

# Decriminalisation of Petty Offences in Africa Inception Training Report:

*Enhancing the Role of National Human Rights Institutions  
in the Decriminalisation of Petty Offences in Africa*



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# Decriminalisation of Petty Offences in Africa Inception Training Report:

*Enhancing the Role of National Human Rights Institutions  
in the Decriminalisation of Petty Offences in Africa*

The inception training was hosted by the South African Human Rights Commission



# The Network of African National Human Rights Institutions (NANHRI)

The Network of African National Human Rights Institutions (NANHRI) is a not-for-profit organisation and regional umbrella body that brings together 44 National Human Rights Institutions (NHRIs) in Africa. NANHRI, whose Secretariat is based in Nairobi, Kenya, was registered under Kenyan laws as an independent legal entity in 2007.

The Network works towards the establishment and strengthening of the NHRIs in Africa. It also facilitates coordination and cooperation amongst NHRIs and links them with other key human rights actors at the regional and international level. It supports these institutions through capacity building to meet their objective of protecting and promoting human rights at the national level.

## Vision

A continent with effective NHRIs; contributing to an enhanced human rights culture and justice for every African.

## Mission

To support, through national, regional and international co-operation, the establishment and strengthening of NHRIs to more effectively undertake their mandate of human rights promotion, protection, monitoring and advocacy.

## Values and Guiding Principles

To achieve its mission and vision, NANHRI is committed to the following: -  
Transparency, Accountability, Openness, Cooperation, Professionalism and Gender Equality.



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Network of African National Human Rights Institutions



@NANHRI40

#DecriminalisePettyOffencesNow

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## ACRONYMS

<b>ACJR</b>	Africa Criminal Justice Reform
<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>APCOF</b>	African Policing Civilian Oversight Forum
<b>CNDHCI</b>	Côte d'Ivoire National Human Rights Commission
<b>HRAC</b>	Human Rights Advocacy Centre
<b>KNCHR</b>	Kenya National Commission on Human Rights
<b>MHRC</b>	Malawi Human Rights Commission
<b>NHRIs</b>	National Human Rights Institutions
<b>NANHRI</b>	Network of African National Human Rights Institutions
<b>SAHRC</b>	South Africa Human Rights Commission

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# Introduction



*NANHRI Operations Manager James Kasombo (left) meets SAHRC Chairperson Bongani Majola during the September 2018 inception training on decriminalisation of petty offences in South Africa. Photo: SAHRC.*

The Secretariat of the Network of African National Human Rights Institutions (NANHRI) held its first project activity funded by the Open Society Foundation- Human Rights Initiative grant: “**Enhancing the Role of National Human Rights Institutions (NHRIs) in the Decriminalisation of Petty Offences in Africa**” from September 19-20, 2018, in Johannesburg, South Africa.

The aim of the two-year-project is to promote and support the role of National Human Rights Institutions (NHRIs) to undertake national and regional level interventions in the decriminalisation of petty offences in Africa through the development of National Action Plans and Memoranda to effect policy reforms.

Moreover, the development of this project is anchored on the recent adoption of the African Commission on Human and Peoples’ Rights (ACHPR) Principles on the Decriminalisation of Petty Offences in Africa (hereinafter referred to as the Principles) in November 2017). This landmark instrument provides a strong legal basis and tool to guide States on measures to be taken to enhance human rights protection at the critical intersection of poverty and criminal justice.

Additionally, the project stems from the recognition of NHRIs’ mandate in the promotion and protection of human rights in compliance with the Paris Principles, that uniquely places them to undertake a holistic assessment of the criminal justice system and interalia also tasks them with advising States on their obligation to conform to regional and international human rights instruments which explicitly curb the violation of fundamental human rights in all its dimensions.

### Objectives of the Inception Training

The overall objective of the Inception training was to enhance the capacity of the five NHRIs<sup>1</sup> to lead the process of decriminalising petty offences in accordance with regional and international standards

<sup>1</sup> Côte d’Ivoire, Ghana, Kenya, Malawi and South Africa.

through a peer-to-peer exchange. The training had the following four specific objectives:

- (a) Promote the NHRIs’ institutional management determination to actively engage in the Decriminalisation of Petty Offences in Africa campaign;
- (b) Build the knowledge and skills of the five NHRIs’ technical staff to plan and undertake concrete activities to decriminalise petty offence within their mandate;
- (c) Provide a platform for exchange of experiences and good practices among the NHRIs on the national and regional processes in the decriminalisation of petty offences in the respective countries;
- (d) Provide participants with practical skills to carry out effective detention monitoring visits, with a specific focus on petty offenders.

#### **In particular, at the end of the training, participants were able to:**

- 1) Validate NANHRI’s *Baseline Assessment Report: Enhancing the Role of NHRIs in the Decriminalisation of Petty Offences in Africa* so as to guide interventions at national level focusing on review of laws and policies;
- 2) Be familiar with the definition of petty offences, and the concept of decriminalisation of petty offences;
- 3) Visit Sun City Prison in Johannesburg, South Africa, through an effective and planned process, with a focus on petty offenders;
- 4) Commit to engage strategically on the protection of persons deprived of their liberty and decriminalisation of petty offences campaign in their respective country.

The training brought together technical staff from the five implementing NHRIs and two representatives from civil society organisations namely:

- 1) Mr. Hassane Diane, General Secretary of Côte d'Ivoire National Human Rights Commission (CNDHCI);
- 2) Mr. Lawrence Kwaku Lartey, Director for Investigations at the Ghana Commission on Human Rights and Administrative Justice (CHRAJ);
- 3) Mr. Brian Kituyi, Legal Officer in Charge of Penal Reforms at the Kenya National Commission on Human Rights (KNCHR);
- 4) Mr. Peter Mota, Deputy Director of Civil and Political Rights and Head of Legal Services at the Malawi Human Rights Commission (MHRC);
- 5) Ms. Louise Edwards, Programme Manager at the African Policing Civilian Oversight Forum (APCOF).
- 6) Prof Lukas Muntingh, Co-founder and Project Coordinator of Africa Criminal Justice Reform (ACJR);
- 7) Ms. Princess Magopane, Senior Legal Officer at the South Africa Human Rights Commission (SAHRC);
- 8) Mr. James Kasombo, Operations Manager at NANHRI;
- 9) Ms. Maureen Bwisa, Programme Officer at NANHRI.
- 10) Ms. Josiane S. Tapsoba-Koné, NANHRI's Consultant.

