THE IMPLEMENTATION OF THE LUANDA GUIDELINES ON ARREST, CUSTODIAL AND PRETRIAL DETENTION IN NIGERIA AND SOUTH AFRICA

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ABSTRACT

Arbitrary arrest and pretrial detention have led to the problems of overcrowding in correctional facilities and abuse of human rights in several African countries. The excessive use of firearms has also led to extra judicial killing of citizens and suspects by criminal justice system officers. The Luanda guidelines on arrest, police custody and pretrial detention were however adopted to provide solutions to these problems. The Luanda guidelines guarantees the respect of the rights of suspects, limits the use of firearms to unavoidable circumstances, limits the use of arrest and pretrial detention to a measure of last resort and guarantees a conducive facilities of detention.

This research makes use of the analytical method of research. It analysed the extent to which the Luanda guidelines has been implemented in Nigeria and some other African countries.

Although, these guidelines have been ratified by many African countries including Nigeria, the implementation has however become seemingly impossible because of some challenges that have been in existence before the adoption of the Luanda guidelines which if not solved will continue to debar the implementation of the guidelines. However, South Africa and Uganda have started the implementation of the guideline and this is possible because of the existing laws that were already in place before the adoption of the guidelines which are in conformity with the Luanda guidelines.

The implementation of the Luanda guidelines will cause drastic changes in the various criminal justice systems of African countries as it is the anticipated messiah for the criminal justice system. It is however recommended that the ACPHR should help state parties in tackling the various challenges debarring the implementation of the guidelines in various countries and criminal justice system officers should be subjected to mandatory continuous training.

Keywords: Arrest, Luanda Guidelines, Pre-trial detention, Africa

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1.0. Introduction

During its 55th Ordinary Session of the ACHPR (Resolution 273) in Luanda, Angola, from 28 April to 12 May 2014, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Guidelines on the Conditions of Arrest, Police Custody and pretrial Detention in Africa ('the Luanda Guidelines'). The adoption of the Luanda Guidelines is part of the ACHPR's mandate to formulate standards, principles and rules on which African governments can base their legislation. The African Charter on Human and Peoples' Rights (ACHPR) provides all people with the rights to life, dignity, equality, security, a fair trial, and an independent judiciary. The Luanda Guidelines will assist states to implement these obligations in the specific context of arrest, police custody and pretrial detention.

The ACHPR has acknowledged that the pretrial justice environment presents significant and concerning human rights challenges in Africa. It has specifically pointed to arbitrary arrest and detention, the risk of torture and other-ill treatment, corruption, high rates of overcrowding in police cells and pretrial detention facilities, conditions of detention that do not meet minimum agreed standards, and the denial of procedural safeguards, as being of particular concern.[2]

The Luanda guidelines on Arrest, Police custody and Pretrial Detention in Africa summarizes and make explicit the rights of people in Africa who are suspected of or charged with a criminal offence from the time of arrest until trial, as set out in standards of the African Union and United Nations (UN).

The adoption of the guidelines by the ACHPR was an important step in its work to promote a right based approach to criminal justice in Africa. It is difficult to underestimate the implementation of the Luanda Guidelines in the African Criminal Justice system especially in countries like Nigeria where the innocent are indefinitely detained and the correctional facilities are over-crowded. The Luanda guidelines aim to ensure respect for human dignity, the right to liberty and the right to a fair trial, including the presumption of innocence. It also aim to prevent

[2]Marina, I.& Martin, S., 2016, Raising the Profile of Pretrial Detention in Africa. The justice initiatives, from https://www.justiceinitiative.org/voices/raising-profile-pretrial-detention-africa

and protect against violations of the rights of people suspected or accused of a criminal offence. These include the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment; arbitrary detention; enforced disappearance; and arbitrary deprivation of the right to life[3].

The Luanda guidelines have been adopted by many African countries like Uganda, Tunisia, Zambia, Malawi, Ghana, Sierra Leone, South Sudan, Kenya, South Africa, Nigeria, Swahili, Zimbabwe, Malawi, Tanzania, Mali, Benin, Zambia, Cote d'voire, Sierra Leone and some more countries but the implementation of those guidelines are yet to take place, for instance, Ghana has adopted the Luanda Guidelines but their criminal justice system in not anyway better than that of Nigeria.[4] South Africa has also adopted the guidelines and has started implementing the guidelines but not totally[5]. Nigeria however has adopted some parts of the guidelines through the promulgation of the Administration of Criminal Justice Act.

The issue of arrest, police custody and pretrial detention has become a critical issue that demands an urgent attention especially in African countries. Contrary to the provisions of the Luanda Guidelines on arrest, police custody and pretrial detention, many African countries are still backward in the treatment of offenders, suspects and inmates and the police force especially in Nigeria use their position to extort and incriminate innocent citizens. The unnecessary and arbitrary use of arrest, police custody and pretrial detention is a major contributory factor to prison overcrowding. It feeds corruption, expose detainees to the risk of human rights violations and has significant socioeconomic effects on detainees, their relatives and societies.[6]

Concerned about the effect of prison overcrowding and consequences of arbitrary arrest and prolonged pretrial detention, the African Commission on Human and People's Rights (ACHPR)

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[3]*International Commission of Juris*t, 2016. Pretrial Rights in Africa: A Guide to International Human Rights Standards pg 5

[4]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 18. *The African policing civilian oversight forum*

[5]Ibid note 3

[6]Edwards, L. & Stone, K., 2017. Implementation of the Luanda guidelines: A review of arrest, police custody and remand detention in South Africa, page 1.

adopted the guidelines on the conditions for arrest, police custody and pretrial detention in Africa (the Luanda Guidelines) as part of its mandate.

The Luanda guidelines provide all peoples with the rights to life, dignity, equality, security, a fair trial and an independent judiciary. The Luanda Guidelines provides an authoritative interpretation of the application of these provisions and a guide to the law and policy makers and criminal justice practitioners, to strengthen day to day practices in terms of arrest, police custody and pretrial detention. In doing so, the guidelines reinforce the importance of a criminal justice system built on core human right principles."[7]

Excessive and arbitrary pretrial detention is an overlooked form of human rights abuse that affects millions of persons each year, causing and deepening poverty, stunting economic development, spreading disease, and undermining the rule of law. Pretrial detainees may lose their jobs and homes; contract and spread disease; be asked to pay bribes to secure release or better conditions of detention; and suffer physical and psychological damage that last long after their detention ends.[8]

Pretrial detention can provide a window into the effectiveness and efficiency of a particular state's criminal justice system, as well as its commitment to the rule of law. In the developed world, the lower percentage of all prisoners who are in pretrial detention and the shorter average duration of pretrial detention indicate a relatively efficient criminal justice system: people move through the system quickly and are generally released pending trial. In developing countries, however, the great majority of all detainees are pretrial and they can languish in that situation for many years. This indicates, at best, an inefficient and overwhelmed criminal justice system and at worst a lack of commitment to the rule of law.[9]

[7]Edwards, L. & Stone, K., 2017. Implementation of the Luanda guidelines: A review of arrest, police custody and remand detention in South Africa, page 1.
[8]Birk, M., Kozma, M., Schmidt, R. & Watts, Z.O. 2011. Pretrial Detention and torture: why pretrial detainees face the greatest risk, page 5.
[9]Ibid note 7

During arrest, the police may legally use reasonable force to apprehend and secure a suspect, to prevent escape or harm to themselves or others. In practice, the police often use excessive force during arrest or transfer to police custody, resulting in pain or suffering disproportionate to the circumstances of the case. For example, in Nigeria, where armed robbery is a grave problem, it has become common practice for police to shoot suspects in the legs and feet once they have been apprehended to prevent them from fleeing, or as a means to make them confess.[10]

The Luanda guidelines makes provision for the police to make of use of firearms in some extreme cases but giving such power to human is outrageous especially when such power has all the probability of been abused.

