PROTECTING VULNERABLE GROUPS IN AFRICA THROUGH PRISON VISITS

By Dupe Atoki (1)

On behalf of the African Commission on Human and Peoples’ Rights (hereinafter the African Commission or the Commission), I wish to express my sincere appreciation to The American University Washington College of Law and the Association for the prevention of Torture for inviting me to this conference. My participation is a demonstration of the practical cooperation, which has evolved over the last few years, between the African Commission and various international and regional governmental and non-governmental organizations in the pursuit for the promotion and protection of human rights. As the Special Rapporteur on Prisons and Places of Detention in Africa (SRPPDA), this forum provides me the opportunity to give visibility to the mandate of the Commission and to engage with all stakeholders in highlighting issues that surround the promotion of human rights in prisons in Africa.

Mandate of the African Commission

The African Charter on Human and Peoples’ Rights (hereinafter the African Charter) was adopted by Member States of the then Organization of African Unity (OAU) and all 53 Member States of the current African Union (AU) are States Parties to the African Charter. It provides for the establishment of a regional human rights body -the African Commission- with the mandate to promote the observance of the African Charter, monitor its implementation, ensure the protection of the rights and freedoms set out therein, interpret the Charter and advise on its implementation. (3)

It is a quasi-judicial body composed of 11 members elected by the Assembly of Heads of State and Government of the African Union as a treaty supervisory body for the African Charter. The Secretariat of the Commission is based in Banjul, The Gambia. The African Commission meets twice a year in Ordinary Sessions with different human rights stakeholders, including State Delegates, representatives of International Organisations and other members of the Civil Society, to discuss the human rights situation on the Continent. Please visit www.africancommission.org for further information.

As part of measures established in fulfilling its mandate, the African Commission appoints Special Rapporteurs and members of working groups in relation to different thematic areas. (4) This strategy has proved to be an excellent promotional tool, which also enables the Commission to have a better understanding of the extent to which human rights are respected in the continent. It currently has six Special Rapporteurs dealing with the following thematic issues:

(1) Special Rapporteur, on prisons and places of detention in Africa and chair, committee for the prevention of torture Africa Commission on human and peoples’ rights
(3) Article 45 of the African Charter on Human and peoples Rights
(4) This was done under Article 46 of the Charter, which provides that the Commission may resort to any appropriate method of investigation.

Prisons and Place of Detention in Africa; Rights of Women in Africa; Refugees, Asylum Seekers and Internally Displaced Persons; Freedom of Expression and Access to Information; Human Rights Defenders; Summary, Arbitrary and extrajudicial killings.

There are also eight Working Groups dealing with the following themes; Prevention of torture in Africa; Rights of Indigenous Populations; Economic Social and Cultural Rights; Rights of people living with HIV/AIDS; Extractive industries; Death penalty; Rights of older persons; and Specific issues relevant to the work of the Commission.

**Situation of Prison in Africa**

The present day infrastructural, legislative and institutional framework of most correctional and penal services in Africa is largely an inheritance from the former colonial masters of the continent. And in spite of the astronomical increase in prison populations over the years, this framework has remained largely unchanged and has led to untold misery for many inmates. Although considerable efforts have been deployed by some African countries to improve prison and detention conditions, these have remained inadequate and in most countries, the prevailing conditions are at best deplorable.

It is common knowledge that many African prisons and detention facilities are plagued by a plethora of problems common to prisons around the world which have effectively transformed these facilities into institutions where punishment takes precedence over reformation and rehabilitation. Unacceptable levels of overcrowding, disease, physical and psychological abuse by officials and inmates alike, violence, malnutrition, poor hygienic conditions, old dilapidated facilities, harsh disciplinary measures, inadequate medical care for inmates and high mortality rates among inmates are very prevalent in most prisons on the continent. These conditions lead to a myriad of human rights violations and deny people deprived of liberty their humanity.

The above problems have been exacerbated by the fact that there is a high level of official secrecy regarding what goes on in prisons and detention centers thus prison conditions are therefore shielded from public scrutiny. Furthermore, most prison and law enforcement authorities are still ignorant about the provisions of human rights instruments on the treatment of people deprived of their liberty and the material and financial resources available to them are in most cases inadequate.

**Establishment of the Special Rapporteur on prison and places of detention in Africa**

It is in the above context that this paper examines the work of African Commission and indeed the SRPPDA in protecting the rights of persons detained in Africa. As mentioned earlier, the African Commission has appointed several special rapporteurs on various
thematic issues. The 1995 Kampala Resolution on Prisons in Africa (5) extended the rights set forth in Articles 5 and 6 of the African Charter as it relates to detainees and recommended the appointment of a special Rapporteur on prison.