### **Format of the Meeting**

The meeting was managed in an interactive manner. It included presentations, group study and a prison visit. An interpreter was hired to provide translation for Mr. Diane.

### **Pre-training Evaluation Process**

At the beginning of the training, the participants filled a pre-training evaluation form. The aim of this evaluation was to assess their level of knowledge and understanding of the topics that will be discussed and to determine their expectations from the training.



# Pretraining Evaluation Responses

Have you ever worked on matters related to criminal justice reforms with a focus on decriminalisation of petty offences in your country?

Yes - 5 participants  
No- 3 participants

How will you rate your level of knowledge of decriminalisation of petty offences?

Very good	2 participants
Good	2 participants
Fair	3 participants
None	1 participant

Kindly elaborate your understanding of the following terminologies:  
a) Petty offences: Minor offences for which punishment is a fine or short term imprisonment usually less than three years.  
b) Decriminalisation of petty offences: To remove from the law and its associated penalties.



Are you familiar with the different ways in which the NHRIs can engage with the ACHPR to promote and protect human rights at national and regional level?

Yes 5 participants  
No 3 participants

Kindly provide details about the type of activity you undertook in respect to question 2 above.

- a) Lead drafter of ACHPR's Principles
- b) Advocacy at national level to raise awareness on the ACHPR Principles
- c) Monitoring detention centres e.g police cells and prisons; providing recommendations to relevant authorities
- d) Took part in auditing of criminal justice system in my country, further auditing the release of petty offenders by the CSO Committee
- e) Offences of being vagabond and begging have been removed from the penal code and the NHRI will work with the law reform commission and parliament to repeal the same.

Kindly provide one examples of how NHRIs can engage with the ACHPR to support the promotion and protection of human rights in your country in relation to question 4.

- Submitting reports to ACHPR
- Actively participating during ACHPR sessions
- Advising states to implement recommendations, including observations and soft laws emanating from the ACHPR and international level

Before the invitation for this training, were you aware of the existence of the ACHPR's Principles on the Decriminalisation of Petty Offences in Africa?

Yes 5 participants  
No 3 participants

Are you aware of how the ACHPR adopts soft laws?

Yes- 8 participants

Are you aware of the mandate and functioning of the ACHPR?

Yes- 6 participants  
No- 2 participants

Is your organisation committed towards the realisation of decriminalisation of petty offences in Africa?

Yes 8 participants

If yes, kindly indicate how you learnt about the soft law mentioned in 5 above.

- a) Lead drafter
- b) Provided input to zero draft during ACHPR's consultations
- c) Not seen the Principles yet.
- d) Commissioners from my NHRI were consulted in the incountry review for the zero draft.
- e) Repeated one of the above



What do you hope to gain from this inception training?

Understanding challenges facing NHRIs in decriminalisation of petty offences  
Strengthen the campaign by working closely with other NHRIs  
Tools for detention monitoring with a specific focus on petty offenders  
Better understanding of the concept of decriminalisation of petty offences

Kindly provide details on number 8 above.

- Active members of the campaign
- Lobby and sensitise the state to implement the Principles
- By participating in NANHRI's project; we hope to develop strategies to advocate for the decriminalisation of petty offences
- My NHRI is implementing projects on decriminalisation of petty offences; we are part of the national taskforce on the same.

## Welcome Remarks

The Honourable Chairperson of the SAHRC and NANHRI's Operations Manager graced the training and gave opening remarks as shared below:



*South African Human Rights Commission Chairperson Bongani Majola opened the inception training on the Role of NHRIs in Decriminalisation of Petty offences with a key note address. Photo: Secretariat.*

### Advocate Bongani Christopher Majola, Chairperson SAHRC

The meeting was held at the premises of the SAHRC. A warm welcome was extended to participants. The Chairperson congratulated NANHRI and its partners for undertaking such an important project.

A brief introduction of the Commission was given by alluding that SAHRC was established by the Constitution; it has eight commissioners and has been given means to be independent and impartial in the execution of its duties. SAHRC has powers to promote, protect (investigate, examine complaints, advise the Government) and monitor human rights.

The Chairperson further recalled the adoption of the Principles by the ACHPR. The Principles *inter alia* establish an integrated regional approach in the decriminalisation of petty offences, providing States

with norms and standards against which they can model legislative reforms. He further affirmed that the role of NHRIs in the decriminalisation of petty offences, include but not limited to advising and lobbying the State to adopt legislative reforms in compliance with the Principles.

Notably, the Chairperson emphasised that the criminalisation of petty offences is linked to the criminalisation of poverty and thereby raises the issue of equality before the law and enhances the overcrowding in prisons and consequence thereof.

In his conclusion, Adv. Majola encouraged NHRIs to effectively engage with NANHRI in this project and capitalise on the lessons and experiences shared so as to utilise the knowledge strategically in their respective.

## **Mr James Kasombo, Operations Manager, NANHRI**

In his remarks, Mr. Kasombo thanked the SAHRC for hosting the meeting. He also appreciated the technical staff for honouring NANHRI's invitation to participate in the training, which provided a platform for the five NHRIs and like-minded stakeholders to share experiences, best practices and challenges in bringing about criminal justice reforms with a specific focus of decriminalisation of petty offences in the respective countries.

To commence with, he made reference to the 2002 Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa<sup>1</sup> which encouraged States to adopt strategies to address prison overcrowding, including, through reducing the number of people entering the prison system by decriminalising petty or minor offences.

Subsequently, he noted that the criminalisation of petty offences amounts to nothing more than the criminalisation of poverty, homelessness, unemployment and violation of one's constitutional rights as some of the offences are obsolete as they date back to the colonial time.

While recognising the fact that some efforts have been made to bring about criminal justice reforms, the correctional services sector still remains overcrowded in Africa, hence NANHRI's project. Although it is a pilot project targeting five countries, it is the hope that the same may be scaled up in future to more countries to uniformly campaign for the decriminalisation of petty offences, and decongest African prisons.

