

**THE AFRICAN COMMISSION ON HUMAN AND PEOPLES'
RIGHTS AND THE PROMOTION AND PROTECTION OF
PRISONERS' RIGHTS: AN ANALYSIS**

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE LLM (HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)

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DECLARATION

I **RHODA NKIROTE IGWETA** declare that this dissertation: **the African Commission on Human and Peoples' Rights and the promotion and protection of prisoner's rights: an analysis** is my work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged. It is in this regard that I declare this work as originally mine. It is hereby submitted in partial fulfilment of the requirements for the award of LLM (Human Rights and Democratisation in Africa).

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DEDICATION

This dissertation is dedicated to my husband, Ng'entu Murangiri Njeru, a precious gem and to my parents Joseph M. Igweta and Marcella K. Igweta for your guidance, love and support every single day of my entire life.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and the Welfare of the Child
AHSG	African Heads of State and Governments
AIDS	Acquired Immune Deficiency Syndrome
APT	Association for the Prevention of Torture
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	United Nations Convention on the Rights of the Child
DRC	Democratic Republic of the Congo
ECPT	European Committee for the Prevention of Torture
ECtHR	European Court of Human Rights
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
NGO	Non Governmental Organisation
NHRI	National Human Rights Institution
OAU	Organisation of African Unity
OPCAT	Optional Protocol to the Convention against Torture
PRI	Penal Reform International
SR	Special Rapporteur
SRP	Special Rapporteur on Prisons and Conditions of Detention in Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNSMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
WG	Working Group
WW2	World War Two

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CHAPTER ONE

THE STUDY

1.1 Introduction

There is an estimated one million prisoners in Africa and most of them are detained in overcrowded prisons and conditions that well below internationally accepted standards.¹ These prisons hold both sentenced prisoners and persons awaiting trial. What happens in prisons is usually unknown to the outside world leading to vulnerability of prisoners. For this reason, prisoners require specific recognition and protection. It is trite to say that how a society treats its prisoners, reveals a lot about its moral values, its commitment to the rule of law and democracy.²

Under international law, prisoners' rights enjoy considerable prominence despite the fact that they are relatively invisible in many domestic jurisdictions.³ There is a large body of standards and principles⁴ addressing the various aspects of prisoners' rights and the interaction with those in whose custody they are placed. These instruments apply in addition to all the human rights instruments that apply to all human beings, save for the limitations due to deprivation of liberty.

At the regional level, the African Charter on Human and Peoples' Rights⁵ (Charter) has no provisions that explicitly refer to detainee or prisoner rights. These rights are implied from

¹ J Sarkin 'An overview of human rights in prisons worldwide' in J Sarkin (ed) *Human rights in African prisons* (2008) 1; International Centre for Prison Studies 'Africa occupancy rates' http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=africa&category=wb_occupancy (accessed 31 October 2008).

² R Edney 'Judicial deference to the expertise of correctional administrators: The implications for prisoners' rights' (2001) *Australian Journal of Human Rights* <http://www.austlii.edu.au/au/journals/AJHR/2001/5.html#fn2> (accessed 3 September 2008); L Muntingh 'Prisons in South Africa's constitutional democracy' (2007) Centre for the Study of Violence and Reconciliation 5.

³ F Viljoen 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 126.

⁴ These standards laid down by the United Nations include, among others, Standard Minimum Rules for the Treatment of Offenders (1977), Principles of Medical Ethics Relevant to the Role of Health Personnel Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel or Inhuman or Degrading Treatment and Punishment (1982), Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment (1988), The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Basic Principles for the Treatment of Offenders (1990).

⁵ OAU Doc. CAB/LEG/67/3 rev. 5, Adopted 27 June 1981, entered into force 21 October 1986)

reading the Charter and interpreting the rights therein in relation to detained persons. For example the right to dignity and the prohibition of cruel, inhuman or degrading treatment or punishment,⁶ the right to have his cause heard⁷ non-discrimination,⁸ equality before the law⁹ and freedom of conscience and religion¹⁰ also apply to detained persons.

