not returned and vendors cannot ask for their stock for fear of reprisal, such as being detained again.¹⁵⁰

The Kenyan National Commission on Human Rights has observed that violence against informal sector workers is an unresolved issue that needs to be adequately addressed.¹⁵¹ In addition to other forms of torture and other ill treatment¹⁵² suffered by street traders in Nairobi, police shootings in 2014 accounted for the bulk of injuries inflicted on hawkers and small-scale business operators there.¹⁵³ It should be emphasised that these excesses are perpetrated in the course of by-law enforcement and not in pursuit of arresting dangerous criminals posing a serious threat to public safety.

There have been reports of brutal assaults and deaths of street vendors by the city's *askari* officials who are reported to operate with impunity.¹⁵⁴ Some of these are documented below.

- On 13 September 2014 a street vendor had passed out due to the pain caused by a broken shin bone, internal injuries, fractured ribs caused by a mob-style beating. He woke up four days later. He explained that *askaris* 'grabbed me and started battering with clubs and knives as one of them repeatedly kicked my lower leg with his boots ... The last thing I

¹⁴⁹ Kamunyoru SW *A Growing Space for Dialogue: The Case of Street Vending in Nairobi's Central Business District* (unpublished MA thesis, Department of Urban Studies and Planning, Massachusetts Institute of Technology, June 2007).

¹⁵⁰ Kamunyoru SW *A Growing Space for Dialogue: The Case of Street Vending in Nairobi's Central Business District* (unpublished MA thesis, Department of Urban Studies and Planning, Massachusetts Institute of Technology, June 2007).

¹⁵¹ World Organisation Against Torture (OMCT), International Commission of Jurists – Kenya (ICJ) and Independent Medico-Legal Unit (IMLU) *Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture* (2008).

¹⁵² These included beatings, confiscation of wares, arrests, incarceration and justice for hawkers and small-scale business persons, being bundled into trucks in an undignified manner sometimes resulting in injury, threats, coercion to give bribes, destruction and theft of wares and sexual harassment.

¹⁵³ Independent Medico-Legal Unit (IMLU) *A Cry for Justice: Torture and Ill Treatment of Hawkers and Small Scale Traders in Nairobi City County* (2014).

¹⁵⁴ Achuka V 'Rogue city county askaris leave trail of death, injuries' *Daily Nation* 1 November 2015.

remember hearing was “*Wewe hakuna mahali tunakupeleka, tutakumaliza hapa*” (“We are not taking you anywhere, we will kill you here”),’ he recalls.¹⁵⁵

- Another street vendor reported that he had just opened his shop around 16h30 to cash in on the high traffic of people leaving work when *askaris* suddenly appeared. They clobbered him with metal bars and forced him into their vehicle and drove off. They dumped him along a road, taking his phone and the money he had made that day. The attack left him with a broken right arm and a broken finger on his right hand. He was undergoing physiotherapy to enable him to use his finger.¹⁵⁶
- Joseph Maina, a hawker, was selling socks around Khoja roundabout on 10 April 2014 when a County government van full of *askaris* pounced on hawkers. As he attempted to flee, he heard two gunshots and then felt a sharp pain in his body before he passed out. His medical examination report filed at the Kenya Police on 10 November 2014 indicates that the bullet fired at him by a police officer ‘entered his body from the back through his shoulder blade exiting through his left orbital cavity’. The bullet shattered his eyeball, leaving him blind in one eye. He says this information was filed seven months after he had been led around in circles by police. Worse, his attempts to find justice one year later have been futile.¹⁵⁷
- In another case, Mr. Gathece was cornered by county *askaris* at the New Ngara market at a section known as Tsunami. *Askaris* started attacking everyone in sight and Mr. Gathece tripped as he was running and fell. A witness said that the *askaris* ‘descended on him with machetes and knives, leaving him seriously wounded. We rushed him to the nearby Guru Nanak Hospital where they tried to stabilise him before transferring him to Kenyatta but he was pronounced dead on arrival.’
- Kimani was selling stockings when a County van with City *askaris* backed by regular police officers ambushed them. A post-mortem examination by the Independent Medical Legal Unit shows that a bullet, which entered his body from the back, penetrated his liver.

¹⁵⁵ Achuka V ‘Rogue city county askaris leave trail of death, injuries’ *Daily Nation* 1 November 2015.

¹⁵⁶ Achuka V ‘Rogue city county askaris leave trail of death, injuries’ *Daily Nation* 1 November 2015.

¹⁵⁷ Achuka V ‘Rogue city county askaris leave trail of death, injuries’ *Daily Nation* 1 November 2015.

However, the City Inspectorate denied that its officers, tasked with maintaining law and order, are breaking the same laws they are supposed to uphold.¹⁵⁸

The most recent case is the hacking to death of the street hawkers' leader in a city hotel, directly implicating four city department *askaris*.¹⁵⁹ This incident puts into sharp question whether the leader was killed to cover up other senseless killings of hawkers.¹⁶⁰ Apparently, the same officers have been widely mentioned by victims as part of a team that has been using machetes, knives, iron bars, broken bottles and stones to brutalise street vendors since last year.¹⁶¹

Reports from other countries where unemployment, poverty and conflict are rife allude to similar practices.¹⁶² In Rwanda, an illegal street vendor committed suicide in 2012 by public self-immolation after being repeatedly abused by Local Defence Forces.¹⁶³ On the day he committed suicide, the Local Defence Forces beat him and confiscated his goods. Reports by several impoverished local residents indicated that such abuse by Local Defence Forces is commonplace.¹⁶⁴ Two years earlier the self-immolation of Mohamed Bouazizi on 17 December 2010 was the spark that started the revolution in Tunisia.¹⁶⁵ Reportedly, Bouazizi was a struggling street vendor who set himself alight after a local official confiscated his vegetable cart and humiliated him in public. Whether he refused to pay bribes or committed suicide for other reasons, the struggle of this young man from a poor family struck a chord with many Tunisians and started the uprising which led to the fall of the authoritarian regime of President Ben Ali.

Reports from Kampala, Uganda, indicate that the government intends to put a stop to street trading,¹⁶⁶ arguing that street trading is a frequently unhygienic form of economic activity as it generates excessive litter that the local municipalities have to clean up. It is also said that street traders crowd pavements, creating traffic problems.¹⁶⁷ Such policies are typical of a government's

¹⁵⁸ Achuka V 'Rogue city county askaris leave trail of death, injuries' *Daily Nation* 1 November 2015.

¹⁵⁹ Kiarie J 'Did county askaris kill hawkers' leader to cover up other deaths?' *Standard Digital* 19 November 2015.

¹⁶⁰ Kiarie J 'Did county askaris kill hawkers' leader to cover up other deaths?' *Standard Digital* 19 November 2015.

¹⁶¹ Kiarie J 'Did county askaris kill hawkers' leader to cover up other deaths?' *Standard Digital* 19 November 2015.

¹⁶² Rios L 'Street vendors expelled from downtown Cairo Egypt' *AL-Monitor*; Petersen C 'Cape street vendors facing arrest' *IOL* 20 July 2015.

¹⁶³ US Department of State *Human Rights Reports: Rwanda* (2012). The Local Defence Forces is a statutorily established law enforcement organization of approximately 20,000 members under the Ministry of Local Government (MINALOC) that assists the police.

¹⁶⁴ US Department of State *Human Rights Reports: Rwanda* (2012).

¹⁶⁵ Manfreda P 'How the Arab Spring Started' (undated) *About.com*.

¹⁶⁶ *New Vision* 'Arrests: KCCA tough on street vending' 1 August 2015.

¹⁶⁷ Mkula C 'Nuisance or necessity? Street vending in Malawi' *UrbanAfrica.net* 4 August 2014.

heavy-handed policy against the poor and marginalised, one that has lost touch with its people and their basic needs. Furthermore, in Kampala in June 2014 a magistrate convicted and sentenced 13 hawkers to one month imprisonment for selling foodstuffs and other merchandise on Kampala's streets.¹⁶⁸ Law enforcement of this nature is counter-developmental and is a destructive infringement of people's right to maintain a livelihood. Solutions to these problems rather lie in the domain of suitable regulation, the creation of supportive infrastructure and other services aimed at addressing multi-sectoral concerns.

There have been recent media reports of the abuse of power by police on street vendors in Zimbabwe.¹⁶⁹ According to Zimbabwe Lawyers for Human Rights, the municipal police launched pre-dawn raids on vendors' booths near the Rezende Street parkade.¹⁷⁰ This occurred a day after the new local government Minister vowed to act tough on street traders.¹⁷¹ There have also been reports from Zimbabwe of street vendors kept in custody with substantial delays in their bail hearings, in violation of their constitutional right to an urgent determination of their bail application.¹⁷²

Human Rights Watch confirmed in 2015 that police in Harare were carrying out violent crackdowns on unlicensed street vendors which were characterised by beatings, destruction of goods and arbitrary arrests on apparent trumped-up charges of public violence.¹⁷³ It was also reported that the majority of the street vendors were women living in extreme poverty, part of the more than 70 per cent of Zimbabweans who live on less than US\$1.25 per day.¹⁷⁴ Dewa Mavhinga, a senior Africa researcher at Human Rights Watch, reported the following in response to the situation concerning street vendors: '[P]olice harassment and arrests of street vendors [have] rapidly escalated in recent weeks since the Harare City Council launched its clean-up campaign.'¹⁷⁵ He reiterated that 'the lack of a vending license is no grounds for beating and jailing people who are desperate to earn a living'.¹⁷⁶

¹⁶⁸ Women in Informal Employment: Globalizing and Organizing (WIEGO) 'Hawkers jailed for selling merchandise on Kampala streets' 26 June 2014.

¹⁶⁹ *News24* 'Police in Harare arrest 12 in street vendor clampdown' 9 July 2015.

¹⁷⁰ *News24* 'Police in Harare arrest 12 in street vendor clampdown' 9 July 2015.

¹⁷¹ *News24* 'Police in Harare arrest 12 in street vendor clampdown' 9 July 2015.

¹⁷² Matenga M 'Arrested street vendors further remanded in custody to today' 16 October 2015.

¹⁷³ Human Rights Watch 'Zimbabwe: Violent Crackdown on Street Vendors' 29 July 2015.

¹⁷⁴ Human Rights Watch 'Zimbabwe: Violent Crackdown on Street Vendors' 29 July 2015.

¹⁷⁵ Human Rights Watch 'Zimbabwe: Violent Crackdown on Street Vendors' 29 July 2015.

¹⁷⁶ Human Rights Watch 'Zimbabwe: Violent Crackdown on Street Vendors' 29 July 2015.

Reports from Angola indicate that the government also plans to enforce laws banning street trading.¹⁷⁷ Street vendors will be subject to fines of up to 50 per cent of the value of the goods they are selling, while punishments for those who buy from them would follow.¹⁷⁸ Human Rights Watch reported in 2013 on police abuses against street vendors in Angola.¹⁷⁹ Known as *Zungeiras* (from the word ‘Zunga’, which in the Kimbundu language means ‘to move around’), these traders are among the country’s poorest and most vulnerable citizens, many of them refugees to the capital during the Angolan civil war. Most are female (many with children), illiterate, have no identity documents, lack access to basic government services, and live in informal settlements without legal protection.¹⁸⁰ Seventy-three street vendors were interviewed in Luanda by Human Rights Watch and described how police officers and government inspectors, often in civilian clothes without identification, seized their goods, extorted bribes, threatened them with imprisonment, and in some cases arrested them during operations to force them off the streets.¹⁸¹

The arrest of street vendors for trying to making a living is effectively the criminalisation of poverty and targets the only available means to an income. The AChHPR guarantees that ‘every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work’.¹⁸² Furthermore, the ICESCR provides everyone the right to work,¹⁸³ to just conditions of employment,¹⁸⁴ and to equality between men and women to pursue economic, social and cultural rights.¹⁸⁵ The targeting of street vendors, infliction of violence and accompanying extortion of bribes deny them this right and further limit their economic and social development. Overly restrictive street trading by-laws are a direct interference in poor people’s aspirations and their enforcement a violation of the ICESCR.