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<sup>1</sup> This declaration is the output of the pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso in 2002 and was endorsed by the ACHPR. The declaration is available online: <http://www.achpr.org/fr/instruments/ouagadougou-planofaction/>



# SESSION 1





## Highlights from the Presentations

The two-day meeting was facilitated by experienced human rights practitioners in the thematic area, who made presentations as follows:

### Introduction to ACHPR Principles on the Decriminalisation of Petty Offences and NHRIs role in its implementation- Josiane S. Tapsoba-Koné, NANHRI's Consultant

Participants were given a detailed hierarchy of events leading to the adoption of the Principles by the ACHPR during its 61<sup>st</sup> Ordinary Session in November, 2017, held in Banjul, Gambia. Further, it was noted that the ACHPR is set to officially launch the Principles in the upcoming 63<sup>rd</sup> Ordinary Session to be held from the October 24 to November 7, 2018 in Banjul, The Gambia.

Prior to commencing her presentation, Ms, Koné gave participants a *caveat* in that the Principles are yet to be officially launched and hence cannot be circulated as yet.

Background information was shared on the ACHPR, a regional body created by the African Charter on Human and Peoples' Rights (the African Charter), established in 1987 with the mandate to promote and protect human rights, and make interpretation of the provisions of the African Charter. Article 45 (1) (b) of the African Charter gives the Commission the authority to develop and adopt soft laws such as the Principles.

The development of the Principles by the ACHPR as recognised under Article 45(1) (b) of the African Charter entailed the following chronology of events:

- 1) Adoption by the ACHPR of a Resolution 366 mandating the Special Rapporteur on Prisons Conditions of Detention and Policing in Africa to develop the Principles<sup>1</sup>;
- 2) Development of the Zero Draft Principles,

- 3) Organization of technical and consultative meetings by the Commission;
- 4) Call for public contribution;
- 5) Review of the Zero Draft Principles; and
- 6) Adoption during the second review in November 2017.

The Principles, contains six parts as follows:

**Part A** provides a definition for the key terms used in the Principles. It defines petty offences as “*minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine*”; and decriminalization as “*The process of removing an act that was criminal, and its associated penalties, from the law.*”

**Part A** further provides few examples of petty offences such as being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public and laws criminalising informal commercial activities, such as hawking and vending;

**Part B** explains the purpose of the adoption of the Principles which is to guide States on the decriminalisation of petty offences, establish standards for the assessment of laws and promote the adoption of measures that prevent discrimination in the criminalisation of the offences;

**Part C** highlights the inconsistency of petty offences with article 2 (freedom from discrimination), 3 (equality before the law) and 18 (protection of the vulnerable groups such as women, children, persons with disabilities) of the **African Charter**;

**Part D** highlights the inconsistency of petty offences with Article 5 of the Charter which guarantees the right to dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment;

<sup>1</sup> <http://www.achpr.org/sessions/21st-ao/resolutions/366/>

**Part E** points out the fact that Petty offences are inconsistent with Article 6 of the Charter which guarantees the right to liberty and security of the person and freedom from arbitrary arrest and detention.

**Part E** has extremely important provisions as it sets out criteria that should be followed by the states. **It provides that when enacting, making interpretation or enforcing petty offences laws; State parties should: Comply with the rule of law (the law should be clear, concise and accessible), respect the principles of legitimacy, necessity and proportionality, ensure compliance with the regional and international standards in particular, the principles of equality before the law and non-discrimination;**

**Part F** of the Principles calls upon States to take the necessary measures that will give effect to the Principles including decriminalising the offences (especially laws that criminalise conduct in broad, vague and ambiguous or criminalise the status of a person or their appearance), providing alternatives to detention for those which are not decriminalised under the Principles, combatting poverty and marginalisation.

In conclusion, Ms. Koné emphasised that NHRIs have a crucial role to play in the implementation of the Principles through:

- 1) Promoting the implementation of the Principles at national level,
- 2) Assisting the State in the analysis and review of existing laws to lobby for the amendments of those which are not consistent with the Principles;
- 3) Monitoring and providing information and reports to the ACHPR;
- 4) Collaborating with the ACHPR especially the Special Rapporteur on Prisons, Conditions of Detention and Policing;

5) Using Affiliate Status<sup>2</sup> to attend the ACHPR

sessions and make relevant statements

- 6) Participating in the development of periodic States reports submitted under Article 62 of the Charter;
- 7) Conducting research and submitting shadow reports;
- 8) Monitoring the implementation of the concluding observations adopted by the ACHPR following the examination of periodic States reports.

During plenary the following concerns were raised and noted:

- 1) When developing strategies to lobby for the decriminalisation of petty offences, it is important to also think about **suggesting concrete alternatives to the decriminalisation** so that governments can be keener to listen;
- 2) States should not rely on monies collected from the payment of fines by petty offenders to grow economies, as the means of extortions by some law enforcement agencies may be subject to harassment;
- 3) In developing the Principles, the ACHPR focused on decriminalisation rather than declassification to give a strong signal and firmly highlight the need to decriminalise. It does not mean that the ACHPR is not conscious of the fact that for some offences, it will be easier to declassify;
- 4) The definition and qualification of the offences varies from one State to another due to the common-law system to the Civil Law System. As a result of which the Principles merely provides a general definition for States to interpret accordingly;
- 5) It would be vital for NANHRI to provide assistance for the NHRIs to engage with the ACHPR.

<sup>2</sup> As recognized ACHPR Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa: <http://>

# SESSION 2



NANHRI Programme Officer Maureen Bwisa makes a presentation on the objective of the project in decriminalising petty offences in Africa. Photo: Secretariat.



## NANHRI-APCOF Partnership

### Simplified version of the Principles and Basic Scorecard by Louise Edwards, Programme Manager, APCOF



APCOF  
Programme  
Manager  
Louise Edwards  
explains about  
the simplified  
version of the  
Principles on  
Decriminalisation  
of Petty Offences  
during the  
inception training  
in South Africa.  
Photo: Secretariat.

Ms. Edwards, shared with participants two documents:

- 1) **The simplified versions of the Principles :** Version 1 and 2 which highlight key provisions from the Principles and less technical terminologies for ease of reference by NHRIs.
- 2) **Basic Scorecard** a visual tool to be hosted by either the NANHRI or petty offences website, will be used to assist NHRIs to monitor and track State's progress in the implementation the Principles. The Principles shall rank NHRIs on a scale of 0 to 5 in terms of compliance with the Principles (0 for being non-compliant and 5 for being an example of best practice).

