



Arrested in Africa: An Exploration of the Issues

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The aim of CSPRI is to improve the human rights of people deprived of their liberty through research-based advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity building.

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Abstract

Recent research and advocacy efforts have drawn attention to the excessive use of and prolonged pre-trial detention in Africa. At any given moment there are roughly 1 million people in Africa's prisons. Far more move through prisons each year. Their stay in prison, regardless of duration, starts with being arrested. Substantially more people are arrested than those who end up in prison for pre-trial detention. Pre-trial detention figures are thus a poor indicator of contact with the criminal justice system.

The purpose of arrest and subsequent detention of a suspect is essentially to ensure the attendance of the person in court or for another just cause. The police's powers of arrest are, in theory, curtailed to the extent that the arresting officer must be able to provide reasons for the arrest and continued police detention. Police officials have considerable discretion in executing arrests, especially when arresting without a warrant.

This exploratory report focuses on arresting without a warrant and starts off with setting out the legal requirements in this regard by way of a case study. In order to understand current arrest practices, the report provides a brief description of the history of policing in Africa and concludes that much of what was established by the colonial powers has remained intact, emphasising high arrest rates, a social disciplinarian mode of policing, supported by myriad petty offences that justify arrest without a warrant. This combination enables widespread corruption and results in negative perceptions of the police.

The report further argues that given the wide discretionary powers of the police to arrest without a warrant, it follows that not all people are at an equal risk of arrest, but rather that it is the poor, powerless and out-groups that are at a higher risk of arrest based on non-judicial factors. The report concludes with a number of recommendations calling for further research, decriminalisation of certain offences and restructuring of the police in African countries.

1. Introduction

Recent research and advocacy efforts have drawn attention to the excessive use of and prolonged pre-trial detention in Africa.¹ There are roughly 1 million people in Africa's prisons at any time and the proportion of pre-trial detainees of total prison populations ranges from 91.7 per cent (Comoros) to 7 per cent (Rwanda).² Their stay in prison, regardless of the duration, starts with being arrested. The number of people being arrested by the police annually in Africa is, however, unknown. It can be safely assumed that it is substantially more than the number of people awaiting trial in prison on any one day. For example, data from South Africa for 2011/12 shows that there are 34 times more arrests annually than there are people awaiting trial in that country,³ indicating that substantially more people are arrested than the number ending up in pre-trial detention. Pre-trial detention figures are thus a poor indicator of contact with the criminal justice system. Comparable data from other African countries is, as far as could be established, not available.

Not all arrests result in police detention, not all suspects who are detained by the police appear in court, and not all suspects who appear in court will be detained in a prison while awaiting trial. Similarly, not all suspects who are tried will be convicted. For example, in 2012/13 the South Africa Police Service (SAPS) made some 1.68 million arrests but during the same period there were only 323 390 criminal convictions – roughly a five-to-one ratio of arrests to convictions.⁴ In short, while there is reasonably accurate data on prison populations (for example, their sentence status, gender, charge, etcetera), the great unknown figure is the number of, and reasons for, arrests. Of particular interest is the extent to which arrest without a warrant is used by African police forces as this is, as far as could be established, the most frequent form of arrest.

The purpose of arrest and subsequent detention (first police detention and then pre-trial detention in a prison) of a suspect is essentially to ensure the attendance of the person in court or for another just cause. The police's powers of arrest are, in theory, curtailed to the extent that the arresting officer must be able to provide reasons for the arrest and continued police detention.⁵ It is because arrest and detention is a *prima facie* interference in the right to liberty, that the powers of arrest are limited and, if challenged, that the onus is upon the state to show why the arrest was executed and the suspect detained.⁶ The European Court of Human Rights (ECtHR) notes that there is indeed a positive obligation on the state to prevent an individual's deprivation of liberty, implying that alternatives to arrest must be systematically considered.⁷

Arrest results in the limitation of a right (the right to liberty) and the jurisprudence from the South African Constitutional Court advises a two-stage process of inquiry to assess the constitutionality of any limitation of rights. Firstly, it must be verified by a court that a right has indeed been infringed by law or conduct, and secondly, assuming the first answer is positive, whether the infringement is in terms of a law which embodies a constitutionally acceptable limitation.⁸ The second question requires a more factual enquiry by the court into the

¹ See Promoting Pre-trial Justice in Africa, available at <http://www.ppja.org> (accessed 3 October 2015).

² World Prison Brief, available at http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=15 (accessed 3 October 2015).

³ Department of Correctional Services website, <http://www.dcs.gov.za/AboutUs/StatisticalInformation.aspx> (accessed 31 March 2012); SAPS (2012) *Annual Report 2011/12* (Pretoria: SAPS) 66.

⁴ SAPS *Annual Report 2012/13*; National Prosecuting Authority *Annual Report 2012/13*.

⁵ Currie I & De Waal J (2005) *The Bill of Rights Handbook* 5 Ed (Cape Town: JUTA) 767.

⁶ *Zealand v Minister for Justice and Constitutional Development and Another* (CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (11 March 2008).

⁷ *Storck v Germany* (Application no. 61603/00), 16 June 2005.

⁸ Currie I & De Waal J (2005) *The Bill of Rights Handbook* 166.

specific circumstances, events, impact and purpose of the limitation.⁹ It is indeed the particular facts of an arrest without a warrant that are of critical importance when assessing its lawfulness.

While arrests may be thought of individually when testing their lawfulness, this tells only part of the story. As evidence shows that arrests occur on a significant scale, their societal impact cannot be ignored. Arrest patterns, the reasons for arrests, the profile of people arrested and the number of arrests, to name a few of the issues, are important because they are reflective of law enforcement policy and practice, and more broadly, the state's ability and manner of exercising social control. Arrest practices may have a detrimental impact on perceptions about and legitimacy of law enforcement agencies if arrests are executed in an arbitrary, discriminatory or corrupt manner. The power to arrest is an important one for it can be used to improve public safety. But it can also have the opposite effect – instilling a sense of fear and mistrust of the police. The fear of deprivation of liberty and the threat of use of force, especially in a poorly functioning criminal justice system with poor conditions of detention, are real and strong motivational factors in perpetuating the abuse of powers of arrest, and frequently extortion to avoid arrest and custody.

Most African states have legal requirements for a court to mandate the continued detention of an accused or order release at the first court appearance following arrest. Where detention is ordered, the intention is to transfer the suspect to a prison if bail is not granted or the case not immediately resolved. Practice, however, tells a different story and suspects often remain in police custody for much longer than the legal requirement. Statistical data on this duration is hard to come by and data on the proportion of cases that proceed from police detention to first court appearance is even scarcer. Some data has, however, been generated in Malawi, Mozambique and Zambia¹⁰ which affirms that that a substantial number of suspects are, after arrest, detained by the police for anything from a few hours to several days, and even longer, without ever being charged or appearing in court.¹¹ For them, arrest and detention is a summary punishment, without their guilt or innocence ever being ascertained.¹²

Research from the northern hemisphere has to a large extent focused on the policing of minority groups (with specific reference to stop, search and arrest policies and practices), with a particular emphasis on racial minorities. Given the racial homogeneity of African populations, race has not been a focus on this continent; however there is some evidence to suggest tribal affiliations may play a role in arrest trends in different regions. In addition, other discriminatory variables are equally at play in how the police use their discretionary powers to stop, search and arrest. It is common knowledge that police officials have considerable discretion in whom they choose to arrest.