¹⁷⁷ Open Society Initiative for Southern Africa (OSISA) *Selling out Angola’s Street Vendors* (2014).

¹⁷⁸ Open Society Initiative for Southern Africa (OSISA) *Selling out Angola’s Street Vendors* (2014).

¹⁷⁹ Open Society Initiative for Southern Africa (OSISA) *Selling out Angola’s Street Vendors* (2014).

¹⁸⁰ Human Rights Watch ‘Angola: Police Abuse Luanda’s Street Vendors: Mistreatment, Extortion of Oil-Rich Country’s Urban Poor’ 29 September 2013.

¹⁸¹ Human Rights Watch ‘*Take That Filth Away*’: *Police Abuses against Street Vendors in Angola* (2013).

¹⁸² Art. 15 AChHPR.

¹⁸³ Art. 6 ICESCR.

¹⁸⁴ Art. 7 ICESCR.

¹⁸⁵ Art. 3 ICESCR.

4.6 People with disabilities

The UN Convention on the Rights of Persons with disabilities has as a central objective to prevent and eradicate unfair discrimination against people with disabilities.¹⁸⁶ Articles 12 to 16 of the Convention deal with the rights of persons with disabilities pertaining to equality before the law, access to justice, liberty and security of the person, freedom from torture and other ill treatment, and freedom from exploitation, violence and abuse. Guideline 33 of the ACHPR Luanda Guidelines on Arrest and Pre-trial Detention provides a number of protective measures for persons with disabilities coming onto contact with the criminal justice system.

From the outset it should be noted that there is very limited research on people with disabilities in Africa. Nonetheless, a significant proportion, some 300 million people, of the African population live with disabilities.¹⁸⁷ Disability is caused by many factors, including malnutrition and disease, environmental hazards, traffic and industrial accidents, and civil conflict and war. The overwhelming majority of people living with disabilities in Africa are excluded from schools and opportunities for work, virtually guaranteeing that they live as the poorest of the poor.¹⁸⁸ Access to schooling is limited, and it is estimated that no more than five to 10 per cent access education and as many as 70 to 80 per cent of working-age people with disabilities are unemployed.¹⁸⁹ Social stigma associated with disability results in marginalisation and isolation, often leading to begging as the sole means of survival.¹⁹⁰

Support services for people living with disabilities, in particular psychosocial and intellectual disabilities, are wholly inadequate across the continent.¹⁹¹ Psychiatric hospitals are usually located in the capital only and the number of psychiatrists is inadequate; in 2000 Ethiopia, with a

¹⁸⁶ See in particular article 5 of the Convention: 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

¹⁸⁷ <http://www.ascleiden.nl/content/webdossiers/disability-africa>.

¹⁸⁸ <http://www.ascleiden.nl/content/webdossiers/disability-africa>.

¹⁸⁹ <http://www.ascleiden.nl/content/webdossiers/disability-africa>.

¹⁹⁰ <http://www.ascleiden.nl/content/webdossiers/disability-africa>.

¹⁹¹ Alem A 'Human rights and psychiatric care in Africa with particular reference to the Ethiopian situation' (2000) 101(399) *Acta Psychiatrica Scandinavica* 93-6.

population of 55 million at the time, had 11 qualified psychiatrists.¹⁹² In the absence of suitable care for people with psychosocial and intellectual disabilities, Alem observes in respect of Ethiopia: ‘Many of such patients become vagrant. Observing such patients walking about naked or dishevelled in villages and more often in the streets of towns is common.’¹⁹³

Given the sheer number of people living with disabilities in Africa, and coupled with their exclusion and marginalisation, it is inevitable that some people living with disabilities will come into contact with the criminal justice system, even for offences such as loitering, begging and vagrancy. In many states begging is criminalised (for example, Eritrea,¹⁹⁴ DRC,¹⁹⁵ Guinea,¹⁹⁶ Kenya,¹⁹⁷ Nigeria,¹⁹⁸ South Africa,¹⁹⁹ the Gambia,²⁰⁰ Tunisia,²⁰¹ and Uganda²⁰²) as well as loitering and being a rogue and vagabond. The enforcement of these laws will sooner or later net people with disabilities. The use of criminal law to respond to the need for support services in the community or treatment is not only an inappropriate intervention but also escalates a decidedly non-criminal situation into a criminal one where violence and forceful arrest are used.

Persons with psychosocial and intellectual disabilities are arbitrarily arrested in two ways. The first is through ‘sweeping operations’ where all persons with psychosocial and intellectual disabilities are rounded up and arrested, not for any offence committed but for being on the streets. Secondly, police use power vested in them by the petty offence provisions in criminal law to arrest persons with psychosocial disabilities who are in a mental crisis. In many jurisdictions, criminal statutes, mental health legislation and, at times, the Constitution, criminalise non-criminal behaviour of persons with psychosocial and intellectual disabilities. A study from Zambia identified three legal provisions enabling the police to arrest a person with psychosocial and intellectual disabilities:

¹⁹² Alem A ‘Human rights and psychiatric care in Africa with particular reference to the Ethiopian situation’ (2000) 101(399) *Acta Psychiatrica Scandinavica* 93-6.

¹⁹³ Alem A ‘Human rights and psychiatric care in Africa with particular reference to the Ethiopian situation’ (2000) 101(399) *Acta Psychiatrica Scandinavica* 94.

¹⁹⁴ Art. 206. - Dishonest Begging. Penal Code.

¹⁹⁵ Decret du 23 mai 1896, tel que modifié et complété par le Decret du 6 décembre 1958.

¹⁹⁶ *Guinée: Code pénal* [Guinea], 31 December 1988, ss 276-8.

¹⁹⁷ Section 182 Penal Code.

¹⁹⁸ Section 2 of the Illegal Collection of Dues in Public Place (prohibition) Law of Lagos State 2003.

¹⁹⁹ The City of Cape Town By-Law Relating to Streets, Public Spaces and the Prevention of Noise Nuisances, The City of Johannesburg Metropolitan Municipality Public Road and Miscellaneous By-Laws, The Ekurhuleni Metropolitan Municipality Regulations of Parks and Open Spaces By-Laws.

²⁰⁰ Section 169 – Rogues and Vagabonds.

²⁰¹ Article 171 du code pénal.

²⁰² The Penal Code Act, Cap.120 Laws of Uganda, section 167(b) & (g).

the 1996 Constitution of Zambia (Article 13(1) (h)), which allows the arrest of individuals who are “reasonably suspected to be of unsound mind, addicted to drugs or alcohol, or a vagrant”; the Criminal Procedure Code Act (Section 27(b)), which empowers the police to arrest any person without a warrant “who has no ostensible means of subsistence or who cannot give a satisfactory account of himself”; and the Mental Disorders Act, Section 7, which empowers the police to arrest a person found to be “wandering at large”.²⁰³

The same report notes further that there are no guidelines for police to determine the best route forward, that is, to make an arrest, not make an arrest or take the person to a psychiatric hospital.²⁰⁴ In the absence of clear guidelines and procedures, the result may be that people are arrested unnecessarily, do not receive the appropriate treatment promptly, and end up in prison awaiting trial for long periods. Due to limited capacity in psychiatric hospitals, it is not uncommon that persons with psychosocial and intellectual disabilities may await transfer to a psychiatric hospital for treatment²⁰⁵ or assessment²⁰⁶ in a prison, or, in the absence of such a facility, be detained indefinitely in a prison.²⁰⁷

The lack of adequate care services and treatment facilities has the regrettable consequence that persons with psychosocial and intellectual disabilities are pushed onto the streets where they are not able to fend for themselves and are at risk of arrest for offences such as loitering, vagrancy and begging. Even if the behaviour of such individuals in public spaces is offensive or unsettling, it does not require a criminal justice response but rather a mental health-care approach as required by the UN Convention on the Rights of Persons with Disabilities. This Convention obliges states ‘[t]o take all appropriate measures, including legislation, to modify or abolish existing laws,

²⁰³ Ministry of Home Affairs et al. *Challenging Disadvantage in Zambia: People with Psychosocial and Intellectual Disabilities in the Criminal Justice System* (2015) 29-30.

²⁰⁴ Ministry of Home Affairs et al. *Challenging Disadvantage in Zambia: People with Psychosocial and Intellectual Disabilities in the Criminal Justice System* (2015) 32.

²⁰⁵ Alem A ‘Human rights and psychiatric care in Africa with particular reference to the Ethiopian situation’ (2000) 101(399) *Acta Psychiatrica Scandinavica* 93-6.

²⁰⁶ *Die Burger* ‘Geen bed by Valkenburg vir Eksteen’ 17 May 2010 [No bed at Valkenburg for Eksteen – own translation].

²⁰⁷ Pedersen L & Muntingh L *Assisting the process of prison reform in Southern Sudan: Building leadership capacity within the Prisons Service and addressing the circumstances of prisoners with specific needs (Phases I and II)*, Final Evaluation (SDNT19 and SDNU48) (2010) 25.

regulations, customs and practices that constitute discrimination against persons with disabilities’.²⁰⁸

Accurate figures on the number of people with psychosocial and intellectual disabilities detained in police cells and prisons are not available, but it is safe to assume that it is higher than the norm in the general population. Regardless of the charges against them, it is furthermore accepted that in general they will not receive the appropriate care and medication whilst in police detention or imprisoned.²⁰⁹ A UNODC report noted:

The difficulties people with disabilities face in society are magnified in prisons, given the nature of the closed and restricted environment and violence resulting from overcrowding, lack of proper prisoner differentiation and supervision, among others. Prison overcrowding accelerates the disabling process, with the neglect, psychological stress and lack of adequate medical care, characteristic of overcrowded prisons.²¹⁰

While the needs of a person may depend on the nature of the disability, some common areas have been identified:

- *Access to justice*: Prisoners with disabilities face numerous challenges in accessing justice, especially when officials are not appropriately trained or deliberately marginalise people with disabilities.
- *Protection*: Due to their vulnerable physical condition, prisoners with disabilities are easy targets for abuse and violence from other prisoners and prison staff. For example, prison guards may confiscate from prisoners wheelchairs, crutches, braces, hearing aids, glasses and medications. Prisoners who need special assistance with daily activities, such as eating, dressing and bathing, may be simply ignored, left without meals and forced to urinate on themselves in the absence of bathroom assistance. Prisoners with disabilities may be psychologically abused, for example, by the moving around of furniture in the cell of a

²⁰⁸ Article 4(b), UN Convention on the Rights of Persons with Disabilities.

²⁰⁹ Ministry of Home Affairs et al. *Challenging Disadvantage in Zambia: People with Psychosocial and Intellectual Disabilities in the Criminal Justice System* (2015) 67.

²¹⁰ UNODC (2009) *Handbook on prisoners with special needs*, Vienna: UNODC, p.44.

visually impaired prisoner or by verbal taunts. Women prisoners with disabilities are at a particularly high risk of manipulation, violence, sexual abuse and rape.

- *Discrimination:* Prisoners with disabilities encounter difficulties in accessing services, complying with rules and participating in prison activities that do not take account of their special needs. Due to architectural barriers, prisoners with mobility impairments may be unable to access dining areas, libraries, sanitary facilities, work, recreation and visiting rooms. Prisoners with visual disabilities cannot read their own mail unassisted or prison rules and regulations, unless these are provided in braille. Prisoners with a hearing or speaking disability may be denied interpreters, making it impossible for them to participate in various prison activities. All of these forms of discrimination may result in significantly lengthening their periods of imprisonment.
- *Health care:* Prisoners with disabilities may have particular health-care needs related to their disability, such as physiotherapy, regular eyesight and hearing examinations and occupational therapy, some of which may be difficult to meet in prisons. They also need access to tools and services that enable them to enjoy their human rights in prisons to the fullest possible extent, such as hearing aids, wheelchairs, canes and orthotics. Prisoners with disabilities are also likely to be in need of mental health care. Increased mental health-care needs have been noted, for example, among prisoners who have sensory disability conditions, which are isolating in themselves and more so in prisons, where the special needs of such persons are rarely taken into account and where they can be victims of psychological abuse and bullying.