To enable its success, NHRIs are encouraged to feed the necessary information onto the platform regularly.

During plenary the following concerns were raised and noted:

- 1) Lack of information related to petty offenders in the detention centres, as the available data is general in nature;

- 2) NHRIs have a big role to play in gathering data related to petty offenders by use of the Basic Scorecard and modify the Questionnaire shared during detention monitoring visits;
- 3) In the event that the Basic Scorecard does not capture all the necessary information, NHRIs are at liberty to modify the Questionnaire to suit their needs;
- 4) In a bid to convince States on the need to decriminalise petty offences, NHRIs can use empirical evidence to depict overcrowding in prisons and what it causes the government to imprison petty offenders.

### Introduction to NANHRI Project by Maureen Bwisa, Programme Officer

Ms. Bwisa commenced her presentation by highlighting the project's objective which is to promote and support the role of NHRIs to undertake national and regional level interventions in the decriminalisation of petty offences in Africa, through development of National Action Plans and Memoranda to effect policy reforms in five African countries.

# SESSION 3

## BASELINE ASSESSMENT REPORT

**ENHANCING THE ROLE OF  
NATIONAL HUMAN RIGHTS  
INSTITUTIONS (NHRIS) IN THE  
DECRIMINALISATION OF  
PETTY OFFENCES IN AFRICA.**

**RESEARCH CONDUCTED BY:  
MAUREEN BWISA OF THE  
NETWORK OF AFRICAN  
NATIONAL HUMAN RIGHTS  
INSTITUTIONS (NANHRI).**

**PICTURE CREDIT:  
Department of Correctional  
Services, Republic of South  
Africa, Annual Report 2016/  
2017**



## Validation of NANHRI's Baseline Assessment Report by Maureen Bwisa - Programme Officer

### Campaign Video: Punished for Being Poor in Africa<sup>5</sup>



Participants watched a [video](#), *Punished for Being Poor* produced by Campaign Partners in the Decriminalisation of Petty Offences in Africa, illustrating the linkages between social justice and criminal justice for petty offenders and the ripple effect to society.

**Group Work:** Participants were divided into two groups and requested to use the criteria set out in Part E of the Principles to assess the scenario depicted in the video, and recommend to the State whether or not to decriminalise the offence of street trading.

#### Feedback from Groups:

- 1) Arresting John (a character in the video) for being a street trader is discriminatory in nature and criminalises poverty;
- 2) The scenario raises the importance of analysing national laws, county or provincial bylaws for review. NHRIs should consider sensitisation of the law enforcement agencies and the judicial officers to have a human face in the application of the laws as well as offer favourable alternative sentences to protect human rights as per the constitution.
- 3) John's detention for the offences of trading was a disproportionate measure as the following

rights were violated: right to fair trial, freedom from arbitrary arrest, right not to be subject of torture, ill-treatment or inhumane and degrading treatment, freedom from discrimination and equality before the law, right to food, right to work, right to education, and right to shelter.

4) When arguing for the decriminalisation of petty offences, one should consider sensitising the audience on the elements of crime (1) the legality (whether the behavior subject to repression is clearly provided by law (2), the offence (whether there is really an act constituting an offence) and, (3) the intention (whether there was a will to commit the offence).



*One of the groups tackling an assignment during the inception training in South Africa in September, 2018. Photo: Secretariat.*

#### Peer to peer exchange

The representatives of the five NHRIs made in country presentations on their role in advancing criminal justice reforms and specifically on the decriminalisation of petty offences as follows:

## Côte d'Ivoire National Human Rights Commission

The Commission draws its **mandate** from the Constitution and is operationalised by national legislation to ensure the promotion, protection and defence of human rights. There are 22 Commissioners and 31 regional Commissions. Each of the regional Commissions is composed of eight Commissioners.

CNDHCI **functions** include consultations, evaluations and proposals for the promotion, protection and defence of human rights. CNDHCI has the power to receive individual complaints for alleged human rights violations from persons deprived of their liberty. It carries-out investigations on the complaints received and can be seized *so moto* for alleged human rights violations. However, it does not have the power to order reparation for the victims. CNDHCI can seize the administrative authorities for the matters it is handling but cannot seize the tribunal or the courts.

Further, CNDHCI monitors the detention centers through unannounced visits, and can make recommendations related to the rights of persons deprived of their liberty but cannot order sanctions. To disseminate its findings, the Commission publishes reports and technical notes addressed to the relevant authorities. For the promotion and protection of the rights of detainees.

With respect to the criminalization of petty offences in Côte d'Ivoire, being rogue and vagabond, begging, being a vagrant and common nuisance are criminalised.

As part of the key measures that CNDHCI can undertake to decriminalise petty offences, Mr. Diane indicated that the Commission will have to familiarise more with the Principles because the thematic area is new. CNDHCI will then have to work towards sensitising and building the capacity of key actors such as the judicial officers and law enforcement officials. Further, CNDHCI can work for the review of laws, policies and administrative measures, and work closely with nongovernmental organisations and the International Committee of the Red Cross (ICRC).

## Commission on Human Rights and Administrative Justice, Ghana

The Commission on Human Rights and Administrative Justice was represented by Lawrence Kwaku Lartey, Director for Investigations. CHRAJ is established by the Constitution and operationalised by national legislation. The Commission is a hybrid Institution and as such, its mandate encompasses:

- i. National Human Rights Institution;
- ii. Ombudsman;
- iii. Anti-corruption Agency.

iv. Additionally, CHRAJ is headed by Commissioner and two Deputy Commissioners; there are ten Regional Directors in line with the administrative/political divisions of the country.

The Commission has powers of investigations including in relation with human rights violations. It can receive individual complaints including those in relation with the rights of persons deprived of their liberty and held in detention centers and has the independence and resources to monitor, and provide redress as an oversight mechanism to the criminal justice system. In that regard, it can negotiate and compromise, seize any Ghana courts to seek implementation of a remedy ordered by the Commission which has not been implemented.