The African Commission on Human and Peoples' Rights¹¹ (the Commission), which is the principal body mandated to promote and protect human rights in states parties to the Charter, has adopted several resolutions in relation to detained persons. They include the Dakar Declaration and Recommendations on the Right to a Fair Trial (1999)¹², Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa (Robben Island Guidelines on Torture) (2002),¹³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)¹⁴ and the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa (2003).¹⁵ There also exist special mechanisms specifically related to prisons, in particular the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) whose mandate was first adopted by the Commission in 1996. Other important regional instruments that have been recognised and adopted by the Commission include the Kampala Declaration on Prison Conditions in Africa in 1996 and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System (2006). These, read together with the Protocol to the African Charter on

⁶ Art 5.

⁷ Art 7.

⁸ Art 2.

⁹ Art 3.

¹⁰ Art 8.

¹¹ Created under article 30 of the Charter and commenced its operations in 1987.

¹² Provides an outline for more detailed principles.

¹³ Adopted to prohibit and prevent torture and makes specific reference to detainees.

¹⁴ The Commission expounds on its understanding on the content and scope on the standards outlined in the 1999 Dakar Declaration.

¹⁵ Was adopted with the intention of accelerating prison reforms in Africa and proposed the adoption of a Charter on the rights of prisoners.

Human and People Rights on the Rights of Women in Africa¹⁶ and the African Charter on the Rights and Welfare of the Child¹⁷ provide the basis for the rights of detained persons in Africa.

1.2 Problem statement

The Charter provides the dual mandate of the Commission as being to promote¹⁸ and protect¹⁹ human and peoples' rights. Prisoners fall within this mandate. Despite the resolutions and declarations on issues related to prisoners and prisons, the situation in African prisons remains bleak and a sustained focus on promoting and protecting prisoners' rights has not emerged.

The responsibility to operate prisons lies primarily with the state but other actors such as National Human Rights Institutions (NHRIs) and civil society play an important role in providing oversight. The Commission and the Charter provide a regional platform and framework supporting domestic institutions to promote and protect human rights.

The conditions in African prisons are generally poor leading to gross human rights violations of prisoners and the staff who are required to work under the existing conditions. Penal Reform International (PRI), an international organisation working on prisons reform, notes 'if the situation in African prisons was "inhuman" in 1996, the situation in 2006 is, if anything, worse.'²⁰ PRI notes that there are several common problems in African prisons such as lack of food, poor hygiene and sanitation, prison overcrowding and inadequate medical care.²¹ The United Nations Mission in the Democratic Republic of Congo describes Tschikapa prison as 'a "mortuary" where prisoners "resemble skeletons" even before they die of malnutrition.'²² This statement illustrates the severity of the challenges that many prisons in Africa face even as far as the most basic provisions are concerned. African prison systems have, for a variety of reasons,

¹⁶ OAU Doc CAB/LEG/66.6/Rev/1, adopted in July 2003 and entered into force on 25 November 2005.

¹⁷ OAU Doc. CAB/LEG/24.9/49 (1990), adopted 11 July 1999 and entered into force Nov. 29, 1999,

¹⁸ Art 45(1).

¹⁹ Art 45(2).

²⁰ A Stapleton 'Introduction and overview of legal aid in Africa' in Penal Reform International and Bluhm legal clinic of the Northwestern University School of law *Access to justice in Africa and beyond: Making rule of law a reality* (2007) 8.

²¹ 'Health in Prison' (2007) 59 (3) *Criminal Justice News* <http://www.penalreform.org/resources/new-2007-newsletter-59-en.pdf> (accessed 7 August 2008).

²² Tshikapa prison - a mortuary, <http://www.monuc.org/News.aspx?newsId=14793> (accessed 7 August 2008).

not been able to address fundamental and systemic problems and this has had dire consequences for prisoners.

1.3 Research questions

This study addresses the following questions:

- What is the human rights situation in prisons in Africa? What challenges do African prisons face in general?
- Is there a legal framework in place for the protection of prisoners' rights in Africa and how does it relate to other human rights instruments? What is the mandate of the Commission in relation to the prisoners' rights?
- What has the Commission done and achieved under its promotional and protection mandates in respect of prisoners' rights? Have the various mechanisms been fully utilised in relation to prisoners' rights? How has the Commission been able to optimise its relationship with the states, civil society and national human rights institutions to fully protect these rights?
- If the conclusion is reached that the Commission has not effectively addressed issues of prisoners' rights, how would it do so more effectively?