Central to the problem is that inadequate care and support services result in people with psychosocial and intellectual disabilities being at risk of arrest and detention for petty offences such as vagrancy and loitering. The declassification and decriminalisation of these offences should at least prevent arrest and detention, which in all likelihood will be detrimental to their physical and mental well-being.

5 Arrest for petty offences does not promote public safety and the punishments are disproportional

5.1 The police inherited from colonial powers and police reform

The roots of African policing lie in Europe. However, the model replicated in Africa was not the European model of civilian policing but one that protected the ruling white colonial elite and aimed at social control, the vestiges of which are still visible in many jurisdictions.²¹¹ Africa inherited a mode of policing established by the colonial powers which has remained intact, emphasising high arrest rates, supported by myriad petty offences that justify arrest without a warrant. Policing was not aimed at general public safety; there was little investigative capacity or purpose in policing, and the style of policing was para-military in character as it served a narrow interest group with political and commercial concerns.

Baker describes the following as characteristic of the colonial policing that was used as a means to bring the local population under criminal justice control:

Not only did the Europeans use armed policing, but just as importantly, they equipped themselves with “a legal arsenal of arbitrary regulations to carry out [their] responsibilities: diverse master-and-servant ordinances, specified periods of obligatory labour service at state defined tasks, plenary powers to local administrators to impose penalties for disobedience”. Charges of “vagrancy”, “prostitution”, “beer brewing”, “smuggling”, “poaching”, membership of an “unlawful society”, “native witchcraft” and the catch-all “public nuisance” were used to criminalize Africans, to control their labour and to repatriate them to “native” areas. This legal framework “enabled the police to tackle legalistically what it had previously accomplished militaristically. State law provided the technical procedures and the bureaucratic framework that enabled the police to rationalise their activities as law enforcement”.²¹²

²¹¹ This section is based on Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²¹² Baker B *Multi-Choice Policing in Africa* (2008) 56.

It is argued that Africa has a social disciplinarian mode of policing.²¹³ This kind of policing model entails that the actions and behaviour of the police are designed to send authoritative messages about the relative position of the police and the policed.²¹⁴ This is in comparison to two other modes of policing, namely due process and crime control. The former model communicates the law's concern with individual autonomy and integrity, along with its commitment to maintaining close control over state power. The latter model, crime control, communicates the desirability of speed and efficiency and indicates the trust that can be placed in police and prosecutors.²¹⁵

Under the social disciplinarian mode of policing, there is little interest in fact or guilt, but rather emphasis on social control and maintaining authority by demanding respect and inflicting summary punishment.²¹⁶ Arresting and detaining a suspect at a police station renders the suspect powerless, and the police station is an ideal environment 'at which to subject recalcitrant members of the police community to a status degradation ceremony'.²¹⁷ The aim was not primarily to detect crimes, solve them and refer for prosecution and thus enhance public safety (the crime control model of policing), but instead something that has more to do with social discipline than the rule of law.

In executing arrests the police may contend that they use their powers of arrest in pursuit of the rule of law, but there is a hidden system at play serving police goals (for example, communicating authority) and enabling the powers of arrest to be used as summary punishment.²¹⁸ It is clear that the African style of policing inherited from the colonial past contributes substantially to the arbitrary manner in which some arrests are executed in African countries, to the attitudes of law enforcement officials in the execution of these arrests, and in particular to the existence of these petty offences. There is a need to address police reform by focusing on the colonial style of policing

²¹³ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²¹⁴ Choongh S 'Policing the dross: a social disciplinarian model of policing' (1998) 38(4) *British Journal of Criminology* 626.

²¹⁵ Choongh S 'Policing the dross: a social disciplinarian model of policing' (1998) 38(4) *British Journal of Criminology* 626.

²¹⁶ Choongh S 'Policing the dross: a social disciplinarian model of policing' (1998) 38(4) *British Journal of Criminology* 625-6.

²¹⁷ Choongh S 'Policing the dross: a social disciplinarian model of policing' (1998) 38(4) *British Journal of Criminology* 625-6. See also Garfinkel H 'Conditions of successful degradation ceremonies' (1956) 61(5) *American Journal of Sociology* 420-4.

²¹⁸ Choongh S 'Policing the dross: a social disciplinarian model of policing' (1998) 38(4) *British Journal of Criminology* 623-34.

and arrest practices and by decriminalising offences that exist in the current mode of policing in Africa.²¹⁹

It is no secret that law enforcement officials are pressured to arrest people to fulfil performance target indicators set by governmental departments: various media reports and departmental annual strategic documents illustrate this.²²⁰ The key issue to be taken from this is that when there are arrest targets (explicit or mediated), the police will arrest to reach the target. If it is a mediated target, this will be used to make themselves appear to be effective, and it will be people who potentially offer the least resistance that will be targeted to make up the quota, such as the homeless, immigrants, street children, sex workers and so forth.²²¹ It will also be the most trivial offences that will be easy to come by. These arrests have little if any impact on crime reduction and may indeed be counter-productive.²²² The focus on arrest targets provides an opportunity for police to conduct random arrests for minor offences and has the consequence of using more law enforcement officials and resources in fighting very minor forms of crime, which might lead to criminals getting away with serious crime.

In South Africa, the Khayelitsha Commission, set up to investigate police performance in the area, noted that intermediate performance targets may contribute to abusive arrest practices.²²³ A good example of this is using the amount of alcohol confiscated by the police from unlicensed traders as a performance indicator, which will be reflected in the police annual report as an achievement and thereby encourage arrests.²²⁴ In Dorset, England, where arrest targets were used, a change in policy demonstrated the impact of scrapping arrest targets, given that the number of children arrested fell by 74 per cent over a five-year period and resulted in the development of alternative measures to deal with problem behaviour.²²⁵

There is a need to do away with indicators emphasising police outputs, such as the number of arrests, roadblocks, stop-and-searches, the response time and so forth.²²⁶ These do not provide a

²¹⁹ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²²⁰ ISS – <https://www.issafrica.org/uploads/CQ31Faull.pdf>; *Channel 4* ‘Exclusive: police arrest targets do exist, despite denials’ 6 November 2014; Woolf N ‘Local police say arrest quotas may be normal for Normal but they’re not right’ *The Guardian* 19 November 2014.

²²¹ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²²² Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²²³ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²²⁴ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²²⁵ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

²²⁶ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

comprehensive picture of police performance aimed at advancing public safety and improving public relations.²²⁷ A paradigm shift is needed so that police officials do not equate good policing with meeting performance quotas.²²⁸ Police action should always be motivated by a sound knowledge of police purpose, and should involve a consistent application of the law.²²⁹ Until we see police legitimacy as the ultimate measure of police performance, illegitimate activities that enhance current measures of police performance will continue, and the risk that the police alienate themselves from the population will grow.²³⁰

5.2 Arrests for petty offences do not promote public safety

The nebulous offences contained in many African legal systems regarding loitering, being idle and disorderly, and being a rogue and vagabond, date back to the colonial era and target individuals who are supposedly idle, lazy, drunk, unwilling to work, habitual criminals or ‘morally depraved’.²³¹ Criminal justice audits commissioned by the Open Society Initiative for Southern Africa between 2013 and 2015 in Zambia, Malawi and Mozambique show that a significant number of persons in prison are detained for petty offences relating to being a rogue and vagabond, touting and loitering.²³² In a recent case in Malawi, for instance, the magistrate noted that ‘[t]he tendency of loitering within the town at night can make the town prone to crime’.²³³ It is unclear what evidence the learned magistrate relied on to substantiate this conclusion. Crime prevention and the promotion of public safety are often cited as the justification for retaining colonial offences and executing arrests therefore. Aggressive arrest strategies adopting a ‘zero-tolerance’ approach to crime and a strict enforcement of petty offences are frequently observed across the continent. The underlying assumption is that this will prevent the ‘development of an atmosphere conducive to more serious criminal offending’.²³⁴

²²⁷ Musime A ‘From repressive to community policing in Uganda’ in Francis D *Policing in Africa* (2012) 117.

²²⁸ Faull A ‘Missing the target: when measuring performance undermines police effectiveness’ (2010) 31 *SA Crime Quarterly* 19-25.

²²⁹ Faull A ‘Missing the target: when measuring performance undermines police effectiveness’ (2010) 31 *SA Crime Quarterly* 19-25.

²³⁰ Faull A ‘Missing the target: when measuring performance undermines police effectiveness’ (2010) 31 *SA Crime Quarterly* 19-25.

²³¹ Banda C & Meerkotter A *Examining the Constitutionality of Rogue and Vagabond Offences in Malawi* (2014).

²³² OSISA & Community Law Centre *An audit of case flow management and conditions on detention in Malawi* (2011).

²³³ Chibwe H ‘Malawi court convicts 26 people for loitering at night’ *Nyasa Times* 12 August 2014.

²³⁴ Grabosky PN ‘Zero tolerance policing’ (1999) 102 *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice*.

The argument that arrests for petty crimes are vital to promote social order, public safety and crime prevention has been soundly rebutted in the authoritative Sherman report, a meta-analysis of existing research on what works and what does not in reducing crime.²³⁵ A key finding in the Sherman report regarding policing is that the extent to which any law enforcement agency can have an impact on crime or prevent crime may depend on how well it is focused on specific objectives, tasks, places, times and people. More importantly, success depends upon putting police where serious crime is concentrated at the times it is most likely to occur, thus focusing on risk factors.²³⁶

The employment of more police personnel to provide rapid emergency responses, unfocused random patrols and reactive arrests²³⁷ does not prevent serious crime. Community policing without a clear focus on crime risk factors generally shows no effect on crime. Directed patrols,²³⁸ proactive arrests²³⁹ and problem-solving at high-crime ‘hot spots’, on the other hand, have shown substantial evidence of crime prevention.²⁴⁰ Furthermore, studies have shown that arresting people for minor offences may reduce violence in the short run but may also increase serious crime in the long run.²⁴¹

Sherman notes that being arrested by the police for a petty crime can permanently lower police legitimacy, both for arrested persons and their social network of family and friends, because being arrested is usually a traumatic experience for most people²⁴² and perceived to be unjust and often discriminatory. Police officers often treat arrestees harshly in an effort to ‘show them who is boss’ and to punish them, as they know that few of these arrests will make it to court. Those arrested feel unduly victimised over a petty misdemeanour and studies show this makes the arrested person more defiant towards law enforcement officials.²⁴³ Studies have also found that arrests for petty

²³⁵ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²³⁶ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²³⁷ Reactive arrests suggest that the more arrests police make in response to reported or observed offences of any kind, the less crime there will be.

²³⁸ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²³⁹ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²⁴⁰ Adopting a directed preventive-patrol hypothesis predicts that the more precisely patrol presence is concentrated in the ‘hot spots’ and ‘hot times’ of criminal activity, the less crime there will be in those places and times.

²⁴¹ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8. Sherman notes that ‘[e]ven while massive arrest increases, such as those in New York City, may reduce violence in the short run – especially gun violence – they may also increase serious crime in the long run’.