This research will examine all these problems that militate against the implementation of the Luanda guidelines in treating suspects, convicts and inmates with dignity according to the United Nations Declaration of Human Rights.

2.0. Historical Development of The Luanda Guidelines

The special rapporteur on prisons and conditions of detention identified the problem of overcrowding at the Zimbabwe prisons in 1996. Consequently a judicial sentencing conference was held in 1996 to consider alternatives to imprisonment. The perennial problem of limited financial resources was also stated.[11]

Another visit by the special Rapporteur to Mali where the Special Rapporteur was able to visit prisons in Bamako, Tombouctou, Goundam, Mopti, Baguineda and Kati in 1997. The Special Rapporteur discovered a lot of anomalies in the remand system of Mali which include prison cells without windows to let in light and air, chaining of prisoners in cells, assault and battery of prisoners, dilapidating state of the cells, female prisoners are kept in private houses, keeping male and female detainees together and even juveniles with adult offenders, preferential treatment giving to civil servants as was evidenced by their comfortable surroundings, lack of

[10]Birk, M., Kozma, M., Schmidt, R. & Watts, Z.O. 2011. Pretrial Detention and torture: why pretrial detainees face the greatest risk, pg 28

[11]Dankwa, E. V. O. 1996. Report on visit to prisons in Zimbabwe, from https://www.achpr.org/sessions

basic amenities like soap, mat, blankets and so on and NGO's are not allowed to visit detention facilities.[12]

Every session of the ACPHR before the adoption of the Luanda guidelines involves issues of human rights violations from different countries, either on issue of arbitrary arrest, arbitrary detention of persons, pressmen and more, including Nigeria in 2012 about the extra judicial killing in the Kaduna where Nigeria was directed to take necessary steps to stop the killing of civilians.

In order to address the challenges faced by Africa's police forces in achieving a rights-based approach to the use and conditions of police custody and pre-trial detention in Africa, the African Commission at its 52nd Ordinary Session in 2012, adopted Resolution 228 on the need to develop guidelines on conditions of police custody and pretrial detention in Africa. Resolution 228 acknowledges the pressing need to articulate a set of guidelines aimed at minimising the risk factors associated with excessive and arbitrary arrest and detention. While many of the obligations on States in relation to arrest and detention are contained in various instruments, such as the African Charter on Human and Peoples' Rights, the Robben Island Guidelines and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, collating these in a single instrument and outlining practical measures will be of significant value."[13]The ACHPR mandated its Special Rapporteur on Prisons and Conditions of Detention in Africa to develop a set of practical guidelines on arrest and detention. A number of background studies, regional consultations expert group meetings led to the final adoption of the Luanda guidelines at the 55th Ordinary Session of the ACHPR in 2014.[14]

3.0. Implementation of the Luanda Guidelines in South Africa

[12]Dankwa, E. V. O. 1997. Missions on prisons and the conditions of detention, from https://www.achpr.org/sessions

[13]African Commission on Human and Peoples' Rights, 2013. Experts meeting on the development of guidelines for pretrial detention.

[14]The Luanda guidelines: A rights-based approach to arrest and pretrial detention in Africa.

South Africa's constitutional and legislative framework pertaining to arrest, police custody and pretrial detention aligns with the Luanda guidelines. However, there are challenges regarding the framework for arrest, bail and a wider challenge concerning the implementation of the overall legislative and policy framework. Also, implementation challenges in South Africa is a complex exercise given a vast array of stakeholders with responsibilities for care, management and oversight of persons in conflict with the law.[15]

3.1.Arrest

There is no statutory definition of arrest under the South African law. This is problematic from a rights based perspective because citizens only become entitled to prosecutions under section 35(1) of the constitution of the republic of South Africa, 1996, when they assume the status of an arrested person. These rights include to remain silent and the consequences of not remaining silent, the right not to be compelled to make confession and the right to be brought before a court within 48 hours of arrest.

SAPS standing Order 341 (a) which govern the procedures that SAPS officials must apply when making an arrest and provides minimum standards of treatment of arrested persons. Section 4 of the Standing Order states that as a general rule, the object of an arrest is to secure the attendance of such persons at his or her trial and further stated that arrest cannot be used to punish, scare or harass a person.[16] The exception to the general rule in respect of making an arrest include arrest for the purpose of further investigation, arrest to verify a name and/or address, arrest to prevent the commission of an offence, arrest in order to protect a suspect, arrest in order to end an offence.[17] The exception to the general rule of arrest as provided by the standing order is problematic because an arrest constitute a serious restriction on a person's right to personal liberty and those exceptions constitutes unnecessary threat against the protections under section 35(1) of the constitution.

[15]Ibid note 85
[16]SAPS Standing order 341 (a)
[17]Section 35(1) of the Constitution of the Republic of South Africa, 1996

Accordingly, an arrest must be supported by 'just cause and must be necessary and proportional for achieving the penological objectives of the state. Thus making an arrest for further investigation, and/or to verify name and/or address is offensive and less restrictive measures can be used to obtain such information such as calling in for questioning, obtaining a search warrant or other actions forming part of an intelligence-led approach to the investigation.

The standing order also provides failure to furnish names or address as a stand-alone ground for arrest whereas Luanda guidelines and the CPA permits arrest where the person is reasonably suspected of having committed an offence. SAPS should before carrying out an arrest especially in relation to minor and non-violent crimes, consider whether there are less extreme measures for bringing a suspect before the court to face charges.

It was reported that quotas of arrest are being used to determine the performance rates of individual officers.[18] This kind of performance rate needs to be checked because it will encourage abuse of arrest by the police.

In terms of the use of force during arrest, the wordings of section 49 of the CPA which governs the use of force provides that the arrestor may use deadly force only if the suspect poses a threat of serious violence to the arrestor or other person, or if the arrestee is suspected on reasonable grounds of having committed a crime involving infliction or threatened infliction of serious bodily harm and there are no reasonable means of effecting the arrest whether at that time or later[19]. However, the Luanda guidelines, which reflects the international/normative standards on the use of deadly force by law enforcement personnel, limit the potential use of lethal force through resort to firearms to 'the arrest of a person presenting an imminent threat or death or serious injury, or to prevent the perpetration of a serious crime involving a grave threat to life and only when less extreme measures are insufficient to make the arrest. This is a higher

[18]Katherine Wilkinson, 2010. Kynsa Police ordered to meer arrest quotas; West Cape news.
[19]S49 of the South African Criminal Procedure Act of 1977

threshold than that laid down in section 49, as it does not permit the use of firearms based on suspected involvement in a serious crime.[20]

The arbitrary and unnecessary use of arrest, police custody and pretrial detention is a major contributing factor to prison overcrowding in South Africa. It has also fed corruption and exposed arrestees and detainees to the risk of human rights violations and also has socioeconomic impacts on detainees as well as their families and communities.[21]

3.2. Police Custody

Section 12 of the constitution of the republic of South Africa, 1996 provides for the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. Section 35(2) provided an extensive list of the rights of detained person which is in alignment with the provisions of the Luanda guidelines.