⁹ Currie I & De Waal J (2005) *The Bill of Rights Handbook* 167.

¹⁰ Muntingh L & Redpath J (eds) (2011) *An audit of pre-trial detention and case flow management in Zambia* (Johannesburg: OSISA). Muntingh L & Redpath J (eds) (2011) *An audit of pre-trial detention and case flow management in Malawi* (Johannesburg: OSISA). CDH (forthcoming) *An audit of pre-trial detention and case flow management in Mozambique* (Johannesburg: OSISA).

¹¹ South African Human Rights Commission (1999) *Report into the Arrest and Detention of Suspected Undocumented Migrants* (Johannesburg: SAHRC) 31, available at <http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf> (accessed 5 October 2015); *Ndaba and Others v Minister of Police* (48208/2012, 48209/2012, 49490/2012) [2014] ZAGPPHC 180 (2 April 2014); Redpath J (2011) 'Case flow management research' in Muntingh L & Redpath J (eds) *Pre-trial detention in Malawi* (Johannesburg: OSISA). Baradaran S (2010) 'The Presumption of Innocence and Pretrial Detention in Malawi' *Malawi Law Journal* 4(1). Lorizzo T (2012) 'Prison Reforms in Mozambique Fail to Touch the Ground' *SA Crime Quarterly* 42. United Nations Human Rights Council *Report of the Working Group on Arbitrary Detention: Mission to Angola*, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p.3. Auerbach JN (undated) *What's a Constitution Worth?: Bringing an Illegal Detention to Light*, available at <http://www.humanrightsinitiative.org/artres/What%27s%20a%20Constitution%20Worth.03.pdf> (accessed 5 October 2015). 'Months in prison without a bail hearing' *Groundup* 28 November 2012, available at http://groundup.org.za/article/months-prison-without-bail-hearing_591 (accessed 5 October 2015).

¹² Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 625. Feeley M (1981) 'The Process is the Punishment: Handling Cases in a Lower Criminal Court' *American Bar Foundation Research Journal* 6(1).

Sometimes there will be little room for discretion (for example, a suspect is caught in the act of a serious offence), but in other situations there is wide discretion, especially when detection is dependent on police action. For example, the vague and broad definition as well as the enforcement of loitering offences¹³ are notorious in this regard, as it is an offence of questionable validity and highly dependent on who individual police officers define as persons eligible for arrest. The following notes are taken from recent media reports on this issue:

- in March 2015 Johannesburg (South Africa) police arrested 277 people for loitering;¹⁴
- in June 2013 Malawian police arrested 47 people aged 14 to 40 years for loitering in Balaka town in an effort 'to curb criminal activities';¹⁵
- in March 2012 more than 30 children were arrested in Malawi, Kasungu, for 'loitering around town without proper reasons';¹⁶
- in February 2014 more than 700 children were arrested in Malindi Town, Kenya, for loitering instead of being in school;¹⁷
- in September 2015 Human Rights Watch accused the Rwandan government of arresting and detaining thousands of 'undesirables' and detaining them at an unofficial detention centre.¹⁸

Being arrested for loitering raises a number of questions about the nature of the crime, how the police use their discretion to arrest and with what purpose in mind. The literature on African policing is replete with reports on how the police abuse their powers of arrest and investigation to extort bribes and harass people. For example, reports from Nigeria indicate that arrests increase when the police have not received their salaries,¹⁹ while reports from Sierra Leone indicate that police road blocks are notorious for extorting bribes from motorists.²⁰

This is an exploratory paper on arrest practices in Africa, with the primary aim being to draw attention to the lack of research on the issue and subsequent lack of policy reform attention to arrest. The paper focuses on arrest without a warrant as such arrests are highly dependent on police discretion and available evidence indicates that this is abused on a significant scale. The paper will firstly deal with the legal framework for arrest without a warrant, focusing on the example of South Africa. The paper goes on to offer a brief history of policing in Africa to give insight into current arrest practices. The latter part of the paper deals with models of policing, paying particular attention to who gets arrested. It concludes with a number of recommendations.

¹³ SALC and CHREAA (2014) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi* (Johannesburg: SALC).

¹⁴ '277 arrested for loitering in JHB' *Eyewitness News*, 4 March 2015, available at <http://ewn.co.za/2015/03/04/277-arrested-for-loitering> (accessed 5 October 2015).

¹⁵ 'Malawi police arrest 47 in Balaka town for loitering' *Nyassa Times*, 21 June 2013, available at <http://www.nyasatimes.com/2013/06/21/malawi-police-arrest-47-for-loitering-in-balaka-town/> (accessed 5 October 2015).

¹⁶ '30 Children Arrested for Loitering' *Zodiak on-line*, 24 March 2012, available at http://zodiakmalawi.com/ZBS2012_BACKUP/the-news/top-news/4657-30-children-arrested-for-loitering- (accessed 5 October 2015).

¹⁷ '700 children arrested for loitering' *Daily Nation*, 17 February 2014, available at <http://www.nation.co.ke/counties/Kilifi/Kilifi-Children-Arrested-Loitering/-/1183282/2210332/-/format/xhtml/-/b99rc6/-/index.html> (accessed 5 October 2015).

¹⁸ 'Rwanda arresting 'undesirables' to keep city clean', *Chronicle*, 29 September 2015, available at <http://www.chronicle.co.zw/rwanda-arresting-undesirables-to-keep-city-clean/> (accessed 5 October 2015).

¹⁹ Narayan D & Petesh P (2012) *Voices of the poor, from many lands* (New York: World Bank and Oxford University Press) 99.

²⁰ Kabia J (2012) 'A force for good: police reform in Sierra Leone' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan) 67.

2. Legal requirements for arrest

Before proceeding to a further description of the ways in which arrest without a warrant is used and abused, it is necessary to examine the legal requirements for lawful arrests without a warrant. For the purposes of the discussion, the focus is placed on ordinary uniformed police officials tasked with general policing tasks (for example, patrolling public spaces) who will in the course of executing their duties respond to complaints from the public as well as react to behaviour from the public where they have to use their discretion about whether to effect an arrest without a warrant.

Arrest is understood to mean the following, as per *Holgate-Mohammed v Duke*: 'First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody (sc. by action or words restraining him from moving anywhere beyond the arrester's control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate's judicial act.'²¹

The Universal Declaration of Human Rights (UDHR) (Article 9),²² the African Charter on Human and Peoples' Rights (ACHPR) (Article 6)²³ and the Constitutions of many African countries²⁴ guarantee the right to be free from arbitrary arrest and detention. The *ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa* (the Luanda Guidelines)²⁵ furthermore articulate the 'grounds for arrest' based on the principles of legality and equality as follows:

- a. Persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.
- b. Arrests must not be carried out on the basis of discrimination of any kind such as on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status.