²⁴² Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²⁴³ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

crimes seldom act as deterrents to individuals, especially if they are unemployed and feel marginalised.²⁴⁴ Instead, these arrests can lead to increased disorder and criminality.²⁴⁵

Greene mentions that ‘get tough’ measures that lead to lengthy incarceration of a large number of young offenders (notably drug offenders) may offer a measure of short-term relief for law-abiding residents.²⁴⁶ The difficulty is that in the long term the negative consequences may wash out the short-term positives: ‘this is because the deterrent effects of such a strategy are weak at best, whereas its damaging effects – disruption of family ties, stigmatizing barriers to labour market participation, increased levels of alienation and distrust – may prove criminogenic in themselves’.²⁴⁷ Sherman concluded that the ‘modest but consistent scientific evidence supports the hypothesis that the less respectful police are towards suspects and citizens generally, the less people will comply with the law’.²⁴⁸ He notes that

changing police “style” may thus be as important as focusing police substance. Making both the style and substance of police practices more “legitimate” in the eyes of the public, particularly high-risk juveniles, may be one of the most effective long-term police strategies for crime prevention.²⁴⁹

An aggressive policing style focusing on petty offenders ‘may thus actually reduce police presence’.²⁵⁰ Not all socially undesirable conduct needs to be classified as a crime or result in arrest and detention.²⁵¹ Criminal justice systems are the main consumers of prison resources throughout the world, and the first question to ask when tackling the issue of excessive arrest and detention is whether particular forms of conduct must fall within the scope of the criminal justice system.²⁵² While some behaviour may be annoying, it should not follow that criminalisation is the solution.

²⁴⁴ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²⁴⁵ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²⁴⁶ Greene JA ‘Zero tolerance: a case study of police policies and practice in New York’ (1999) 45 *Crime & Delinquency* 171-85.

²⁴⁷ Greene JA ‘Zero tolerance: a case study of police policies and practice in New York’ (1999) 45 *Crime & Delinquency* 171-85.

²⁴⁸ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²⁴⁹ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

²⁵⁰ Grabosky PN ‘Zero tolerance policing’ (1999) 102 *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice*.

²⁵¹ United Nations Office on Drug and Crime *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007) 13.

²⁵² United Nations Office on Drug and Crime *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007) 13.

Even if criminalised, it should equally not follow that arrest and detention are required. Many of the offences discussed above require a socioeconomic response and not a law enforcement or criminal justice response.

Governments need to change their law enforcement strategies to focus on high-risk people, places, offences and times rather than focusing on petty offences, many of which involve poor and vulnerable persons who pose no threat to public safety. Decriminalising these offences and dealing with the behaviour outside of the criminal justice system will not only reduce the burden on the system but also produce a long-term positive impact on public safety.²⁵³

5.3 The punishments are disproportional

Loitering, begging, and being a rogue or vagabond are not behaviours that endanger public safety, yet they attract disproportionate punishments. The use of imprisonment for such offences exact a weighty punishment on people so convicted and causes great harm and suffering for a trivial offence.

The Kenya Penal Code (2014) states that a person who is convicted of being a ‘common nuisance’ may be liable to imprisonment for a period of one year.²⁵⁴ The same law, in section 185(b), defines idle and disorderly persons as beggars and prescribes a punishment of one month imprisonment, and, for second and subsequent offences, up to one year of imprisonment plus a fine of KSh100.²⁵⁵ The Botswana Penal Code defines ‘common nuisance’ in a similar manner and prescribes one year

²⁵³ United Nations Office on Drug and Crime *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007) 13.

²⁵⁴ Section 175. Common nuisance: (1) Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.

²⁵⁵ 182. Idle and disorderly persons: The following persons - (a) every common prostitute behaving in a disorderly or indecent manner in any public place; (b) every person causing, procuring or encouraging any person to beg or gather alms; (c) deleted by Act No. 61 of 1968, s. 22; (d) every person who publicly conducts himself in a manner likely to cause a breach of the peace; (e) every person who without lawful excuse publicly does any indecent act; (f) every person who in any public place solicits for immoral purposes; (g) deleted by Act No. 61 of 1968, s. 22; shall be deemed idle and disorderly persons, and are guilty of a misdemeanour and are liable for the first offence to imprisonment for one month or to a fine not exceeding one hundred shillings, or to both and for every subsequent offence to imprisonment for one year.

of imprisonment.²⁵⁶ Table 1 below provides a sample of a number of African countries criminalising loitering and begging, and the prescribed punishments.²⁵⁷

Table 1

COUNTRY	OFFENCE	PUNISHMENT	REFERENCE
CAMEROON	LOITERING	Imprisonment and a fine	The penal code
DRC	BEGGING	Can receive warning but the law provides that beggars or vagabonds are placed at government institutions for forced labour from one to seven years	<i>Decret du 23 mai 1896, tel que modifié et complété par le Decret du 6 décembre 1958</i>
ETHIOPIA	LOITERING/VAGRANCY	Imprisonment (direct)	Vagrancy Control Proclamation, Proc. No. 348/2004
GUINEA	VAGRANCY	3-6 months imprisonment	<i>Guinée: Code pénal [Guinea], 31 December 1988,</i>
KENYA	LOITERING	Imprisonment or a fine	Kenya Penal Code S 182, Mombasa Municipal By-Law, Kisumu Municipal Council by laws,
	BEGGING		Kenya Penal Code S182(B)
NIGERIA	LOITERING	Imprisonment	Section 199 of the Penal Code; Sections 166(a)(i) and (ii) of the Criminal Law of Lagos State, 2011
	BEGGING		Section 2 of the Illegal Collection of Dues in Public Place (prohibition) Law of Lagos State 2003.
TUNISIA	BEGGING	Imprisonment (suspended)	Article 171 du code pénal
UGANDA	LOITERING	Imprisonment or fine or both	The Penal Code Act, Cap. 120, Laws of Uganda Section 167(d) which criminalises a person considered as publicly conducting her/himself in a manner likely to cause a breach of peace

²⁵⁶ Botswana Penal Code CAP 8: Section 176. Common nuisance: (1) Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the offence termed a common nuisance and is liable to imprisonment for a term not exceeding one year.

²⁵⁷ The data were collected as part of a survey conducted by PALU in 2015.

COUNTRY	OFFENCE	PUNISHMENT	REFERENCE
	BEGGING	Imprisonment or fine or both	The Penal Code Act, Cap. 120 Laws of Uganda, Section 167(b) and (g)
ZIMBABWE	LOITERING	Fine	Criminal Law (Codification and Reform) Act. Also use section 81 of the Criminal Code (Soliciting)
ERITREA	BEGGING	Fine \$100-\$400, imprisonment 1-6 months	Art. 206. - Dishonest Begging. (1) A person who: (a) encourages a child to beg; or (b) begs as a member of or at the direction of a group that carries on begging as a business, is guilty of unlawful begging, a Class 2 petty offence, punishable with a definite term of imprisonment of not less than 1 month and not more than 6 months, or a fine of 5 001 - 20 000 Nakfas, to be set in intervals of 1 000 Nakfas. (2) The provisions of this Article shall not apply where members of a family solely carry out the encouragement or other activity.
NAMIBIA	LOITERING	Unknown	Vagrancy Proclamation 25 of 1920, s. 3(1) (national), Various local authority regulations, such as Katima Mutilo, Hentiesbaai and Karasburg Street Regulations, ss. 10, 32; Luderitz Street Regulations ss. 11, 25.
SOUTH AFRICA	LOITERING	Fine or imprisonment	The City of Cape Town By-Law Relating to Streets, Public Spaces and the Prevention of Noise Nuisances; The Ethekwini Municipality: Nuisances and Behaviour in Public Places By-Law, 2015 - Paragraph 21(1)(a); The City of Johannesburg Metropolitan Municipality Public Road and Miscellaneous By-Laws, published on 21 May 2000.

6 Pre-trial detention and overcrowding

This section deals with pre-trial detention and petty offences, paying particular attention to prison overcrowding and arrest practices in Africa and the socioeconomic impact of pre-trial detention.

Recent studies have made available more accurate quantitative data that provide better insight into trends and could support the decriminalisation and declassification of petty offences.

6.1 Overcrowding is an Africa-wide problem

Africa's prisons are not filled with petty offenders, but there is evidence that they make up a notable proportion in many African states. Overcrowding is a problem in nearly all African prisons and all efforts should be made to address this, as called for by the Ouagadougou Declaration and Plan of Action.

There are nearly 1.2 million prisoners in Africa, according to the International Centre for Prison Studies (ICPS).²⁵⁸ Using the available data it was calculated that some 340 000 of these are pre-trial detainees, representing some 14 per cent of the world's pre-trial population. On average, pre-trial detainees constitute 42 per cent of national total prison populations in Africa, but this ranges from 90 per cent (Libya) to 6 per cent (Algeria). Of the 46 countries and territories for which data are available, only seven do not have overcrowded prisons, these being Botswana, Sao Tome e Principe, Namibia, Reunion (France), Lesotho, Niger and Algeria.

Using the data from the ICPS, it was furthermore calculated that in countries with overcrowded prisons, the bed space shortfall is roughly 242 000. Occupancy levels range from 388 per cent (Comoros) to 60 per cent (Niger). In total, 73 per cent of African prisoners are held in prisons that are at higher than 100 per cent capacity and 32 per cent in prisons that are at 150 per cent or more capacity. In short, prison overcrowding is a near-universal phenomenon on the continent, affecting the overwhelming majority of prisoners.²⁵⁹ Basic figures on Africa's prison population per country are presented in Table 2.

Table 2

Country	Prison population total	% pre-trial detainees	Occupancy	No. of pre-trial detainees
Algeria	60 220	6	88	3 734
Angola	21 634	48	167	10 319

²⁵⁸ World Prison Briefs – <http://www.prisonstudies.org/highest-to-lowest/prison-population-total>.

²⁵⁹ It should be noted that incomplete data are available for the following states and territories and, if available, would in all likelihood worsen the existing poor picture: Central African Republic, Congo (Brazzaville), Democratic Republic of the Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Guinea Bissau, Mayotte (France), Reunion (France), Somalia, and South Sudan.

PUNISHED FOR BEING POOR

Country	Prison population total	% pre-trial detainees	Occupancy	No. of pre-trial detainees
Benin	7 247	75	364	5 428
Botswana	3 826	23	100	891
Burkina Faso	6 251	48	171	3 000
Burundi	8 646	52	214	4 479
Cameroon	25 337	62	149	15 760
Cape Verde	1 434	30	122	424
Central African Rep.	845	70	-	593
Chad	4 831	63	232	3 063
Comoros	233	56	388	130
Congo (Brazzaville)	1 240	75	-	930
Cote d'Ivoire	10 850	42	218	4 557
Djibouti	600	50	171	300
DRC	22 000	82	-	18 040
Egypt	62 000	-	-	-
Equatorial Guinea	1 000	10	-	99
Ethiopia	93 044	14	-	13 026
Gabon	3 500	33	-	1 155
Gambia	914	22	141	203
Ghana	14 297	17	145	2 416
Guinea Bissau	92	-	102	-
Kenya	54 154	40	202	21 878
Lesotho	2 073	20	71	404
Liberia	1 719	83	138	1 427
Libya	6 187	90	142	5 568
Madagascar	18 719	53	181	9 921
Malawi	12 156	16	174	1 957
Mali	4 963	53	223	2 620
Mauritania	1 768	41	102	725
Mauritius	2 123	36	117	769

PUNISHED FOR BEING POOR

Country	Prison population total	% pre-trial detainees	Occupancy	No. of pre-trial detainees
Mayotte (France)	173	-	107	-
Morocco	76 000	43	158	32 300
Mozambique	15 663	33	201	5 106
Namibia	3 560	7	96	235
Niger	7 116	54	60	3 843
Nigeria	57 121	69	114	39 585
Republic of Guinea	2 600	65	175	1 690
Reunion (France)	1 022	-	85	-
Rwanda	55 618	7	102	3 949
Sao Tome e Principe	201	11	77	22
Senegal	8 630	41	117	3 573
Seychelles	735	16	143	114
Sierra Leone	3 792	59	212	2 237
Somalia	3 450	-	-	-
South Africa	159 241	27	133	42 836
South Sudan	7 500	45	-	3 375
Sudan	19 101	20	255	3 897
Swaziland	3 616	18	127	654
Tanzania	34 196	50	120	17 132
Togo	4 493	65	165	2 929
Tunisia	23 686	54	139	12 790
Uganda	42 013	55	255	23 107
Zambia	17 160	23	279	3 981
Zimbabwe	18 857	17	111	3 225
TOTAL	1 019 447			340 398
AVERAGE		42	160	

There is no single solution for prison overcrowding as the causes lie, by and large, in criminal justice processes that result in unnecessary detention and long periods of custody. Possible

solutions must therefore be sought in a multiplicity of localities, and with the overall aim of avoiding arrest, reducing the use of detention and expediting the flow of cases through the criminal justice system.