The question that had arisen is that at what point does a person held in police custody become a detained person and therefore entitled to the protections under section 35(2)? SAPS Standing Order 361 (g) defines

> a person in custody as a person who has been arrested and who is in the custody of the service (SAPS) and who has not yet been handed over or back to the department of correctional services or any other institution for detention."

Detention facilities however includes police cell, lock-up or temporary detention facilities (stormsel) which are under the control of the service(SAPS).[22]

According to the standing order, a person held in police custody is an arrested person who is waiting to be transferred to the DCS or another institution of detention. However, this does not

[20]The Luanda guidelines on arrest, pretrial detention and police custody, 2014, guideline 3(c) (ii)
[21]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 65. *The African policing civilian oversight forum*
[22]SAPS standing order 361 (G)

account for persons held in police custody but are not arrested. South African courts however have differs opinion on this issue.

In *S V. Sebejan*[23], Satchwell J argued for an understanding that the right to a fair trial begins at the inception of the criminal justice process, not at the commencement of the criminal trial, in order to preserve the right to the presumption of innocence and to protect the accused person's right against self-incrimination. However, the High courts have diverged on this point as in S v. Langa[24] and S v. Mthethwa[25], both courts ruled that the rights under section 35 (1)(2) and (3) do not apply to suspects.

It can be said going by the Luanda guidelines that the ruling of the High Courts judges are right because the Luanda guidelines outrightly made provisions for those in detention, police custody and those arrested separately. The problem is that the South African CPA makes no provision for the right of those in police custody which can still be provided for.

3.3. Police Cell Monitoring

One of the key gaps in the current monitoring system is the lack of sustained and systemic oversight of police cells. The responsibility for cell monitoring was moved from the former independent complaint directorate to the CSP and this has led to reduction of cell inspections. Consideration should therefore be given to the establishment of a lay-visitors scheme as provided by the Luanda guidelines.[26]

3.4. Pretrial Detention

The framework for making a remand order in South Africa is not entirely consistent with the provisions of the Luanda guideline. The normative standard provided for in the the guideline is that detention be a measure of last resort but the South African framework provided only that the

[23] SACR, 1997, pt 626 (I)
[24]SACR, 1998, 21 (T)
[25]SACR, 2004, 449 (E)
[26]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 75. *The African policing civilian oversight forum*

release of persons awaiting trial depends on a relatively narrowly constructed notion of the 'interest of justice'.[27]

Factors contributing to overcrowding in South Africa includes the backlog in ranting of bail both by the police and the judiciary. The police are always reluctant to grant bail while the judiciary most times grant bail on conditions that cannot be met by the detainees/suspects.[28] Also, lack of the knowledge of the existence of legal aid department and also the under staffing that is been faced by the legal aid department is another.[29]

Arbitrary and unnecessary use of arrest, police custody and pretrial detention is a major contributing factor to prison overcrowding in South Africa. It has also fed corruption and exposed arrestees and detainees to the risk of human rights violations and also has socioeconomic impacts on detainees as well as their families and communities.[30] Overcrowding was identified in South Africa's National Development Plan (NDP) as a critical challenge and significant efforts have been made both to address the coordination and effectiveness of the criminal justice system in the management and treatment of remand detainees and to reduce the number of suspects held in remand detention. The management on care of remand detainees in South Africa do not solely fall on a particular department but rather cut across variety of role players across the criminal justice system which requires significant coordination, communication and cross-sectoral support. This is so because a holistic view of remand detention justice is taken in line with the Luanda guidelines that considers the various preconditions of remand detention, such as stop and search, arrest and police custody in addition to ancillary factors such as court utilisation, access to legal assistance services and the prosecutorial services. For instance, the performance of the South African Police Service (SAPS) in terms of the timeous and thorough investigation of crime has a significant effect on the ability

[27]De Lange v. Smuts and others, (1998) 785 (CC) at page 23
[28]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 75. *The African policing civilian oversight forum*
[29]Ibid note 99
[30]Ibid note 99

of the National Prosecuting Authority (NPA) and the courts to ensure an accused persons right to a speedy trial. The progress made in recent years in reducing the number of remand detainees in DCS facilities has been commendable and encouraging but there are still a number of gaps that must be addressed if South African is to achieve rights-based approach to remand detention that is consistent with the Luanda guidelines and the country's own constitutional framework. [31]

The South Africa's approach to remand detention management applies the key pretrial justice system with coordination among the main sectoral institutions responsible for the case and management of accused persons which include the police, correctional services, the judiciary, the prosecution authority, legal aid, health services and others.

In 2007, the South African government established a committee to review the challenges within the criminal justice system and to develop a plan to make such system effective and efficient. The aim of the review was to enhance coordination among government departments in the JCPS cluster which are SAPS, DOJ & CD, the NPA, the DCS and the Department of Social Development (DSD).[32] The committee came up with a 7-point plan which was approved by the cabinet in 2008 and later endorsed by the NDP in 2013. The 7-point plan and the NDP aim to establish a criminal justice system that is modernised, integrated and effectively managed under a single coordinating structure at every level of governance and which is further reflected in the JCPS delivery Agreement as outcome 3 and in the Medium Term Strategic Framework (MTSF) for 2014 to 2019.[33]

The 7-point plan and the NDP emphasise the importance of establishing an effective and efficient criminal justice system not only to create sustain development and build communities but also to promote a culture of human rights. The 7-point plan sets out to mordernise the systems that integrate the various players in the criminal justice system by adopting a single vision and mission and responsible structures, improving court processes and performance,

[31]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 70. *The African policing civilian oversight forum*
[32]Ibid note 102
[33]Ibid 102

modernising, integrating information and technology systems and engaging the community in the criminal justice system. Every department in the criminal justice system was instructed by the NDP to align its strategic and annual performance plans in order to achieve the objectives of the MTSF, which sets out a five year strategy for the long term achievements of the NDP. In this regard, the Department of Planning, Monitoring and Evaluation (DPME) within the office of the presidency is mandated to monitor the performance of every department in meeting its target under the MTSF. The coordination efforts at a national level have resulted in marked improvements in the case and management of accused persons in South Africa. For example, such efforts have brought about decrease in the number of remand detainees in South Africa including the average length of remand detention.

