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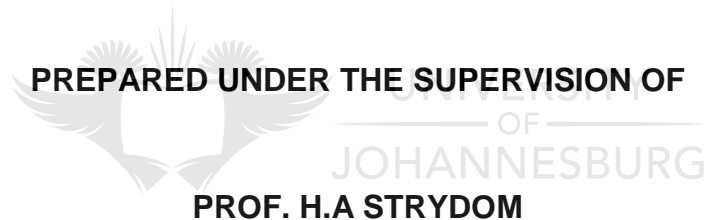
**THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS  
AND THE PROTECTION OF WOMEN DETAINEES IN AFRICA**

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE  
DEGREE LLM (INTERNATIONAL LAW)

**BY**

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**AT THE**

**UNIVERSITY OF JOHANNESBURG (KINGSWAY CAMPUS)**

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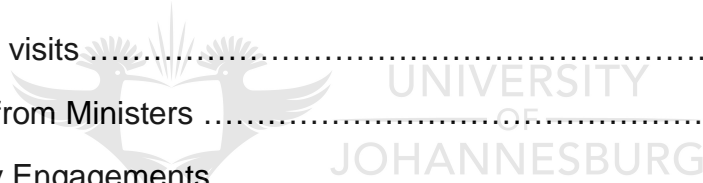
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## DECLARATION

I **WOODS WADIKGWA MOGOPUDI** declare that this dissertation: **the African Commission on Human and People's Rights and the protection of women detainees in Africa** is my work and that it has not been submitted for any degree or examination in any university. All the sources used or quoted have been duly acknowledged. It is hereby submitted in partial fulfilment of the requirements for the award of LLM (International Law)





## DEDICATION

This dissertation is dedicated to my family as specially my mom Jane Mogopudi for all the support you shown every single day of my entire life. This is further dedicated to my two sons Mogomotsi and Kgothatso who inspire me every day to be the best so that they can have an example to look up to.



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## LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and People's 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 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
SRP	Special Rapporteur on Prisons
SRW	Special Rapporteur Women's Rights

# CHAPTER ONE: THE NATURE AND SCOPE OF THE STUDY

## 1.1 INTRODUCTION

At any given time, there are about 10 million people held in prisons around the world, with about 668,000 of these incarcerated in sub-Saharan Africa<sup>1</sup> and about one million in the continent in total.<sup>2</sup> On the continent, female prisoners – an estimated five per cent of the population – are particularly vulnerable to human rights violations due to their historical inequalities, socio-economic vulnerabilities and a gender-slanted criminal justice system.

The African Charter on Human and People's Rights<sup>3</sup> guarantees the rights of detainees through the interpretation of several articles.<sup>4</sup> The vulnerabilities of women detainees highlight the need to prioritise the rights of women in a system that is wholly unequal, fostering the rights to non-discrimination<sup>5</sup> and promoting equality before the law,<sup>6</sup> as recognised by the charter.

Besides numerous international instruments,<sup>7</sup> several resolutions and declarations have been adopted on the continent regarding the general rights of detainees through the African Commission on Human and People's Rights.<sup>8</sup> These instruments aim to prohibit cruel treatment and torture,<sup>9</sup> make provision for fair access and treatment under the judicial system,<sup>10</sup> create a standard for reasonable prison conditions,<sup>11</sup> accelerate penal reform<sup>12</sup> and through the Special Rapporteur<sup>13</sup> on Prisons (SRP), monitor the promotion and protection of the rights of detainees.



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<sup>1</sup> <http://www.unodc.org/southernafrica/en/hiv/prison-settings.htmlcontinent>.

<sup>2</sup> 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\\_occupany](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=africa&category=wb_occupany) (accessed 15 April 2010).

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

<sup>4</sup> Article 5, *the prohibition of cruel and inhuman treatment*; Article 7, *the right to have case heard*; and Article 8, *freedom of conscience and religion*, etc.

<sup>5</sup> Art 2.

<sup>6</sup> Art 3.

<sup>7</sup> 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 Treatment or Punishment (1984) and the Basic Principles for the Treatment of Offenders (1990).

<sup>8</sup> Created under Article 30 of the Charter and commenced its operations in 1987.

<sup>9</sup> 9 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).

<sup>10</sup> Dakar Declaration and Recommendations on the Right to a Fair Trial (1999) which was interpreted by the commission to become Principles and Guidelines on the Right to a Fair Trial and Legal Assistant in Africa (2003).

<sup>11</sup> Kampala Declaration on Prison Conditions in Africa in 1996.

<sup>12</sup> Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal in Africa (2003).

<sup>13</sup> As above 8.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provides a general framework for the protection of women's rights in Africa, but does not expand its scope to protect women in the vulnerable grey area evident within the criminal justice system and, in particular, the penal system.

## 1.2 PROBLEM STATEMENT

In theory, the African Charter on Human and People's Rights and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provide an overlapping and complementary function in the protection of women's rights. Considering the inequalities that are rife and surrounding the rights of women in many African countries, an effective functioning of such an overlap would be essential in addressing the problems of female prisoners.

Sadly though, the unequal treatment of women under African judicial systems is notable, the protection of their particularly vulnerable basic human rights is inherently absent, and the mechanisms that may usually be expected to assist them, at first glance, seem helpless.

In a number of countries, women are, for instance, punished more severely for adultery as compared to men. Married women in the Democratic Republic of Congo (DRC) who are found guilty of adultery are punished with six months to one year in prison, plus a fine. Congolese men, on the contrary, seldom get punished for adultery (Vetten). Moroccan women who have conceived a child out of wedlock can be imprisoned for up to a year, unless they can prove that they were raped.

Another reason for concern is that some African prisons do not hold female inmates separate from men. In some Ugandan prisons, women were not separated from male prisoners during the day but only during the night. In Natitingou Prison, in Benin, women and men use the same toilet and shower facilities.<sup>14</sup> As a result, African female detainees in various prisons are subjected to physical, psychological and sexual abuse.

The severity of the conditions of African prisons is generally recognised and worrying; overcrowding, unsanitary living conditions, and lack of medical resources are often cited as the biggest challenges. For women, particularly those with children, these problems are often compounded by the view of their inferiority within African socio-political and legal systems. Women's inferior socio-economic status South Africa has been recognised at Constitutional Court level,<sup>15</sup> and the particular

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<sup>14</sup> A Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Uganda, Report on a visit 11-22 March 2001, African Commission on Human and People's Rights, 16.

<sup>15</sup> See for instance *Bannatyne v Bannatyne and Another* 2003(2) BCLR 111 (CC).

effects of this upon women's incarceration are stark.<sup>16</sup>

African prisons have not been able to address the critical issues concerning female detainees, resulting in gross violations of human, prisoners and women's and, in many cases, children's rights. Effective functioning of mechanisms to protect these rights is essential.

### 1.3 RESEARCH QUESTIONS

This study addresses the following questions:

- What is the human rights situation in prisons in Africa? What is the women's rights situation in prisons in Africa? What challenges with regard to female prisoners do African prisons face?
- Is there a legal framework in place for the protection of prisoners' rights in Africa and how does it relate to instruments protecting women's rights? What is the mandate of the Commission in relation to prisoners' rights? Have provisions been made for the protection of female prisoners' rights?
- Has the Commission achieved a significant change under its promotional and protection mandates in respect of female prisoners' rights? How has the Commission been able to optimise its relationship with the states, civil society, national human rights institutions and women's rights institutions in order to protect these rights fully? Is the policy of "Gender Mainstreaming" appropriate in furthering the recognition of women's rights as human rights?
- If the conclusion is reached that the Commission has not effectively addressed issues of female prisoners' rights, how would it do so more effectively?

This study seeks to investigate whether the theoretical framework for prisoners' and women's rights, under the African human right system, has created a single or multi-tiered structure for issues relating to women in prisons. It examines whether steps have been taken to exclude or include other mechanisms in respect to female prisoners' rights and whether the mandates of the Special Rapporteur on Prisons and the Special Rapporteur on Women are mutually exclusive.

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<sup>16</sup> <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/newsletters/newsletter/newsletter/209.pdf/>.

## 1.4 SIGNIFICANCE OF STUDY

It must be acknowledged that international human rights law has recognised that it may be necessary to take effective positive action in order to give effect to the principle of equality in favour of a group that has been disadvantaged,<sup>17</sup> such as women. It must also be noted that the legal and policy obligation with regards to women's rights is enshrined in numerous documents;<sup>18</sup> a principle has been formally established that "women's rights are human rights". Through this study, the overlap of the various mechanisms of the Commission for the promotion and protection of women's and prisoners' rights is analysed in order to identify the effectiveness of the combination of mechanisms. The relationship between the Special Rapporteurs on Prison conditions and the Special Rapporteurs Women's rights are examined in order to identify the most suitable. The study emphasises how the mandate of the Commission can be utilised better for the benefit of women in African prisons for the sake of the protection of their fundamental human rights.

## 1.5 LITERATURE SURVEY

### 1.5.1 Overview and history of prisons and imprisonment

The study of prisons is naturally interconnected with the study of crime and punishment, and the subject of prisons has in most part been approached from these perspectives. None of the authors deal with the history of prisons at length or directly with the purposes of prisons. In Tonry and Petersilla,<sup>19</sup> essays are contained that examine the use of imprisonment as a means of social control and the many issues that arise as a result, such as deterrence, incapacitation, the effects of imprisonment on children of offenders, communities, and the prisoners themselves.

Evans and Murray are some of the leading writers on the African system and their book<sup>20</sup> 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.

### 1.5.2 Conditions in African prisons

Reports from the human rights commissions of Kenya, Malawi, Uganda and South Africa, as well as the reports of the Special Rapporteur on Prisons and Conditions of

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<sup>17</sup> MA Freeman 'Women's Human Rights in the Twentieth Century' in A Bullard (ed) Human Rights in Crisis (2008); Aldershot.

<sup>18</sup> Fraser, Avrone S "Becoming Human: The Origin and Development of Women's Human Rights" Human Rights Quarterly (2002) 21:4.

<sup>19</sup> Tonry and Petersilla, *Crime and Justice: A Review of Research* (1999) volume 26.

<sup>20</sup> M Evans & R Murray *The African Charter on Human and Peoples' Rights, The system in practice, 1986-2000* (2002).

Detention in Africa and research carried out by Penal Reform International, were highly informative on the conditions in African prisons.

### **1.5.3 Women's rights in Africa**

Most literature regarding the rights of women in Africa is restricted to a few chapters in entire bodies of work that are focused on the interpretation of the CHPR. A few articles were found regarding the rights of women in Africa, although they were more directed towards an economic or social development agenda regarding the role of African women.

### **1.5.4 Women in African prisons**

The topic of women in African prisons is very sparsely published compared to the Western equivalent. A majority of published works of research on the rights of women in prisons can be found on the websites of mostly American and British advocacy groups, the UN website and the Quaker United Nations Office (QUNO). In an essay, Vetten discussed the plight of female prisoners in a book edited by Sarkin.<sup>21</sup>

### **1.5.5 The African Commission on Human and People's Rights**

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.

Viljoen<sup>22</sup> provided an analysis of the Commission, starting with the normative framework, and explored the practical working of the Commission in some depth, but overlooked the focus of the commission on women's rights and, therefore, the rights of female prisoners. Sarkin<sup>23</sup> edited a compilation bringing together different aspects of of prisons by different authors and is the most recent work on prisoners' rights, but as mentioned above, only one chapter delves into the realm of women in prison. 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.