(5) www.africancommission.org

The importance of this declaration was noted and annexed to a resolution by the United Nation in 1997 (6) The first SRPPDA was appointed in 1996 (7) and this mechanism has played a significant role in improving prison condition throughout Africa.

**Mandate**

The resolution that established the mandate of the SRPPDA generally empowered him/her to examine the situation of persons deprived of their liberty within the territories of State Parties to the African Charter. The mandate extends to other detention centers such as reform centers and police cells and covers detainees awaiting trial and convicts.

The role of the SRPPDA include amongst others to inspect and report on prison conditions in order to protect the rights of those held therein. The SRP researches prison conditions, communicates with African governments regarding the state of their penal systems, entertains individual complaints about prison conditions, and reports to the Commission on a yearly basis. The SRPPDA also proposes solutions to challenges facing African prisons. The mandate also provides for training of law enforcement personnel, police, prison guards and administrators, and lawyers to improve prison condition (8).

In addition to examining prison facilities, the SRPPDA is also charged with analyzing national penal legislation to ensure its compliance with international and African law. The Commission strives to emphasize individual state accountability to care for prisoners and guarantee the minimal standard of prisoners’ rights. However, the Commission has not yet established coherent standards by way of guidelines as to degrees or even elements of violations of prisoners’ rights. In its cases, the Commission usually hears a complainant’s evidence and evaluates a government’s response. In the absence of a governmental response, the Commission simply finds in favor of the complainant.

In pursuit of the mandate, the Commission has also adopted several other resolutions on the standards of prisons in Africa, including the Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa, The Arusha declaration on good prison practice and The Kadoma Declaration on Community Service. (9) All of these instruments contain recommendations on reducing overcrowding, making prisons in Africa more self sufficient, promoting rehabilitation and reintegration programs, making prison administrations more accountable for their actions, encouraging best practices, promoting the African Charter and supporting the development of a Charter on the Basic Rights of Prisoners from the UN.

(6) A resolution on International co-operation for the improvement of prison conditions in developing countries by the
An additional instrument (the Robben Island Guidelines on the prevention of torture in Africa) was adopted by the Commission in 2002. It encourages African nations to adopt minimum international standards on prison conditions and gives detailed instructions on how to achieve them. The guidelines also include specific recommendations for combating many of the challenges including physical conditions of prisons, the use of alternative sentencing to mitigate overcrowding, the role of NGOs, judicial independence, increasing awareness and training of staff, and the separation of such vulnerable groups as women and children. Finally, the Guidelines established an important follow-up committee to monitor state implementation of these provisions.

International and regional human rights instruments also play a large role in the work of the Commission and its subsidiary organs in the course of their work on African prison conditions. For example, the Commission has made use of the UN Standard Minimum Rules for the Treatment of Prisoners, the International Covenant on Civil and Political Rights, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the African Charter on the Rights and Welfare of the Child, and the Protocol on the Rights of Women.

The Vulnerable Groups in detention places

The Vulnerable Groups in the African context can be classified to include amongst others: Women; pregnant and nursing; Babies; Juveniles/Children; mentally ill; persons affected with HIV/AIDS; the elderly and the physically challenged.

**Women**

The African Commission in its Kampala Declaration calls for “particular attention” and “proper treatment” of women’s “special needs”. The Protocol to the African Charter on the Right of women in Africa also guarantees the right to integrity and security of women, pregnant and nursing mothers in detention, prohibits sexual violence in private and public and imposition of death penalty on pregnant and nursing mothers.

Women form between 1 and 6 percent of African prison populations. Even though the continental average is lower than elsewhere in the world, national averages vary from rates as high as 4.5 percent in North Africa, 5 percent in West (Cape Verde).
and Southern Africa (Botswana), 3.3 percent in Central Africa (Angola) and 6.3 percent in East Africa (Mozambique), to 1.7 percent in North Africa (Sudan), 1 percent in West (Burkina Faso) and Central Africa (São Tomé e Príncipe), 1.2 percent in East Africa (Malawi), and 1.8 percent in Southern Africa (Namibia). (15)

There are several critical problems faced by women in prison - most are unmet in the prison environment. Women in prison have experienced victimization, unstable family life, school and work failure, and substance abuse and mental health problems. Social factors that marginalize their participation in mainstream society and contribute to the rising number of women in prison include poverty, minority group member, single motherhood, and homelessness.