The National Development Plan in 2012 identified six priority areas for achieving a safer South Africa, which are:

1. Strengthening the criminal justice system

2. Professionalising the police service

3. Demilitarising the police service

4. Increasing the rehabilitation of prisoners and reducing recidivism

5. Building a safe environment and using an integrated approach

6. Increasing community participation with regard to safety.

Following the adoption of the 7-point plan by the NDP, the Civilian Secretariat for Police (CSP) circulated two key policies for public comment which are ‘draft white paper on the police’ and ‘draft white paper on safety and security’.[34] the white draft on the police aims to establish a framework for ‘an accountable, professional, competent and highly skilled police service’ while the draft white pater on safety and security promotes interventions to confront risk factors at

[34]CSP, 2015. draft white paper on police, government gazette, general notice 179 of 2013 hereafter 2015.

individual, family, community and society level.[35] An explicit commitment to human rights principle, specifically the fundamental rights provided for in chapter 2 of the constitution is central to both white papers. In this regard, each white paper aims to protect and promote the rights of persons in remand detention. The remand detention population rate reduced significantly between 2010 to 2015 due to the use of non-custodial placements as a result of bail review applications to the courts in terms of section 63 of the CPA in addition to specific remand interventions by the substructures of the JCPs cluster.[36]

3.5.Vulnerable Group

3.5.1. Children

The DSD plays a critical role in the provision of efficient, responsive and professional criminal justice services, specifically for children subject to remand detention. Going by the terms of the Child's Justice Act (CJA), 2008 and the National Policy Framework for Implementation of the CJA, the DSD is responsible for ensuring that all children charged with criminal offence are accessed by probation officers and are referred to the children's court, recommended for counselling and placed in a secure care facility. The DSD is responsible for the provision of educational programmes for children awaiting trial and the provision and management of Child and Youth Care Centres (CYCCs) as provided for by the Children's Act of 2005. SAPS and DOJ & CD are to ensure adequate levels of security at every CYCC.[37] The arrest of a child has been provided to be of last resort. A child who is suspected of committing an offence listed in schedule 1 of the CJA may not be arrested but in all other instances, he or she maybe arrested.. However, the CJA has requested that a child be informed of the nature of the allegation against him or her, his or her rights including the right to remain silent and the right not to be forced into making a confession, explain to the child the procedures to be followed in terms of the CJA, notify the child's parent, guardian, caregiver or another appropriate adult that the child has been arrested. The child may be released at a preliminary inquiry or any subsequent appearance in one

[36]Ibid 102

[37]National policy framework for implementation of the Child Justice Act, 2010 page 15-16

of the three ways; the child may be released into the care of a parent, an appropriate adult or guardian, in respect of a schedule or on his/her own recognisance or on bail. The presiding officers can detain a child at CCYC in practice if the child is 14 years or older.[38]

3.5.2. Women

According to APCOF, the extent and prevalence of abuse against women in police custody are largely unknown due to extremely low levels of reporting by victims. However, reports have emerged about numerous women (sex workers in particular) being raped by officers while detained in holding cells and being released only after submitting to acts of sexual coercion.[39]

In April 2020, police minister Bheki Cele noted that police registered over 2,300 complaints of gender-based violence between March 27 to March 31, 2020 during the lockdown implement to reduce the spread of corona virus.[40]

Also, the kind of health care services that are provided for women detainees seem to be centred on reproductive health, particularly in relation to mothers and children while some correctional service officers are always unresponsive towards women who are pregnant, breastfeeding or accompanied by small children.[41]

3.5.3. Migrant and Refugees

The ACHPR and the Luanda guidelines as well as South Africa's other international obligations stemming from the Universal Declaration of Human Rights require South Africa to respect and promote the human rights of all persons within its borders, regardless of their national or social origin. South Africa has a legal and moral obligation to take action to protect and promote the

[38]Section 20(3)(a), (b), (c), (d) of the Criminal Procedure Act of South Africa.
[39]Fick, N., 2006. Enforcing fear: police abuse of sex workers when making arrests, South Africa quarterly report, no 16 at 27-28. available at https://www.jssafrica.org/uploads/CQ16Fick.pdf
[40]Human rights watch, 2021. World report
[41]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 99. *The African policing civilian oversight forum*

rights of all non-national within its territory and this includes, in relations to the role of the police, not only responsible to violence against foreigners but also safeguarding and protecting their rights in the context of arrest, police custody and remand detention.

An important part of the South African human rights commission's mandate is to monitor the observance of human rights including in detention facilities. This is one reason the High Court ordered in the case of South African Human Rights Commission v. Minister of Home Affairs,case no 41571/12 that the commission should be granted access to the Lindela Repatriation Centre where foreign nationals waiting deportation are detained. Undocumented migrants are among the most vulnerable victims in South Africa because the default reaction is to arrest and detain them while their status is being prepared for deportation. Xenophobia is inflamed by the way the criminal justice system and most notably how police service respond in certain circumstance.[42]

Additionally, migrants in South Africa are often accused of causing a variety of societal problems, including draining public resources, taking economic opportunities away from local South Africans and engaging in criminal activity. The attacks and the harassment were also committed by the government and law enforcement officials. Government and law enforcement officials throughout the country not only largely failed to ensure justice for xenophobic violence but also operated discriminatory and abusive ways against non-nationals. This is outrightly against the provisions of the Luanda guidelines.[43]

On Africa pretrial detention day in 2017, the human rights commission calls upon the government to strengthen effort to improve conditions of detention and effectively implement the

[42]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 101. *The African policing civilian oversight forum*
[43]Ibid note 113

constitutional guarantee to each detainee to have his/her trial begin and concluded without unreasonable delay.[44]

3.5.4. Person with Mental Health Disorders

Research conducted in Durban revealed a high prevalence of serious mental disorders among the prison population with no record of diagnostic or treatment within the correctional facility. The DCS and DOH had noted that there are not enough beds available to ensure that remand detainees who are mentally ill are accommodated separately and this poised a serious security burden on department.[45]

3.6. Accountability

The accountability architecture in respect of South Africa's criminal justice system is the most comprehensive in Africa and largely reflects the oversight and accountability framework provided by the Luanda guidelines. However, the accountability mechanism can be improved to address the gap in current system by establishing a mechanism which will ensure a cohesion among all oversight actors including the development of shared framework for inspections.

Monitoring the treatment of remand detainees and their conditions of detention falls within the mandate of the Judicial Inspector for Correctional Services (JICS) and in terms of the development of a national preventative mechanism as required by the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or punishment (OPCAT). The JICS is mandated to facilitate inspections of correctional services centres and remand detention facilities and to report the treatment of inmates, conditions of detention and any corrupt or dishonest practices within the DCS. However, in recent years, the effectiveness and efficiency of the JCIS has been questioned, given that its functional and administrative

[44]United Nations high commission on refugees, 2015. Protection from xenophobia:evaluation of the UNHCR's regional office for Southern Africa' xenophobia related programmes, page 22

[45]Edwards, L. & Stone, L., 2017. The Luanda guidelines assessments for Ghana, Malawi, South Africa, Tanzania & Uganda, pg 101. *The African policing civilian oversight forum*

support comes directly from the DCS and not the national treasure.[46] Therefore, for effective performance, JCIS should be allowed to financial independence in order to promote the broader independent and effectiveness of this key oversight institution as well as to promote public confidence in its work and findings.

4.0. Implementation of the Luanda Guidelines In Nigeria

4.1.Arrest

Arrest according to the Luanda guideline refers to the "*act of apprehending a person for the alleged commission of an offense or the action of a competent authority to arrest and detain a person as otherwise authorized by law."*[47]

Unlike the Luanda guidelines, neither ACJA nor any other criminal law in Nigeria provided a definition for arrest but procedure of effecting an arrest in section 4 of ACJA.

Section 4:

> In making an arrest, the police officer or other persons making the arrest shall actually touch or confine the body of the suspect, unless there is a submission to the custody by word or action

This section is what looks like the description of arrest; confining of the body of a suspect, when this is done, an arrest has taken place.