Jurisprudence from the African Commission on Human and Peoples' Rights (ACHPR) on the right to be free from arbitrary arrest and detention is sparse, but nonetheless confirms that arrest and detention must have a legal basis and be accompanied by procedural safeguards, such as the right to be informed of the charge and access to legal representation.²⁶ The Commission also noted that Article 6 of the Charter must be interpreted 'in such a way as to

²¹ [1984] AC 437, [1984] 1 All ER 1054, [1984] 2 WLR 660.

²² Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

²³ Article 6. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

²⁴ See for example section 29 of the Kenya Constitution, section 12 of the South African Constitution, section 11(1) of the Namibian Constitution, article 13 of the Zambian Constitution, article 54 of the Egyptian Constitution, article 3 of the Central African Republic Constitution, and article 17 of the DRC Constitution.

²⁵ Adopted at the 55th Ordinary Session of the ACHPR, Luanda, April 2014.

²⁶ Communication 368/09, Abdel Hadi, *Ali Radi & Others v Republic of Sudan*; Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*. 48/90-50/91-52/91-89/93: *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*.

permit arrests only in the exercise of powers normally granted to the security forces in a democratic *society*, and that just because a provision exists in law does not mean it is immune from violating Article 6.²⁷

In the light of these broad requirements, the question arises as to what guides police officials in their day-to-day duties of law enforcement to carry out a lawful arrest without a warrant? To explore these questions further, South Africa is used as an example as such guidance exists in the principal legislation as well as subordinate law and a significant body of jurisprudence. Also, some African jurisdictions may not have as detailed and up-to-date Standing Orders as their South African counterparts.

The power to arrest is derived from the Criminal Procedure Act²⁸ which lists a total of 17 reasons that a police official, as a peace officer,²⁹ may use to effect an arrest without a warrant.³⁰ These are grouped below for ease of reading. Based on the following requirements, a police (or 'peace') officer may arrest someone:

General offences

- who commits or attempts to commit any offence in his presence;
- who is reasonably suspected of having committed an offence referred to in Schedule 1,³¹ other than the offence of escaping from lawful custody;

²⁷ 48/90-50/91-52/91-89/93: *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*. Para 59. In its written submission to the Commission on 1st January 1991, in reply to the allegations of arbitrary arrests made by the Complainants, the government described the powers given to the President of the Revolutionary Command Council to issue orders and take measures in a state of emergency. Simply because an arrest is carried out under a written provision in force does not amount to a violation of Article 6. This article must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society. In these cases, the wording of this decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter.

²⁸ Act 51 of 1977.

²⁹ A 'peace officer' includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section. (*Definitions* Criminal Procedure Act 51 of 1977).

³⁰ Section 40(1).

³¹ Schedule 1 includes the following offences: Sedition; Public violence; Murder; Culpable homicide; Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; Trafficking in persons for sexual purposes by a person contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; Robbery; Kidnapping; Childstealing; Assault, when a dangerous wound is inflicted; Arson; Malicious injury to property; Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; Theft, whether under the common law or a statutory provision; Receiving stolen property knowing it to have been stolen; Fraud; Forgery or uttering a forged document knowing it to have been forged; Offences relating to the coinage; Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine; Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody; Offences referred to in section 4 (1) and (2) of the Prevention and Combating of

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- who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

Possession offences

- who has in his possession any implement of housebreaking or carbreaking equipment³² and who is unable to account for such possession to the satisfaction of the peace officer;
- who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;
- who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;

Offences relating to law enforcement, criminal procedure and sentencing

- who has escaped or who attempts to escape from lawful custody;
- who willfully obstructs him in the execution of his duty;
- who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under the Criminal Procedure Act;
- who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;
- who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Criminal Procedure Act;

Past and future night time offences

- who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;

Vices

Torture of Persons Act, 2013; Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

³² As contemplated in section 82 of the General Law Third Amendment Act, 1993 to be 'Any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor-vehicle or to gain unlawful entry into a motor-vehicle, and who is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding three years.'

- who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;
- who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;

Status offences

- who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;
- who is reasonably suspected of being a deserter from the South African National Defence Force;

Interpersonal violence

- who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act (116 of 1998), which constitutes an offence in respect of which violence is an element.³³

At operational level the SAPS is guided by its Standing Orders derived from the rights afforded to arrested and detained persons in the Constitution³⁴ as well as the provisions of the Criminal Procedure Act (51 of 1977) listed above.³⁵ The SAPS Standing Orders dealing with arrest³⁶ are therefore a useful benchmark to further explore the requirements for and processes of arrest without a warrant as it is in these instances that police officers apply the greatest degree of discretion and where there is limited oversight. Admittedly these requirements may vary from one jurisdiction to another and also do not account for unusual situations, such as states of emergency which may grant the police additional powers of arrest.

The first important issue is that the SAPS Standing Orders emphasise that there are various ways to secure the attendance of a suspect at trial and that arrest 'constitutes one of the most drastic infringements of the rights of an individual' and a police official should therefore regard it as a measure of last resort.³⁷ The second important issue is the definition of 'reasonable suspicion or grounds' as the motivation for an arrest without a warrant as provided for in the Criminal Procedure Act.³⁸ The Standing Orders require that a police officer must *really* believe or suspect that the person has committed or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn which any reasonable person in view of the same facts would draw.³⁹ As noted, the Standing Orders state that as a general rule the purpose of an arrest is to secure the

³³ 'Domestic violence' means – (a) physical abuse; (b) sexual abuse; (c) emotional, verbal and psychological abuse; (d) economic abuse; (e) intimidation; (f) harassment; (g) stalking; (h) damage to property; (i) entry into the complainant's residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

³⁴ Section 35.

³⁵ Section 40 of Act 51 of 1977.

³⁶ SAPS Standing Order (G) 341, Issued by Consolidation Notice 15/1999.

³⁷ SAPS Standing Order (G) 341, para 3(1).

³⁸ Section 40(1).

³⁹ SAPS Standing Order (G) 341 para 2(2).

attendance of the suspect at his or her trial and that the purpose is not to 'punish, scare or harass such person'.⁴⁰ However, there are additions to this general rule, including arrest for the purposes of further investigation; to verify the identity and address of a person; to prevent the commission of an offence; to protect a suspect; and to end an offence.⁴¹

From the above it can be accepted that the legislation and Standing Orders provide an adequate description of the reasons for arrest without a warrant, as well as operational guidelines. Moreover, the legislation provides two levels of discretion, first noting that a police officer 'may' arrest and is not compelled to arrest, and secondly, the police officer must have a 'reasonable suspicion or grounds' that an offence has been committed or is about to be committed. In short, as a measure of last resort, an arrest without a warrant may be effected if there is a reasonable suspicion or grounds to believe that an offence has been or is about to be committed.