Penal Reform International and Bluhm Legal Clinic of the North Western University School of Law compiled and edited papers that were presented at a conference in Lilongwe, Malawi, on legal aid in the criminal justice, on the role of lawyers, non-lawyers and other service providers.<sup>24</sup> The compilation provided a background for

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<sup>21</sup> J Sarkin, *Human Rights in African Prisons*, HSBC Press (2008).

<sup>22</sup> F Viljoen, *International Human Rights Law in Africa* (2007).

<sup>23</sup> As above 21.

<sup>24</sup> 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.



an integrated approach in relation to prisoners' rights, and created a basis for understanding African criminal justice systems within which prisons and prisoners are situated.

Given the work that has been published so far, the researcher was unable to identify one that identifies the vulnerabilities of female prisoners' rights within the framework of the ACHPR.

## **1.6 METHODOLOGY**

This study relies on desk research in order to draw observations and conclusions from published works by various national institutions, relevant domestic and international legal instruments, official journals, and on the Commission, in relation to prisoners' rights. Research tools used were the library and the Internet. The study engaged various viewpoints in the available literature, analyses and primary sources such as activity reports of the Commission.

## **1.7 LIMITATION OF STUDY**

There already exists a substantial body of information on the work of the Commission in general, although it does not focus adequately on female prisoners' rights. The publications relied on, particularly with regard to the functions of prisons, are not current. 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. The same situation applies to sources of information consulted on national human rights institutions, though these are not dated. As a 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 OVERVIEW OF CHAPTERS**

Chapter 1 introduces the study and the questions that have prompted the study. The second chapter looks at how prisons came into being and what purposes they serve. The scope of Chapter 3 is the examination of conditions of prisons in Africa and focuses on the evolution of prisoners' rights with regard to the specific vulnerabilities of women. Chapter 4 outlines the normative framework within which the African human rights system operates.

The final chapter will examine how the ACHPR has utilised or might utilise the mechanisms available to it, in favour of the best possible protection of the human rights of female prisoners.

Conclusions and recommendations will then follow.

## CHAPTER TWO: THE EVOLUTION OF HUMAN AND WOMEN'S RIGHTS IN AFRICAN PRISONS

### 2.1 INTRODUCTION

This chapter aims to provide a brief history of prisons and their functions from their early applications in law to modern African penal systems. It also describes the facts regarding the human rights situation of modern African prisons, with particular attention being directed towards the dire situations faced by women in this system.

### 2.2 PRISONS: THEORIES AND FUNCTIONS

The purposes and functions of the prison can be surmised as incapacitation, punishment, rehabilitation, reformation and reintegration.

#### 2.2.1 Incapacitation

Isolating the offender from free society incapacitation seeks to prevent the commission of more crimes.<sup>25</sup>



#### 2.2.2 Punishment

By depriving the offender of his liberties, punishment aims to serve as a form of retribution for offences that were committed and as a deterrent to potential offenders or repeat offenders who are being punished. Whether the retribution is commensurate to the crime will depend on variables such as the length of imprisonment.

#### 2.2.3 Rehabilitation

Rehabilitation of the offender is based on the realisation that imprisonment is, with a few exceptions, only for a period of time and the offender will eventually be released into the society with the expectation that he/she will not commit another offence.<sup>26</sup> It was anticipated that, by reforming the offender, he/she would see the error of his/her ways and choose to live in accordance with society's accepted norms

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<sup>25</sup> Murton T O 'Prison Management: *The Past, the Present and the Possible Future*' in Wolfgang M E(ed) Prisons: Present and Possible (1979) 5-53.

<sup>26</sup> Jayewardene C H S and Jayasuriya D J N *The Management of Correctional Institutions* (1981) 21.

## 2.2.4 Reintegration

Reintegration sought to help the offender cope with the stigma attached to prison and to return to the society that he had wronged. The reintegration function helps him to return to the society that he had wronged and to take his appropriate place as a law-abiding citizen within that community.

These functions of the prison can be broadly categorised into two theories of punishment: the utilitarian and the retributive theories.

The utilitarian theory purports to punish offenders for the general welfare of society, thus incapacitation for society's safety, deterrence to minimise the rate of crime and rehabilitation for the offender's own good. The retributive theory, on the other hand, regards the offender's wrongdoing as deserving of punishment, which should be proportionate to the extent of the wrongdoing.<sup>27</sup>

This study does not deal 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.<sup>28</sup>

Foucault observes that the prison, as a punishment, was preferred because of its disciplinary potential and because liberty was perceived more as a good to which every individual is attached. Thus, to deprive one of liberty was an appropriate punishment.<sup>29</sup> Foucault further argues that the prison is the 'clearest, simplest, and most equitable of penalties.'<sup>30</sup> The loss that all people who are imprisoned experience is the same regardless of one's place in society – it is an egalitarian punishment.

## 2.3 THE HISTORY OF PRISONS

Prisons, as we know them today – state-run institutions used to isolate individuals suspected or convicted of wrongdoing – are a recent phenomenon. Towards the end of the 17th century in England, suspects were detained, awaiting trial

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<sup>27</sup> Ten C L *Crime Guilt and Punishment A Philosophical Introduction* (1987) Footnotes on the text have been excluded.

<sup>28</sup> 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 Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 (XXIV) of 3 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>29</sup> M Foucault *Discipline and Punish: The birth of prison* (1977). See KC Hass & GP Alpert. The dilemmas of corrections: Contemporary readings (1999).

<sup>30</sup> Foucault (n 29 above) 232.

execution, but not as punishment. The law simply required a law enforcement officer to produce a suspect on the day of trial or execution.

### 2.3.1 Roman Empire

Prisons can be traced back to the Roman Empire, when offenders were detained – pending trial or sentence – by masters in order to punish disobedient servants.<sup>31</sup> In England, in the ninth century, prisons were used to remove the King's enemies from going around.<sup>32</sup>

### 2.3.2 Sixteenth Century Europe

In the 16th century, Europe introduced houses of correction where able-bodied people could perform labour to address the increasing problem of petty offenders.<sup>33</sup> In the 17th century, transportation from Europe to other locations where the prisoners could work was introduced, and the destinations were colonies, mainly North America and Australia.<sup>34</sup>

### 2.3.3 Eighteenth Century Europe

Some of the legally authorised sanctions in Europe in the 18th century were death, penal servitude, imprisonment, corporal punishment, detention in a reformatory school, release on recognisance and fines.<sup>35</sup> 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, lock-ups, 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 who would await a harsher kind of punishment.<sup>36</sup>

### 2.3.4 The United States of America

In America, the first prisons were designed around a programme developed by Dr Benjamin Rush, one of the signatories of the Declaration of Independence.<sup>37</sup> The Act that is regarded as the beginning of the modern system of prison administration in America is the law that came into effect on 5 April 1790. It established the

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<sup>31</sup> R Tomasic & I Dobinson *The failure of imprisonment: An Australian perspective* (1979) 7.

<sup>32</sup> GD Treverton-Jones *Imprisonment: The legal status and rights of prisoners* (1989) 1.

<sup>33</sup> Tomasic & Dobinson (n 31 above) 7; See, KL Hall Police, *Prison and punishment: Major historical interpretation* 1987.

<sup>34</sup> Tomasic & Dobinson (as above n 33) 8; also Treverton –Jones (n 32 above) 2.

<sup>35</sup> D Garland *Punishment and welfare* (1985) 6.

<sup>36</sup> T Sellin 'A look at Prison History' (1967) 31 Federal Probation 18.

<sup>37</sup> H Gill 'State Prisons in America, 1787-1937' in GG Killinger et al *Penology: The evolution of corrections in America* (1979) 61.

principle of solitary confinement, and the basis of the Pennsylvania and Auburn systems of discipline.<sup>38</sup>

### 2.3.5 Colonial Era Africa

#### 2.3.5.1 Pre-Colonial Africa

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.<sup>39</sup> During the slave trade era, although not considered imprisonment in the modern sense of the term, slaves were held in prison – like facilities that were available prior to transportation of slaves to overseas destinations and prior to building infrastructure to be later used for confinement.<sup>40</sup>

#### 2.3.5.2 Colonial Africa

Only towards the end of the 19th century did the use of prisons become widespread in Africa, except in Southern Africa, where prisons have 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.<sup>41</sup> Countries such as Kenya, Uganda, Ghana and Nigeria had prisons built rapidly in order to accommodate the large number of prisoners resulting from active resistance to colonialism.<sup>42</sup>

#### 2.2.5.3 Twenty-First Century Africa

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 20th century, the colonial masters increased the use of imprisonment and, in some cases, resorting to the use of emergency camps for confinement.<sup>42</sup> It is against this background that prisons in Africa continued to operate only in highly bureaucratic states such as South Africa, which has succeeded in maintaining the prison system at the heart of the judicial system.<sup>43</sup>

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<sup>38</sup> As above 37.

<sup>39</sup> 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.

<sup>40</sup> Pete (n 39 above) 43.

<sup>41</sup> F Bernault 'The politics of enclosure in colonial and post colonial Africa' in Bernault.

<sup>42</sup> 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.

<sup>43</sup> As above 41.

## CHAPTER THREE: THE HUMAN RIGHTS SITUATION IN AFRICAN PRISONS

### 3.1 CHALLENGES OF PRISONS IN AFRICA

Prisons in African states have been plagued with many problems accentuated by state-specific social, political, historical and economic factors. Among the common problems, overcrowding, antiquated buildings, corruption, lack of separate facilities for various categories of prisoners and poor governance resulted in human rights violations.<sup>44</sup>

#### 3.1.1 Overcrowding

Overcrowding of prisons has been singled out as the primary problem of African prison systems and consequently resulting in human rights violations. Overcrowding increases the spread of communicable diseases, makes the attainment of hygiene and sanitation standards difficult, and violates the dignity of people due to the inhumane conditions that they are subjected to. This is compounded by poor infrastructure that has not been expanded to accommodate the growing numbers of prisoners. Research has shown that, in 64 per cent of the African states, the prison population increased between 2002 and 2006.<sup>45</sup> Of the 36 states on which information is available, 20 have occupancy rates of 140 per cent and higher.<sup>46</sup>

#### 3.1.2 Administration and Reform Obstacles

In a study by Penal Reform International, it was found that while some of the countries had updated some of the legislation dealing with prisons, 11 countries are still using legislation that dates back to the 1970s and even as far back as the 1950s.<sup>47</sup> This means that these countries are operating without the benefit of modern penal practice requirements, and may not have included in their legislation guidelines such as the United Nations Standard Minimum Rules for the Treatment of Prisoners and other legal instruments, both universal and regional.<sup>48</sup>

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<sup>44</sup> J Sarkin 'An overview of human rights in prisons worldwide' in Sarkin (ed) Human Rights in African Prisons.

<sup>45</sup> R Wamsley 'World Prison Population, Seventh Edition'.  
<http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf> (accessed 4 April 2010).

<sup>46</sup> International Centre for Prison Studies.

<sup>47</sup> Penal Reform International 'Analysis of Responses to Questionnaires Directed to Prison Services, Representatives of the Judiciary and Non-Governmental Organisations'.  
[http://www.penalreform.org/english/frset\\_theme\\_en.htm](http://www.penalreform.org/english/frset_theme_en.htm) (accessed 12 April 2010).