A concerted and sustained effort to reduce overcrowding can reap rewards in a relatively short period of time. Based on the figures in Table 2, it was calculated that if the African pre-trial population is reduced by five per cent every year, it will take 14 years to bring it to just below half of its current level, which will reduce the overall prison population size by 17 per cent – a not insignificant improvement. In short, small contributions can have a much larger impact. The decriminalisation of petty offences can make such a contribution, as well as avoiding arrests and detention for petty offences through declassification.

6.2 Petty offences, arrests and detention

An audit of case-flow management in Malawi found the following proportions of persons admitted to pre-trial detention in selected prisons, as shown in Table 3. The audit noted that between one and eight per cent of admissions were for petty offences.²⁶⁰

Table 3

Prison	Offence	Percentage
Chichiri	Touting	2%
	Illegal immigrant	4%
Kachere	Rogue and vagabond	3%
	Hemp offences	1%
Mzuzu	Rogue and vagabond	8%

A more detailed analysis of pre-trial admissions at Mzimba Prison (Malawi) from 2006 to 2010 also found that not insignificant proportions of people are admitted for petty offences, as shown in Table 4 below. While the actual numbers may appear low as it was a sample, the percentages indicate that between eight and 13 per cent of detainees are admitted for petty offences, or roughly one out of ten admissions.

²⁶⁰ OSISA & Community Law Centre *An audit of case flow management and conditions on detention in Malawi* (2011).

Table 4

Offence	2006	2007	2009	2010
Prostitution	1			
Rogue and vagabond	1	1	1	
Touting	1	1		
Breach of the peace		2	1	2
Witchcraft		1		1
Proposing violence				
Hemp offences			1	2
In possession of forest products without a licence			1	
Total	3	5	4	5
Percentage	8%	13%	10%	13%

In the case of Zambia, a similar study found the following profile for admissions to police and prison custody, using a sample of nine police stations and nine prisons, as shown in Table 5.²⁶¹

Table 5

Police		Prison	
Loitering	8%	Riotous behaviour	2%
Failure to obey police officer	2%		
Driving offences	1%		

A sample of admissions to Nairobi Central Remand and Thika Remand prisons in Kenya found that even for petty offences, detainees can spend extraordinary lengths of time in pre-trial detention (Table 6).²⁶² At the time of the field work, the greatest duration in detention was 447 days (15 months), for the offence of ‘failing to produce accused (accomplice)’; in this case the detainee had still not been released but remained in custody. This case was followed by illegal possession of farm produce (383 days), creating a disturbance (344 days), and illegal possession of farm produce (321 days). At Thika Remand Prison these admissions for petty offences constituted 38 per cent of

²⁶¹ OSISA & Community Law Centre *An audit of case flow management and conditions on detention in Malawi* (2011).

²⁶² Muntingh L & Redpath J *The Socio-Economic Impact of Pre-Trial Detention* (forthcoming).

admissions, and at Nairobi Central Remand, 7 per cent (the latter prison holds a wider range of offences and also more serious cases, such as murder).

Table 6

Case	Offences	Days in detention
1	Being unlawful in Kenya	34
2	Bond to keep peace	2
3	Bond to keep peace	64
4	Bond to keep peace	206
5	Bond to keep peace	76
6	Creating disturbance	3
7	Creating disturbance	7
8	Creating disturbance	143
9	Creating disturbance	198
10	Creating disturbance	344
11	Damaging flower plants on public street	273
12	Depositing Refuse C/Sec 30(1)	75
13	Depositing Refuse C/Sec 30(1)	204
14	Destroying plants on land	43
15	Failing to produce accused (accomplice)	447
16	Illegal possession of farm produce	253
17	Illegal possession of farm produce	383
18	Illegal possession of farm produce	51
19	Illegal possession of farm produce	89
20	Illegal possession of farm produce	121
21	Illegal possession of farm produce	321
22	Possession of cannabis	212
23	Possession of cannabis	30
24	Possession of Bhang (cannabis)	37
25	Possession of changaa (homemade liquor)	266

Case	Offences	Days in detention
26	Possession of changaa (homemade liquor)	127
27	Possession of narcotics	8
28	Possession of narcotics	37
29	Possession of narcotics	135
30	Possession of narcotics	258
31	Removal of forest produce	233
32	Riding in a dangerous position	129
33	Rioting after proclamation	58
34	Selling alcohol without licence	317
35	Selling alcohol without licence	144
36	Theft of farm produce	63
37	Touting	77

The overall impression from the above is that the detention for petty offences makes up less than 15 per cent of admissions. Nonetheless, declassification and decriminalisation can have a material impact on prisoner numbers if it is assumed that one in ten pre-trial detainee admissions is unnecessary. The data has also shown that detainees can remain in custody for very long periods, which is a violation of the right to a speedy trial, especially in the light of the trivial nature of the offence. Pre-trial detention, especially that which is prolonged, can have serious socioeconomic consequences on poor and marginalised households, as discussed in the next section.

6.3 Pre-trial detention has significant socioeconomic impact

Across the world it is the case that it is predominantly the poor and marginalised who end up in prisons awaiting trial. The UN Special Rapporteur on Extreme Poverty and Human Rights succinctly summarised the socioeconomic impact of pre-trial detention in a recent report:

The economic and social costs of detention and incarceration can be devastating for persons living in poverty. Detention and incarceration can lead to loss of income and employment and often temporary or permanent withdrawal of social benefits. Their families, particularly their children, are also directly affected. Therefore, criminal justice systems predicated on detention and incarceration, even for minor

non-violent crimes, can themselves represent a significant obstacle to access to justice for persons living in poverty. Those who are poor and vulnerable are likely to leave detention disproportionately financially, physically and personally disadvantaged.²⁶³

The section below reports key findings from research undertaken to demonstrate and quantify the socioeconomic impact of pre-trial detention and the complexity with which it plays out in three African countries: Kenya, Mozambique and Zambia.²⁶⁴ The research design was informed by the framework for socioeconomic rights set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁶⁵ and fair trial rights in the International Covenant on Civil and Political Rights.²⁶⁶

The nature of the obligations on states set out by the ICESCR is not that states must ensure that every person has employment, social security and the like, but rather that states should ‘respect’, ‘protect’ and ‘promote’ these socioeconomic rights. The duty to ‘respect’ entails an obligation not to interfere with the resources of individuals, their freedom to find a job, nor their freedom to take necessary action and to use their resources to satisfy needs. This duty to respect socioeconomic rights intersects with fair trial rights when states make and enforce criminal procedural and criminal laws. Respect for socioeconomic rights by states in this context would mean that criminal procedural laws and practices are designed and implemented in such a way as to ensure that the

²⁶³ A/67/278 para. 50.

²⁶⁴ Muntingh L & Redpath J *The Socio-Economic Impact of Pre-Trial Detention* (forthcoming).

²⁶⁵ Kenya and Zambia have ratified the ICESCR but Mozambique has not. The rights enumerated in the ICESCR include: the equal right of men and women to pursue economic, social and cultural rights (art. 3); the right to work and the duty of the state to take measures to enable people to access gainful employment (art. 6); the right to just conditions of employment (art. 7); the right to social security (art. 9); the duty of the state to provide the widest possible protection to the family (art. 10); the right to an adequate standard of living and to be free from hunger (art. 11); the right to the enjoyment of the highest attainable standard of physical and mental health (art. 12); and the right to education (art. 13).

²⁶⁶ The ICCPR, in articles 9-15, sets out the following rights:

- arrested or detained persons must be brought promptly before a judicial officer and be entitled to trial within a reasonable time or to release;
- it must not be the general rule that persons awaiting trial are detained in custody, but release may be subject to guarantees to appear for trial;
- there must be a fair and public hearing by an independent and impartial tribunal;
- there must be equality before the courts and tribunals;
- there must not be arbitrary detention;
- there must be restriction of the use of incommunicado detention;
- there is access for lawyers, doctors and family; and
- there is independent internal and external oversight.

impact of interference with socioeconomic rights on all persons is minimised, by ensuring that it (the detention of an accused) occurs only when absolutely necessary and for the shortest possible duration. Arresting and detaining people for petty offences is an interference with people's aspirations to fulfil their socioeconomic needs.

The socioeconomic impact of pre-trial detention is multi-dimensional and is also spread unevenly across individuals and households, depending on their degree of vulnerability. The research points to a complex set of factors that interact to either intensify or ameliorate the socioeconomic impact of pre-trial detention. Moreover, households respond in different ways to the fact that a member or the head of the household has been imprisoned awaiting trial. The central issue is that when an individual is arrested and detained awaiting trial, in most instances it has a socioeconomic impact on other people. Detaining people in prison to await trial on charges relating to petty offences is disproportionate and is, it will be argued, counter-developmental and not in the interests of justice. While the findings below relate to all pre-trial detainees and are not exclusive to petty offenders, they nonetheless demonstrate the impact of pre-trial detention. It is submitted that the link between pre-trial detention and its socioeconomic impact is central to the arguments in favour of decriminalisation and declassification.

6.3.1 Detainee proportional contribution is above 60 per cent of household income

If the detainee is the main or sole income-earner in the household and he or she is imprisoned, it follows that the impact will be more severe. For example, where figures were available it was found that in Kenya the median proportional detainee contribution to total household income was 67 per cent, in Mozambique 70 per cent, and in Zambia 100 per cent. The loss of such income is immediate and severe due to the disappearance of at least a relatively stable cash income. The more income-earners a household has, the better able it will be to cope with the loss of income, but the research indicates that there is generally a reliance on one income-earner for the overwhelming majority of total household income.

6.3.2 Gender is important

The research shows that gender is an important variable in the socioeconomic impact of pre-trial detention. Generally, female detainees have more dependants than males, and they have more dependants who are not their children. For example, 50 per cent of Kenyan female detainees had three or more dependants, compared to 25 per cent of men. Women also make very substantial

non-financial contributions to households: in Kenya it was found that 50 per cent of females cared for children and some 53 per cent cleaned houses. In Mozambique some 37 per cent of female detainees were reported to clean the house, 33 per cent cared for children, 10 per cent mentioned being involved in food or farm production, and 7 per cent were responsible for cooking.

Male detainees also made significant non-financial contributions to household income, but these focused on food production and maintenance of the residential structure. It is generally the pattern that men are charged with more serious offences and also in some countries for offences for which bail is not allowed. For example, in Kenya 56 per cent of women were detained for theft, compared to 23 per cent of men. The result is that they spend longer periods in detention. For male detainees in Kenya, the median duration of detention was 30 days, in Mozambique 328 days, and in Zambia an earlier study by the authors found a range of medians for each of the prisons, ranging from 11 to 112 days.²⁶⁷

When a woman is imprisoned, the impact is felt by her children, other children she may have cared for and in the general household workload, cash income and security. Men, on the other hand, are firstly the numerical majority in pre-trial detention and are generally charged with more serious offences that result in longer periods of detention. The socioeconomic impact is frequently felt by wives and mothers, who are forced into earning roles while attempting to continue to visit and support detainees. In Zambia, 94 per cent of families interviewed experienced a loss of income; in Kenya 75 per cent; and in Mozambique 64 per cent. As a consequence of this, food insecurity increased for the majority of households. Even though the findings relate to pre-trial detention in general, they also apply to those charged with petty offences.