What the law says and what happens in practice are often two different things, and the Minister of Police frequently faces civil damages claims for unlawful arrests and detention. Between 2004 and 2010 seven High Court decisions⁴² and ultimately the Supreme Court of Appeal (SCA)⁴³ dealt with the grounds for arrests. Benade provides a succinct summary of the issues at stake.⁴⁴ In the High Courts a total of twelve judges in the seven cases came to progressive conclusions about the powers of arrest under the new constitutional dispensation, but ultimately the SCA 'nipped this emerging constitutional limitation of arresting powers in the bud' in *Minister of Safety and Security v Sekhoto*.⁴⁵ At issue was whether the 1951 *Tsose* decision was compatible with the Constitution:

What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases it is generally desirable that a summons should be used. But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.⁴⁶

Given that the *Tsose* decision predates the new constitutional order, the High Court decisions took the position in *Tsose* that there is no rule of law requiring a less invasive manner to bring a person to trial untenable under the Constitution. *Sekhoto* cites the four jurisdictional facts established in case law necessary for a lawful arrest: the arrester must be a peace officer; the arrester must entertain a suspicion; the suspicion must be that the suspect committed an offence referred to in Schedule 1 [of the Criminal Procedure Act], and the suspicion must rest on reasonable grounds.⁴⁷ The *Sekhoto* decision then proceeds to state that the High Court decisions, in particular in *Louw v Minister of Safety and Security*,⁴⁸ added a fifth jurisdictional element, thus challenging the 1951 decision of *Tsose v Minister of Justice*. In *Louw* the court wanted to see that the powers of arrest without a warrant be curtailed by placing additional requirements on the arresting officer:

⁴⁰ SAPS Standing Order (G) 341 para 4(1).

⁴¹ SAPS Standing Order (G) 341 para 4(2).

⁴² *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (TPD), *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (TPD), *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (wld) *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (ECD) *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (NPD) *MVU v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) and *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB).

⁴³ *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB)

⁴⁴ Benade H (2014) 'Different arresting worldviews' *The Advocate*, August.

⁴⁵ Benade H (2014) 'Different arresting worldviews' *The Advocate* 11.

⁴⁶ *Tsose v Minister of Justice* 1951 (3) SA 10 (A) para 17 g-h. Emphasis added.

⁴⁷ *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB) at para 6, citing *Duncan v Minister of Law and Order* 1986(2) SA 805 at 818G-H. Plasket C (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 186.

⁴⁸ 2006 (2) SACR 178(T) at 186 a – 187e.

If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice of summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.⁴⁹

That *Tsose* was open to criticism had already been noted in academic work,⁵⁰ and the SCA was also alive to the abuse of powers of arrest but at the same time questioned how the High Courts arrived at the fifth jurisdictional principle. The SCA drew attention to a statement by Constitutional Court Judge President Chaskalson 'that the Constitution does not mean whatever we wish it to mean and, furthermore, that cases fall to be decided on a principled basis.'⁵¹ The SCA noted that in one of the seven High Court cases (*Ralekwa*) De Vos J remarked obiter that the cited statement in *Tsose* could no longer be reconciled with the Bill of Rights and consequently it was this line of reasoning that the *Louw* court decision followed, but neither discussed the case law to arrive at such a position. Notably, the SCA reminded the High Courts of the manner in which statutes should be interpreted,⁵² and concluded:

I am unable to find anything in the provision which leads to the conclusion that there is somewhere in the words a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.⁵³

If the arrester has met the four jurisdictional principles, the SCA ruled, then he has the discretion to arrest without a warrant and the arrest would be lawful. If the arrested person is of the opinion that there was some other factor (for example, punishment) that motivated the arrest, then the onus is upon him to show that this was the case. Benade summarises as follows:

The controversy stems from the difference between the substantive reasoning used by the twelve [High Court judges] and the formal, rule-based reasoning used by the five [SCA judges]. The crucial issue is whether an arresting officer's discretion (i.e. 'a peace officer may without warrant arrest any person ...') is still permeated by the values underlying section 12(1) of the Constitution, (i.e. 'everyone has the right to freedom ... which includes the right not to be deprived of freedom ... without just cause'). The question, therefore, is whether such discretion is still constrained by the Constitution when the four jurisdictional requirements for an arrest without a warrant set out in section 40 [of the Criminal Procedure Act] are present. Or whether, on the rule-based reasoning of Harms DP, whenever the four jurisdictional factors are present 'peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality ... A number of choices may be open to [them], all of which may fall within the range of rationality.' The focal point is the 'are entitled.' Can it really be said that police officers are entitled to act 'as they see fit,' notwithstanding the values entrenched in section 12?

In the end, the SCA did not raise constitutional issues on whether the *Tsose* decision still holds under the new constitutional order, but it is a question that the Constitutional Court will have to deal with sooner or later. The key issue remains the discretion exercised by the arresting officer and Plasket notes that in addition to the suspicion being reasonable, (a) the arrester must have an open mind with regard to factors pointing to both innocence and guilt, (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested, and (c) for the suspicion to be reasonable, it must extend to all elements of the offence.⁵⁴ Furthermore, when arresting without a warrant the arresting officer 'would have to satisfy the court that he had considered and not merely paid lip service to, the rights of the suspect to human dignity and to freedom

⁴⁹ Cited in *Sekhoto* at para 10.

⁵⁰ Plasket C (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 176.

⁵¹ *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB) at para 14.

⁵² *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545, 2000 (10) BCLR 1079 (CC).

⁵³ *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB) at para 22.

⁵⁴ Plasket C (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 186.

and had not relegated them to ‘a worthless level of subservience’.⁵⁵ In short, the arresting officer must think twice before making an arrest without a warrant.⁵⁶

As much as law and jurisprudence guide the powers of arrest without a warrant, the fact remains that a police officer wields considerable discretion as to whom he stops, questions and searches, and even if there is some basis for suspicion, whether this suspicion is sufficient for an arrest without a warrant. Police officers require considerable leeway and discretion in exercising their mandates, but they still derive all their powers from the Constitution and are thus bound by its four corners: ‘The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act.’⁵⁷

The above set out the legal requirements for a lawful arrest without a warrant using South Africa as a case study, illustrating that this essential power the police holds raises difficult questions in practice. In order to come to a closer understanding of contemporary arrest practices in Africa it is necessary to dwell briefly on the history of policing in Africa. It will be shown that much of what was put in place by the colonial powers from the nineteenth century has remained intact and continues to shape policing and arrest. As much as the law may guide police officials with regard to arrest, socio-historical and political factors, as well as police sub-culture, can serve to compromise the ideals of written law.

3. History of policing in Africa

The roots of African policing lie in Europe, but the model replicated was not the European model of civilian policing, but rather one that protected the ruling white colonial elite and aimed at social control, the vestiges of which are still visible in many jurisdictions. It is important to note from the outset that the focus is here on formal policing and not on other expressions of African policing documented in the literature. The formal police force, uniformed and employed by the state is but one form of policing in Africa. Baker notes that self-policing constitutes the historical norm, with state policing existing in parallel, or even obscuring but never eradicating it. In his survey of African policing he identifies the following as expressions of what he calls ‘multi-choice policing’: the mob, informal security groups (vigilantes), religious police, ethnic/clan militias, political party militia groups, civil defence forces, informal commercial security groups, formal commercial security groups, customary courts and police, and dispute resolution forums.⁵⁸ The extent to which these other expressions of policing link up with and interact with the more formal policing (and criminal justice system) is uncertain and may vary greatly from one jurisdiction to another. It may indeed be the case that in some jurisdictions there are close linkages while in others there are none.