<sup>48</sup> Adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

Other areas covered included the number of staff in proportion to the number of prisoners, and this was found to be 1:3 or less in six countries, and 1:15 or more in two countries, with most countries averaging 1:4-6 members of staff to prisoners. The imprisonment levels from country to country as well as the prison population rate tend to be higher in Southern African countries and lowest in Central Africa and West Africa.<sup>49</sup>

The average population rate was found to be 119 prisoners per 100,000 inhabitants.<sup>50</sup> From the survey, Penal Reform International estimated that there were nearly one million prisoners in African prisons, with the number of prisoners varying between 177,000 in South Africa to 500 in Gambia. These prisoners will eventually be released to rejoin the societies they left and the effect of the prison conditions will begin to be felt in those societies in terms of health, increased financial burden as a result of unemployment amongst other things. Before that, however, higher imprisonment rates have implications on the cost of maintaining the prisoners as well as the logistical obstacles accompanying such rises in prison populations.

### **3.1.3 Resources: Infrastructure, health and sanitation nutrition shortages**

Prisoners interviewed by the Special Rapporteur have complained of inadequate food, clothing and bedding, both in terms of quality and quantity. Toilet facilities were deplorable, with inmates sometimes having to use the same bucket as a toilet and for carrying bathing water.<sup>51</sup> Hygiene and health care were also cited as wanting and, in many cases, inmates were not attended to by doctors at the prison, and they were not taken to a hospital due to lack of transport or prohibitive costs, and sometimes because of lack of enough staff who can accompany inmates to hospital.<sup>52</sup>

### **3.1.4 Dignity and humane treatment**

Incidences of torture, cruelty and inhuman treatment were observed, such as the use of leg irons in Benin, Gambia and Mali, to name a few.<sup>53</sup>

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<sup>49</sup> Penal Reform International as above 46.

<sup>50</sup> This figure rises to 147 per 100,000 inhabitants when Rwanda is included in the survey because of the unique circumstances faced by Rwandan prisons after the genocide of 1994.

<sup>51</sup> Report of the Special Rapporteur on a visit to prisons in Malawi. See Reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa at <[http://www.penalreform.org/english/frset\\_pub\\_en.htm](http://www.penalreform.org/english/frset_pub_en.htm)> (accessed 11 October 2003). The countries visited by the Special Rapporteur and whose reports are available are Benin, Central African Republic, Gambia, Malawi, Mali and Mozambique.

<sup>52</sup> See Reports of the Special Rapporteur on visit to prisons in Benin (1999) Series IV n6 at 39 and Mozambique.

<sup>53</sup> See Reports on Benin (as above), Gambia (June 1999) Series IV n9 at 24 & 25 and Mali (Nov-Dec 1998) series IV n4 at 22 & 38.

### 3.2 VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN AFRICAN PRISONS

Prisoners form one of society's most marginalised groups; female prisoners all the more so. Perhaps contrary to common belief, prisoners retain all rights except those curtailed in order to implement the imposed sentence. On the African continent, the plight of women and the violation of their human rights are at their worst within the prison walls. Additional challenges to their human rights exist, in addition to those of their male counterparts.

In most countries, women constitute a minority of the prison population – usually between 2% and 8%.<sup>54</sup> Prison systems and prison regimes are almost invariably designed for the majority of male prisoners' population – this can easily be observed from the architecture of prisons, security procedures, facilities for health care, family contact, to work and training. Women's prisons are an adaptation of prisons for men. As a consequence, prisons tend not to meet the needs of women prisoners, and women in prison are affected by imprisonment in a particularly harsh way. All too often, the human rights and basic dignity of women in prison are systematically violated.

The needs and concerns of women prisoners are different from those of men prisoners. Female prisoners are very often the sole or primary caregivers of young children and have other family responsibilities. They may be particularly vulnerable to abuse in prison. Women prisoners have different health needs, including those related to sexual and reproductive health. In some countries, women may be pregnant in prison and may give birth in prison. Women prisoners suffer from unusually high rates of mental illness.

Whilst problems such as overcrowding, poor hygiene and inadequate visiting facilities affect both men and women prisoners, there are many concerns that are specific to women, or which affect women prisoners in a different or particularly harsh way. Particular groups of women, such as female juvenile prisoners, women with disabilities, women who are foreign nationals, indigenous and other minority women, have further needs that are specific to them as women. These are often overlooked by the broad application of human rights provisions by the ACHPR.

Despite this basic principle of the UN Standard Minimum Rules, discrimination against women in prison is systemic. In many African countries, women in prison and other places of detention are victims of gender-based violence, which is a form of discrimination. In most countries, even where prison conditions are not physically violent, women prisoners are discriminated against as compared to male prisoners in almost every aspect of prison life – including decisions made as to pre-trial

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<sup>54</sup> Coyle, A. (2002) *A Human Approach to Prison Management: Handbook for prison staff* (International Centre for Prison Studies) p. 131.



detention,<sup>55</sup> opportunities for education and employment, health care, and in the exercise of marital and parental rights. They have had no significant vocational training opportunities, few opportunities for transfer, and very little access to a true minimum security institution.<sup>56</sup>

### **3.2.1 Security Classification**

A prisoner's security classification determines the parameters of their liberty. Prisons are operated pursuant to rules that determine the degree of supervision and control imposed on prisoners, according to their security classification. Security classifications direct decisions such as the granting of leave from prison, access to visitors and access to work programmes. There are two key ways in which women prisoners in Africa tend to be discriminated against in relation to security classification:

- **Not being classified**

The comparatively small number of prisons for women, coupled with the rapidly growing female prisoners' population, means that there is often limited accommodation for women prisoners as compared to male prisoners. Importantly, the type of available accommodation for women prisoners tends to be limited. For example, in a region where there might be four men's prisons of different security classifications, there may be just one women prison.

Where this is the case, that one prison's regime will be determined by the maximum security requirement. This means that women prisoners are particularly likely to be held according to a security classification that is stricter than could be justified by any assessment of the risk that they pose. Untried prisoners are often held with convicted prisoners, and those sentenced for civil and criminal offences are often held together.

- **Being housed at a higher security level than one's classification**

Prisoners should be housed in accommodation that is appropriate to the security classification assigned to them. However, very often there are far too few low security places for women, so even when women have been classified as low security, they are accommodated within a high security regime. Women regularly serve their sentences in maximum security regardless of their security classification.<sup>57</sup>

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<sup>55</sup> Issues relating to women's pre-trial detention are explored further in Townhead, L (2007) Pre-Trial Detention of Women and Its Impact on Their Children (Quaker United Nations Office).

<sup>56</sup> Arbour, L. (1996) *Commission of inquiry into certain events at the Prison for Women in Kingston* (Public Works and Government Services Canada) p. 180.

<sup>57</sup> Beyond Bars Alliance NSW (2005) Submission to the Anti-Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 March 2012) p.19.

### 3.2.2 Strip-Searches

One aspect of unnecessarily harsh security regimes is routine strip-searching of women prisoners. Women prisoners experience strip-searching in a discriminatory manner – the effect on women prisoners is disproportionately greater than the effect on men. Women prisoners, as a group, have a higher chance as victims of previous sexual assault than the general community and male prisoners.<sup>58</sup>

In Africa, where women are found within cultural or religious practices that emphasise modesty, women may also find strip-searching particularly degrading and traumatic. Strip-searching may constitute cruel, inhuman or degrading treatment.<sup>59</sup>

### 3.2.3 Supervision of women prisoners by women

Women in prison all around the world are at risk of rape, sexual assault and torture. In some countries, gender-based violence is endemic in places of detention. Sexual violence against women in prisons has received attention from the Human Rights Committee, the Committee on Elimination of Discrimination Against Women<sup>60</sup> and the Committee Against Torture.<sup>61</sup>

In less overtly violent prison environments, improper touching during searches, being watched when dressing, showering or using the toilet – what the Special Rapporteur on Violence Against Women describes as ‘sanctioned sexual harassment’ – is often prevalent. The presence of male correctional officers in housing units and elsewhere creates a situation in which sexual misconduct is more pervasive than if women are guarded by female officers.<sup>62</sup>

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<sup>58</sup> Kilroy, D. “When Will You See the Real Us?” *Women in Prison Journal*, October 2001.

<sup>59</sup> Megan Bastick & Laurel Townhead, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* 42 (June 2008) (citation omitted), available at <http://www.quno.org/humanrights/women-inprison/womenPrisonLinks.htm>.

<sup>60</sup> The Committee for the Elimination of Discrimination against Women has highlighted violence against women in prisons and detention centres in a number of its Concluding Observations, for example: Peru, A/50/38(1995)79 at para. 445; Bangladesh, A/52/38/Rev. I part II(1997) 117 at para 443; India, A/55/38 part I (2000) 7 at para. 72; Egypt, A/56/38 part I (2001) 33 at para. 344; Russian Federation, A/57/38 part I (2002) 40 at paras. 391 and 392; Tunisia, A/57/38 part II (2002) 102 at para. 194. In its General Recommendations to Turkey, the Committee ‘noted with the gravest concern the practice of forced gynaecological examinations of women in the investigation of allegations of sexual assault, including of women prisoners while in custody... The Committee emphasized that such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women’.

<sup>61</sup> For example: Report of the Special Rapporteur on violence against women, its causes and consequences: Addendum, Communications to and from Governments, E/CN.4/2005/72/Add.I, para. 21 (Bangladesh), para. 44 (Burindi), para. 61-77 (China), para. 137-142 (Egypt), para. 184 (India), para. 132 (Pakistan), para. 413 (Sudan), para. 452-459 (Turkey); Mission to Guatemala, E/CN.4/2005/72/Add.3; Mission to Occupied Palestinian Territory, E/CN.4/2005/72 (Add.4); Report of the Special Representative of the Secretary-General, Addendum, Summary of cases transmitted to Governments and replies received, E/CN.4/2005/101/Add.I.

<sup>62</sup> Report of the Special Rapporteur on violence against women of the mission to the United States of America on the issue of violence against women in state and federal prisons, E/CN.4/1999/68/Add.2, paras. 55, 58.

Furthermore, the dependency of prisoners upon prison staff leads to increased vulnerability to sexual exploitation, as it pushes them to “willingly” trade sex for favours. The Special Rapporteur on Violence against Women has observed that: “Given the power imbalance in prison/prisoner relationships and the hierarchy within the prison, relationships between prison guards and prisoners corrupt the prison environment and tend to exploit the women”.<sup>63</sup>

Prisoners who are abused or exploited by prison staff have little opportunity of escaping from their abuser.

### 3.2.4 Separation of female and male prisoners

Because of the lack of facilities in African prisons, especially regarding female prisoners’ detention facilities, women and girls in many countries are imprisoned in places where men and women share facilities such as cooking and recreational space. Formally, male and female prisoners may be held separately, but in practice, they are not. This places women at an unacceptable risk of assault by male prisoners. In a recent incident, a woman from Durban in the KwaZulu-Natal province of South Africa instituted civil proceedings against the Minister of Correctional Services in South Africa, where she claims that: she was “raped, sodomised and assaulted almost every day by the male prisoners at Westville Prison”.<sup>64</sup>

Visits are crucial to a woman maintaining family contact. Because there are far fewer women’s prisons, women tend to be imprisoned further away from their homes and families than are male prisoners. This makes it more difficult for people to visit women in prison and, in general, women prisoners receive fewer family visits than do their male counterparts. In a recent compiled report, it was found that 63% of women held in South African prisons are held more than 10 kilometres from their home towns.<sup>65</sup>

The negative effects of such geographical isolation had been recognised by a Canadian court in considering living conditions in the federal penitentiary for women in 1991. The court found that incarcerating the defendant there would constitute cruel and unusual punishment because of its geographical distance from her home.<sup>66</sup>

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<sup>63</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. R Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44.