While in prisons, women, like prisoners throughout the world, face specific pains and deprivations arising directly from their imprisonment. Women in African prisons are overwhelmingly poor and uneducated. They are frequently incarcerated for crimes such as murder and attempted murder, infanticide, abortion, theft and alcohol brewing (Sudan). Sexism is apparent in the criminalization and sentencing of certain conducts. For example, in many countries abortion—which only women can obtain—is punished via life sentence. (16) Once in prison, discrimination against women persists. Vocational and recreational programs are more often than not inadequate. Prisons often lack appropriate supplies to accommodate menstruating women.

While some prison systems provide separate facilities for the incarceration of women, in most countries, women are imprisoned in the same facilities as men. (17) Even in cases where women are incarcerated separately, these facilities experience violence and abuse akin to that found in male facilities. Moreover, women prisoners are particularly vulnerable to sexual abuse by prison guards whether in female or mixed prisons.

**Juveniles/Children**

Africa is the only continent with a region-specific child rights instrument – The African Charter on the Right and Welfare of the Child (ACRWC) (18) It emphasizes the paramount aim of incarceration of children as reform, reintegration into family and social rehabilitation. It makes elaboration provisions on safeguards on the rights of children including prohibition of torture and degrading treatment, separation from adults, provision of prompt legal aid and welfare of children of imprisoned mothers (19) The Charter also sets up a committee to monitor the observance of these provisions.

While there are far less children in prison in Africa than women, certain individual facilities house particularly high youth populations. According to available data, children comprise anywhere from .5 to 2.5 percent of the general prison population, with the majority of those children awaiting trial for months or even years.

(12) Reso AHG/ReS240(XXXI) 1995) which was adopted to complement and enhance the rights of women in the Charter Adopted July 2003 in force November 2005
(13) Articles 3, 4, 24(b)
(15) Ibid
(16) Ibid
South African prisons accommodate the highest number of child prisoners in Africa at 3,600. Namibian prisons house the largest percentage of children, at 5.5 percent of the country’s total prison population. (20) Children are usually incarcerated for crimes that include such minor and petty offenses as vagrancy, not carrying proper identification, loitering, truancy, begging, and being beyond a parent’s control. For these slight infractions, children can be detained pending trial during the most formative years of their development.

As is true for women, most African prison systems besides those in South Africa, Côte d’Ivoire, Mali, and Angola Tunisia lack the resources to house children separately from the adult male population. The commingling of children with the general prison population can lead to disastrous consequences. First, children imprisoned with the general population must compete with adults for scarce resources such as food. Second, given that African prisons fail to meet even the most basic minimum standards for adults, it should come as no surprise that they fall far short of meeting international standards for juvenile detention. For example, overcrowding compromises child prisoners’ health and hygiene and exposes them to increased risk of sexual abuse. The educational, developmental, health, and nutritional needs of the juvenile are left unattended.

While some progress is being made, particularly in the countries noted above, to separate child prisoners from their adult counterparts, more needs to be done. Examples can be derived from countries such as Egypt, Tunisia which is experimenting with diversion and restorative justice programs as alternatives to imprisonment of youth. (21) Pre-release programs, as well as rehabilitation and reintegration policies can also reach child offenders before they lose their precious developmental years to prison.

Babies/ Children of Imprisoned Mothers

Most women in prison are mothers. The imprisonment of a woman who is a mother can lead to the violation not only of her rights but also the rights of her children. When a mother is imprisoned, her baby and/or young children may go into prison with her or be separated from her and left on the ‘outside’. Both situations can put the child at risk. As the Special Rapporteur on Prisons and Conditions of Detention in Africa stated:

Prisons are not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mother. (22)

Most correctional systems in Africa do not take into account the importance of the mother-child relationship in designing policy for women in prison.
In some of the prisons I have visited, there is no provision for educating these children. Many women in prison are primary carers for children or others, whose welfare may be adversely affected by their imprisonment. One particularly problematic issue in this context is whether - and if so, for how long - it should be possible for babies and young children to remain in prison with their mothers. This, I agree, is a difficult question to answer given that, on the one hand, prisons clearly do not provide an appropriate environment for babies and young children; while on the other hand, the forcible separation of mothers and infants is highly undesirable.