6.3.3 The impact is most severe at the start of detention

The research indicates that the initial socioeconomic impact of pre-trial detention is most severe at the start of detention but that over time households develop new coping strategies and their situation improves, largely because they reduce expenses related to the detention itself (that is, regular visits and bringing less food and other materials). This may also be a consequence of having depleted available reserves and resources. However, coping strategies may involve selling assets,

²⁶⁷ For various reasons this admissions profile of Zambia is likely to understate long-term detainees: the methodology for drawing the sample could not capture those who had been there for more than five years, and the full duration of those not released could not be measured.

borrowing money and stopping visits to prisons. While households may become less dependent on the detainee, it does not mean that their socioeconomic position has improved. Even if a person is detained for a relatively short period (on a petty offence), the impact is still severe on poor and marginal households.

6.3.4 Children suffer negative consequences

Children are extremely vulnerable to negative changes in the socioeconomic position of the household. This is manifested in a number of ways, such as decreased access to schooling (for example, they cannot afford school fees or drop out of school), relocating to relatives or friends, food security, general security, lack of or limited supervision by adults, and so forth. It may also happen that older children are removed from school to take care of younger children and to perform the duties previously performed by the detainee. Children are therefore affected by the loss of financial and non-financial support services rendered by the detainee or affected by the detention, and this may have a longer-term socioeconomic and psychological impact.

In Kenya, some 16 per cent (20 per cent of those who had children in the household) said that the children in the household were forced to relocate as a result of the detention; 11 per cent of households with children reported that the children's behaviour had been adversely affected by the detention; 11 per cent reported that the children missed school; while three per cent reported that the children had dropped out of school. In Mozambique, some 13 per cent said the children in their household were forced to relocate and live with another relative as a result of the detention. This was 32 per cent for female detainees and three per cent for male detainees. How an additional child impacted on the receiving household is not known, but it can be assumed that it would add to expenses.

6.3.5 Assets are sold to cover new expenses and loss of income

The research found that many detainees did not hold significant assets, but where this was recorded it was fairly common of households to dispose of assets to generate cash. Selling assets may, however, be a short-term strategy increasing longer-term vulnerability. Selling of animals or equipment with which food security can be maintained or an income generated may bring immediate support to the detainee but pull the household deeper into poverty. Such sales are likely to have long-term consequences.

In Zambia 53 per cent, Kenya 22 per cent, and Mozambique 9 per cent of households surveyed reported that they had been forced to sell at least one type of asset as a result of the losses caused by the detention. The items sold range from household appliances (for example, a stove) to livestock. In 4 per cent of Zambian cases land was sold. Data from Kenya indicate that in half of instances, items were sold for less than the respondents wished to sell them. The difference between asking and selling price in these instances ranged from KSh150 (US\$1.66) to KSh50000 (US\$553), median KSh3000 (US\$33). In other words, the sale resulted in realising less than the item was worth. Detention due to a petty offence that results in the sale of assets adds to the burden on the household. There is little doubt that the actions of the state will be perceived by affected households to be unjust and disproportionate to the alleged offence. Moreover, in the case of being detained for a petty offence, many of such detainees are poor and might not have assets to sell, and remain in detention as a result.

6.3.6 Loss of employment and income

If the detainee, regardless of the offence, is in formal employment it becomes increasingly likely that he or she will lose his or her employment the longer he or she remains in custody. Detainees may also be economic migrants (as was observed in Kenya in particular) and find themselves in an especially vulnerable situation, with their family and other support structures far away from where they are detained. If self-employed, it is likely that the detainee will lose the business client base unless there is a household member that can step into his or her shoes. Many interviewees expressed this fear and that their generally meagre earnings were now at risk. In Mozambique 72 per cent and in Zambia 65 per cent of detainees were earning an income at the time of their arrest.²⁶⁸ The loss of employment, and thus income, is significant in monetary terms. When the arrest and detention is for a petty offence, this places a disproportionate burden on poor households.²⁶⁹

²⁶⁸ Data for Kenya were, however, incomplete in this regard.

²⁶⁹ For example, seen against the background that the minimum wage for domestic work in Kenya is US\$108 per month, the data reflect that the median income for male Kenya detainees was US\$80 and for females US\$111 per month. In Mozambique the median income for male detainees was recorded to be US\$124 and for females US\$79. These earnings put the majority of Mozambican pre-trial detainees at earning less than the statutory minimum wage. In Zambia the median detainee earnings for females were recorded as US\$95 and for males US\$262. The implication is that detainees in general originate from poor backgrounds and their households are placed at further socioeconomic risk due to detention.

6.3.7 Food security is threatened

Pre-trial detention also impacts on food security, and 40 per cent of Kenyan households reported that they have less food as a result of the detention. This impact was even more when the household was linked to female detainees: 65 per cent compared to 35 per cent when it was a male detainee. Food security was less affected in Mozambique, and a relatively small percentage (seven per cent) reported that there was now less food in the house as a result of the detention. Although quantitative data on food security were not collected in Zambia, it can be deduced from the loss of income alluded to above, as well as other responses from persons interviewed, that food security in households diminished. The extent to which food security impacted on early childhood development was not researched in this project.

6.3.8 Health is negatively affected

The research found that large proportions of detained people were ill at the time of arrest and an increased proportion became ill during detention. While this had adverse consequences for them individually during detention, it may also hold longer-term consequences for them and the households they return to upon release as it may impact on their socioeconomic potential. In this regard, HIV-positive detainees may suffer more severe consequences under poor conditions of detention and limited medical treatment. The decriminalisation and declassification of petty offences will contribute to reducing overcrowding and this will contribute to an improvement in conditions of detention.

In Kenya 75 per cent of female detainees were either ill at arrest or became ill in prison or both. Of those who were ill at arrest, 69 per cent developed additional illnesses while in prison.²⁷⁰ Some 77 per cent of male detainees said they subsequently fell ill while in prison.²⁷¹ In Mozambique 37 per cent of detainees said they were or became ill during imprisonment: 47 per cent of female detainees and 28 per cent of male detainees. The most common illness while in prison was malaria (12 per cent). Among female detainees, malaria was reported by 21 per cent among those who reported being ill, compared to nine per cent among male detainees. In Zambia 25 per cent of detainees said

²⁷⁰ Illnesses mentioned were diarrhoea and vomiting (15%), chest pains and pneumonia (12%), malaria (9%), skin diseases (6%), toothache (6%), weakness and headache (6%), backache (3%), and eye problems (3%).

²⁷¹ Malaria (17%), skin disease, rashes, 'spores' (17%), chest complaints or pneumonia (13%), cold or flu or coughs (7%), typhoid (7%), diarrhoea (3%), tuberculosis (3%), eye problems (3%), ulcers (3%), fainting or falling down (3%), headache (3%), spine and neck pains (3%), epilepsy (3%), joint pains (3%), cancer (3%), toothache (3%), high blood pressure (3%), asthma (3%) and allergy (3%).

they experienced ill health while in prison. After entering prison, some 11 per cent had malaria, two per cent had ulcers, two per cent had stomach pains, two percent were HIV-positive, and two per cent had back pains.

Access to medical treatment and the effectiveness thereof were also less than desirable. In Kenya 52 per cent of male detainees said they received treatment in prison, and only 52 per cent of this group said the treatment they were given helped. The situation in Mozambique was markedly better, with 92 per cent of those needing health care being able to access it and 80 per cent saying that it helped.²⁷²

6.3.9 The cost of detention

The detention, even for petty offences, of a household member brings new, direct and unplanned costs for the household. It was reported that, for example, visiting the detainee is one such cost as it is associated with transport, bringing food, other materials (for example, lotion), clothing, medicine and so forth. Securing private legal aid – or attempting to do so – or assistance from a state institution (for instance, the Human Rights Commission) may also result in costs. Gathering cash for bail, borrowing money, using savings or paying a bribe are further costs associated with detention.

Pre-trial detention is therefore not only about a household losing a financial and non-financial contribution but also incurring new and unplanned-for expenses. Presumably, the longer detention continues, the higher the total of these expenses will be – until the family is forced to cease incurring these expenses in order to survive. Table 7 below provides more detail on these costs. The central point is that regardless of the charge, households incur costs due to the detention.

Table 7

	Travel cost	Travel time	Cash brought	Food brought cost
Kenya	\$2.76	90 min.	\$3.32	-
Mozambique	\$1.27	120 min.	\$3.17	\$3.27
Zambia	\$17.00	90 min.	\$31.75	\$11.90

²⁷² Data on access to and the effectiveness of medical care in Zambia were not collected.

6.3.10 More than a third of households had to borrow money

The fact that more than a third of households surveyed had to borrow money is indicative of their marginalised status as well as the pervasive financial impact of pre-trial detention, regardless of the charges against the detainee. Substantial numbers of households had to borrow money in order to cover additional expenses and to make up for the loss in income. In Kenya 39 per cent of respondents said they had been forced to borrow from at least one lender, the most common being from friends (14 per cent), relatives (10 per cent) and Chama's²⁷³ (informal financial co-operative) (nine per cent). Only three per cent borrowed from a bank or shylock²⁷⁴ (loan shark). The amounts ranged from US\$4.43 to US\$1106, with the median being US\$33. For 65 per cent of respondents who borrowed money, the amount to be paid back equalled the amount borrowed. However, for 35 per cent, interest ranging from 10 to 90 per cent was payable. Mozambican households surveyed reported that 34 per cent were forced to borrow money in order to make up for the shortfall caused by the detention. Some 19 per cent borrowed from a friend, some 10 per cent borrowed from a family member, while five per cent borrowed from an employer. The amount borrowed ranged from US\$0.32 to US\$475 with a median value of US\$32. Loans were, however, interest free, except in one case. In Zambia more than a third (36 per cent) of households surveyed reported that they had to borrow money to make up for the loss of income, with the median amount being US\$238, or more than double the median household income of US\$111.

6.3.11 Access to legal assistance is expensive

It is less likely that persons charged with petty offences will be able to access state-funded legal assistance as this is more likely to be reserved for serious cases. The overall impression is that legal assistance is expensive and, for many, inaccessible. The extent to which detainees were able to access legal assistance varied greatly. In Kenya only 16 per cent of detainees said they had received some form of legal assistance, with female detainees being much less likely to have received legal assistance – only six per cent compared to 19 per cent of male detainees. This may be because of the difference in charges against them, as almost half (48 per cent) of those who had received legal assistance were charged with murder.

²⁷³ De Frey *Chamas in Kenya* – <http://www.transglobecapital.com/chamas.html>.

²⁷⁴ Kenya Loans – <http://kenyaloans.com/shylocks/>.

Those who did receive legal assistance received it from Legal Aid (39 per cent) and private lawyers (29 per cent). In Mozambique just over half (54 per cent) said they received legal assistance and 76 per cent of those who received assistance said this was from the Instituto do Patrocínio e Assistência Jurídica (IPAJ), the state-funded legal aid institute. In Zambia, 26 per cent of detainees said they had received some form of legal assistance, but that legal assistance did not succeed in securing their release. Very little information was obtained about the cost of private legal assistance, but in Kenya this ranged from US\$223 to US\$3 337, and in Mozambique from US\$64 to US\$792. Hiring a private attorney is simply not affordable to many detainees and their continued detention may thus be a direct result of their poverty, as a lawyer may indeed have been able to launch a successful application for their conditional release.²⁷⁵

6.3.12 Bail is set at unaffordable amounts

In many instances it appears that courts are punitive in setting bail amounts that are clearly unaffordable and thus ensure continued detention. This appears to be an overall trend, and the fact that bail was granted indicates that the charge was less serious and the accused not considered to be a major risk.