The Luanda guidelines in section 1b guaranteed everyone's liberty, security of person and that detention should only be used when all other measures have been exhausted. It furthermore stated that no one should be subjected to arbitrary or unlawful arrest or detention which is consistent with International statutes on arrest, for instance, Article 9(1) of the International Covenant on Civil and Political Rights read as follows:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be

[46]Ibid note 116

[47]Section 1 (a) of the Guidelines on the conditions of arrest, police custody and pretrial detention in Africa

> deprived of his liberty expect on such grounds and in accordance with such procedure as are established by law.

However, section 3 of ACJA provided otherwise by make arrest the first step of the criminal proceeding.

> A suspect or defendant alleged with committing an offence established by an Act of the National Assembly shall be arrested, investigated, inquired into, tried or dealt with according to the provisions of this Act except otherwise provided under this Act.

ACJA in its choice of words placed arrest before investigation whereas suspects according to the Luanda guidelines are supposed to be investigated and when convinced that such person had committed a crime should be arrested.

Reasonably, arrest is supposed to take place after investigation has been concluded. The Court of Appeal in *Falade v. Attorney General of Lagos* that;

> "by all odds, the police has the statutory power to investigate, arrest, interrogate, search and detain any suspect… *"*[48]

This method of effecting an arrest before investigating matters has caused a lot of problems in the Nigerian criminal justice system ranging from arbitrarily detaining suspects to overcrowding in correctional centres. The case of Alade v. FRN[49] is an example of arbitrariness. The petitioner was detained for nine years without trial which was later concluded to be arbitrary at the ECOWAS court. Similarly, in the case of SCC Nigeria Limited & anor v. David George & the Nigerian Police,[50] the Court of Appeal held that;

> there is from the constitutional provision no room for any arbitrary arrest or detention of any person in Nigeria. There must be a prevalence of any of the excepted instances therein for any person

[48](1980) 2 NCLR 771
[49]ECW/CCJ/APP/10/12
[50]CA/A/222/2016

> to be arrested. Anything short of that is clearly in breach of the right of the individual liberty

In *W.Mukong V. Cameroon*,[51], the human rights committee concluded that,

> this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, to prevent fight, interference with evidence or the recurrence of crime.

Furthermore, the Administration of Criminal Justice Act did not provide that arrest should be of last resort. As the practice in Nigeria allows arrest to be carried out for any crime even for a minute offence of refusal to provide one's name and address to police officers.[52]

The use of alternatives to detention as provided by the Luanda guidelines has been provided for by ACJA in section 460 and 464 which makes provision for suspended sentence and community service respectively but there is no provision for alternatives to arrest as provided by section 1(c) of the Luanda guidelines.

Section 2 contains the grounds for arrest which includes thatpersons can only be deprived of his liberty guaranteed by the law only on grounds and procedures established by law. This means that no one can be arrested for an an act which has not been criminalised by the law no matter how morally wrong it may be. Also,discrimination of any form, be it of race, ethnic group, color, sex, language, religion, politics, e .t .c. cannot form a reason for effecting an arrest.

Although this is not contained in ACJA but sufficiently contained in the constitution which is the ground norm in Nigeria under section 35 of the constitution which expressly provided for grounds for anyone to be deprived of his or her right to liberty and section 4 of the Criminal Code Law provides that;

> No person shall be liable to be tried or punished in any court in Nigeria for an offence, except under the express provisions of the

[51] U.N. doc. CCPR/C/51/458/1991,par 9.8

[52]Section 19(1) of the Administration of Criminal Justice Act

> code or some Act or Law which is in force in, or forms part of the law in Nigeria

However, section 2b of the Luanda guidelines which provided that arrest should not be carried out on the basis of discrimination of any form can be likened to the provision of the Constitution of Nigeria in section 42 which guarantees every citizen's freedom from any form of discrimination. In practice, arrest is usually carried out based on discrimination. The Nigerian police force mostly target young men in carrying out arrests. In the case of Dorothy Njemaze & 3 ors. v. Nigeria,[53] the ECOWAS Community Court of Justice found that a systematic sting operation directed against the female gender furnishes evidence of discrimination. Also, in the case of *Loveth Iyoko v. TheMinister, Federal Capital Territory & 13 ors*,[54] it was noted in the concluding remark of the United Nations Human Rights Councils Working Group on Discrimination against Women and girls and the Working Group on Arbitrary Detention that *'human rights are applicable to all, without discrimination.'*

Though Nigerian laws may not make provisions that arrest should not be carried out based on discrimination, however, Nigeria has ratified some International treaties which are against all forms of discrimination, for instance the International Convention on the Elimination of all forms of Racial Discrimination.

ACJA authorises private persons,[55] police officers,[56] Magistrates, judges and justices of peace[57] to carry out an arrest in accordance with the provision of section 3(a) of the Luanda guidelineswhich provides that arrest can only be carried out by the police or authorities authorized by the state or competent officials.

According to S3 (b), officers must identify himself clearly while carrying out an arrest and vehicles used for arrest as well must be clearly labeled. There is no provision either expressly or

[53]ECW/CCJ/JUD/08/17, at page 38
[54]FHC/ABJ/CS/974/2019
[55]S20 of the Administration of Criminal Justice Act, 2015
[56]S4 of the Administration of Criminal Justice Act, 2015
[57]S26 of the Administration of Criminal Justice Act, 2015

impliedly that aligns with this section of the Luanda guidelines in the Nigerian criminal laws. However, most vehicles used by the Nigerian Police Force are well labeled.

S3(c) of the Luanda guidelines provided that the use of firearm cannot be used by officers at will, it has to be used in circumstances when it is strictly necessary. Strictly necessary according to the Luanda guidelines include proportionality, regulation under the law and additional restriction being placed on the used of firearms by the national legislation of different African countries.

The constitution like the Luanda guidelines recognise the inviolability of human life[58]andthat the use of firearms can always occasion permanent injury or death (which conditions are irreversible).The constitution provides that:

> 'Every person shall have a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria[59]

The Constitution goes further to provide situations where life could be taken.

It stipulates that a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use, to such extent and such circumstances as are permitted by law, of such force as is reasonably necessary - a. For the defense of any person from unlawful violence or for the defense of property; b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or c. For the purpose of suppressing a riot, insurrection or mutiny.[60]

In order not to allow irrational officers act in excess of the wide discretion offered, the Police authority provided some guidelines on the use of firearms to guide the use of firearms by Police Officers while performing their duty.

Police Force Order 237, titled Rules of Guidance in the Use of Firearms by the Police, stipulates as follows:

[58]S.33 of the 1999 Constitution
[59]Ibid note 243
[60]Section 33(2) of the constitution of Nigeria, 1999.

'A Police officer may use firearms under the following circumstances:

(a) When attacked and his life is in danger and there is no other way of saving his life;

(b) When defending a person who is attacked and he believes on reasonable grounds that he cannot otherwise protect that person attacked from death;

(c) When necessary to disperse rioters or to prevent them from committing serious offences against life and property.
N.B. Remember that 12 or more people must remain riotously assembled beyond a reasonable time after the reading of the proclamation before the use of firearms can be justified.