This study sets out the theoretical framework for prisoners' rights under the African human rights system (African system) and focuses on the practical expression of the Commission's mandate. The SRP has been the focal point of matters relating to the rights of prisoners. The study also investigates whether the creation of this mechanism has effectively excluded the other mechanisms in respect of prisoners' rights, and created a bureaucratic structure where all issues related to prisoners are referred to the SRP.

1.4 Significance of the study

Given the broad mandate provided by the Charter, the Commission is a powerful body that can create momentum for the effective promotion and protection of prisoners' rights. Through this study, a nexus between the various mechanisms of the Commission for the promotion and protection of prisoners' rights is analysed. The link between states, civil society and national human rights institutions in promoting and protecting human rights will also be considered and proposals for increasing effectiveness will be made. The study emphasises how the mandate of the Commission can be better utilised for the benefit of prisoners in Africa.

1.5 Literature survey

There is a significant body of literature on the mandate and effectiveness of the Commission but information relating to its role in relation to prisoners is limited to a few journal articles and a few chapters in books dealing with a general discussion of the Commission's work.

Evans and Murray are some of the leading writers on the African system and their book²³ provides a good summary of how the Commission functions, its general mandate and its operations. One chapter is dedicated to discussing the work of the SRP. However, the book is dated in respect of the promotion and protection of prisoners' rights and there is therefore a need for recent developments to be discussed and this study provides that information. Viljoen²⁴ addresses international human rights law in Africa from the global, regional, sub-regional and national perspectives. He draws from numerous published and unpublished works, bringing different perspectives into his book and is the most current publication on the African system. Viljoen provides an analysis of the Commission starting with the normative framework and explores the practical working of the Commission in some depth. Viljoen discusses prisons only from the perspective of the SRP and therefore his contribution fails to provide a complete picture of the Commission's interventions in relation to prisoners.

Sarkin²⁵ edited a compilation bringing together different aspects of prisons by different authors and is the most recent work on prisoners' rights but only one chapter by Murray deals with the work of the Commission and less emphasis is placed on prisoners' rights. Viljoen's²⁶ article looks at the SRP and reviews the achievements and possibilities of this mechanism within the regional human rights system. It is the most detailed review of the work of the SRP but does not look at the overall mandate of the Commission with regard to prisoners' rights. The research for the article included field visits and assessed a lot of primary information and is therefore a comprehensive account of the mechanism. It also makes recommendations for improvement. This study provides an update on the SRP and the progress towards the implementation of the recommendations made by Viljoen.

²³ M Evans & R Murray *The African Charter on Human and Peoples' Rights, The system in practice, 1986-2000* (2002).

²⁴ F Viljoen *International human rights law in Africa* (2007).

²⁵ Sarkin (n 1 above).

²⁶ Viljoen (n 3 above) 125–171.

Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law²⁷ compiled and edited papers that were presented at a conference in Lilongwe, Malawi, on legal aid in the criminal justice, the role of lawyers, non-lawyers and other service providers. The book provides a background for an integrated approach in relation to prisoners' rights and creates a basis for understanding the African criminal justice systems within which prisons and prisoners are situated.

Bernault²⁸ edited several chapters on the origins of prisons and confinement in Africa providing different perspectives from several Africa states. The book provides a detailed historical understanding of prisons in Africa by assessing the evolution of prisons in different African states. Foucault²⁹ provides detailed information on the evolution of prisons and the functions of imprisonment. His work is critical in understanding the origins of prisons in Western Europe predating the development of African prisons. Given the work that has been published so far, the author was unable to identify one that looks at the entire Commission through the lens of prisoners' rights thus there is a need for this study.

1.6 Methodology

This study relies on desk research to draw observations and conclusions from published works on the Commission in relation to prisoners' rights. The study engages with various viewpoints in the available literature and analyses primary sources such as activity reports of the Commission.

1.7 Limitation of the study

There already exists a substantial body of information on the work of the Commission in general, although it does not focus adequately on prisoners' rights. Time constraints placed a limit on the depth and scope of the analysis.

The information that should be on the Commission's website is not properly archived and there are many inactive links and thus excluding some primary information from the analysis. As a

²⁷ PRI & Bluhm Legal Clinic (n 20 above).

²⁸ F Bernault *Social history of Africa: A history of prison and confinement in Africa* (2003).

²⁹ M Foucault *Discipline and punish: The birth of prison* (1977).

result, there was a heavy reliance on secondary sources where the primary sources were unavailable within the Commission's or African Union's websites.