CHRAJ can conduct administrative proceedings concerning violation of fundamental human rights of persons deprived of their liberty in detention centers. It has powers to monitor detention facilities without prior notice, to interview pre-trial detainees in private, review the detention centers registers, make recommendations and disseminate the findings.

With respect to penal reforms, the Commission has been working closely with civil society organisations, notably Commonwealth Human Rights Initiative (CHRI), Amnesty International (AI), Ghana, Human Rights Advocacy Centre (HRAC); POS Foundation and Legal Resources Centre among others.

For data collection and reporting on the conditions of detention centers, CHRAJ relies on information generated by the relevant administrations, such as prisons and police authorities regarding conditions of detention centres. It also gathers some information from its monitoring of detention centers.

The Commission engages in sensitisation forums for the respect of international and regional human rights standards. With respect to the decriminalisation of petty offences in particular, CHRAJ will undertake sensitisation and capacity building of its staff and other key stakeholders like Judicial officers and the Police, increase dialogue at national level, conduct research on the topic, collaborate with States and non-states actors and the ACHPR for the decriminalisation.

In Ghana, being idle or disorderly person, loitering, being a vagrant, being a common nuisance is are criminalised. Fines imposed on accused persons in lieu of custodial sentencing, is the only legal provision for non-custodial sentence. Ghana has in place a Sentencing Guidelines aimed at streamlining sentencing; but these Guidelines have no legal force.

## Kenya National Commission on Human Rights

The KNHRC is an **independent** National Human Rights Institution, created by the Constitution of Kenya 2010 and established by an Act of Parliament.

KNCHR's **mandate** is the promotion, protection and observance of human rights in public and private institutions. In this regard, the Commission can raise public awareness, monitor State compliance with the human rights obligations as espoused in regional and international treaties and conventions, audit, investigate, report and receive complaints (it can be seized *so moto*) on human rights violations. Moreover, KNCHR can issue summons, adjudicate on matters relating to human rights, seek information from any person including government authorities in relation to its mandate.

The Commission is involved in relevant interventions pegged on the advancement of criminal justice system reforms as part of the National Task Force dealing with the death penalty and the National Committee on Criminal Justice Reforms.

Moreover, KNCHR makes unannounced visits to detention centres placing reliance on its mandate. The Commission is setting up Early warning and Response mechanism.

Petty offences criminalised in Kenya include, but not limited to: being idle or disorderly, begging, loitering and being a common nuisance. County by-laws criminalise petty offences such as loitering amongst others. Therefore, when working towards the decriminalisation of petty offences in Kenya, there is a need to target the national laws and by-laws.

KNCHR is also conducting activities to ensure that the laws governing persons deprived of their liberty are in compliance with the regional and international human rights standards. Such activities include sensitisation and training of relevant actors and pushing for a review of laws like The Prisons Act Cap. 90, Laws of Kenya.

Additionally, community services and probation orders are alternatives to non-custodial sentences. Between April and May 2018, **5,787 petty offenders were released to engage in community work**. However, this does not happen often, as non-custodial sentences are under-utilised, reason being judicial officers do not have the necessary means to guarantee an effective supervision of the order.

Notably, legal aid in Kenya is merely recognised for capital cases thus leaving a vacuum for petty offenders, an area which requires interventions.

The enactment of a National Council for Administration of Justice Task Force, which the Commission sits in, has pushed for decriminalisation of petty offences. This is one of the key outcomes.



## Malawi Human Rights Commission

**Malawi Human Rights Commission (MHRC) by Peter Mota, Deputy Director of Civil and Political Rights and Head of Legal Services.**

MHRC has been **established** by the Constitution and operationalised by an Act of Parliament. It is composed of 10 Commissioners and has the **mandate** to promote and protect human rights. The Commission also investigates human rights violations on its own initiative or after being seized of a complaint. However, the MHRC has no judicial or legislative powers.

To fulfil its mandate, the working methods of the Commission include, monitoring State compliance with obligations under regional and international treaties and conventions, research, investigations, visits to detentions, consultations with relevant State entities and collaboration with governmental and non-governmental organisations working on the promotion and protection of human rights.

In Malawi, the following offences are punishable with a fine or a short term imprisonment: being an idle and disorderly, conduct likely to cause breach of peace, use of insulting language, nuisance by drunken persons, being rogue and vagabonds, chain letters, insulting the President, National Flag, unlawful use of Armorial Ensigns, Public Seal, National Flag, among others.

Existence of landmark jurisprudence in Malawi related to the offence of being rogue and vagabond is provided for in the case of *Mayeso Gwanda vs. The State*. In this case, the applicant was charged with the offence of being a rogue and vagabond contrary to **Section 184(1) (c) of the Penal Code ONLY** and detained accordingly. In its judgement, the Malawi High Court determined that Section 184 (1) (c) of the Penal Code is overly broad and unconstitutional contrary to international human rights standards. The Section of the Penal Code also provides the police with wide discretion to exercise their mandate contrary to the Constitution and the international human rights standards.

The Law Reform Commission is yet to repeal the said provision from the statutes.



## South African Human Rights Commission

### South African Human Rights Commission (SAHRC) by Princess Magopane, Senior Legal Officer.

SAHRC is established by the Constitution and operationalised by an Act of Parliament. It is an independent institution mandated to promote and protect human rights, and monitor and assess the observance of human rights in the Republic. The powers of SAHRC include: investigate and to report on the observance of human rights, take steps to secure appropriate redress on violations, carry out research and to educate the public.

The Commission can receive complaints on human rights violations and through its new complaint handling procedures<sup>1</sup> which came into effect on January 1, 2018,

The Commission can institute investigations on its own initiative with respect to alleged human rights violations. As in the case of Kenya, by-laws are a key source of the criminalisation of petty offences in South Africa.

Relevant caselaw related to petty offences includes the case of *South African National Traders Retail Association vs City of Johannesburg and Others (CCT 173/13 ; CCT 174/14) [2014] ZACC 8*<sup>2</sup>. In this case, the Constitutional Court ordered the City of Johannesburg to allow informal traders to return to their stalls in the city where several informal traders had been evicted and prevented from selling.

The Constitutional Court is yet to determine the case of *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others (387/2017; 386/2017) [2018] ZASCA 100*. This case deals with allegations of the criminalisation of freedom of speech.

In partnership with APCOF, SAHRC monitors pretrial detention facilities at various police stations across the country.