The governing principle in all cases must be the welfare of the child. This implies in particular that any ante- and post-natal care provided in custody should be equivalent to that available in the outside community. Where babies and young children are held in custodial settings, their treatment should be supervised by specialists in social work and child development. Prison visit can ensure that. The goal should be to produce a child-centred environment, free from the visible trappings of incarceration, such as uniforms and jangling keys. Arrangements could also be made by the visiting team to ensure that the movement and cognitive skills of babies held in prison develop normally.

In particular, they should have adequate play and exercise facilities within the prison and, wherever possible, the opportunity to leave the establishment and experience ordinary life outside its walls. Prison visit can also ensure that facilitating child-minding by family members outside the establishment can also help to ensure that the burden of child-rearing is shared (for example by the child’s father). Where this is not possible, consideration should be given to providing access to crèche-type facilities. Such arrangements can enable women prisoners to participate in work and other activities inside the prison to a greater extent than might otherwise be possible.

Prisoners with HIV / AIDS

Although a statistics for HIV prevalence in many African prisons are not available, some reports have indicated that in some institutions, it can reach 40 per cent. In the absence of adequate HIV prevention and care in penal institutions, the virus spreads there and in the communities inmates return to upon release. We all know that many African prisons are seriously overcrowded. Overcrowding not only causes victimization in the prison, but also hardens the inmates and leads to rapes. Lack of sufficient treatment facilities is increasing the risk of mother-to-child HIV transmission.

The African Commission recently established a working group on the protection of people living with HIV/AIDS and will be collaborating with the SRPPDA on issues of detention of this vulnerable group. (23)
Mentally ill detainees

There no accurate data on mentally ill detainees but Africa is faced with significant problems of a high population of mostly untreated mentally ill people, a problem that is particularly serious in prisons. In the case of imprisoned individuals suffering from mental illness, there is little or no access to mental health practitioners, counseling or specific treatment in prisons. As a consequence, prisoners with physical illnesses may be misdiagnosed with mental illness. Also, convicted prisoners may become mentally ill as a result of their imprisonment, further increasing the relatively high population of mentally ill. The African Commission is yet to give sufficient attention to this problem in order to have a scientific basis for elaborating recommendations, complete………..

Whether the rights of detainees

The controversy surrounding treatment of vulnerable people admitted into prison, whether upon court sentence, or awaiting trial or otherwise, is a familiar subject to those involved in criminal justice system in Africa. One of the central issues being whether such prison inmates have any rights worth protecting. In theory, the concept of prisons has undergone some changes from institutions of state retribution to institutions for reformation with many human rights organizations promoting the latter view. However, in the minds of most people, they still stand as closed gigantic fortified walls of concrete and iron gates, filled with huge numbers of people, punished for breaking the law with little intervention from those beyond the boundaries of these penal institutions.

But I can say this: we as a society of human beings do not even have to advance philosophical or legal arguments why we must ensure that the rights of prisoners are also protected. Our humanity is involved. I recall what Nelson Mandela said: “that one cannot judge a nation by how it treats its most illustrious citizens, but by the treatment it metes out to its most marginalized - its prisoners. One of the best ways to do that is through prison visits.

The potential of prison visit torture and ill-treatment.

It is now widely accepted that one of the best safeguards against torture and ill treatment is for places of detention to be as transparent as possible. What better way to do it than to allow prison visits? Regular and periodic visits by independent monitoring groups are central to protecting the rights of detainees. In the absence of outside pressure, human rights abuses in prisons are allowed to go unchecked. Prison visit has the potential Increasing the transparency and accountability of prison management and the use of public funds; Strengthening safeguards within prisons and the criminal justice system to reduce and prevent human rights violations and violence in prisons through, for instance, the establishment of internal complaints mechanisms in prisons or improving access to legal aid for detainees;

Many prisons in Africa have the reputation of places of low visibility where all types of conditions, mostly inhumane, could prevail while the world outside remain largely ignorant of what goes on within those great big walls. The truth is state supervision over what transpired every day inside the prison became a mere formality, and the surveillance
of society was conspicuous by its absence. In these closed institutions with prison guards, shutters, locks, chains, fetters, high walls, cells and places of solitary confinement, abuse and torture are not only possible but are usually the norm as a prison’s isolation provides them with a cover of obscurity in which fundamental human rights could be unofficially violated and officially denied.

Prison visit provides transparency within prisons and bring some degree of accountability to the prison management. It also has a mode of community involvement in the penal system. Through visits people from the community and those who are duty bound by the virtue of the position they occupy in either government departments or the judiciary can monitor conditions in an otherwise inaccessible institution. Prison visit may be one of the most important means of alleviating numerous problems faced by prisoners, Prison visits is thus not only desirable but also essential if one is to make prisons a correctional and rehabilitative institution rather than a place for mere incarceration.