<sup>64</sup> “Women locked up in men’s jail sues” <http://news.za.msn.com/local/articl64>  
<http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reforminitiative/newsletters/newsletters/newsletters%209.pdf> (accessed 02 March 2010).

<sup>65</sup> <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reforminitiative/newsletters/newsletters/newsletters%209.pdf> (accessed 02 March 2010).

<sup>66</sup> R. v Daniels, [1990] 4 C.N.L.R. 51 (Sask.Q.B), referred to in Arbour, L. (1996) Commission of Inquiry into certain events at the Prison for Women in Kingston (Public Works and Government Services Canada) 216.

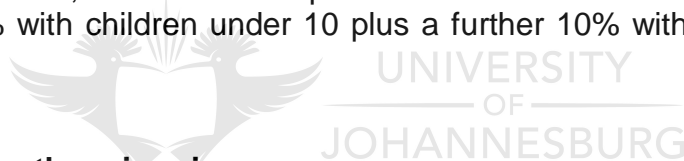
The geographical isolation of women's prisons causes specific problems for indigenous women. Researchers in Canada stressed that: "The dislocation and isolation of imprisonment is worsened by the difficulties encountered by relatives who have to travel from distant, often remote communities, to visit".<sup>67</sup> The difficulty in maintaining contact causes both the woman and her family to suffer. It aggravates the damage to family ties caused by imprisonment and has a particular harsh impact on young children. Research shows that lack of adequate contact with children and family members is a key source of anxiety for female prisoners.

This dislocation of carer relationships also makes a woman's reintegration into society after prison more difficult. Prisoners who maintain family ties while in prison display less disciplinary problems and have better physical and mental health while in prison, and have been shown to be more likely to reintegrate successfully into the community upon release and less likely to re-offend.<sup>68</sup>

### 3.2.6 Mothers of minor children

It is well documented that imprisoned mothers experience a high degree of emotional distress as a consequence of concern for their children, exhibiting "anger, anxiety, sadness, depression, shame, guilt, decreased self-esteem and a sense of loss".<sup>69</sup>

In Rwanda, for instance, 45% of female prisoners have children less than 16 years of age, including 15% with children under 10 plus a further 10% with children less than five years of age.<sup>70</sup>



### 3.2.7 Children of mothers in prison

One of the most complex issues relating to the imprisonment of women is deciding whether young children and babies should be allowed to remain with their mothers in prison. There is a dearth of research on the effects of living in prison on a child's early development, but it is likely that children living in prison often do not receive adequate stimuli to develop normally.<sup>71</sup>

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<sup>67</sup> Arbour, L. (1996) *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Public Works and Government Services Canada) p. 198.

<sup>68</sup> Harrison (1997) cited in Stanley, E. and Byrne, S.: *Mothers in Prison: Coping with Separation from Children*, paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October-1 November 2000, 3.

<sup>69</sup> Stanley, E and Byrne, S: *Mothers in Prison: Coping with Separation from Children*, paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October-1 November 2000, p.3. e.aspx?cp-documentid=15263252 (accessed 15 May 2010).

<sup>70</sup> Information provided to the Quaker UN Office, Geneva, by the Rwandan Ministry of Internal Security, November 2004.

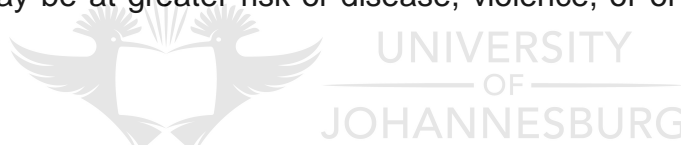
<sup>71</sup> Caddle, D. (1998) *Age limits for babies in prison: Some lessons from abroad* (Home Office Research, Research, Development and Statistics Directorate)p.2.

It is generally accepted that allowing babies to live in prison and separating babies from their mothers present problems. Most prison systems that allow young children to live in prison set an upper age limit, after which the child is removed. This reflects the policy that the adverse effects of a prison environment on a child's development from a certain age outweigh the benefits of the child being with its mother. There is little consensus on the "right age" and by its nature this will vary between cultures. Ghana only allows the baby to be with the mother whilst breastfeeding; Nigeria for 18 months; South Africa and Sierra Leone for two years whilst Kenya and Rwanda for four to five years respectively.

### 3.2.8 Pregnancy, Birth and Postnatal Care

Women who are pregnant whilst in prison have particular health and nutritional needs. They require appropriate facilities and medical care to monitor their pregnancies. They need proper exercise, and to be issued with appropriate clothing. Many will need to be educated about pregnancy, and require counselling and support throughout. Such provisions are often unavailable or sorely inadequate.

In some cases, pregnant women are held separately from the rest of the prison population, which may lead to their suffering from isolation and having a lack of access to facilities. Where pregnant women are integrated with the rest of the prison population, they may be at greater risk of disease, violence, or of having their needs overlooked.



Poor prison conditions and lack of proper care and facilities may place at risk both the health of the woman, and health – or even life – of her unborn child. The high level of stress that accompanies incarceration, in itself, has the potential to affect pregnancy adversely. A specialist on pregnancy in prison has noted, "... pregnancy during incarceration must be understood as a high risk situation, both medically and psychologically, for inmate mothers and their children . . ." <sup>72</sup>

Adequate medical attention during birth is clearly essential for mother and child. Women in African prisons often do not have access to any education in breathing and birthing techniques in order to help prepare them for the birth.

Once born, the child requires immunisation and regular health checks. As during pregnancy, breastfeeding women have particular health and nutritional needs that are often unmet in prison. Mothers require health checks to ensure that their body is recovering from birth in a health manner, and to ensure, for example, that they do

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<sup>72</sup> Acoca (1998), quoted in Owen, B.: "Understanding Women in Prison" in Ross & Richards, Stephen (eds) (2003) *Convict Criminology* (Thomson Wadsworth), p. 240.

not have any infection that they might transmit to the child through breastfeeding. Often, women in prison are discouraged from breastfeeding as it is perceived as interfering with prison routines.

### **3.2.9 Hygiene and health care**

Standards of medical care within prisons vary considerably, both from country to country and from prison to prison; but in Africa, they are often inadequate. Hygiene provisions are often modelled on men's needs, and little or no attention is paid to menstruation, menopause and women's sexual health. Women prisoners suffer from poor physical health, often at rates and with severity far exceeding those of male prisoners or women in the general population. Women may also be at particular risk of contracting HIV and other sexually transmitted diseases whilst in prison, in part, due to their vulnerability to sexual violence.

Through this research, the researcher was not able to find clear or focused policies on the protection of female prisoners' rights. Inadequate attention has been paid by national and regional instruments with regard to security classification of female prisoners, the undignified policy of strip-searches, and the vulnerability of women with regard to sharing detention facilities, the impact on children resulting from the imprisonment, etc.

Lack of adequate facilities, sanitation and nutrition are general problems of the African penal system, but the effects of the above on human rights of women are particularly severe.

### **3.3 CONCLUSION**

The origin of prisons examined in this chapter serves to illustrate how prisons came into existence and the current purposes which they serve. The conditions of prisons have been intertwined with the evolving purposes for which prisons are maintained to the present day. A detailed examination of the conditions in African prisons provides an idea as to what issues exactly are of general concern to prisoners, in addition to giving the African perspective. The "special" challenges facing the rights of women in African prisons were outlined. The present situation of women in prisons can be improved if legal frameworks are adhered to by the states' parties and attention prioritised toward the protection of these rights.

## **CHAPTER 4: PRISONERS' RIGHTS AND HOW THEY ARE PROTECTED IN AFRICA**

### **4.1 WHAT ARE PRISONERS' RIGHTS?**

Prisoners' rights or the human rights of prisoners are, it should be stated, not special rights that accrue to prisoners as such. The concern is to afford prisoners their dignity as human beings and to treat them as such. Prisoners' rights are the same rights that inhere in every human being. However, due to the special circumstances that prisoners find themselves in and the greater propensity for these rights to be violated, a special effort is made to identify and highlight these rights with a view to ensuring respect rather than neglect or violation. Women's rights differ slightly from these as, although women are particularly vulnerable to their general human rights being violated, these rights aim to redress the inherent historical and traditional bias against the exercise of rights by women.

The protection of female prisoners' rights is – under the current normative framework – a combination or an overlap of these rights. Prisoners' rights are necessary because the punishment of imprisonment lies primarily in the deprivation of liberty, and in that offenders are sent to prison as punishment, not for punishment.<sup>73</sup> This is a severe form of deprivation that needs to be strictly regulated. Other rights that are limited by virtue of imprisonment, in addition to the right to liberty, are the right to privacy, the freedom of movement, freedom of expression, association and assembly.

The limitation of these rights is necessary due to the incapacitation of the offender and for security purposes within the prison; thus, they are a necessary and justifiable consequence of deprivation of liberty.<sup>74</sup> The point to be made is that, whereas prisoners' rights were neglected and justified as being typical to prison life, it is now realised that prisoners' rights are an important agenda for prison reforms.

### **4.2 UNIVERSAL INSTRUMENTS**

The principal international legal instruments that protect the rights of individuals including prisoners are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT).<sup>75</sup>

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<sup>73</sup> Sir Alexander Paterson quoted in Howard & Cornes.

<sup>74</sup> Penal Reform International Making Standards work and international handbook on good prison practice (2001) 6.

<sup>75</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984.

The Convention on the Rights of the Child prohibits cruel, inhuman and degrading treatment against children and provides that children should not be detained unless it is a measure of last resort and for the shortest period necessary.<sup>76</sup> The International Convention on the Protection of the Rights of Migrant Workers makes specific reference to the conditions of arrest and detention of migrant workers and their families.<sup>77</sup> Relative to the treatment of prisoners of war, the Geneva Convention is also of direct relevance to prisoners, though its application is confined to persons detained in connection with situations of armed conflict.<sup>78</sup>

Other relevant United Nations standards include the Standard Minimum Rules for the Treatment of Prisoners (SMR)(1955), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment(1988), Basic Principles for the Treatment of Prisoners(1990) and the Code of Conduct for Law Enforcement Officials(1979). These standards are not treaties, but they expound on the provisions that are contained in the international covenants.

The best known of these standards are the Standard Minimum Rules (SMR). They are one of the oldest sets of international principles concerning the treatment of people in custody. They have also gained very wide recognition for their value and influence in the development of penal policy and practice. The SMR covers both sentenced prisoners and untried as well as special categories of detained persons such as juveniles, insane and mentally abnormal prisoners amongst others. The guidelines include standards on *inter alia* registration of prisoners, accommodation, including space, lighting, heat and ventilation, as well as hygiene, clothing and bedding, food and exercise facilities and medical care.

The Body of Principles for the Protection of All persons Under Any Form of Detention or Imprisonment mainly protects imprisoned and detained persons against violation of their physical integrity.<sup>79</sup> The protection of juveniles as a vulnerable category of offenders is catered for by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.<sup>80</sup>

Prisoners' concerns are catered for mainly by the use of general provisions in legal instruments. There does not exist an international convention that imposes binding obligations on states specifically regarding prisoners. The SMR and other standards

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<sup>76</sup> Article 37 of the Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

<sup>77</sup> Articles 16 & 17 of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Adopted by General Assembly resolution 45/158 of 18 December 1990.