<sup>1</sup> <https://www.sahrc.org.za/home/21/files/Complaints%20Handling%20Procedures%20-%20SAHRC%20-%20Public%20-%201%20January%202018.pdf>

<sup>2</sup> [https://collections.concourt.org.za/bitstream/handle/20-S00-12144/3743/Full%20judgment%20Official%20version%20\(155%20Kb\)-21958.pdf?sequence=6&isAllowed=y](https://collections.concourt.org.za/bitstream/handle/20-S00-12144/3743/Full%20judgment%20Official%20version%20(155%20Kb)-21958.pdf?sequence=6&isAllowed=y)

## Validation of NANHRI's Baseline Assessment Report

Ms. Bwisa took the participants through the findings of a Baseline Assessment Report conducted by NANHRI with the aim of validating the contents therein. The Report provides general information on the ACHPR Principles, state of petty offences in the five countries and the work of NHRIs related to the decriminalisation of petty offences.

The methodology used to collect the information in the report included questionnaires, literature review, desk review, review of legislation, review of existing reports from the five countries and NHRIs' reports to regional mechanisms.

Building on the presentations made by representatives of the five NHRIs during the peer to peer exchange, the following additional information was provided to participants:

- 1) The selection of the five NHRIs was done based on the following considerations: budgetary constraints thus pilot phase; NHRIs with well-established constitutional framework embracing fundamental human rights; NHRIs undertaking progressive work related to criminal justice reforms- specifically the decriminalisation of petty offences; language representation, Countries which have ratified the African Charter;
- 2) The accreditation status of the five NHRIs is as follows: CNDHCI is accredited B status, CHRAJ, MHRC, KNHRC and SAHRC are accredited A status;
- 3) The five NHRIs' mandate includes the promotion and protection of human rights and education on human rights;
- 4) Overcrowding in prisons is a common in all five countries, and Africa at large;
- 5) Common nuisance is the commonest type of petty offences criminalised in four of the countries' national legislation: Côte d'Ivoire, Ghana, Kenya, and Malawi and in subordinate legislation in South Africa;
- 6) Kenya and South Africa have since repealed their vagrancy law;
- 7) According to statistics obtained from *World Prisons Brief* website, the number of correctional services centres is as follows: South Africa had 243 correction centres (as of March 2017), Kenya had 119 correction centres (as of 2016), Ghana had 43 as of (March 2015), Côte d'Ivoire had 34 as of December 2017 and Malawi 30 (as of September 2016). According to the same source, the rate of pre-trial detainees are as follow: 40,7% in Côte d'Ivoire (as of 2017), 13,78% in Ghana as of 2015, 16,2% in Malawi as of 2016, 43,1% in Kenya as of 2018 and 27,1% in South Africa as of 2017.

Ms. Bwisa suggested that to enhance their commitment in the work for the decriminalisation of petty offences, NHRIs need to consider engaging more in the following activities: provide reports on the state of petty offenders, undertake activities for the decriminalisation of petty offences such as review of existing laws, policies and administrative measures, train law enforcement and judicial officials on the Principles, collaborate with States and non-States actors including engaging with regional and international human rights mechanisms, lobby States to ratify and domesticate the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Ms. Bwisa's presentation was well received, and the following key remarks/inputs were made:

- 1) It is extremely difficult to get updated data related to petty offenders detained in detention centers that is, police cells and prisons. Therefore, the role of NHRIs is crucial in gathering data at national level;
- 2) Prison statistics should reflect per 100,000 of the national population;
- 3) Make reference to the percentage of women and children accompanying their mothers to detention centres, where the information is available;
- 4) APCOF has published a baseline study when preparing the Luanda Guidelines; it is available on the organisation's website and is a good source of information. States reports submitted to the ACHPR cans also be relevant.
- 5) Counter-check provisions in Malawi's Criminal Procedure and Evidence Law touching on petty offences; and Section 15 of the Human Rights Commission Act in relation to Complaints handling procedure by the Commission;
- 6) Refer to ACJR's report related to women in pretrial detention and a review of detention visiting mechanisms;
- 7) In collaborating with the ACHPR, NHRIs should consider collaborating both with the Committee for the Prevention of Torture and the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa.

# SESSION 4



## Introduction to Decriminalisation of Petty Offences Campaign Partners

### Evidence and arguments for Decriminalisation of Petty Offences by Prof Lukas Muntingh, Associate Professor ACJR Project Coordinator

In a brief presentation, Prof. Muntingh, shared with participant's evidence and arguments for the decriminalisation of petty offences in Africa as follows: Petty offences dates back to the colonial era, which criminalised petty offences largely targeting the most vulnerable groups within the society, in the false belief that they would create public order. These laws are overly broad and vague, providing law enforcement agencies. The wide discretion of enforcement is open to abuse.

Participants were encouraged to rely on the following three key questions when advocating for the decriminalisation of petty offences:

- 1) **What is the impact of the behavior being considered as an offence?**
- 2) **What is the element of crime?**
- 3) **What is the real impact of enforcing a law criminalising the behavior?**

With respect to the Campaign on the Decriminalisation of Petty Offences, Prof. Muntingh indicated that several civil society organisations in Africa came together in 2014. Its membership has 12 partners.

The Campaign focuses on advocacy, research and litigation where possible with the aim of decriminalising petty offences in Africa. Some of the key achievements achieved by the Campaign partners include: launch of the research report *Punished for Being Poor*, the adoption of the Principles by the ACHPR, establishment and Gazettement of the National Council of Administration of Justice by Kenya's Chief Justice, Constitutional Declaration in Malawi's case of *Gwanda v. Malawi* and lastly a Campaign website: [www.pettyoffences.org](http://www.pettyoffences.org)

In closing, Prof. Muntingh urged NHRIs and other key actors in the Campaign to continue their advocacy efforts for the implementation of the Principles at national level and enrich the debate through research and litigation at the African Court on Human and Peoples' Rights.

### b) Sharing of Detention Monitoring Tool by Louise Edwards, Programme Manager APCOF

Ms. Edwards shared with participants a Checklist to be used during detention monitoring visits.

The Checklist was developed by APCOF on behalf of the ACHPR following the adoption of the Guidelines on the Conditions of Arrest, Police Custody and Pre- Trial Detention in Africa<sup>1</sup>.