(d) If he cannot by any other means arrest a person who being in lawful custody escapes and takes to flight in other to avoid re-arrest; providing the offence with which he is charged or has been convicted of is a felony or misdemeanour; and

(e) If he cannot by any other means arrest a person who takes to flight in other to avoid arrest, provided the offence is such that the accused may be punished with death or imprisonment for 7 years and above.'[61]

The last paragraph above is in contradiction with the provisions of section 33 of the Nigerian constitution which guarantees everyone's right to life and section 36(5) which presumes everyone innocent until proven guilty because an attempt to evade arrest should not make a police officer a judge over the matter. However, the provision of section 33 of the constitution does not align with the provision of the Luanda guidelines as it also buttress Order 237 of the Police guidelines on the use of firearms by providing exceptions to the right to life to include;

'...b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

c) for the purpose of suppressing a riot , insurrection or mutiny.

The provisions in Order 237 are extremely permissive and fall foul of international standards for the use of firearms by law enforcement agencies. However, the permissive provisions in Order

[61]Order 237 of the Police guidelines.

237 are made possible by the broadness of section 33 of the Constitution, and also relevant provisions of the Criminal Code.

Paragraph 6 of the Order provides:

'Fire should be directed at the knees of the rioters. Any ringleaders at the forefront of the mob should be singled out and fired on. Only the absolute minimum number of rounds necessary to suppress the riot should be used.

In his report on his 2006 mission to Nigeria, the then UN Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston, noted the flawed nature of Police Order 237. He noted that the rules were "deeply flawed" and that "they provide close to a carte blanche to the police to shoot and kill at will." He recommended that Police Order No. 237 should be amended immediately to bring it into conformity with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The resulting emphasis should be on proportionality, on the use of lethal force as an absolute last resort, and only "when strictly unavoidable in order to protect life". Thus, the possible escape of an alleged robber who presents no direct threat to the lives of others, cannot justify shooting to kill.

Not only do the legal frameworks for the use of firearms fall short of the provision of the Luanda guidelines and International laws but also do not align in practice as well. For instance, the abuse of firearms by police officers especially an arm of the police force which used to be known as SARS unite led to the nationwide protest calling on authorities to end police brutality and abolish an abusive police unit known as the special anti-robbery squad (SARS) received global attention and led to the dissolution of the unit.[62] Protesters were however harassed and attacked by security officers, armed thugs in Abuja, Lagos and other states. On October 20, there was a

[62]The video of a man who was allegedly killed by a police officer led to an uproar among the youths which eventually led to the ENDSARS protest in October, 2020. reported by BBC news from https://www.bbc.com/news/world-africa-54478254

social media footage showing men identified as military officers shooting at peaceful protesters in Lagos which sparked a global outrage.[63]

Authorities did not always hold police, military, or other security force personnel accountable for the use of excessive or deadly force or for the deaths of persons in custody.[64] State and Federal panels of inquiry investigating suspicious deaths generally did not make their findings public. In 2017, the acting president convened a civilian-led presidential investigative panel to review compliance of the armed forces with human rights obligations and rules of engagement, and the panel submitted its findings which was not made public till date.[65]

In February 2019, on the eve of national elections, the President issued a shoot-to-kill order to the military against anyone caught in the act of stealing ballot boxes. If implemented this would have been a serious violation of international laws. [66]

The way in which the police approach the use of force can have an impact on the community perceptions of the police and the level of trust that the community will have in the police. The way in which the community then engage the police will have, in turn, an effect on the way that police themselves perceive and respond to the community.[67]

Following several incidents, it will be better that this sub section be removed totally from both the Luanda Guidelines and the Nigerian statutes. Nobody should be given such right over other citizens especially when such citizen is unarmed. However, this subsection can be better couched to reflect that force can be used against an armed suspect or offenders who pose threat with arms and ammunition.

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[63]ENDSARS movement: from twitter to Nigerian Streets, 2020. Amnesty International from https://www.amnesty.org/en/latest/campaigns/2021/02/niheria-end-impunity-for-police-violence-by-sars-endsars/

[64]Killing at will: extrajudicial executions and other unlawful killings by the police in Nigeria, Reported by Amnesty International

[65]Country Reports on Human Rights Practices for 2019 United States Department of State • Bureau of Democracy, Human Rights and Labor, PG 2

[66] The law on police use of force worldwide, 2019. Accessed on 23/11/2020. https://www.policinglaw.info/country/nigeria

[67] Luanda guidelines on arrest, police detention and pretrial detention 2014, trainee manual

The use of force must only be resorted to with the utmost respect for the law and with due consideration for the serious impact it can have on a range of human rights: the right to life, to physical and mental integrity, to human dignity, to privacy, and to freedom of movements to name just the ones most frequently affected.[68]

The United Nations provided some basic principles on the use of fire arm which are more rational than the provision of the constitution in S36.

Fire arms was impliedly defined in the UN special rapporteur for the basic principles on the use of fire arms by law enforcement officials as:

> A common sense understanding of the scope of application of Principle 9 suggests that all weapons that are designed and are likely to be lethal should be covered, including heavy weapons such as bombs and (drone) missiles, the use of which constitutes an intentional lethal use of force."[69]

However, its logic and the high threshold established for the use of firearms strongly implies a definition of what is to be understood as a firearm: any tool that is designed to kill (as opposed to just having potentially lethal consequences in exceptional or unfortunate, accidental circumstances or in case of inappropriate use). The term thus covers a large range of lethal tools from handguns and rifles with live ammunition to guided armed drones and explosive devices.[70]

The basic rules of the UN rapporteur which are most relevant to the topic discussed include:

> 'Basic Principle 1 "Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law

[68]Guidelines for the implementation of the UN basic principles on the use of force and firearms by law enforcement officials, *Amnesty International*, 2015.
[69]Special Rapporteur on extrajudicial executions, 2014. UN Doc. A/HRC/26/36§71
[70]Guidelines for the implementation of the UN basic principles on the use of force and firearms by law enforcement officials, *Amnesty International,* 2015. pg 54.
www.amnesty_international_guidelines_on_use_of_force-2.pdf accessed on 07/05/2021

> enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review."

The power to use force in general needs to be established by law. This requirement is a direct result of the principle of legality which also requires that the law regulates for which objectives and in which possible circumstances force may be used. While it may be difficult to regulate all possible situations in which resorting to force might be justified by law, a minimum framework should be established.[71]

Basic Principle 4 "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."

Basic Principle 5 "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) Minimize damage and injury, and respect and preserve human life; […]"

Although it can be formulated in various ways, it must be clear that force should only be used when there are no other means available (from the outset or after having exhausted all available means) that are likely to achieve the legitimate objective. Italso should be clear that only minimum force should be used, i.e. that no greater force should be used than what is necessary to achieve the objective.[72]

Usually, the responsibilities and duties of law enforcement officials require them to act in order to achieve a legitimate objective, and to use available police powers to attain this objective.

[71]Guidelines for the implementation of the UN basic principles on the use of force and firearms by law enforcement officials, *Amnesty International,* 2015. pg 54.
www.amnesty_international_guidelines_on_use_of_force-2.pdf accessed on 07/05/2021

[72]Guidelines for the implementation of the UN basic principles on the use of force and firearms by law enforcement officials, *Amnesty International,* 2015. pg 54.
www.amnesty_international_guidelines_on_use_of_force-2.pdf accessed on 07/05/2021

Failing to act in such a situation may be followed by serious disciplinary action or even consequences under penal law. Legal clarity is therefore essential. The law must set the absolute limits to the use of police powers, both as a precaution to prevent law enforcement action from causing excessive harm, and in order to protect the individual law enforcement official from prosecution or other negative consequences when he or she chooses not to act to avoid greater harm.[73]

In the real sense, both the legal framework and implementation of the Luanda guidelines and International standards on the use of firearm have not been achieved in Nigeria.