<sup>78</sup> Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949. The Convention sets standards relating to accommodation, food and clothing (Arts 25-28), hygiene and medical attention (Arts 29-32), religious, intellectual and physical activities (Arts 34-38)

<sup>79</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988.

<sup>80</sup> 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, Inhuman or Degrading Treatment or Punishment adopted by General Assembly Resolution 37/194 of 18 December 1982.



are only guidelines, though they have the backing of states as most have been adopted by the United Nations General Assembly.

### 4.3 THE AFRICAN RIGHTS SYSTEM

The term “African system” describes the architecture of norms and institutions comprised in the core pan-continental human rights treaties adopted under the auspices of the Organisation of African Unity (OAU) and its successor, the African Union (AU).<sup>81</sup> The normative framework at the regional level includes the Constitutive Act of the AU,<sup>82</sup> the Charter, the ACRWC, and the African Women’s Protocol. Other instruments include those relating to corruption, mercenaries, refugees, conservation of nature and combating terrorism.<sup>83</sup> These, however, fall outside the scope of this study. The institutions include the AU, the Commission, the African Court on Human and Peoples’ Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee).<sup>84</sup>

#### 4.3.1 The African Charter on Human and Peoples’ rights

The Charter is the central document of the African system and recognises individual rights, human and peoples’ rights as well as socio-economic rights, in addition to civil and political rights.<sup>85</sup> The Charter was adopted at a time of increased scrutiny of states for their human rights practices and the ascendancy of human rights as a legitimate subject in the international discourse.<sup>86</sup> Initially, the OAU adhered to a strict interpretation of the principle of non-interference, even at the expense of the rights and lives of the citizens of member states.<sup>87</sup>

With the establishment of the Commission, there has been a greater interest in individual rights, and the Commission’s jurisprudence in interpreting human and people’s rights has grown.<sup>88</sup>

The Charter makes no specific reference to “prisoners’ rights” but these rights can be implied from reading the instrument, in particular, the right to ‘respect the dignity inherent in a human being.’<sup>89</sup>

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<sup>81</sup> CA Odinkalu *‘The role of case and complaints procedures in the reform of the African regional human rights system’* (2001) 1 African Human Rights Law Journal 226.

<sup>82</sup> OAU Doc. CAB/LEG/23.15 (July 11, 2000) (entered into force May 26, 2001).

<sup>83</sup> For full texts; C Heyns & M Killander, *Compendium of key human rights instruments of the African Union* (2007).

<sup>84</sup> See VOO Nmehielle *The African human rights system- its laws, practices, and institutions* (2001); GW Mugwanya *Human rights in Africa- enhancing human rights through the African regional human rights systems* (2003); & Evans & Murray (n 20 above); Viljoen (n 21 above); R Murray *Human rights in Africa: From the OAU to the African Union* (2004).

<sup>85</sup> R Murray *The African Commission on Human and Peoples’ Rights* (2000).

<sup>86</sup> M Mutua, *The African human rights system: A critical evaluation*, <http://hdr.undp.org/en/reports/global/hdr2000/papers/mutua.pdf> (accessed 13 April 2010).

<sup>87</sup> EA Ankumah *The African Commission on Human and Peoples’ Rights. Practice and Procedures* (1996).

<sup>88</sup> See note 2, 415.

<sup>89</sup> See note 3, 132.

In 1995, the Commission adopted a Resolution on Prisons in Africa, which confirmed that the rights in the Charter extended to all categories of persons including prisoners, detainees and all persons deprived of their liberty.<sup>90</sup> The resolution urged states to include in the reports submitted to the Commission, under Article 62 of the Charter, information on human rights affecting the human rights of prisoners. How the Commission has addressed issues related to prisoners' rights will be discussed in Chapter 5.

#### **4.3.2 African Charter on Rights and Welfare of the Child**

At the regional level, the African Charter on the Rights and Welfare of the Child seeks *inter alia*, to protect the child against torture and ill-treatment. It is the only instrument that makes explicit reference to the rights of persons in detention. States are to protect the child against torture and ill-treatment. States are to ensure that no child who is detained or imprisoned, or otherwise deprived of his/her liberty, is subjected to torture, inhuman or degrading treatment or punishment and that the child is separated from adults in the place of detention.<sup>91</sup> The right to a speedy trial is also enshrined in the treaty.<sup>92</sup>

#### **4.3.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)**

Despite the wide ratification of the International Bill of Rights<sup>93</sup> and the Convention of the Elimination of All Forms of Discrimination (CEDAW),<sup>94</sup> gender-based discrimination remained rampant in Africa, and there was thus a need to adopt a protocol to address the issue. In relation to women in prison, Article 24(b) provides for the special protection of 'women in distress'. It provides that:

[t]he states parties undertake to:

- ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

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<sup>90</sup> ACHPR/Res.19 (XVII) 95.

<sup>91</sup> Article 17(2)(a) and (b) of the African Charter on the Rights and Welfare of the Child.

<sup>92</sup> Article 17(2) (c) (iv) of the African Charter on the Rights and Welfare of the Child.

<sup>93</sup> UDHR arts 2 and 7; ICCPR arts 2(1), 3, 26; International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) 993 UNTS 3 arts 2(2), 3.

<sup>94</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) 1249 UNTS 13.

#### 4.3.4 The Kampala Declaration on Prison Conditions in Africa (1977)

The Kampala Declaration on Prison Conditions in Africa was brought about as a result of an international seminar on prison conditions in Africa held in September 1996 in Kampala.<sup>95</sup> The seminar was attended by members of the African Commission on Human and Peoples' Rights, Ministers of State, prison commissioners, judges, international, regional and national NGOs and Inter-Governmental Organisations (IGOs).

The Declaration was subsequently annexed to a resolution by the United Nations Economic and Social Council, which called for the cooperation of states, the United Nations and inter-governmental organisations in the improvement of prison conditions in Africa.<sup>96</sup> By doing so, the UN recognised and lent its weight to the efforts of improving penal conditions in Africa. The Kampala Declaration recommends action to be taken by states and non-governmental organisations on four fronts: prison conditions, remand prisoners, prison staff and alternative sentencing.

#### 4.3.5 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)

The right to a fair trial is a fundamental human right, especially for those who are deprived of their liberty or are facing the prospect of deprivation of their liberty.<sup>97</sup> In order to address several aspects that were missing in the Charter such as the right to public hearings, interpretation, protection against self-incrimination and double jeopardy,<sup>98</sup> the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>99</sup> were formulated. They provide for the right to humane treatment of persons in detention and the supervision of places of detention by an external monitoring body.<sup>100</sup>

These principles present a guiding structure through which the rights contained in the Charter can be realised practically. Further, the protection of the right to a fair trial is the first step in protecting prisoners' rights as judicial interventions can take place at any point during the trial if the accused is in custody and are legally binding on the detaining authorities.

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<sup>95</sup> Conditions in Africa (accessed 03 May 2010).

<sup>96</sup> International Cooperation for the Improvement of Prison Conditions United Nations Resolution 1997/36 adopted on 21 July 1997 [www.un.org/documents/ecosoc/res/1997/eres1997-36.htm](http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm), (accessed 03 May 2010).

<sup>97</sup> T van de Walt & S de la Harpe *'The right to pre-trial silence as part of the right to a free and fair trial: An overview'* (2005) 5 African Human Rights Law Journal 70-88.

<sup>98</sup> C Heyns *'Civil and political rights in the African Charter'* in Evans and Murray (eds) 155.

<sup>99</sup> Accessible on [http://www.achpr.org/english/declarations/Guidelines\\_Trial\\_en.html](http://www.achpr.org/english/declarations/Guidelines_Trial_en.html) (accessed 03 May 2010).

<sup>100</sup> Part M para 8.

#### 4.3.6 The Ouagadougou Declaration (2002)

The second Pan African Conference on Prison and Penal Reform held in Burkina Faso in 2002 produced the Ouagadougou Declaration.<sup>101</sup> This Declaration recognised that progress had been made on the recommendations of the Kampala Declaration and reiterated the need to reduce prison populations. The conference encouraged prisons to be self-sufficient without absolving the state from its responsibility of ensuring that minimum standards are maintained; furthermore, that the rule of law should prevail within the prison administration and efforts should be made to implement the best practices in penal reform. The Conference proposed the drafting of an African charter on prisoners' rights, as well as a United Nations charter on the basic rights of prisoners as an important step towards improving the respect for prisoners' rights.

#### 4.3.7 The African Youth Charter (2006)

The African Youth Charter was adopted on 2 July 2006, but two years later in July 2008 it had only six ratifications and is yet to come into force as it still requires 15 ratifications.<sup>102</sup> Article 18 makes reference to young persons in detention and the kind of treatment that they should receive.

Article 18(d) highlights the purpose of imprisonment as reformation, social rehabilitation and re-integration into family life, which is similar to Article 17(3) of the ACRWC. Although the Youth Charter is yet to come into force, Article 14 of the Vienna Convention on the Law of Treaties of 1969 provides that when states sign and ratify an instrument, it signifies their intention to be bound by and adhere to the obligations arising from the instrument. The Youth Charter, therefore, provides an additional basis on which the states parties can act to protect prisoners' rights.

#### 4.3.8 Robben Island Guidelines (2002)

Africa registers the highest incidence of torture and ill-treatment in the world with documented acts of torture, extra-judicial executions and arbitrary arrests committed in 32 countries.<sup>103</sup> The Robben Island Guidelines<sup>104</sup> were developed to provide a torture-specific instrument in order to address the prevalent problem of torture in Africa.<sup>105</sup> The Robben Island Guidelines are structured to deal with torture in three ways.<sup>106</sup> First, states are required to prohibit torture by ratifying existing legal

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<sup>101</sup> The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa, September 2002 [www.penalreform.org/english/pana\\_declaration.htm](http://www.penalreform.org/english/pana_declaration.htm) (accessed 03 May 2010).

<sup>102</sup> <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 03 May 2010).

<sup>103</sup> Amnesty International Report 2007, <http://report2007.amnesty.org/eng/Homepage> (accessed 03 May 2010).

<sup>104</sup> Adopted by the Commission at the 32nd Session, 17-23 October, 2002: Banjul, The Gambia.

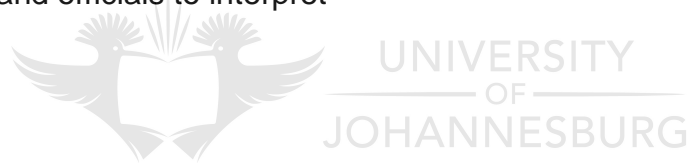
<sup>105</sup> JB Niyizurugezo & P Lessene *Robben Island Guidelines for the prohibition and prevention of torture: Practical guide for implementation* (2008).