The Checklist will act as a guide for NHRIs in gathering data and information pertaining to petty offenders in detention centres, and further States compliance with the minimum regional and international standards on conditions of detention.

<sup>1</sup> [http://www.achpr.org/instruments/guidelines\\_arrest\\_detention/](http://www.achpr.org/instruments/guidelines_arrest_detention/)



# Highlights from the Sun City Prison



*Participants of the inception training in a group photo when they visited Johannesburg Female Correctional Centre in South Africa in September, 2018. Photo: Secretariat.*



The delegation met with the following officials from Johannesburg Medium B Correctional Centre and Female Correctional Centre in Sun City.

- 1) Ms Kheswa - Centre Coordinator Operational Support
- 2) Mr Yona – Head of security (internal/external)
- 3) Mr Hlakula – Head of internal security
- 4) Mr Ndabandaba- Head of CMC
- 5) Mr Zimu – Female Correctional Centre

**Facility Brief:** The Johannesburg Correctional Centre, built in 1981, contains both male and female facilities, and is an admission centre which houses remand/pre-trial detainees at Centre A and convicted prisoners at Centre B, serving 29 Courts in the region. The facility uses the ANR (a software installed in computers) system to capture data in the registers, including that of petty offenders.

**Prison population: As of September 20, 2018, the total prison in the male facility was 2,358 as against an official holding capacity of 1,300 prisoners. In the female facility, total prison population was 1,054, as against official holding capacity of 613. Total number of sentenced offenders were 719, remandees 335 and 25 babies accompanying their mothers. Thus both facilities were overcrowded.**

The Centre is made up of the following five units:

- 6) A - Remand/ pre- trial detainees;
- 7) B - Sentenced offenders with pending charges;
- 8) C- Medium section- shorter sentences convicted for several offences;
- 9) D- Maximum sentence;
- 10)E- Those serving less than 24 months.

#### Types of cells:

- 1) Units A, B and C have **singular cells**, for vulnerable groups such as students, persons with disabilities, Lesbian Gay Bisexual Transgender Identity and Queer community

amongst others, which detainees have to apply for placement;

- 2) **Hospital cells:** located in the hospital section for patients and separate wing for tuberculosis offenders;
- 3) **Kitchen cells:** for detainees who work in the facility kitchen, trained by BOSASA.

Notably, detainees have to apply to be removed from communal cells and placed in singular cells.

#### Male Facility:

On a daily basis approximately 10 detainees are received, with an influx in numbers of Fridays to 50, who are then classified and held at the facility or referred to other Medium or Maximum centres.

**Offender Rehabilitation Pack:** Upon admission to the facility, each detainee undergoes a medical screening, which includes that of tuberculosis and HIV (voluntary basis) within six to 24 hours, before placement in one of the five units by the head of Case Management Committee. This includes: Profiling of offenders, work allocation, classification and re-classification- maximum to medium and vice versa depending on one's behavior.

For mentally ill offenders, the facility refers such cases back to the courts for placement within a mental health institution.

**Foreign nationals:** the centre has foreign nationals in custody, some of whom are due for placement or deportation, but given the bureaucracy through the Department of Home Affairs, the process takes long.

**Short term sentences:** Petty offenders, upon conviction, are sentenced to 10 days imprisonment. An alternative to imprisonment for such offenders is prole placement, however, the Community Correctional Service has to ascertain one's address, which takes a longer period than their sentence Expiry Date, who are then released.

**Remission of sentences:** Given under the presidential prerogative for all offences.

**Release Procedure:** In a bid to decongest prisons, under Section 276(1)(i) of the Criminal Procedure Act 71 of 1955, and dependent on the type of offence one is charged with, successful completion of the

**correctional sentence plan (Programmes for detainees)**, one may be placed on parole upon approval from the Parole Board. The time served by the detainee must be 1/6 of the sentence as indicated in the warrant.

The National Council for Correctional Services (NCC), set up by the Minister of Justice, is charged with making recommendations and approval for parole for detainees serving life sentences.

**Life sentences:** Life sentences vary according to year of sentencing. Previously in terms of Act 8 of 1959 a life sentence was 20 years before a detainee is eligible for consideration for parole. However, as of September 30, 2004, life sentence is 13 years and four months. Those sentenced to life from October 1, 2004 to date serve a life sentence of 25 years before they are eligible for parole.

**Medical facility:** The facility has a medical doctor, a nurse and a psychiatrist in the medical wing, which has beds for offenders. Condoms are accessible in the facility as a precautionary measure.

Serious cases are referred to a nearby medical facility.

**Meals:** Detainees are entitled to three meals a day:

- 1) Breakfast: Eggs or cereals or two slices of bread with coffee/tea
- 2) Lunch: full meal with starch, protein and two veggies
- 3) Dinner: five slices of bread with butter/syrup and powder juice. Served at 5:30pm.

**Daily routine:** 7am parade, 8am breakfast till 9 am lock up at 4:30pm, dinner at 5:30pm thereafter cells are mastered.

### **Women's Correctional Centre:**

Given the time constraints, the delegation was only able to visit the Cresh section which held sentenced women who had their babies accompanying them. The law provides that an offender may be in custody with their child provided the infant is below the age of two years.

Thereafter, the child is taken by the Department of Social Development for placement in cases where the family cannot be traced.