⁵⁵ Plasket C (1998) ‘Controlling the Discretion to Arrest without Warrant through the Constitution’ *SA Journal for Criminal Justice* 1(2), 190.

⁵⁶ *Brand v Minister of Justice* 1959 (4) SA 712 (A) cited in Plasket C (1998) ‘Controlling the Discretion to Arrest without Warrant through the Constitution’ *SA Journal for Criminal Justice* 1(2), 187.

⁵⁷ *Kaunda and others v the President of the Republic of South Africa and others* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004) Para 228.

⁵⁸ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 78-99.

3.1 Prior to 1945

It has been argued persuasively that the colonial powers introduced formal policing to Africa in order to protect commercial interests and ensure political domination.⁵⁹ There is no historical evidence to support the argument that colonial police forces were established to control and promote democratic living.⁶⁰ Moreover, these 'police forces' did not hesitate to use force and were frequently an extension of a private company such as the Imperial British East Africa Company (IBEAC), the British South Africa Company (BSAC), Uganda Railways, the Sierra Leone Selection Trust's Diamond Protection Force, and three unnamed companies in Portuguese East Africa.⁶¹ The threat and use of violence was part and parcel of their operations. Their purpose was to protect the main areas of European investment (such as transportation links, cities and mines), to police urban areas, and to regulate the supply of labour.⁶² Further afield, in the rural areas of the colonies, it was 'local rulers through their agents (messengers and native authority police) that enforced order and who were expected, as a condition of their tenure, to uphold colonial rule.'⁶³ According to Mbaku and Kimenyi, the colonial police in Africa was 'not an instrument of peace but rather a rent-seeking tool used by colonial governments to ensure orderly transfer of wealth from the colonies to the metropolitan economies. The police force was used to help maintain those institutions that fostered the rent-seeking activities of European entrepreneurs.'⁶⁴

An important feature of colonial policing was the creation of a range of offences to be used as a means to bring the local population under criminal justice control:

Not only did the Europeans use armed policing, but just as importantly, they equipped themselves with 'a legal arsenal of arbitrary regulations to carry out [their] responsibilities: diverse master-and-servant ordinances, specified periods of obligatory labour service at state defined tasks, plenary powers to local administrators to impose penalties for disobedience'. Charges of 'vagrancy', 'prostitution', 'beer brewing', 'smuggling', 'poaching', membership of an 'unlawful society', 'native witchcraft' and the catch-all 'public nuisance' were used to criminalize Africans, to control their labour and to repatriate them to 'native' areas. This legal framework enabled the police to tackle legalistically what it had previously accomplished militaristically. State law provided the technical procedures and the bureaucratic framework that enabled the police to rationalise their activities as law enforcement.⁶⁵

There are perhaps few better examples of such policing than the enforcement of so-called pass laws in South Africa, dating back to 1709.⁶⁶ As Haysom has observed: 'The legacy of the police's role in enforcing influx control (until comparatively recently) meant that an overwhelming number of ordinary citizens were channelled through the criminal justice system for technical offences, offences which those arrested did not regard as criminal.'⁶⁷ Data from Nyasaland (1937) paints a similar picture:

⁵⁹ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 52.

⁶⁰ Mbaku J & Kimenyi M (1995) 'Rent Seeking and Policing in Colonial Africa' *The Indian Journal of Social Science* 8(3), 290.

⁶¹ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 52-3.

⁶² Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 54.

⁶³ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 57.

⁶⁴ Mbaku J & Kimenyi M (1995) 'Rent Seeking and Policing in Colonial Africa' *The Indian Journal of Social Science* 8(3), 278.

⁶⁵ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 56.

⁶⁶ <http://www.sahistory.org.za/south-africa-1806-1899/pass-laws-south-africa-1800-1994> (accessed 5 October 2015).

⁶⁷ Haysom N (1989) 'Policing the Police: A Comparative Survey of Police Control Mechanisms in the United States, South Africa and the United Kingdom' *Acta Juridica* 139, 139-164.

The enforcement of minor offenses took up most of the police time. In 1937, for instance, no less than 6,000 Africans were prosecuted for being resident in townships without permission, or because of failure to produce a pass, over 3,000 for crimes against property, more than 4,700 for not paying hut taxes, and more than 1,000 for vagrancy.⁶⁸ Despite these impressive figures, however, many laws were not enforced by the police who ran their operations quite independently from the colonial legal administration.⁶⁹

The enforcement of the Palm Wine Regulations of 1900 in Nyasaland, hut taxes (to be paid in cash) and vagrancy laws compelled Africans to take up employment but also to limit their exposure to alcohol, which according to the police undermined the quality of their labour.⁷⁰

In respect of the British colonies, the particular style of policing can be traced back to the differences between the Royal Irish Constabulary (RIC), established in 1836 to deal with the disturbances in British-occupied Ireland and the Metropolitan Police, established in 1929. Whereas the former was military in character, the latter was civilian and regarded as the model for Britain:

The RIC agents lived in barracks, the different police units were headed by a commander whose orders the agents had to obey, and the commander was directly responsible to the British administration in Ireland. ... Metropolitan Police agents were officially considered enforcers of the law, not servants of any political government. The policemen all had the same duties and were each individually accountable for their actions. The Metropolitan force was also unarmed and its agents lived inside the community they were responsible for. The differences between these two British police forces may explain why the British colonial rulers decided to introduce the Irish police model in its colonies overseas.⁷¹

The RIC was indeed closely akin to the centralised European *Gendarmerie* and the paramilitary character of colonial police forces was essential to their particular task.⁷² Moreover, they were accountable to the governor of the colony and the focus was not on crime detection. Recruitment and training was rather aimed at social control: Musime notes that in respect of the Uganda Armed Constabulary the requirements for African recruits emphasised physical fitness, height and having a 'menacing look', and that their training concentrated on arms drill.⁷³

In summary, the colonial police served a narrow interest group with its own political and commercial concerns; policing was not aimed at general public safety; there was little investigative capacity or purpose in policing, and the style of policing was para-military in character. High volumes of arrests enabled by a myriad of administrative offences were used to control the population and facilitate participation in the colonial economy in order to provide cheap labour.

⁶⁸ It is difficult to place these figures as police force and population size are not available for that period. However, by 1951 Nyasaland had a police force of 751 and a population of 2.35 million (Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 65).

⁶⁹ Deflem M (1994) 'Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast, and Kenya' *Police Studies* 17(1): 45-68.

⁷⁰ Deflem M (1994) 'Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast, and Kenya' *Police Studies* 17(1): 45-68.

⁷¹ Deflem M (1994) 'Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast, and Kenya' *Police Studies* 17(1), 45-68.

⁷² Deflem M (1994) 'Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast, and Kenya' *Police Studies* 17(1), 64.

⁷³ Musime A (2012) 'From repressive to community policing in Uganda' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 97.

3.2 After 1945

Post-1945 saw a general expansion of police forces into rural areas. This expansion, and thus increased expenditure on policing, was in part a response to increased criminal activity in the growing towns, 'illegal' strikes, rivalry and jockeying among ethnic political groups for position in the approaching independent state, secessionism, and, above all, growing political unrest associated with African nationalism.⁷⁴ Policing nonetheless aimed rather at social control than at solving crimes.