<sup>106</sup> JD Mujuzi 'Safeguarding the right to freedom from torture in Africa: The Robben Island Guidelines', Unpublished LLM dissertation, University of Pretoria (2005) 53-57.

instruments and using domestic legislation to criminalise torture.<sup>107</sup> Second, states should prevent torture by putting in place safeguards that prevent torture from happening, especially during the different stages of criminal procedure where torture is likely to be used.<sup>108</sup> Education and awareness raising are emphasised as a way of preventing torture. Third, in case torture happens, the Robben Island Guidelines provide for how to respond to the needs of victims.<sup>109</sup>

This chapter has highlighted what the legal framework in the African system for the promotion and protection of prisoners' rights is. The current framework fails to enumerate prisoners' rights adequately, leaving them mostly to be read into generalised human rights instruments. Female prisoners' rights are, in theory, protected under the same agenda, with no recognition of the particular need for the protection of the rights stated above.

Without a sound legal framework, the protection of rights is more difficult especially starting with the problem of identifying the rights and enforcing them. An African Charter on Prisoners' Rights drafted by the Central, Eastern and Southern Heads of Correctional Services (CESCA) in 2002 represented the first real effort at providing a comprehensive legal framework for the protection of prisoners' rights, but lacks the vision and commitment needed to tackle the specific needs of women within the penal reform. Prisoners' rights are not clearly defined, which becomes a problem for both the prisoners and officials to interpret



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<sup>107</sup> Part I (paras 1-19).

<sup>108</sup> Part II (paras 20-48).

<sup>109</sup> Part III (paras 49-50).

## CHAPTER FIVE: THE PROTECTION OF THE RIGHTS OF FEMALE PRISONERS

This chapter describes the relationships between the various activities, especially the SRP, the African Commission on Human and Peoples Rights and investigates how they link up as part of an overall strategy for the protection of female prisoners' rights. The analysis is based on a review of annual activity reports of the Commission, state reports and promotion and fact-finding mission reports published from October 1996 to May 2008 (the last available report on the website). One year that is significant for prisoners' rights in Africa is 1996, as this was when the Special Rapporteur on Prisoners (SRP) was appointed.<sup>110</sup>

### 5.1 THE ACHPR AND THE PROTOCOL ON THE RIGHTS OF WOMEN

The Protocol to the African Charter on Human and Peoples' Rights, relative to the Rights of Women in Africa,<sup>111</sup> was adopted in July 2003 and entered into force on 25 November 2005, 30 days after the 15th ratification, in accordance with Article 29 of the Protocol. It acknowledges the fact that, despite the widespread ratification by African States of the African Charter on Human and Peoples' Rights, the Convention on the Elimination of all Forms of Violence Against Women and of the instruments that constitute the International Bill of Rights (Universal Declaration on Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights), gender issues barely appeared in political agendas across Africa.

The African Charter deals with gender in its preamble and in Article 2, 3 and 18(3). The Charter addresses the rights of women specifically by making it a duty on States to "eliminate all forms of discrimination against women and ensure adequate protection of women and children's rights as they are stipulated in international conventions and declarations".<sup>112</sup>

However, if Article 18(3) is aimed at protecting women, it does so only in the context of the family. The Charter, therefore, needed to be completed by an additional legal instrument because, while it deals with women's rights to a certain extent, it fails to address particular problems encountered by African women.<sup>113</sup>

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<sup>110</sup> All activity reports for the Commission since 1996 are available on the African Commission's website [http://www.achpr.org/english/\\_info/index\\_activity\\_en.html](http://www.achpr.org/english/_info/index_activity_en.html).

<sup>111</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

<sup>112</sup> Article 18(3).

<sup>113</sup> 'The need for the Protocol', [http://www.achpr.org/english/\\_infor/women\\_prot.htm](http://www.achpr.org/english/_infor/women_prot.htm) (accessed 03 May 2010).

## 5.2 THE PROTECTIONS OF PRISONERS' RIGHTS: MECHANISMS OF THE ACHPR

### 5.2.1 Monitoring adherence to the Charter

One of the ways the CHPR monitors the progress made in the protection of prisoners' rights includes state reporting. When a state is compiling its initial or periodic report, it is expected that various government departments contribute to the report in order to provide a comprehensive, accurate and up-to-date report on the enforcement of the Charter.<sup>114</sup> Initial reports are submitted two years after the state party has ratified the Charter and periodic reports every two years thereafter.<sup>115</sup>

Out of all the states parties, only nine states have presented all their reports while 12 states have not presented any reports at all.<sup>116</sup> The rest of the states parties have presented one or more state reports and owe other reports. Reports assessed include those of Algeria,<sup>117</sup> Benin,<sup>118</sup> DRC,<sup>119</sup> Nigeria,<sup>120</sup> Rwanda,<sup>121</sup> Sudan,<sup>122</sup> Tanzania,<sup>123</sup> Tunisia,<sup>124</sup> Uganda,<sup>125</sup> and Zambia,<sup>126</sup> representing 30 per cent of state reports submitted.<sup>127</sup>

Factors that can be used as a benchmark in this regard may include policy and legislative reforms, conditions of detention, monitoring mechanisms and progress on the prohibition of torture. None of the reports make any mention of an overall strategy for prison reform and the link with prisoners' rights. Some reports such as that of Kenya<sup>128</sup> do not even mention prisons or prisoners.<sup>129</sup>

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<sup>114</sup> See note 2, 371.

<sup>115</sup> Art 62 of the Charter.

<sup>116</sup> Twenty-fourth annual activity report. African Commission 72.

<sup>117</sup> Algeria, third and fourth periodic reports, August 2006.

<sup>118</sup> Benin, consolidated report for 2000-2008.

<sup>119</sup> DRC eighth, ninth and tenth periodic reports, June 2007.

<sup>120</sup> Nigeria second consolidated periodic report, 1990-2004.

<sup>121</sup> Rwanda eighth periodic report, March 2007.

<sup>122</sup> Sudan third periodic report. May 2006.

<sup>123</sup> Tanzania second, third, fourth, fifth, sixth, seventh, eighth and ninth periodic reports, 2006.

<sup>124</sup> Tunisia, fourth, fifth, sixth, seventh, eighth and ninth periodic reports, 2006.

<sup>125</sup> Uganda consolidated report, 2006.

<sup>126</sup> Zambia initial state report, 2006.

<sup>127</sup> <sup>125</sup> [http://www.achpr.org/english/\\_info/statereport\\_considered\\_en.html](http://www.achpr.org/english/_info/statereport_considered_en.html) (accessed 13 May 2010). Some of the links on the website are inactive and do not have the reports.

<sup>128</sup> Initial report of Kenya, May 2007.

<sup>129</sup> JD Mujuzi 'The role of civil society in protecting and promoting prisoners' rights before the African Commission on Human and Peoples' Rights (2005) 5(3) International Journal of Civil Society Law 26.

## 5.2.2 Reform

The reports of Algeria,<sup>130</sup> DRC,<sup>131</sup> Rwanda,<sup>132</sup> Tanzania,<sup>133</sup> Tunisia,<sup>134</sup> Uganda,<sup>135</sup> and Nigeria<sup>136</sup> provide details regarding the reforms in order to make legislation compliant with the Charter and to address specific needs of prisoners. None of the reports, however, elaborate on the progress made in the implementation of the provisions. Factors such as the resources needed to support the implementation are not addressed in any of the reports.

## 5.2.3 Conditions of Detention

The reports of Benin,<sup>137</sup> Nigeria<sup>138</sup> and Tanzania<sup>139</sup> make reference to the conditions of detention but fail to delve into the specific well-known problems and the measures taken to address the challenges other than just addressing the broad legislative reform. In the case of Sudan, the conditions of detention can be implied from the section referring to 'the measures taken to address the poor conditions of detainees.'<sup>140</sup>

## 5.2.4 Monitoring Mechanisms

All the states have a monitoring mechanism through the Human Rights Commission or Justice Ministry save for Algeria and DRC that do not specifically mention them. The mandate of the monitoring mechanisms includes visiting places of detention, talking to prisoners and making recommendations to the states parties on how to improve the conditions in prison. Other than Tanzania, which refers to some action being taken by its monitoring body, there are no references to action taken by states.<sup>141</sup>

## 5.2.5 Prohibition of Torture

All the state reports, other than for Tanzania and Zambia, have legislation outlawing torture. Benin acknowledges the lacuna in the implementation of torture legislation and states that steps are being taken to put in place a mechanism for the prevention of torture.<sup>142</sup> None of the reports link torture and the protection of prisoners' rights.

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<sup>130</sup> See note 117.

<sup>131</sup> See note 119.

<sup>132</sup> See note 121.

<sup>133</sup> See note 123.

<sup>134</sup> See note 124.

<sup>135</sup> See note 125.

<sup>136</sup> See note 120.

<sup>137</sup> See note 118.

<sup>138</sup> See note 120.

<sup>139</sup> See note 123.

<sup>140</sup> See note 122.

<sup>141</sup> See note 123.

<sup>142</sup> See note 118.



Ethiopia remains one of the States Parties that are yet to submit an initial or periodic report to the Commission on the enforcement of the Charter.<sup>143</sup> However, whilst submitting a response to the Commission's report on Ethiopia's human rights situation, the state party made lengthy references to the conditions in prisons and cited from the report of the SRP in order to defend the conditions in its prisons.<sup>144</sup>

### 5.3.1 Promotional visits

Promotional visits are essential in securing engagement with States Parties through non-confrontational and non-investigative visits that facilitate constructive dialogue on the rights protected by the Charter. Mission reports to Botswana,<sup>145</sup> Burkina Faso,<sup>146</sup> Burundi,<sup>147</sup> Guinea Bissau,<sup>148</sup> Lesotho,<sup>149</sup> Mali,<sup>150</sup> Mauritius,<sup>151</sup> Rwanda,<sup>152</sup> Swaziland,<sup>153</sup> and Seychelles<sup>154</sup> can be analysed to investigate the extent to which the Commissioners have created awareness in relation to prisoners' rights and conditions of detention.

As part of promotional visits, discussions are held with the Minister of Justice or the Minister responsible for prisons; and in many instances, the specific conditions of detention are discussed unlike during the state reporting.

### 5.3.2 Comments from Ministers

Justice Minister of Lesotho stated that steps were being taken to implement the recommendations that were given by the Ombudsman, who is responsible for monitoring conditions of detention.<sup>155</sup> In Burkina Faso, the Justice Minister acknowledged that there was overcrowding in the prisons and that the priority was to ensure food self-sufficiency.<sup>156</sup>

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<sup>143</sup> [http://www.achpr.org/english/\\_info/statereport\\_considered\\_en.html](http://www.achpr.org/english/_info/statereport_considered_en.html) (accessed 17 April 2010).

<sup>144</sup> Submissions by Ethiopia concerning the sixteenth activity report of the African Commission in the twentieth activity report 68.

<sup>145</sup> Botswana, 14-18 February 2005.

<sup>146</sup> Burkina Faso, 26-30 March 2007.

<sup>147</sup> Burundi, 1-11 February 2004.

<sup>148</sup> Guinea Bissau, 15-22 March 2005.

<sup>149</sup> Lesotho, 3-7 April 2006.

<sup>150</sup> Mali, 9-18 April 2004.

<sup>151</sup> Mauritius, August 2006.

<sup>152</sup> Rwanda, 26 January-2 February 2004.

<sup>153</sup> Swaziland, 21-25 August 2006.

<sup>154</sup> Seychelles, July 2004.

<sup>155</sup> Lesotho (n149 above) 10.

<sup>156</sup> Burkina Faso (n146 above) 13.

### 5.3.3 Civil Society Engagements

Commissioners were able to engage with civil society organisations in Burundi, Rwanda and Swaziland in order to gather information on the situation in the prisons.