The Luanda guidelines in section 3 provided for search and procedures for it.It provided that search must be carried out in accordance with the law and strict adherence to dignity of the person, right to privacy and by an officer of the same sex with the person being searched.

The guidelines provided for three kinds of search which are pat-down searches, strip searches and internal body searches. A pat-down search is when a police officer pats down the outer surfaces of a person's clothing in an attempt to find weapons.[74]

A strip search is a practice of searching persons for weapons or other contraband suspected of being hidden in the body or clothing but not found by during a pat-down search, an inspection of a naked person. This type of search is done by requiring the person to remove some or all of his/her clothing.[75]A strip search is a search where more than an outer coat, jacket, gloves, headgear, or footwear is removed. This happens when the police think it is necessary to confiscate an illegal item that is hidden under the clothes or body such as weapon. This kind of search can include the exposure of intimate body parts.Strip and internal searches are only to be conducted in private and upon informed consent or by acourt order.[76]

Internal/intimate is the third kind of search and it is a search of the body orifices other than the mouth. This type of search can only happen with a police have a search warrant and with the

[73]Ibid note 257

[74]https://www.law.cornell.edu/wex/pat-down generated on 14/09/2020

[75]https:/https://www.law.cornell.edu/wex/strip_search

[76]https://www.courts/legal-system-s/police-powers-to-stop-and-search-enter-private-property-and-seize-goods generated on 14/09/2020

consent of the person about to be searched.[77]This can include the search of the intestine carried out by doctors in crime investigations.For all these types of search and every other not mentioned in the guideline; persons to carryouta search must be of the same gender with the person to be searched.

Secondly, the suspect must be informed of the reason for the search, a written record must be made and such should be made accessible by the person searched, his/her lawyer or other legal service, his relatives, etc.A receipt shall as well be provided for all items confiscated during the search.

The Police Act in section 29 made provision for the search of persons who he reasonable suspects to have in his custody, stolen items. However, there are no guidelines provided for the search of persons in this Act or any other law. The Administration of Criminal Justice Act also provided for the search of persons in section 9 and provided that suspects be searched using reasonable force but search must be carried out by an officer of the same sex with the suspects and decently except in urgent situations and in the interest of justice. Although, section 34(1) of the constitution guaranteed the right to dignity of persons which can comfortably be likened to the Luanda's guidelines provisions on carrying out a search. However, the provisions of the law are not explicit enough to align with the Luanda guidelines on carrying out a search.

In practice, in Nigeria, stop and search exercises are ways or tactics to extort money from the young masses. The young ones live in fear of the same group expected to protect their well being. The standard for suspecting and detaining people in Nigeria is based on look, physique, style of dress and hairdo, kind of car or wealth displayed.[78]

Part 4 of the guideline deals with the right of an arrested person and provided eleven (11) rights for suspects which include the right to be free from torture or any form of cruel or inhuman treatment, to be informed of the reasons for their arrest and of any charge against them, to contact a family member or persons of their choice and if necessary, consular authorities or

[77]https://www.courts/legal-system-s/police-powers-to-stop-and-search-enter-private-property-and-seize-goods generated on 14/09/2020

[78]Nwaodike, C., 2020. Searches and seizures: SARS and Nigerian youth (part 2), para2 from https://atlascorps.org/searces-and-seizures-sars-and-nigerian-youth-part-2/

embassy (for non-nationals), to contact a lawyer of their choice as soon as possible or when a suspect cannot afford a lawyer, a legal service provided by the state, to humane and hygienic conditions during the period of arrests. This includes food, water, decent accommodation, etc., the right to silence and freedom from self-incrimination, the rights to urgent medical assistance, the right to accessible formats and rights to interpreter, rights to apply for release on bail pending investigation, questioning or trial, to challenge promptly the lawfulness of the arrest before a competent jurisdiction and to reasonable accommodation for persons with disabilities.

The Administration of Criminal Justice Act made provision for the protection of the dignity of suspects or persons arrested by prohibiting torture, cruel, inhuman, or degrading treatment of arrestees[79]which is in sync with the provisions of the Luanda guidelines but it fails to prescribe penalties for violators.[80]The 2017 Anti-Torture Act defines and specifically criminalizes torture by prescribing offenses and penalties for any person, including law enforcement officers, who commits the offence, and anyone who aids, abets by act or omission is an accessory to torture. It also provides a basis for victims of torture to seek civil damages. The law prohibits the introduction into trials of evidence and confessions obtained through torture. However, authorities do not always respect this prohibition and the former Special Anti-robbery Squad (SARS) now SWAT of the Nigerian Police Force (NPF) sometimes used torture to extract confessions later used to try suspects.[81]

ACJA in unison with the Luanda guidelines provides that unless a person is caught committing an offence, such person making the arrest must inform the person arrested of the reasons for his/her arrest[82] and must be informed in writing within 24 hours (and in a language he/she understands) of the facts and grounds for his arrest. The person arrested must be informed of his/her rights which include the right to remain silent until he consults a lawyer or a person of his

[79]Section 8 of the Administration of Criminal Justice Act, 2015.
[80]Country reports on human rights practices, 2019. United States Department of State Bureau of Democracy, Human Rights and Labor, pg 5
[81]ENDSARS movement: from twitter to Nigerian Streets, 2020. Amnesty International from https://www.amnesty.org/en/latest/campaigns/2021/02/niheria-end-impunity-for-police-violence-by-sars-endsars/
[82] S.3 (3) Constitution& s 6 of ACJA

choice, the right to contact a legal practitioner of his choice[83]and such an arrested person must be taken to a Court of competent jurisdiction within a reasonable time.[84]

Despite that the constitution, ACJA and other provisions guaranteeing these rights, in practice they are not been respected especially the right to remain silent and freedom from torture. In the case of *Effiong Edet George v. State*,[85] the appellant resisted several forms of torture for days before he was taken from the cell with six other suspects at night to a lonely spot in Calabar, Cross River State. All the suspects were chained together. The other six suspects were shot to death by the police with their blood splitting on the appellant. The appellant voluntarily shouted that he will sign a confession prepared by the police and was thereafter forced to carry the corpses of the dead suspects into the police vehicle. The confessional statement was admitted in evidence at the lower court and the appellant was sentenced to death. The decision of the lower court was later reversed by the Court of Appeal.

Also, sometimes police seem to turn themselves into the end itself and no longer the means to achieving justice and peace. Sometimes, citizens are arrested without the intention of prosecuting them. In some other cases, those who are arrested are either made to suffer more than the punishment prescribed for the offence or they are mishandled in the process of questioning. Also, the physical conditions of police stations cause ailments to detainees especially first time detainees.[86]

If the provisions of the Luanda guidelines are implemented beyond the legal provisions in the constitution, ACJA and Anti-Torture Act of 2017, in exercising their power of arrest and detention, the police will not only act legally but bonafide as to act otherwise would attract

[83]One Inspector Musa Mohammed at the Orita Challenge, Ibadan Police station in April, 2019 became furious because the suspect contacted his lawyer in less than one hour after his arrest. He insisted that that is not what the law says and would not listen to any explanation. The next thing he did was to cork his gun, been the lawyer, he pointed the gun at, I left the police station. Although, the arrestee was released almost immediately but it shows that what obtains in the several legislation does not obtain really in practice.