In the following decades most independent African states adopted some form of authoritarianism. Under these regimes police forces were poorly funded and trained, and subject to insecurity, political interference, and economic depression.⁷⁵ Being irregularly paid, police officers were unreliable and open to corruption and often became predatory in their practices.⁷⁶ For example, a 2002 report by Transparency International found that on average each Kenyan had been forced to bribe the police four-and-a-half times a month, paying them on average US \$16 per month, and that 95% of interactions with the police resulted in a bribe.⁷⁷ A description of the Sierra Leone police from the late 1960s to the 1990s is true of many African police forces: 'a litany of oppressive policing, nepotism and corruption that undermined public confidence in the police... skills were not sought after and officers were illiterate. The police were not given uniforms, training or equipment.'⁷⁸

A further challenge is observed in post-conflict situations where former combatants are integrated into the security sector, most frequently the armed forces, but also into the police and prison service.⁷⁹ The extent to which former combatants can be trained to be professional police officers, adhering to the rule of law and not abusing their authority, poses significant security sector reform and peace-building challenges in post-conflict situations.

Baker provides a succinct summary of the context in which African police forces operated in, or are in some instances still operating in, with specific reference to a fragile social order and the nature of political power:

- they were brought under tighter central control and made accountable to the president rather than the law;
- policing was militarised, detaching the police from the civilian population and working towards what was best for the survivability of the regime;
- the insecurity of the military regimes led to the fragmentation of state policing, and the more fragile the state, the more specialised the policing agencies became;
- mistrust concerning the reliability and loyalty of security units leads to them being kept weak, dependent and with an uncertain future, through under-funding, low salaries and non-payment of salaries;

⁷⁴ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 60.

⁷⁵ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 68.

⁷⁶ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 68-9.

⁷⁷ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 75.

⁷⁸ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 68-9. See also Kabia J (2012) 'A force for good? Police reform in post-war Sierra Leone' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 67

⁷⁹ Sherif A (2008) 'Reintegration of Female War-Affected and Ex-Combatants in Liberia' in *African Centre for the Constructive Resolution of Disputes: Conflict Trends*. Munive J (2013) *Disarmament, Demobilisation and Reintegration in South Suda: The Limits of Conventional Peace and Security Templates*, DIIS REPORT, 7.

- the customary justice system and its associated policing of society have inevitably had to remain largely unregulated and the state system (concentrated in urban areas) is for the minority.⁸⁰

Societal expectations that state police would provide safety following independence were not met partly due to under-funding, but frequently the result of narrow self-interest for regime stability or even 'malevolent indifference'.⁸¹ It is therefore not surprising that the police are frequently perceived to be indifferent, inept, inefficient and corrupt and their protective functions reserved for urban and high-income areas.⁸² The salient problems created for policing by the post-colonial contexts in which they work include, according to Marenin:

- a lack of occupational and operational autonomy of the police;
- an occupational culture which still echoes a colonial mentality rather than abides by a commitment to service, the rule of law, protection of rights and professional norms;
- organisational failures, specifically a lack of effective and inefficient management, lack of resources, weak organizational identity, persistent corruption and impunity for abuses of power;
- abysmal relations with the public which views the police, and rightly so, as corrupt, brutal, inefficient, and abusive in its normal encounters with the public; and
- a vast informal social ordering system to do what the state police are unable or unwilling to do, indicating in effect a loss of the monopoly of force by the police, and certainly of legitimate force.⁸³

Given the context and problems described above, it follows that the police lack legitimacy and enjoy little public confidence and support. Public perceptions of the police give insight into their practices and a 2004 survey found that in Kenya only 45 per cent of incidents were reported to the police due to the lack of confidence in them.⁸⁴ An opinion poll conducted by the *BBC Focus on Africa Magazine* in 2003 found that 85 per cent of respondents held a negative view of the police, describing them as corrupt, brutal and unable to be held to account for their actions.⁸⁵ Nicknames used for the police are equally informative:

in Nigeria, police officers from the mobile unit are referred to as 'kill and go'; the traffic police in Kenya are called TKK – *Toa kitu kidogo* – Swahili for 'give something small'; in Ghana, police are often chided as 'koti'⁸⁶ because of their tendency to harass the public; in Sierra Leone during the APC era the internal security unit (ISU) was known as 'I shoot you' and when they changed their name to Special Security Division (SSD) they became known as 'Siaka Stevens' [the President's] Dogs'; in Cameroon police are referred to as 'Mange-milles' – thousand eaters – in reference to the customary bribe of 1000 CFA.⁸⁷

The threat (and use) of violence and arbitrary arrest appears to be a fairly constant feature across the continent where legal prescriptions have limited impact on police behaviour. The state in many African countries is weak and fragile, exercising little control and providing few services to their populations. In these situations one can indeed refer to a virtual state: there are laws and standards and even codes of conduct for police officers, as for other

⁸⁰ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 69-71.

⁸¹ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 74.

⁸² Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 74.

⁸³ Marenin O (2009) 'The Futures of Policing African States' *Police Practice and Research* 10(4), 349-63

⁸⁴ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 31.

⁸⁵ Francis D (2012) 'Introduction: Understanding policing in transition societies in Africa' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 7.

⁸⁶ A Twi swear word referring to penis.

⁸⁷ Baker B (2008) *Multi-choice policing in Africa* (Uppsala: Nordiska Afrikainstitutet), 31.

public servants, but they are simply not followed or applied.⁸⁸ Despite the fact that African states have become independent and rid themselves of the colonial yoke, many of the colonial-era offences (intended to control the indigenous population) have remained on the statutes. Loitering, rogue and vagabond offences, begging, causing a common nuisance, conduct likely to cause a breach of peace and idle and disorderly conduct are some examples. Whether these offences are compatible with the African Charter and even domestic constitutions needs to be determined, but they nonetheless broaden the scope of arrestable offences considerably as they are highly reliant on police discretion.

Despite these negative perceptions of the police, it is accepted in the security sector reform discourse that policing and concerns about policing are central to national development, economic growth, socio-political progress, maintenance of sustainable peace, durable security and the consolidation of democracy in transition societies.⁸⁹ Proactive and credible policing forms part of what is needed to advance peace and development and its absence creates conditions for violence and instability.⁹⁰ Security should also be seen in a broader context as human security and that it forms an important part of people's well-being and is therefore an objective of development.⁹¹ A lack of human security impacts negatively on economic growth and thus on poverty and development. In turn, the lack of development and growing inequality are important causes of conflict.⁹² An effective and efficient police force operating according to the rule of law, human rights standards and good governance principles is an essential requirement for development and human security.

4. Social disciplinary mode of policing

As was noted in the section dealing with the legal requirements for arrest without a warrant, police officers wield considerable discretion as provided for in law. In this section it is argued that this discretion is shaped by the particular dominant model of policing in Africa, namely the social disciplinary model inherited from the colonial era and that it remains an important motivation for arrest without a warrant.