Commissioners visited several prisons in Lesotho,<sup>157</sup> Mali,<sup>158</sup> Swaziland,<sup>159</sup> Botswana<sup>160</sup> and Seychelles,<sup>161</sup> at the request or on invitation from the government.

Since the Commission has not approved standards to assess prisons, the recommendations of Commissioners are vague and difficult to implement, as is the case with the SRP. It could be argued that one of the reasons why states parties do not implement the recommendations is that there are no standards in place and recommendations are vague.

## 5.4 SPECIAL RAPPORTEUR ON PRISONS AND CONDITIONS OF DETENTION IN AFRICA

### 5.4.1 The work of the SRP

The special mechanism is employed to promote the work of the Commission's Special Rapporteurs (SRs).<sup>162</sup> Nearly all the mandates of the SRs can be interpreted to include some or all prisoners' rights, but only the SRP has the specific and direct mandate in this regard.

The Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) was established in accordance with its mandate under Article 45 of the African Charter on Human and Peoples' Rights (the Charter), and the African Commission on Human and Peoples' Rights (The Commission). The SRP is empowered to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights.

The mandate of the SRP includes visiting prisons and making recommendations with a view to improving prison conditions, advocating for prisoners' rights and providing support to the Commission, especially with regard to communications – if called upon to do so.<sup>163</sup> Since 1996, there have been visits to 14 countries and over 200 places of detention with repeat visits to Mozambique and Mali.<sup>164</sup>

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<sup>157</sup> Lesotho (n 149 above) 32.

<sup>158</sup> Mali (n 150 above) 18.

<sup>159</sup> Swaziland (n 153) 23.

<sup>160</sup> Botswana (n 145) 38.

<sup>161</sup> Seychelles (n 154) 29.

<sup>162</sup> Viljoen, (n 22 above) 127-135.

<sup>163</sup> Tenth Annual activity report.

<sup>164</sup> Viljoen, 137. (n 22 above).

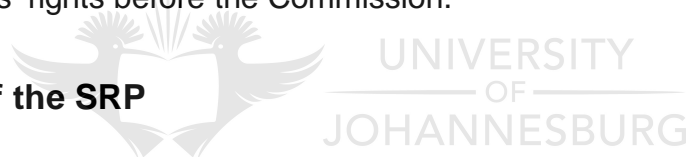
Several factors are considered when selecting the countries to be visited, namely geographical representation, main languages of the AU, size of the country, mainland and island countries, language competence of the SRP, the likelihood of cooperation by the government and NGOs, as well as the travel difficulties in the country.<sup>165</sup>

With regard to the methods of work, one challenge is the broad mandate of the SRP, which includes investigative and preventive functions as well as some punitive and standard setting elements.<sup>166</sup> Because the mandate does not have specific standards, the methodology applied when conducting visits ends up with a reflection of what was observed rather than a measure of compliance with a set of identifiable standards.

Murray notes that the SRP reports do not clearly indicate the standards against which the prisons are being measured, resulting in vague references such as “international standards” being used.<sup>167</sup> In one case, the SRP called for the conditions to be “as good as possible” and in another instance it stated that prisoners should be detained only for a “maximum of a few hours”.<sup>168</sup>

Given that there are no stringent standards forming the basis for the SRP’s visits, it is of concern how the personal views of the SRP fit within the discussions during the consideration of communications. Viljoen is of the view that the SRP’s experience and expertise has been drawn upon in most of the communications brought in relation to prisoners’ rights before the Commission.<sup>169</sup>

## 5.4.2 Findings of the SRP



### 5.4.2.1 Inadequate facilities

In all countries, there are fewer women’s prisons than men’s prisons. Where no separate women’s prisons exist, women may be held with men, and not always separately. In March 1995, twenty-three women and five children were held in a corrugated iron hut that had been built thirty years earlier as temporary accommodation. Gaps in the iron, covered with barbed wire, served as windows.<sup>170</sup>

The women’s wing of the Masaka prison in Uganda was created from what were originally punishment cells for men who broke prison regulations. The ventilation was poor and the premises cold, with most of the women having no blankets. The knowledge that they were being housed in punishment cells compounded the women’s sense of injustice.<sup>171</sup>

<sup>165</sup> R Murray *The African Commission’s approach to prisons* in Sarkin 207.

<sup>166</sup> Uganda Consolidated Report, 2006.

<sup>167</sup> As above 166.

<sup>168</sup> Viljoen, (n 22 above) 147.

<sup>169</sup> Viljoen, (n 22 above) 147.

<sup>170</sup> Stern, Vivien, *A Sin Against the Future* (London: Penguin, 1998), 137.

<sup>171</sup> L Tibatemwa-Ekirikubinza, *Women’s Violent Crime in Uganda* (Kampala: Fountain Publishers, 1999), 213.

All of these problems are considerably compounded by the fact that, because there are so few women's prisons, many women are held at some distance from their families and other support networks. Travel costs may prevent family and friends from visiting regularly (if at all), thus, leaving women not only isolated but bereft of material assistance. This is particularly likely to be the case where prison authorities expect family members to provide prisoners with food, soap, toiletries and clothing.

#### 5.4.2.2 Overcrowding

As is the case for men's prisons, women's prisons are also overcrowded – although not to the same extent. According to the SR, overcrowding is a phenomenon in Benin,<sup>172</sup> the Central African Republic (CAR),<sup>173</sup> Ethiopia<sup>174</sup> and Namibia.<sup>175</sup>

Overcrowding is also reported in South Africa<sup>176</sup> and Egypt.<sup>177</sup> The Thohoyandou Women's Prison in South Africa, for example, reported a 242% occupation rate in 2005 whilst the Durban women's prison reported a 159% occupation rate.<sup>178</sup> In the Kirikiri women's prison in Nigeria, overcrowding was calculated at 130.47%.<sup>179</sup>

Many other adverse conditions that flow from overcrowding include insufficient and inadequate bedding, leaving women to sleep on the floor in the CAR,<sup>180</sup> Egypt,<sup>181</sup> Namibia,<sup>182</sup> and Uganda.<sup>183</sup> Overcrowding also places a strain on sanitation facilities and ventilation, and worsens hygiene, thus creating an environment conducive to ill-health and diseases such as tuberculosis. For example, in the Kaduna prison in Nigeria, 18 women were reported to be sharing two cells and a bathroom with no running water.<sup>184</sup>

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<sup>172</sup> Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Benin Report on a visit 23-31 August 1999, African Commission on Human and People's Rights, 45.

<sup>173</sup> Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in the Central African Republic, Report on visit 19-29 June 2000, African Commission on Human and People's Rights, 5.

<sup>174</sup> 172 Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Ethiopia, Report on a visit 15-29 March 2004, African Commission on Human and People's Rights, 25.

<sup>175</sup> See note 8, 28.

<sup>176</sup> The Inspecting Judge of Prisons, Annual Report for the period 1 April 2005 to 31 March 2006, Judicial Inspectorate of Prisons, 16.

<sup>177</sup> Human Rights Association for the Assistance of Prisoners, Detention and Detainees in Egypt 2003 Sixth Annual Report on the Conditions of Prisons and Detention Centres, 90.

<sup>178</sup> See note 112, 16.

<sup>179</sup> Cited in B. Agozino, *"Nigerian Women in Prison"* in Julia Sudbury (ed) *Global Lockdown* (New York: Routledge, 2005), 195.

<sup>180</sup> See note 109, 14.

<sup>181</sup> Art 62 of the Charter.

<sup>182</sup> Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Mozambique Second visit – April 4-14 December, 2001, African Commission on Human and People's Rights, 26.

<sup>183</sup> Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Uganda, Report on a visit 11-22 March 2001, African Commission on Human and People's Rights, 16.

<sup>184</sup> 182 IRInews.org Nigeria: In overcrowded prisons, survival is a daily battle, 11 January 2006, <http://www.irinnews.org/print.asp?ReportID=51047> Site accessed 7 April 2010.

### 5.4.2.3 Health care, birth and postnatal care

The absence of adequate health care and medication is highlighted in the SR's reports for Benin,<sup>185</sup> Mozambique<sup>186</sup> and Namibia.<sup>187</sup> It has also been raised by South African women,<sup>188</sup> women in Egyptian prisons,<sup>189</sup> as well as those in Nigeria.<sup>190</sup> While little detail is provided as to the nature of this lack of adequate health care and medication, it certainly raises questions about the quality of care provided to pregnant women. Certainly, in relation to Botswana, Modie-Moroka and Sossou<sup>191</sup> noted that the requirements for a healthy pregnancy, such as adequate nutrition, exercise, fresh air and reasonably sanitary conditions were not being met. While there is no information highlighting how frequently it occurs, accounts do exist of women giving birth in cells in Mozambique<sup>192</sup> and Zimbabwe.<sup>193</sup>

Better access to mental and physical health services is another need for women. One in five women (21%) surveyed in three prisons in Gauteng, South Africa, described their health as poor.<sup>194</sup> Seventy-five per cent of 80 women in six Botswana prisons stated that they had some form of physical or mental health problem.<sup>195</sup> These included long-standing, untreated pelvic inflammatory disease (PID), chronic dysmenorrhoea, human papilloma virus (HPV), hypertension, chlamydeous infection, anxiety and depression.<sup>196</sup>

While women prisoners may need better health care, prison authorities would not appear to have the resources to provide it. In Benin,<sup>197</sup> an NGO was taking care of the medical needs of women and children, and in Egypt, women were expected to buy their own medication.<sup>198</sup>



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<sup>185</sup> Note 110, 111.

<sup>186</sup> Note 122, 3.

<sup>187</sup> Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Namibia, Report on a visit 17-28 September 2001, African Commission on Human and People's Rights, 37.

<sup>188</sup> S. Haffejee, L. Vetten and M. Greyling, *Violence and abuse in the lives of women and girls incarcerated at three Gauteng women's prisons*. Centre for the Study of Violence and Reconciliation, Research Brief no.3, Feb. 2006, 3.

<sup>189</sup> See note 181.

<sup>190</sup> See note 184.

<sup>191</sup> T. Modie-Moroka, T. and M. Sossou, M. "Women, criminality and multi-focal empowerment responses: some prospects for Botswana" (2001) 16 *Journal of Social Development in Africa*, 2, 17.

<sup>192</sup> See note 120.

<sup>193</sup> J. Samakaya-Makarati, "Female Prisoners in 'Male' Prisons" in Chiedza Musengezi and Irene Staunton (eds), *A Tragedy of Lives Women in Prison in Zimbabwe*, (Harare, Weaver Press, 2003), 16.

<sup>194</sup> S. Haffejee, L. Vetten and M. Greyling, *Minority Report: the imprisonment of women and girls in Gauteng*. Centre for the Study of Violence and Reconciliation, Research Brief no.4, Feb. 2006, 170.

<sup>195</sup> Cited in T. Modie-Moroka, "Vulnerability across a life course: an empirical study: women and criminality in Botswana prisons" (January 2003) 18 *Journal of Social Development in Africa* 1, 170.

<sup>196</sup> See note 195, 18.

<sup>197</sup> As above 174.

<sup>198</sup> See rule 53(1), (2) and (3) of the UN Standard Minimum Rules for the Treatment of Prisoners.