1.8 Chapter Breakdown

Chapter 2 – The evolution of human rights in African prisons

The chapter familiarises the reader with the history of prisons and the evolution of prisoners' rights in Africa. It highlights the functions of prisons and conducts an assessment of whether these functions have been achieved. It also provides a snapshot of the human rights situation in prisons.

Chapter 3 – Normative framework: The African human rights system and protection of prisoners' rights

The chapter highlights the legal framework under the African human rights system for the protection of prisoners' rights. It provides an overview of various instruments and the link with the rights of detainees and prisoners, including a review of soft law.

Chapter 4 – Promotion and protection of prisoners' rights: an analysis of the interventions of the African Commission on Human and Peoples' Rights

This chapter assesses how the mandate of the Commission has been used in relation to prisoners' rights. This assessment includes a description of how the Commission has interacted with states, civil society and NHRI to work towards the promotion and protection of prisoners' rights.

Chapter 5 – Conclusion and recommendations

This chapter will draw conclusions based on the research and make some recommendations to make the intervention by the Commission in relation to prisoners' rights more effective.

Key phrases

African Commission on Human and Peoples' Rights and prisoners' rights - prisoners' rights in Africa - prisons in Africa - promotion and protection of prisoners' rights - human rights in African prisons - states and prisoners' rights

CHAPTER TWO

THE EVOLUTION OF HUMAN RIGHTS IN AFRICAN PRISONS

2.1 Introduction

This chapter highlights the origins of prisons from ancient Rome and how they came to be in Africa, what developments in the prisons led to the concept of prisoners' rights and the nature of prison conditions in Africa.

2.2 The idea of punishment

Some of the legally authorised sanctions in Europe in the eighteenth century were death, penal servitude, imprisonment, corporal punishment, detention in a reformatory school, release on recognisance and fines.³⁰ According to Myrl E. Alexander;

[s]ociety's offenders have been dealt with in many ways. Until recent times, historically speaking, punishment was harsh; criminals were exiled, enslaved, tortured, mutilated, and executed. The use of imprisonment as a method of treating the offender is relatively new, dating back no further than the last quarter of the 18th century. Of course, jails, lockups, and places of detention of various kinds have been in existence for hundreds of years. But it was only 200 years ago that they were used for anything other than places of detention for offenders awaiting a harsher kind of punishment.³¹

This study does not engage with the philosophical arguments of whether imprisonment is an appropriate punishment or not. It accepts that use of imprisonment is an accepted and widely used punishment. A prison is understood as an institution where prisoners, criminal or civil, untried or convicted are physically confined in accordance with judicial orders.³²

³⁰ D Garland *Punishment and welfare* (1985) 6.

³¹ T Sellin 'A look at Prison History' (1967) 31 *Federal Probation* 18.

³² United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR), preliminary observations, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at

Foucault observes that the prison as a punishment was preferred because of its disciplinary potential and because liberty was perceived as a good to which every individual is attached thus to deprive one of liberty was an appropriate punishment.³³ Foucault further argues that the prison is the 'clearest, simplest, and most equitable of penalties.'³⁴ The loss that all people who are imprisoned get is the same regardless of one's place in society; it is an egalitarian punishment.

2.3 The origins of prisons

Prisons can be traced back to the Roman Empire when offenders were detained pending trial or sentence or by masters to punish disobedient servants.³⁵ In England, in the ninth century, prisons were used to remove the King's enemies from circulation.³⁶ By the eleventh century, there was a need for prisons to hold those waiting to attend their trials or be executed.³⁷ Prisoners would pay for their own upkeep to those that managed the prison including sheriffs, local corporations, individual franchise holders and the church.³⁸ In the sixteenth century, Europe introduced houses of correction where able-bodied people could perform labour to address the increasing problem of petty offenders.³⁹ Through prison labour, it was expected that prisoners would understand the error of their ways and become law abiding citizens by using the skills that they had acquired in prison to work in the free world. In the seventeenth century, transportation from Europe to other locations where the prisoners could work was introduced and the destinations were colonies, mainly North America and Australia.⁴⁰ The ships that

Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

³³ Foucault (n 29 above) 232; see KC Hass & GP Alpert *The dilemmas of corrections: Contemporary readings* (1999).

³⁴ Foucault as above 232.

³⁵ R Tomasic & I Dobinson *The failure of imprisonment: An Australian perspective* (1979) 7.