## POST-TRAINING EVALUATION RESPONSES OF PARTICIPANTS

### 1. General administration of the training

Description	Excellent	Very good	Good	Fair
Organisation of training	5	2		
Time keeping	3	2	1	1
Presentations	3	3	1	
Competence of presenters	4	2	1	
Documentation and background reading	3	3	1	
Methodology used	4	3		
Meeting venue	4	3		
Accommodation	5	2		

### 2. Kindly provide any other comments on administration of the training

*The facilitators were knowledgeable on the subject matter and the information shared was insightful and well researched.*

*The meeting was well organised and a lot of thought went into the agenda.*

### 3. How would you rate your level of understanding of the topics after each presentation?

Description	Excellent	Very good	Good	Fair
Conceptualisation of the ACHPR Principles on Decriminalisation of Petty Offences	3	3	1	
How NHRIs can engage with ACHPR	3	2	2	
Use of the simplified Principles and basic scorecard	3	3	3	
Understanding of NANHRI's project	5	2		
Knowledge of other NHRIs' experience on the decriminalisation of petty offences	2	4	1	
Knowledge of findings of Baseline Assessment Report	4	3		
Knowledge of the campaign to decriminalise petty offences	2	5		
Knowledge and evidence for decriminalisation of petty offences	2	4	1	
Awareness of detention monitoring tools with a specific focus on decriminalisation of petty offences	2	5		

4. Observation in relation to petty offences after visiting Sun City Prison

- *Commendable and impressive standards of the facilities*
- *Proper segregation of detainees who have committed serious and petty offences.*
- *Women with babies are segregated and with good facilities.*
- *Wadens are professional, treat detainees with respect and dignity.*
- *Clean, manned by professional officers; a possible benchmarking facility in Africa.*

5. Which was the most relevant session (s) to your work

- *Prison visit*
- *Baseline Assessment Report*
- *Opportunities of NHRIs of engaging with ACHPR*
- *Campaign video and group work*
- *Introduction to the campaign - understanding the achievements of partners and role of NHRIs in engaging in evidence-based arguments for decriminalisation of petty offences.*
- *Peer to peer exchange.*

6. Which of the session (s) were least relevant to your work? Kindly elaborate your answer.

*Each of the sessions was relevant to me- my knowledge in decriminalisation of petty offences has been greatly enhanced.*

7. Any other comment you feel may have not been addressed by this post-evaluation form?

*Discussions on people living with disabilities charged with petty offences*

8. Overall evaluation of the training

a) Has your overall expectation of the training been met?

*Yes-seven participants*

*No-none.*

*The knowledge on NANHRI's project has enlightened me on the role of NHRIs in implementation of the Principles of the ACHPR.*

*At the beginning, i had scanty details on decriminalisation of petty offence. The training has greatly enriched my knowledge.*

*I have better understanding of the Principles.*

b) Was the peer to peer exchange session useful to you?

*Yes- seven participants*

*No-none*

*Better understanding of what NHRIs are doing in decriminalisation of petty offences, achievements and challenges at national level.*

c) Explain how you will use the information from this training to incorporate NANHRIs project activities into your work to decriminalise petty offences.

- *Sharing of the information with the staff of the Commission*
- *Capacity building of my colleagues at the NHRI level, state and non state actors.*
- *Work closely with campaign partners, CSOs in my country*
- *Lobby parliament*
- *Improved state reporting to include petty offences*
- *Organising national consultations based on received information*
- *Use of data in the Baseline Assessment Report will be important in advocacy and painting a regional picture of the problem of petty offenders.*



# CHECKLIST

## Petty offences-related questions for detention visits

### 1. Inspection of police station and prison/correctional records

The collection of statistical data through inspections of dockets, charge sheets and registers, can provide a snap shot of the number of persons against whom petty offences are enforced on a given day, which can be expressed as a proportion of the detention population. Tracking data on arrest through to remand/pre-trial detention can also provide a picture on the extent to which those who are charged end up in a detention facility, and for what reasons.

The data collected during detention visits can be supplemented through additional research, including examination of court records, to track what happens to persons against whom petty offences are enforced.

Information	Disaggregation	Data sources
Number of people arrested	Demographic data: age, gender, race, nationality, fixed/no address Category of offence	Dockets Charge sheets Registers
Number of people charged	Demographic data: age, gender, race, nationality, fixed/no address Category of offences	Dockets Charge sheets Registers
Number of people detained in custody	Demographic data: age, gender, race, nationality, fixed/no address Category of offence	Dockets Registers
Number of remanded/pre-trial detainees	Demographic data: age, gender, race, nationality, fixed/no address Category of offence Held on account of being unable to post bail	Dockets Charge sheets Registers
Duration of detention	Demographic data: age, gender, race, nationality, fixed/no address Category of offence	Registers
Number and proportion of detainees held in excess of legal custody limits	Demographic data: age, gender, race, nationality, fixed/no address Category of offence	Registers

## 2. Interviews with detainees

Statistical information collected through the inspection of dockets, charge sheets and registers can be supplemented by detainee interviews. Questions relating to data collection about those against whom petty offences are enforced can include the following:

- Relevant demographic data: does the person identify as being from one of the categories listed by the ACHPR Principles? This includes:
  - Vulnerable persons: ‘persons who are marginalised in society and the criminal justice system because of their status, or an intersection of one or more statuses. This includes, but is not limited to, the economically or socially marginalised, including persons living in poverty, homeless persons, street children, beggars, older persons, persons marginalised in the basis of sexual orientation or gender identity, key populations, persons with disabilities, street traders or vendors.’
  - Key populations: ‘people who inject drugs, men who have sex with men, transgender persons, [and] sex workers.’
- Category of offence
  - For what offence has the person been arrested, charged and/or detained?
  - If the person has been arrested, charged and/or detained for a petty offence:
    - Is this the first time the person has been arrested, charged and/or detained for this or similar activities/behaviours?
    - Does the person understand what type of activities/behaviours result in the arrest, charge and/or detention?
    - Was the person informed of the reason for their arrest, charge and/or detention?
    - Was the person afforded their procedural rights, including but not limited to, being informed of their rights, access to a lawyer or the provision of assistance from a legal aid practitioner, offer of bail, access to medical treatment, appearance before a judicial authority within the prescribed period?
    - Has the person been offered diversion?
    - If the offence related to economics (i.e. vending or trading or sex work), relating to the performance or life sustaining activities in public places, or for any other reason relating to that person’s status or vulnerability, how likely is the person to commit the same or similar offence again?
- Treatment of persons by police and prison/correctional officials
  - Was the person denied bail for failure to provide a fixed address or for any other reason not pertaining to the seriousness of the offence?
  - Was the person asked for a bribe or other favour in exchange for no arrest, charge or detention?
  - How does the person describe the conditions of detention in which they are held?
  - How was the person treated by the arresting officer and/or officials during detention?
  - Does the person allege ill treatment or discrimination on the basis of their status (i.e. were they treated less favourably than other persons because they are, or identify as being, a vulnerable person or part of a key population)?
  - Was the person arrested without charge and subsequently held in detention or released after a period of time? Were they provided with an explanation for this by officials?

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