[84] S.35(4) the constitution.

[85](2009), 1 NWLR, pt 1122 at 325

[86]Arisukwu, O., Adebisi, T., Igbolekwu, C., & Asamu, F., 2021. Police treatment of the public in police stations: evidence from Zaria, Nigeria, from https://academic.opu.com/policing/advance-article/doi/10.1093/police/paab019/6238577

unpleasant consequences to the officer concerned and the Nigeria Police Force in general. This is more so when there is a Constitutional provision that any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person specified by law.[87]

5.0. The Aims and Significance of the Luanda Guidelines on African Criminal System

5.1. Depopulating Detention Facilities

The major concern that led to the adoption of the Luanda guidelines was overcrowding in detention facilities in African countries with majority of those in detention being pretrial detainees. If the provisions of the Luanda guidelines are followed strictly, the problem of overcrowding will be solved in detention facilities in Africa. For instance, if the 51, 893 pretrial detainees in Nigeria are granted bail, discharged, granted non-custodial sentence, the problems of overcrowding will be totally solved. It may not occur ever again if the provisions of the Luanda guidelines are still adhered to strictly for future cases. Nigeria government granting amnesty to 2000 out of 71,000 detainees will not solve the problem of overcrowding.[88]The emphasis and repetition of the Luanda guidelines on using alternative measures to pretrial detention and police custody detention depicts its primary purpose.

The Luanda guidelines was adopted to solve the problem of overcrowding in detention facilities in Africa.

5.2. Ensuring that Right to Life is Guaranteed

Part 1 of the Luanda guidelines specifically provided that firearm should me used as a means of last resort and should be guided by national and international laws. In ensuring compliance to

[87]Newswatch v. I.G.P (unreported) but contained in Guidance Newspaper of 10-12-86, where the then I.G.P Etim Inyang had to tender a public apology to Newswatch Publication and it's four Editors of Dele Giwa, Ray Ekpu, Dan Agbese and Yakubu Mohammed as ordered by the Court.

[88]Erezi, D., 2020. Nigeria grants amnesty to 2600 prisoners, TheGuardian news, from https://www.google.com/amp/s/guardian.ng/news/nigeria-grants-amnesty-to-2600-prisoners

this, ACHPR designed a training tool for law enforcement agencies for their training on the use of firearms and how to carry out duties without making recourse to the firearms. The tool kit also contains international standards and legal provisions on the use of firearms. This is because, the right to life is the most important right upon which all other rights settles comfortably.[89]

5.3. Protecting the Rights of Suspects and Inmates

The Luanda guidelines guaranteed the right of suspects and inmates ranging from right to dignity, right to be informed of the offence alleged, right to remain silent, right to bail or bond, freedom from torture and inhuman treatment. The Luanda guidelines provides safeguards for persons in pretrial detention and police custody. It criminalise all forms of torture and provides that independent complaints mechanisms be created and detainees should have free access to such mechanism and right to confidential discussion between detainees, suspects and their legal practitioners and medical practitioners. All these provisions confirm that the Luanda guidelines aims at protecting the rights of suspects and pretrial detainees.

Conclusion

Luanda guidelines was well drafted, with good intentions of depopulating prisons, upholding the human rights of everyone involved in the criminal justice system which if well implemented by African countries will set a positive tune for the various criminal justice system of each country.

However, the provision of the Luanda guideline on the use of firearms needs to be amended and the authority provided by that section on the use of firearm be watered down. Also, the provision of the Administration of Criminal Justice Act on the arrest is quite misleading by putting arrest before investigation which is supposed to be the other way round, that is investigation, before arrest as this will defeat the intentions of the provisions of the Luanda guidelines.

[89] https://www.achpr.org/public/Document/file/English/conditions_of_arrest_police_custody_trainer_manual_.pdf

Corruption, lack of trained personnel, nonchalant attitude of officers, lack of checks and balances all within the criminal justice system coupled with some wrong tone or draft of the criminal laws are the reasons why Nigeria and some other African countries are still behind in the administration of their various criminal justice system. Therefore, implementing the Luanda guidelines in practice will in fact help in curbing a lot of menace in the criminal justice system.

Finally, the implementation of the Luanda guidelines in many African countries has not been possible despite having legal frameworks that are in conformity with the guidelines.

Recommendation

One of the problems of police officers in Nigeria is inferiority complex, the police force from the highest to the lowest officer should be subjected to continuous training and should be encouraged at all times.

Documentation of suspects bio-data is important and should be made mandatory not just on paper but digitally. The section that allows the police officer to resolve to the use of force should be removed or watered down from both the Luanda guidelines and the Nigerian laws.

There should be thorough discipline in all sectors of the criminal justice system in Nigeria.

Also, the Nigerian police force title should be changed from ‘force’ to ‘service’ like what obtains in South Africa as this will enable them know that they are service providers.

Also, a section of the police force can be trained as paramilitary officers who fights armed offenders but definitely not all police officer should be allowed to use firearms. Those who will be occupy the office of the force department in the police force should be subjected to mental, emotional, physical and intellectual test. The police force should go back to the time of using sticks to curb future occurrences of the misuse of firearms.

The Luanda Guidelines has trainer and a trainee manual; this can be used as a mandatory training manual for the police and the citizens at interval. Those that have been awaiting trial for a long period of time may be released on probation to decongest our correctional facilities and stop some innocent people from been introduced to crime.

The police force should be rehabilitated, reformed and subjected to continuous educational and professional training. It is very important because the police force commit so much atrocitiesdue of lack of knowledge.

There should be a specific minimum academic qualifications for anyone who desires to join the police force which should be an 'Ordinary National Diploma Certificate (OND)'. Like what obtained in the United Kingdom, officers may be employed with low qualifications but they have to compulsorily undergo the degree courses provided by the Police Force. This approach will help better in Nigeria. The judiciary should be allowed to operate independently without any interference from the other arms of government.

Also, the Nigerian Judicial Council should enforce discipline and visit courts of law regularly to correct some atrocities and look into the various case files.

Judges in Nigeria should be encouraged to embrace other forms of punishment aside imprisonment and to grant considerable bail conditions to suspects.

Furthermore, the Legal aid council should be funded in order to assist more indigent detainees. More funds should be disbursed to correctional facilities so as to achieve the primary purpose of incarceration and discipline should be enforced to curb corruption among officers.

The remuneration of the legislature should be reduced so as to have people vie for the position in good faith and out of their interest for the growth of the country.

Also, the constitutional should be amended to provide for the minimum qualification to be a lawmaker which maybe a university certificate or its equivalent and they should be professional from different fields of study. The Administration of Criminal Justice Act should be amended as well to put investigation before arrest. ACHPR should intensify its effort in ensuring that the states laws are not only conforming with the guideline but implemented totally.

Lastly, educational programmes should be organised for the citizens especially the uneducated ones on the provisions of the law, what constitutes crimes, their rights, the difference between morals and law, etc. The young ones should be encouraged to go to school by reducing the cost of education in Nigeria and those who are unwilling to study should be encouraged to acquire

skills as this will reduce idleness among youths which will automatically reduce crime rate in the country.

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