³⁶ GD Treverton-Jones *Imprisonment: The legal status and rights of prisoners* (1989) 1.

³⁷ As above 1.

³⁸ GB Shaw *Imprisonment* (1924) 67.

³⁹ Tomasic & Dobinson (n 37 above) 7; See, KL Hall *Police, Prison and punishment: Major historical interpretation* 1987.

⁴⁰ Tomasic & Dobinson (as above) 8; also Treverton-Jones (n 38 above) 2.

transported them were considered prisons and once they arrived, the entire settlement was one vast prison.⁴¹

In America, the first prisons were designed around a programme developed by Dr. Benjamin Rush, one of the signatories of the Declaration of Independence.⁴² The Act that is regarded as the beginning of the modern system of prison administration in America is the law of 5 April 1790. It established the principle of solitary confinement, the basis of the Pennsylvania and Auburn systems of discipline.⁴³ This evolved into the reformatory system where education and trade training were considered central features.⁴⁴ Between 1900 and 1935, the industrial prison provided labour for industries but this changed with the depression between 1929 and 1933 and with the passage of legislation by congress restricting the sale of prison products in the open market.⁴⁵ Due to the success of the American prison systems, European penologist and reformers visited America to observe the systems of Pennsylvania and New York which formed the basis of solitary confinement in most European prisons since the 1800s.⁴⁶ The solitary system was intended to produce honest and obedient citizens who would not revert to their criminal ways.⁴⁷

In pre-colonial Africa, few societies used containment and where it was used, it was only until compensation, which was the main form of punishment, was paid.⁴⁸ During the slave trade era, although not considered imprisonment in the modern sense of the term, slaves were held in prison-like facilities prior to transportation to overseas destinations and generating

⁴¹ As above 9.

⁴² H Gill 'State prisons in America, 1787 - 1937' in GG Killinger et al *Penology: The evolution of corrections in America* (1979) 61.

⁴³ As above 61.

⁴⁴ As above 62.

⁴⁵ As above 62.

⁴⁶ New York Correction History Society 'The evolution of the New York System' <http://www.correctionhistory.org/html/chronicl/state/html/nyprisons.html> (accessed 31 October 2008).

⁴⁷ GA de Beaumont and A de Tocqueville *On the Penitentiary System in the United States and its Application in France* (1964) 59 cited in New York Correction History above.

⁴⁸ S Pete 'A brief history of human rights in the prisons of Africa' in Sarkin 40; According to Pete, several centralised societies used imprisonment as it is used today such as the Kingdom of Dahomey, the Empire of Samori Toure and the Mandara Kingdom.

infrastructure for confinement to be used later on.⁴⁹ Only towards the end of the nineteenth century did the use of prisons become widespread in Africa, except in Southern Africa where prisons had already been established. Imprisonment was an important tool in achieving colonial control over indigenous people through enforcing tax collections and obtaining forced labour from the locals.⁵⁰ The colonial powers built prisons at garrisons and administrative outposts that were established across the continent supported by comprehensive legislation from the home states giving wide powers to particularly the British colonisers.⁵¹ Countries like Kenya, Uganda, Ghana and Nigeria had prisons built rapidly to accommodate the large number of prisoners resulting from active resistance to colonialism.⁵²

Between 1900 and 1935, imprisonment and prisons in Africa were significantly similar to what they were 100 years before in England and America retaining the use of archaic forms of punishment such as flogging.⁵³ The colonial powers were running two prison systems, one at home and another in the colonies. The reforms that were being made at home were not being transferred to the colonies that they occupied. As the struggle for independence continued over the first half of the twentieth century, the colonial masters increased the use of imprisonment and in some cases resorting to the use of emergency camps for confinement.⁵⁴ It is against this background that prisons in Africa continue to operate only in highly bureaucratic states, such as South Africa, which have succeeded in maintaining the prison system at the heart of the judicial system.⁵⁵

⁴⁹ Pete (n 48 above) 43.

⁵⁰ As above 45.

⁵¹ F Bernault 'The politics of enclosure in colonial and post colonial Africa' in Bernault (n 28 above) 13.

⁵² As above, according to Bernault, the colonial powers wanted free labour for their agricultural and public works projects and prisoners were the source of such labour.

⁵³ As above 3.

⁵⁴ As above 12.

⁵⁵ As above 39.