#### 5.4.2.4 Children of women in prisons

Children are imprisoned with their mothers in Benin.<sup>199</sup> Ethiopia,<sup>200</sup> South Africa,<sup>201</sup> Zimbabwe,<sup>202</sup> Mozambique,<sup>203</sup> the Gambia,<sup>204</sup> Sudan<sup>205</sup> and Uganda.<sup>206</sup> In South Africa, where children may remain with their mothers until the age of five, there were 68 children imprisoned with their mothers in 2005.<sup>207</sup> While children may remain with their mothers until the age of 18 months in Ethiopia, a 2004 visit by the Special Rapporteur noted children as old as eight years in one Ethiopian women's prison who were also not attending school.<sup>208</sup> Children of school-going age in Sudan might also have their schooling disrupted by a spell in prison with their mothers.<sup>209</sup>

Tibatemwa-Ekirikubinza notes that whilst there is an obligation on the Ugandan government to provide prisoners with clothing, no such duty exists in relation to children. She observed that the children born to poor women in prison, who also did not receive family assistance, were particularly disadvantaged by this state of affairs.<sup>210</sup>

#### 5.4.2.5 Separation of female prisoners from male prisoners

According to the United Nations Standard Minimum Rules for the treatment of prisoners, women should be kept separate from men as juveniles are from adults.<sup>211</sup> This does not appear to be the case for a number of prisons, according to the SR. In the CAR, elderly men were incarcerated with women at Bouar prison<sup>212</sup> while in some Ugandan prisons women were not separated from male prisoners during the day, only at night.<sup>213</sup> In Natitingou, Benin,<sup>214</sup> women and men used the same toilet and shower facilities.

At one women's prison, both men and women were held together in the same facilities, and although the inmates were segregated at night, the door of the women's cell could not be locked.<sup>215</sup>

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<sup>199</sup> See note 110, 2, 45.

<sup>200</sup> See note 112, 26.

<sup>201</sup> See note 2, 371.

<sup>202</sup> See note 127, 17.

<sup>203</sup> See note 116, 32.

<sup>204</sup> Article 62 of the Charter.

<sup>205</sup> IRINnews.org. SUDAN: Women and children in prison, 20 August 2003, [http://www.irinnews.org/S\\_report.asp?ReportID=36081](http://www.irinnews.org/S_report.asp?ReportID=36081) accessed 7 April 2010

<sup>206</sup> See note 121.

<sup>207</sup> See note 110, 16.

<sup>208</sup> See note 108, 26.

<sup>209</sup> See note 205.

<sup>210</sup> See note 171, 218.

<sup>211</sup> Rule 8(a) and (d).

<sup>212</sup> See note 111, 22, 211.

<sup>213</sup> See note 121, 15.

<sup>214</sup> See note 118, 39.

<sup>215</sup> See note 172, 11.

Agozino,<sup>216</sup> writing on Nigerian women's conditions of imprisonment, stated that the older inmates of cells extort "state money" or taxes from new inmates, with refusal to pay resulting in physical abuse. While more common amongst male prisoners, such demands may also be extended to female prisoners who are threatened with being put into a men's cell if they refuse to pay. It has also been reported that women may be sexually assaulted during interrogation. Typically, this takes the form of inserting a candlestick or bottleneck into their genitalia to force them to "confess" to their crimes.

#### 5.4.2.6 Supervision of female prisoners by males

Women should not only be kept separate from men but should ideally be guarded primarily by other women.<sup>217</sup> This appeared to be the case in both Ethiopia<sup>218</sup> and The Gambia.<sup>219</sup> In most prisons in Namibia, women, men and juveniles were held separately from one another and female staff guarded women prisoners. This was not the situation in the police cells. There, while women were segregated from men, the women were guarded by male prison staff<sup>220</sup> and cases of police officers raping women prisoners have been reported.<sup>221</sup> Reports of police officers raping women in police cells have also been reported in South Africa<sup>222</sup> and Nigeria.<sup>223</sup>

#### 5.4.2.7 Strip-searches, torture and degrading treatment of female prisoners

The SRP reported that women in Malawi<sup>224</sup> and Uganda<sup>225</sup> were physically abused by prison warders. Women in Namibian prisons reported verbal and physical abuse as well as racism and also described the intimate body searches carried out on them as degrading and humiliating (this included being told to open their legs or crouch so that they could be searched).<sup>226</sup> Human Rights Watch reports that Egyptian security forces have forced female relatives of suspected Islamist militants to strip naked male detainees. This is an attempt both to degrade the women and, by extension, their male family members.<sup>227</sup>

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<sup>216</sup> Cited in B. Agozino, "Nigerian Women in Prison" in Julia Sudbury (ed) *Global Lockdown*. (New York: Routledge, 2005), 191-192.

<sup>217</sup> See rule 53(1), (2) and (3) of the UN Standard Minimum Rules for the Treatment of Prisoners.

<sup>218</sup> Note 174, 51.

<sup>219</sup> Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in the Gambia, Report on a visit 21-26 June 1999, African Commission on Human and People's Rights, 12.

<sup>220</sup> See note 185.

<sup>221</sup> A. Odendaal, "Crime, Social Change and Social Control in Namibia" in Anita Kalunta-Crumpton and Biko Agozino (eds). *Pan-African Issues in Crime and Justice* (Aldershot: Ashgate, 2004), 69.

<sup>222</sup> Janine Stephen, Police prison rape fury, *The Star* 27 October 2005.

<sup>223</sup> Note 120, 192.

<sup>224</sup> Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Malawi, Report on a visit 17-28 June 2001, African Commission on Human and Peoples' Rights, 38.

<sup>225</sup> Note 183, 16.

<sup>226</sup> Note 187, 41.

<sup>227</sup> Human Rights Watch, *Abuses Against Women in Custody*

<http://www.hrw.org/about/projects/womrep/General-84.htm> accessed 15 April 2010.

## 5.5 EFFECTIVENESS OF THE SRP ON THE RIGHTS OF FEMALE PRISONERS

Since July 2005, there has been no visit to any state party by the SRP due to lack of funding. The SRP has since then undertaken low cost activities such as meeting with various government officials and other stakeholders to discuss issues pertaining to conditions of detention.<sup>228</sup> The SRP's impact has been significantly weakened due to inactivity. A further limitation is that the periodic state reports also raise few issues related to prisons; because of the lack of visits, the SRP has not actively engaged States Parties on the issue.

Because of the inability, for over five years, to perform an effective monitoring function of prisons in the African countries, let alone the monitoring of the rights of women in prisons, it may then be said that this function may fall within the scope of the National Human Right Institution and Special Rapporteur on the Rights of Women in Africa (SRW) through the regional framework.



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<sup>228</sup> Twenty-fourth Annual Activity Report.



## CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

### 6.1 CONCLUSION

In most African countries, conditions of detention in police custody, pre-trial detention and in correctional institutions for convicted prisoners, amount to inhuman or degrading treatment.<sup>229</sup> Detainees, whether deprived of their liberty for justified or less justified reasons, belong to the most vulnerable and forgotten sectors of people's societies. In practice, they are deprived of most of their liberties and human rights, including the right to an adequate standard of living, to food, water, health, education and privacy.

Contrary to widespread misconceptions on the African continent, people deprived of their liberty are entitled to human rights, except for those legally taken away by virtue of imprisonment and to facilitate their detention. This must be done humanely, and dignity should be the cornerstone of treatment of prisoners. Through the African human rights system, these rights have been highlighted, and various instruments put in place for the protection of these basic human rights, although the monitoring and implementation of these remain largely inadequate.

As has been noted by those writing on the position of women in Africa, not only are women ignored in the traditional democratic discourse, 'their oppression and subordination in male-dominated patriarchal society has also kept them outside the parameters of formal politics'.<sup>230</sup> To remedy this situation, international human rights law has recognised that it may be necessary to take positive action to give effect to the principle of equity in favour of a group that has been disadvantaged.<sup>231</sup> Through the adoption of several declarations and the establishment of the Charter for the protection of Women's rights in Africa, the ACHPR has shown its recognition of the need to champion these principles throughout member states.

The Commission created the Special Rapporteur on Prison Conditions to prioritise the need for the protection of detainees. The effectiveness of the instruments created for the protection of prisoners' rights is limited by the lack of resources afforded to the SRP, this resulting in the SRP's inability to implement its mandate fully from 2007 to date. The lack of a cohesive policy on the scope of the SRP and measurable standard requirements for prison conditions has led to confusion within the member states, and close to no implementation of the SRP's recommendations thus far.

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<sup>229</sup> Quaker United Nations Office (QUNO) *Women in Prison: A Comparative on the UN Standard Minimum Rules for the Treatment of Prisoners* (2008).

<sup>230</sup> S. Tamale, 'Towards Legitimate Governance in Africa': *The Case of Affirmative Action and Parliamentary Politics in Uganda*, in Quashingah and Okafor (eds), *Legitimate Governance in Africa*, 235-23.

<sup>231</sup> UN Human Rights Committee General Comment No.18 (37), 10 November 1987.

The limited scope of the Special Rapporteur on the rights of women renders the SRW unable to coordinate functions necessary for the protection of female detainees, except those that are pregnant – even though they are particularly vulnerable group. A policy on the coordination of the two SRs is non-existent, therefore, risking both duplication and overlooking essential rights of women.

The existence of the SRW with regard to prisoners' rights is both a gift and a curse. The prioritisation of women's rights by the commission creates a forum for the furthering of these rights of women in the general African community, but in essence, the existence of the SRP excluded the SRW from monitoring the plights of this forgotten group. Considering the desperate needs of these women, the function of the SRP may well be considered a "passing comment" within the overall scope of this Rapporteur.

Besides the protection afforded to all prisoners under the Africa human rights, women in detention facilities require the provision of additional rights especially for the most basic human rights of women in prisons. Their needs include facilities designed and created specifically for detainment of women, protection from violence, the inhumane treatment of separating women from male prisoners and guards, adequate facilities for their basic health care and consideration made for mothers and children. In principle, these are some of the basic rights that the ACHPR, SRP and SRW are tasked to protect. In practice, this is inherently lacking. This marginal area of overlapping of instruments is detrimental to the recognition of women's rights as human rights, especially in prisons, where the violation of these rights is particularly dire.

## **6.2 RECOMMENDATIONS**

- i. The Commission must fully and formally recognise the plight of detained women as particularly dire and the need to prioritise it as a need for its immediate redress. This can be done by complementing the Charter on Human and People's Rights and the Protocol on the Rights of Women with specific provisions in this regard.
- ii. Under its provisions, the Commission must institute the formation of a Working Group (WG) similar to the one that developed the Robben Island Guidelines. Drawing on the expertise, knowledge and experience of the SRP and SRW amongst others, it would develop guidelines on the required policy

changes, minimum resources, and governance structures required to implement a system that does not prejudice female detainees or violate their women's and human rights. The aim of the WG would be to convert it into a follow-up committee in order to promote the contents of the guidelines after the completion of its mandate.

- iii. The Commission must implement a stringent Gender Mainstreaming policy throughout the Commission's instruments in order to ensure that no further administrative lapses regarding women's rights occur or ever leave any group of women within any area of influence underserved.
- iv. The Commission must also investigate feasibility especially due to the negligible size of the female detainee population on the continent; that small custodial unit should gradually replace the system of women's prisons, which should be dismantled and incorporated into the male estate.
- v. Recognising imprisonment itself is a curtailment of rights; the Commission must also investigate and recommend any number of alternatives to imprisonment, thereby curtailing the isolation of women into situations where they are particularly prone to victimisation.



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