The Commission need not be the only institution to undertake prison monitoring and reform in Africa. Since I was appointed Special Rapporteur, I have come to realize that almost all the prison systems in Africa have in law some type of a visiting system, even for those countries that are not signatories both to the Convention Against Torture (CAT) and the Optional Convention Against Torture (OPCAT). As is well known, that the aim of the OPCAT is to prevent torture and other forms of ill-treatment by establishing a system of regular visits to places of detention or wherever people are deprived of their liberties and will be carried out by independent international and national bodies composed of experts. States who have ratified the OPCAT will be obliged to allow these bodies to visit any detention center or prison.

From my time as Special Rapporteur, I have come to the conclusion that NGOs and civil society within states can perform that task. They can help create a well-functioning prison visiting system that does not need more finances or manpower from the State. It merely needs the State to act in obedience of the existing laws, rules and regulations and, for those mandated to make the system work, to carry out their duties with due diligence. 417 NGOs have observer status with the Commission

Several countries have established National Human Rights (NHRI) Institutions, which though of varying efficacy, have the mandate amongst others to monitor prison conditions on the national level. The challenge facing many of them is one of breadth and lack of independence. At the moment 22 NHRIs have affiliate status with the African Commission and regularly attend the sessions of the Commission. They are available tools for effective cooperation

From my experience, there are too many people in prisons in Africa who, simply, should not be there. The remedies protecting vulnerable groups and for stopping this injustice and for reducing the chronic overcrowding that overburdens the jail administration, are all in place in law - bail rather than jail; effective legal defense; periodic jail house hearings by judges aimed at delivering quick decisions; parole and probation. These remedies remain under-utilized but in the absence of anyone looking over the walls of the
shuttered prison system, the jails will continue to fill and fester creating embittered alienated people who have little support or ability to integrate into society.

In fact, in most African countries I have visited, few people care about the welfare of prisoners. Traditionally, courts have also adopted a broad 'hands off' attitude towards matters of prison administration. This stems from a healthy sense of realism that prison administrators are responsible for securing their institutions against escapes or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating the inmates placed in their custody.

Challenges.
In theory, the SRPPDA is a useful tool for protecting prisoners’ rights. However, a number of barriers have hindered its scope and practical import. First, the SRPPDA is strapped by virtue of under-funding and double-billing as a Commissioner. As a result, the SRPPDA has only managed to visit a fraction of African states. Secondly, the SRPPDA is also constrained in the number of visits because such trips require the consent of the receiving state. Admittedly, receiving the SRPPDA requires a level of commitment that includes following the subsequent recommendations. However, if the SRPDA is going to reach its full potential as a human rights institution, more African states need to accommodate requests for visits. (23)

SRPPDAs are part time members of the African Commission and combine the prison mandate with other activities of the Commission thus limiting the time available for the prison activities.

Despite these challenges, the SRP has achieved some success in its short existence. First, its mere creation has raised the profile of prisoners’ rights in the Commission’s agenda. Thus, while progress is slow, the matter remains on the Commission’s agenda and will be followed for years to come. Secondly, even though the number of the SRPDA’s visits has not been as large as possible, approximately 250 places of detention have been examined in the last decade (24). This is a start on the road to more visits. Thirdly, the SRPPDA has shed light on previously-ignored issues. For example, during her term as SRPPDA, Vera Chirwa opposed capital punishment, Mumba Malila has spoken out against corporal punishment.

Conclusion
The prison system takes people from their families and communities, put them into an overcrowded and repressive environment, subjects them to isolation, violence, torture, guard brutality, organized crimes and a life of boredom and useless toil, then releases them with little to no support to face poverty, post-trauma stress, and ongoing persecution from the law.
All of us are needed to voice out its necessity and put pressure to those who have the power to decide to ensure that regular visits take place. Mandate holders, policy makers and all in the criminal justice system need to work to establish mutual understanding and
practical links between those vulnerable groups, the legal system and those of us who work in the prison system.

(23) Jeremy Sarkin: Prisons in Africa- An evaluation from the human rights perspective
(24) Ibid

Let me quote Judge J Sach in the case of August and another v Electoral Commission and others (1999). (25) He said:
"[p]risoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed. The inroads which incarceration necessarily makes upon prisoners' personal rights and their liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress."

One of the best ways to do that is through prison visits.
(25) (CCT8/99) [1999] ZACC 3