The literature distinguishes three broad models of policing and thus the function of arrest: crime control, due process and social disciplinary models.⁹³ The crime control model emphasises efficiency and 'is defined in terms of speed and finality, and accordingly, court-based processes are rejected in favour of extra-judicial, administrative and standardised procedures in which the opportunity for challenge is kept to a minimum.'⁹⁴ Moreover, the model assumes 'that police and prosecutors, as administrative experts, can and will identify and screen out those who are probably innocent'.⁹⁵ The Due Process model is deeply concerned about the possible misuse of state powers, such as arrest, detention, and search and seizure. Safeguards are therefore built in to ensure that such misuse does not

⁸⁸ Davidheiser M & Hultin N (2012) 'Policing the post-colony: legal pluralism, security and social control in Gambia' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 131.

⁸⁹ Francis D (2012) 'Introduction: Understanding policing in transition societies in Africa' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 8, 40.

⁹⁰ Francis D (2012) 'Introduction: Understanding policing in transition societies in Africa' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 40.

⁹¹ Stewart F (2004) 'Development and Security' Working paper 3 (Centre for Research on Inequality, Human Security and Ethnicity, CRISE, University of Oxford).

⁹² Stewart F (2004) 'Development and Security' Working paper 3 (Centre for Research on Inequality, Human Security and Ethnicity, CRISE, University of Oxford).

⁹³ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 623-24.

⁹⁴ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 623.

⁹⁵ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 623.

occur: for example, to have a lawyer present at all stages of the investigation and to require judicial approval for any invasive actions.

Emphasis is placed here on the social disciplinary model as it fits the African context better. All three models have communicative features: 'Due Process communicates the law's concern with individual autonomy and integrity, and its commitment to maintaining close control over state power. Crime control communicates messages about the desirability of speed and efficiency, and the trust that can be reposed in police and prosecutors.'⁹⁶ In the social disciplinary model the actions and behaviour of the police are designed to send authoritative messages about the relational position of the police and the policed.⁹⁷ Under this model, there is little interest in fact or guilt, but rather emphasis on social control and maintaining authority by demanding respect and inflicting summary punishment.⁹⁸ Arresting and detaining a suspect at a police station renders the suspect powerless, and the police station is an ideal environment 'at which to subject recalcitrant members of the police community to a status degradation ceremony'.⁹⁹

As noted above, policing in Africa has its roots in the colonial era, placing particular emphasis on policing urban areas and to a large extent who belongs there and who does not, and whether their actions there constitute an infringement on the colonial order. The aim was not primarily to detect crimes, solve them and refer for prosecution and thus enhance public safety (the Crime Control Model of policing), but rather something else that appears to have more to do with social discipline than the rule of law. This model was also observed in colonial Australia, which Weber called 'patrolling the boundaries of belonging', with indigenous Australians as an out-group the primary targets in being excluded from public spaces through arrest and moving-on offences.¹⁰⁰ The question then arises as to the extent to which current African police are still 'patrolling the boundaries of belonging' and who is targeted for 'not belonging'?

In executing arrests the police may contend that they use their powers of arrest in pursuit of the rule of law, but there is a hidden system at play serving police goals, for example, asserting authority and using the powers of arrest as a summary punishment.¹⁰¹ Punishment is achieved by having total control over the suspect, removing him from family and friends, forcing him to hand over his property on demand, subjecting him to abuse, threats of violence (if not actual violence) and poor conditions of detention.¹⁰² Choongh concludes that this mode of policing represents instead a self-contained policing system which uses the law to subordinate sections of society viewed as anti-police and inherently criminal.¹⁰³ Who these 'sections of society' are in the African context may differ from context to context, as will be discussed in the following section.

⁹⁶ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 626.

⁹⁷ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 626.

⁹⁸ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 625-6.

⁹⁹ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 625-6. Garfinkel H (1956) 'Conditions of Successful Degradation Ceremonies' *American Journal of Sociology* 61(5), 420-4

¹⁰⁰ Weber L (2011) 'It sounds like they shouldn't be here': Immigration Checks on the Streets of Sydney' *Policing and Society: An International Journal of Research and Policy* 21(4), 464.

¹⁰¹ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 623-34.

¹⁰² Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 630.

¹⁰³ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 625.

Threatening to arrest, or arresting, people for minor offences (such as loitering, vagabond offences and public drunkenness) is revealing about the relationship between the police and the policed. On the basis of research in England and Wales, Quinton observed that the categories dominating police thinking led to disproportionate suspicion of socially marginal young men, black people, and people who had been previously arrested: 'Given that stereotyping and framing reflect wider relationships of power, police action would not only target those worthy, in police eyes, of being 'kept in order', but would also reproduce existing social inequalities.'¹⁰⁴

The willingness to arrest where significant discretion is required (for instance, for public drunkenness) also appears to be shaped by three contextual factors that have little to do with the facts of the case. A US study on arrest rates for public drunkenness isolated three variables that will increase the risk of arrest.¹⁰⁵ The first was the conspicuousness of the offence – is the person drunk in a place where he is visible to the public and the police, or is it out of the 'public eye'? The more visible the offence, the higher the chance of arrest. Secondly, the more powerless the offender, the higher the likelihood of arrest. This was observed in the higher arrests rates of Native American offenders and declassified offenders. Making an arrest on sketchy facts may result in a 'mistake' and the consequences of that mistake may be more severe for the police officer if the arrested person has the resources to challenge the arrest via a law suit or drawing media attention to it. The risk of the consequences of such a mistake is reduced by arresting people who have less power, such as poor people, members of minority groups and drunken people. Thirdly, the more disrespectful the offender is to the police officer, the more likely it is that he will be arrested, although being disrespectful to a police officer is not a criminal offence.

It is notable that the three variables (conspicuousness, powerlessness and disrespect) are all non-legal in nature but play an important role in how the arresting officer exercises his discretion. Whether this analysis fits the African context requires further research, but it may be a useful starting-point.

As outlined above, arresting a person is fundamentally about demonstrating authority, and should the suspect challenge that authority by questioning the police officer's power to inquire into his background, business and intentions, the chances of arrest on a minor offence increase significantly. Vague offences such as obstructing an officer in the execution of his duty or charges under public order legislation are resources used to achieve the police-defined objective of creating and maintaining operational control.¹⁰⁶ In summary, the social disciplinarian model of policing fits African policing more closely than the other two models and this particular mode of policing also provides a better description of how the police functions in relation to political power and of the negative views held by the public of the police in many African countries. It should, however, be added that paying bribes to avoid arrest is a pervasive feature of African policing. A narrow understanding of the social disciplinarian model will only provide part of the answer. What appears to happen is that persons 'who do not belong', for whatever reason, are at a higher risk of arrest and extortion.

5. Who gets arrested?

Not every member of society stands an equal chance of arrest, even when suspicion is present. Some people are regarded with more suspicion than others, particularly, as will be described below, people who have less power. There is a substantial body of evidence from Europe and North America showing that ethnic and racial minorities are at significantly higher risk of being stopped and searched and consequently arrested. These patterns have been documented in the UK,¹⁰⁷ Canada,¹⁰⁸ Hungary,¹⁰⁹ London,¹¹⁰ Japan,¹¹¹ and Australia,¹¹² to name a few. The

¹⁰⁴ Quinton P (2011) 'The Formation of Suspicions: Police Stop and Search Practices in England and Wales' *Policing and Society: An International Journal of Research and Policy* 21(4), 357-68.