In Kenya it was found that 65 per cent of detainees claimed they could not afford the bail amount set by the court. An assessment of these values does lend credence to a claim that bail is set at disproportionate amounts with the aim to make it unaffordable. Despite the fact that women are more commonly detained for theft than men, women reported unaffordable bail amounts in much higher frequency than men, 97 per cent versus 54 per cent. Unaffordable bail amounts alluded to by detainees ranged from US\$77 to US\$44 300 cash bail and US\$55 370 bond. The most frequently mentioned amount was US\$2 215, which applied to nearly one in five (17 per cent) of those who said they were still in detention because of the bail amount. The next most common amount was

²⁷⁵ All three jurisdictions allow for various forms of bail, bond and surety. However, in Zambia section 123 of the Criminal Procedure Code Act sets out offences that are not bailable. They include murder, treason, and any offence carrying a mandatory death penalty. Other offences are aggravated robbery and theft of motor vehicles if the accused has previously been convicted of the offence of theft of a motor vehicle. The State Security Act states that espionage is not a bailable offence. Lastly, people charged with offences related to drug trafficking or manufacturing of drugs under the Narcotic Drugs and Psychotropic Substances Act cannot be granted bail. See Criminal Procedure Code Act No. 35 of 1993, as amended by Act No. 9 of 2005, Chapter 88 of the Laws of Zambia; section 3 of the State Security Act No. 36 of 1969, as amended by Act No. 27 of 1985, Chapter 111 of the Laws of Zambia; section 123(4) of the Criminal Procedure Code Act No. 35 of 1993, as amended by Act No. 9 of 2005, Chapter 88 of the Laws of Zambia; section 43 of the Narcotic Drugs and Psychotropic Substances Act, No. 37 of 1993, as amended by Act No. 13 of 1994, Chapter 96 of the Laws of Zambia.

US\$1 107, which applied to 15 per cent of those who could not afford bail. The net result is that 32 per cent of detainees who were granted bail were granted an amount that is more than the annual median income of detainees, US\$960²⁷⁶ compared to US\$1 107.

The data for Mozambique are sketchy as only 20 per cent of male detainees interviewed had an amount for security recorded, which presumably they were unable to afford and thus remained in detention. The amounts ranged from US\$319 to US\$8 240, with a median of US\$3 800. All of the amounts applied to theft or robbery charges. The minimum wage, the lowest of which applies to the agricultural sector, is MK37 200 per year (or US\$1 140 at the time),²⁷⁷ which is also in line with median incomes earned by detainees. The security amounts are thus far in excess of median earnings and more than three times the annual minimum wage.

7 The role of police or law enforcement officials in executing arrests for petty offences

7.1 Petty offences are highly dependent on police discretion for arrest without a warrant and encourage police corruption and extortion

It is important to set out some legal principles regarding arrest without a warrant, and South Africa is used as an example. There are various ways to secure the attendance of a suspect at trial; as arrest ‘constitutes one of the most drastic infringements of the rights of an individual’, a police official should regard it as a measure of last resort.²⁷⁸ A further important issue is the definition of ‘reasonable suspicion or grounds’ as the motivation for an arrest without a warrant.²⁷⁹ A police officer must *really* believe or suspect that the person had 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 would in view of those facts would also draw.²⁸⁰

As a general rule the purpose of an arrest is to secure the attendance of the suspect at his or her trial and not to ‘punish, scare or harass such person’.²⁸¹ Although there may be variations between different jurisdictions, there are additions to this general rule, namely: arrest for the purposes of further investigation; arrest to verify the identity and address of the person; arrest to prevent the

²⁷⁶ The monthly median income was reported to be US\$80.

²⁷⁷ *AllAfrica* ‘Mozambique: government announces new minimum wages’ 30 April 2014.

²⁷⁸ SAPS Standing Order (G) 341, para. 3(1).

²⁷⁹ For example, South Africa, Criminal Procedure Act Section 40(1).

²⁸⁰ SAPS Standing Order (G) 341 para. 2(2).

²⁸¹ SAPS Standing Order (G) 341 para. 4(1).

commission of an offence; arrest in order to protect a suspect; and arrest in order to end an offence.²⁸²

A key issue remains the discretion exercised by the arresting officer. In addition to the suspicion being reasonable, (a) the arrestor 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 the elements of the offence.²⁸³ Furthermore, when arresting without a warrant the arresting officer ‘would have to satisfy the court that he 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”’.²⁸⁴ In short, the arresting officer must think twice before making an arrest without a warrant.²⁸⁵

The enforcement of certain petty offences is highly reliant on police discretion, including the offence of being a rogue and vagabond, loitering, breach of the peace, drunk in public, and drunk and disorderly. Individual police officers decide on the spot if a person’s behaviour is in breach of a law, such as a loitering law. Whether there are objective criteria for what constitutes, for example, loitering, is highly questionable. The Malawi Penal Code in section 184(1)(c) provides that

[e]very person found in or near any premises or in any road or highway or any place adjacent thereto or in any public place, at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed a rogue and vagabond.

It is this provision that is used to arrest people for so-called loitering and requires that a police officer must come ‘to the conclusion that such person is there for an illegal or disorderly purpose’. How the police officer will come to this conclusion is evidently open to interpretation, thus leaving it to the police officer to use his or her discretion. There is no victim or property involved as an

²⁸² SAPS Standing Order (G) 341 para. 4(2).

²⁸³ Plasket C ‘Controlling the discretion to arrest without warrant through the Constitution’ (1998) 1(2) *SA Journal for Criminal Justice* 186.

²⁸⁴ Plasket C ‘Controlling the discretion to arrest without warrant through the Constitution’ (1998) 1(2) *SA Journal for Criminal Justice* 190.

²⁸⁵ *Brand v Minister of Justice* 1959 (4) SA 712 (A) cited in Plasket C ‘Controlling the discretion to arrest without warrant through the Constitution’ (1998) 1(2) *SA Journal for Criminal Justice* 187.

objective measure of a crime committed. These arrests are also executed without a warrant and there is thus no judicial review of the facts prior to the arrest. The situation invites stigma and societal stereotypes to play a role in criminalising people for who they are rather than for any particular criminal act. Having such broad discretion invites applying a stigmatic approach to persons with disabilities, for example, and may lead police officers to attribute a ‘disorderly purpose’ to someone whose only vice is looking non-typical, different or possibly ‘strange’.

The broad definition of the offence, the authority of the police officer, coupled with the lack of oversight creates the ideal opportunity for corruption to take place. We can present this as a mathematical formula: corruption happens where an official holds the monopoly (to arrest) and has discretion to exercise that power, but where there is little or no accountability:

$$\text{Corruption} = (\text{Monopoly} + \text{Discretion}) - \text{Accountability}^{286}$$

To avoid arrest (and possible use of force), the police officer may then ask for a bribe. Bribes are also solicited for a variety reasons, such as to avoid paying a fine, to be granted police bail²⁸⁷ and to avoid arrest at all. This, of course, must be an affordable amount and thus amounts to petty corruption, which can be defined as follows:

Small-scale, bureaucratic or petty corruption is the everyday corruption that takes place at the implementation end of politics, where the public officials meet the public. Petty corruption is bribery in connection with the implementation of existing laws, rules and regulations, and thus different from “grand” or political corruption. Petty corruption refers to the modest sums of money usually involved, and has also been called “low level” and “street level” to name the kind of corruption that people can experience, more or less, daily, in their encounter with public administration and services like hospitals, schools, local licensing authorities, police, taxing authorities, and so on.²⁸⁸

The pervasive influence of even the smallest acts of corruption should not be underestimated. All acts of corruption are serious because ‘they lead to the establishment of patterns of undesirable

²⁸⁶ Hassan S ‘Corruption and the development challenge’ (2004) 1(1) *Journal of Development Policy and Practice* 11.

²⁸⁷ US Department of State *Malawi 2014 Human Rights Report* (2014) 6.

²⁸⁸ U4 Anti-Corruption Resource Centre – <http://www.u4.no/glossary/>.

behaviour, patterns that cannot be undone easily, and which thereby lower the ethical standards within a society however incrementally'.²⁸⁹

The scale of petty corruption is not insubstantial. The 2013 South African Victims of Crime Survey found that 4.5 per cent of households surveyed had to pay cash, give a gift or do a favour in exchange for a service that a government official was required by law to perform. Of this group, 50 per cent paid a bribe to a traffic officer and 23 per cent to the police.²⁹⁰ While proportions seem low, the potential monetary value involved may be substantial. A 2002 report by Transparency International found that on average each Kenyan had been forced to bribe the police four and a half times a month, paying them on average US\$16 per month, and 95 per cent of interactions with the police resulted in a bribe.²⁹¹ Nicknames used for the police are equally informative:

the traffic police in Kenya are called TKK – *Toa kitu kidogo* – Swahili for “give something small”; in Ghana, police are often chided as “koti”²⁹² because of their tendency to harass the public; . . . in Cameroon police are referred to as “Mange-milles” – thousand eaters – in reference to the customary bribe of 1000 CFA.²⁹³

Highly discretionary offences coupled with weak governance in a police force create an ideal environment for extortion and other forms of corruption targeting the poor and powerless in society.

7.2 High levels of violence are associated with law enforcement, even for petty offences.

Across the continent high levels of violence are associated with law enforcement, and various sources²⁹⁴ lament the use of excessive force during arrests and public protests. Few African countries keep reliable statistics, if at all, on complaints regarding excessive use of force by the police during arrest. Such figures are, however, available for South Africa, where the police oversight structure, the Independent Police Investigative Directorate (IPID),²⁹⁵ records significant

²⁸⁹ Hassan S ‘Corruption and the development challenge’ (2004) 1(1) *Journal of Development Policy and Practice* 6.

²⁹⁰ Statistics South Africa *Victims of Crime Survey* (2012) 45.

²⁹¹ Baker B *Multi-Choice Policing in Africa* (2008) 75.

²⁹² A Twi swearword referring to penis.

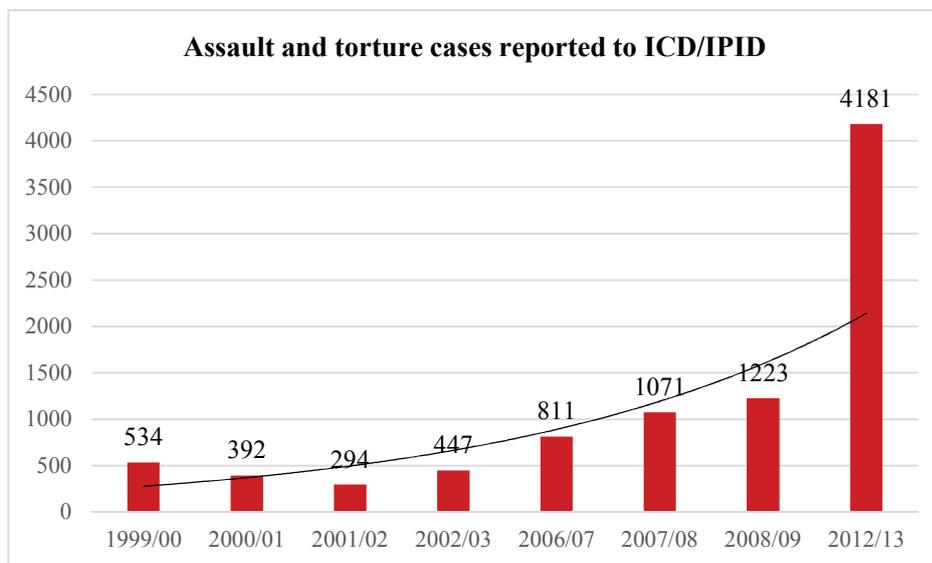
²⁹³ Baker B *Multi-Choice Policing in Africa* (2008) 31.

²⁹⁴ Reports by the UN Special Rapporteur on Torture, UN Working Group on Arbitrary Arrest and Detention, US Department of State annual reports on human rights in the world, Amnesty International Annual reports on human rights in the world, and Human Rights Watch annual reports on human rights in the world.

²⁹⁵ The IPID’s predecessor was the Independent Complaints Directorate (ICD).

numbers every year, as shown in Figure 1.²⁹⁶ While it is unknown what the reasons for the arrest were (that is, a serious or petty offence), the overall trend is that a substantial number of people reported the police's abusive conduct to IPID. There is also in all likelihood a severe under-reporting of such complaints for fear of reprisal, given that many poor and marginalised persons are subjected to abusive police practices.

Figure 1



A 2012 report on compliance with the Southern African Police Chiefs Cooperation Organisation (SARPCCO) Code of Conduct covers ten SADC member countries,²⁹⁷ and for all countries surveyed there were reports of excessive use of force by the police during arrests.²⁹⁸ There is increasing evidence that the levels of abuse perpetrated against the poor have escalated. For example:

- A report by the Independent Medical Legal Unit (IMLU) issued in 2014 showed that police shootings account for the bulk of injuries inflicted on hawkers and small-scale business operators in Nairobi, Kenya. The report also notes extensive beatings,

²⁹⁶ All figures were obtained from ICD and IPID annual reports.

²⁹⁷ Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

²⁹⁸ Dissel A & Frank C *Policing and Human Rights Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* (2012).

threats and extortion perpetrated by *askaris* (municipal by-law enforcement officers) against street traders.²⁹⁹

- Reports issued by the UN and Human Rights Watch in 2014 documented how ill-conceived crime prevention efforts resulted in summary killings of unarmed men and boys in the Democratic Republic of Congo.³⁰⁰
- A report issued by Human Rights Watch in 2014 documented the range of abuses faced by street children in Uganda at the hands of police under the guise of enforcing vagrancy laws.³⁰¹
- A report issued by Human Rights Watch in 2013 documented police abuse of street vendors in Angola. Since 2012, following a provincial government decision, ‘the police and government inspectors (known as *fiscals*) have increasingly conducted joint operations against street traders throughout Luanda, frequently beating street traders, including pregnant women and women with babies on their back. Police and *fiscals* also routinely seize goods, extort bribes, threaten to detain, and in some cases arrest street vendors during the roundups.’³⁰²

Under international law all states are obliged to condemn torture and extra-judicial killings. Moreover, all states are obliged to investigate such cases and hold perpetrators accountable. This would require legislative reform, where needed, the establishment of effective oversight mechanisms and the appropriate training of law enforcement officials.

7.3 High volumes of arrests for petty offences are severely detrimental to police-community relations

The AChHPR states that every individual shall have the right to the respect of the dignity inherent in a human being and prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.³⁰³ Human dignity is an inherent basic right to which all human beings are entitled without discrimination.³⁰⁴

²⁹⁹ Independent Medico-Legal Unit (IMLU) *A Cry for Justice: Torture and Ill Treatment of Hawkers and Small Scale Traders in Nairobi City County* (2014).

³⁰⁰ Human Rights Watch *Operation Likofi: Police Killings and Enforced Disappearances in Kinshasa* (2014).

³⁰¹ Human Rights Watch ‘Where Do You Want Us to Go?’: *Abuses against Street Children in Uganda* (2014).

³⁰² Human Rights Watch ‘Take That Filth Away’: *Police Abuses against Street Vendors in Angola* (2013).

³⁰³ Art. 5, AChHPR.

³⁰⁴ *Purohit and Another v the Gambia* (2003) AHRLR 96 (ACHPR), para. 57.

The ACHPR stresses that inhuman and degrading treatment includes not only actions that cause serious physical or psychological suffering, but those which humiliate or force the individual against his will or conscience.³⁰⁵ The arbitrary confrontation by the police and the unlawful arrest of an individual is a demeaning and humiliating experience. This is even more demeaning if it is for minor offences, which are not a threat to public safety and which target vulnerable and poor people and people with disabilities for behaviour which is not criminal.

Constructive police-community relations are highly dependent on mutual respect and policing methods that remain within the bounds of the law and human rights standards. Ross describes good versus poor community-police relations as follows.³⁰⁶ Good police-community relations bring a number of advantages, such as the police having a better understanding of the public's concerns, people being more inclined to report crimes and give information and intelligence to the police, people being more likely to appear as witnesses in trials. This enables the police to be more proactive in preventing crimes or at least minimising their impact. When there are poor police-community relations, the police are out of touch with community needs, problems, goals and desires, and are perceived as an occupying force that does more harm than good. In such situations they become more reactive. All indications are that the harsh and abusive enforcement of petty offence laws is detrimental to police-community relations.

The authoritative Sherman report notes that research findings are inconclusive in respect of proactive arrest rates, observing that in some instances it appears to have an impact on crime rates but in other situations not.³⁰⁷ Targeting high-risk offenders appears to be promising.

The Khayelitsha Commission (South Africa) was established to investigate the breakdown of police-community relations in Khayelitsha township, a large settlement east of Cape Town. The Commission found that many reasons contributed to poor police-community relations, many of which fed a sense of fear, distrust and antagonism.³⁰⁸ One of these was that people were frequently arrested without there being sufficient evidence:

³⁰⁵ *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR), para. 36.

³⁰⁶ Ross JI *Policing Issues: Challenges & Controversies* (2013) 117.

³⁰⁷ Sherman LW et al. *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.

³⁰⁸ *The Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha*, available at <http://www.khayelitshacommission.org.za/final-report.html> (accessed 5 October 2015).

[T]here are many arrests for minor offences, such as riotous behaviour, at the Lingeletu West station [a police station in Khayelitsha] where detainees are locked up overnight and then released the following morning on a J534 (payment of an admission of guilt fine).³⁰⁹

Moreover, the Commission heard that the police had arrest targets for certain offences, the implication of which that the police would arrest large numbers of people in the hope that they may find something.³¹⁰ Yet this had very little if any impact on the crime rate and perceptions of safety, and contributed to the breakdown of police-community relations.

Sweeping operations, or crackdowns, are often used by the police to demonstrate that something is being done about crime or to address particular problem areas, resulting in high numbers of arrests, many for petty offences. Petty offence enforcement is a handy tool for arresting high numbers of people. Research done in Malawi made a number of important observations regarding sweeping operations conducted by the police which have a potentially negative impact on police-community relations:

Such exercises are often conducted as a learning tool for young police recruits, a strategy with the potential of producing unnecessary arrests for training purposes. Police stations must develop clear criteria and objectives for arrests during sweeping exercises. Typically, sweeping exercises have only very general objectives, meaning that persons are arrested, for example, for being on the street at night, even when they have not committed a specific offence or engaged in suspicious activity. There is no overarching policy on sweeping exercises, a fact that accordingly gives police relative freedom to arrest persons without having to follow procedures or conduct thorough investigations.³¹¹

The literature also raises a number of other concerns about sweeping or crackdown operations.³¹² If there is any impact, it is of short duration because crackdowns do not address the underlying physical and socioeconomic conditions responsible for crime. Crackdowns may, however, have a

³⁰⁹ *Final Report of the Khayelitsha Commission* 379-80.

³¹⁰ *Final Report of the Khayelitsha Commission* 380.

³¹¹ Southern Africa Litigation Centre (SALC), Centre for Human Rights Education, Advice and Assistance (CHREAA) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related offences in Blantyre, Malawi* (2013) 61.

³¹² Scott MS *the Benefits and Consequences of Police Crackdowns* (2004) Response Guide No. 1, Centre for Problem Oriented Policing.

positive impact when done for a very specific purpose to bring short-term relief. These operations can result in displacement, that is, a problem is displaced from one area to another. Improperly conducted crackdowns can be negative for police-community relations and, at least in the US, have resulted in widespread public protests against the police. The more militarised in style and appearance a crackdown is, the more likely that it will instil fear in citizens, which erodes trust and respect. However, if the purpose and aims of the crackdown are properly communicated, loss of public confidence is not inevitable. Poorly planned and poorly supervised crackdowns accompanied by pressure to make arrests and confiscate contraband increase the risk of abuse and rights violations. Crackdown requires large numbers of police officers and this increases costs, especially when overtime must be paid over a sustained period. Costs also increase for registering arrest and booking detainees. Crackdowns result in additional pressure on prosecutors, courts and magistrates, who may in turn manage the sudden increased caseload by asking for light sentences or choosing not to prosecute. Lastly, crackdowns result in resources being withdrawn from other areas and concentrated in one area, which may have negative consequences for the other areas.

High volumes of arrest and crackdowns on petty offences do not, in general, build confidence and trust in the police, nor contribute to sustained public safety. The opposite seems to be true – it alienates the public and brings about a sense of fear and mistrust.

8 Conclusion

The main arguments for the decriminalisation and declassification of petty offences centre on four issues: (1) The offences are almost without fail defined in a broad and vague manner, leaving them open to interpretation and thus abuse by law enforcement officials. (2) The punishments that these offences attract are disproportionate to the potential harm that was caused. Imprisonment of up to one year for an offence such as loitering is indicative of a vindictive penal code inherited from the colonial powers and perpetuated by governments that have not transformed their criminal justice systems to reflect the AChHPR and acknowledge the socioeconomic realities of Africa. (3) The enforcement of these offences is frequently discriminatory in nature, targeting individuals because they are poor, homeless, belong to an out-group or merely trying to earn a living in contravention of an outdated or overly restrictive law. (4) The enforcement of these laws is frequently done in an arbitrary and erratic manner through sweeping operations, but also tainted by corruption and

bribery. Arrest and detention result in severe socioeconomic consequences for detainees and their households.

This report has argued that the majority of people arrested for petty offences are poor, marginalised, powerless and vulnerable. They are often the first victims of police violence, because their vulnerability and poverty do not allow them to defend themselves and demand their rights. The problem is enabled by, on the one hand, myriad 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.³¹³ The Preamble to the AChHPR states that ‘freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples’. Petty offence laws, which emanate from the colonial past, remain on the statutes of many African states despite the pledge made in article 2 of the Charter, to ‘eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa’.³¹⁴ The arbitrary and unlawful arrest for outdated, discriminatory and petty offences, targeting the most vulnerable persons, violates fundamental rights as enshrined in the AChHPR and supported by the Ouagadougou Declaration and the Luanda Guidelines.

The AChHPR provides everyone the right to equality and equal protection before the law³¹⁵ and non-discrimination on grounds of any kind, including race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.³¹⁶ State Parties to the AChHPR have an obligation to ensure the elimination of discrimination against women, and protection of the rights of woman and children.³¹⁷ The aged and the disabled shall also have the right to reasonable accommodation, supported by the applicable procedural and substantial safeguard.³¹⁸ The enforcement of petty offences (particularly those that are vague or over-broad) that allows police the wide discretion to execute arrests, has the risk of officials using their arrest powers to assume criminality on the basis of economic disparity, poverty, gender, race, ethnicity and place of origin. This denies certain categories of persons the right to equality before the law. Such arrests also violate the right not to be discriminated against, as it gives law

³¹³ Muntingh L *Arrested in Africa: An Exploration of the Issues* (2015).

³¹⁴ Art. 2 AChHPR.

³¹⁵ Art. 3 AChHPR. See also article 19 of the AChHPR: All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

³¹⁶ Art. 2 AChHPR.

³¹⁷ Art. 18(3) AChHPR.

³¹⁸ Luanda Guidelines, Guideline 33(a)(iii).

enforcement officials the opportunity to target specific categories of persons such as street children, females and poor people who have no place to stay or street vendors who are trying to earn a living to feed their families. Arrests are executed because such individuals are considered ‘undesirable’ in the eyes of law enforcement officials and/or such arrests enjoy support from other citizens who do not face such challenges.

In view of the above, it is necessary that states across the continent embark on law reform and law enforcement reform processes to ensure that trivial and outdated offences are decriminalised and, where appropriate, declassified.

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