¹⁰⁵ Lundman RJ (1974) 'Routine Police Arrest Practices: A Commonweal Perspective' *Social Problems* 22(1), 127-41.

¹⁰⁶ Choongh S (1998) 'Policing the Dross: A Social Disciplinarian Model of Policing' *British Journal of Criminology* 38(4), 630.

¹⁰⁷ Bowling B & Phillips C (2007) 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' *The Modern Law Review* 70(6), 936-61.

creation of an out-group or a particular profile of people who do not belong in, for example, an urban area, is not new in policing. Choongh noted in respect of policing in England and Wales that '[t]he result of this targeting is that the police, as they themselves put it, process 'the same dross', 'the same losers' again and again.'¹¹³

In the African context it appears that ethnic minorities are at a higher risk of arrest and ultimately pre-trial detention as was found to be the case in Kenya,¹¹⁴ Malawi¹¹⁵ and Zambia.¹¹⁶ Although it is not certain whether ethnicity plays a role, certain groups in particular contexts are evidently targets for arrest. Street traders (especially females) in Nairobi, Kenya, are specifically targeted by the police and askaris (county law enforcement officials) for trading in prohibited areas.¹¹⁷ Restrictive town policies on urban trading dating back to colonial times make traders fair game for police harassment, arrest, extortion as well as excessive use of force.¹¹⁸ Ethnic profiling in relation to terrorism following the Westgate Mall attack in Nairobi in 2014 has also emerged as a trend. Somali refugees were rounded up and returned to refugee camps, and similar tactics are reportedly used in the Mombasa area where the police, searching for Al Shabaab fighters, are targeting Muslims.¹¹⁹ In the case of Kenya, the state has little control or presence in the north of the country and many refugees from Somalia find their way into the country¹²⁰ and ultimately to the larger urban areas where they then appear to be targeted for police attention. Police perceptions about Somali refugees in Kenya make them a target, as reflected in the following statements: 'They [Somali

¹⁰⁸ Wortley S & Owusu-Bempah A (2011) 'The Usual Suspects: Police Stop and Search Practices in Canada' *Policing and Society: An International Journal of Research and Policy* 21(4), 395-407.

¹⁰⁹ Tóth BM and Kádár A (2011) 'Ethnic Profiling in ID Checks by the Hungarian police' *Policing and Society: An International Journal of Research and Policy* 21(4), 392.

¹¹⁰ Yesufu S (2013) 'Discriminatory Use of Stop-and-Search Powers in London, UK' *International Journal of Police Science and Management* 15(4), 281-93.

¹¹¹ Namba M (2011) 'War on Illegal Immigrants', National Narratives, and Globalisation: Japanese Policy and Practice of Police Stop and Question in Global Perspective' *Policing and Society: An International Journal of Research and Policy* 21(4), 432-43.

¹¹² Weber L (2011) 'It sounds like they shouldn't be here': Immigration Checks on the Streets of Sydney' *Policing and Society: An International Journal of Research and Policy* 21(4), 464.

¹¹³ Choongh S (1998) 'Policing the Dross: A Social Disciplinary Model of Policing' *British Journal of Criminology* 38(4), 628.

¹¹⁴ Muntingh L & Redpath J (forthcoming 2015) *The Socio-economic impact of pre-trial detention* (Open Society Institute).

¹¹⁵ Redpath J (2011) 'Case Flow Management' in Muntingh L & Redpath J *Audit of pre-trial detention in Malawi* (Johannesburg: OSISA).

¹¹⁶ Redpath J (2011) 'Case Flow Management' in Muntingh L & Redpath J *Audit of pre-trial detention in Malawi* (Johannesburg: OSISA).

¹¹⁷ Muiruri P (2010) *Women Street Vendors in Nairobi, Kenya: A Situational and Policy Analysis* (Addis Ababa: OSSREA), 66.

¹¹⁸ Muiruri P (2010) *Women Street Vendors in Nairobi, Kenya: A Situational and Policy Analysis* (Addis Ababa: OSSREA), 66. 'Hawkers decry intimidation by council askaris' *News24Kenya*, 3 July 2014, available at <http://m.news24.com/kenya/MyNews24/Hawkers-decry-intimidation-by-council-askaris-20140703> (accessed 5 October 2015); 'Brutality of 'askaris' battling hawkers using knives' *Standard Digital*, 25 October 2014, available at <http://www.standardmedia.co.ke/article/2000139346/brutality-of-askaris-battling-hawkers-using-knives> (accessed 5 October 2015); 'Hawkers take police, county askaris to court over harassment' *Standard Digital*, 20 November 2014, available at <http://www.standardmedia.co.ke/thecounties/article/2000141959/hawkers-take-police-county-askaris-to-court-over-harassment> (accessed 5 October 2015).

¹¹⁹ 'Harassment haunts Somalis after Westgate' *News24*, 19 September 2014, available at <http://www.news24.com/Africa/News/Harassment-haunts-Somalis-after-Westgate-20140919> (accessed 5 October 2015).

¹²⁰ Maingi J & Omeje K (2012) 'Policing refugees in fragile states' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 75.

refugees] sell guns in the market in Somalia. Here they [refugees] sell them in Eastleigh [a suburb of Nairobi]. Not in the open but it happens' (Police Corporal, January 2010); 'Weapons in criminal hands have increased since Somali refugees came here' (Senior Police Superintendent, January 2010); 'Guns are a major source of insecurity in the country. We know some guns are brought in by refugees' (Police Inspector, January 2010).¹²¹

Refugees in South Africa also suffer at the hands of the police in the form of wrongful arrests, thefts, assaults, and the police's refusal to open cases laid by foreign nationals.¹²² Sex workers are almost universally harassed by the police and suffer frequent arrests and adverse treatment;¹²³ more than a quarter of sex workers surveyed in a 2008 study in Cape Town were extorted for sex in exchange for release from custody.¹²⁴ Of 80 sex workers surveyed in 2013 in Johannesburg 15 per cent said they had been arrested, with 10 per cent stating that they were held in holding cells without appearing in court.¹²⁵ Even off-duty sex workers in Cape Town are routinely arrested by the police.¹²⁶

Children are also a frequent target of police arrest, especially those living and working in public spaces. Research from Egypt clearly indicates targeted arrest campaigns against children by the police:

The director of Cairo Governorate Police Directorate's al Azbekiya juvenile lockup, Brigadier Yasir Abu Shahdi, described his interpretation of these arrest powers: 'We arrest kids in parks who look like they are homeless. We arrest kids selling tissues in the street. These kids become known to us, so it isn't hard. [Sometimes] we arrest kids walking down the street during school hours with their school books, but I don't have enough officers to make as many of these arrests as I would like. I am asking for more officers, because in the future we want to conduct campaigns to search for and arrest truants.' While some of these arrests involve small numbers of children, more often they take the form of arrest campaigns involving tens of children in a targeted neighbourhood. 'Our daily work is to gather up children from the streets and arrest any who are in violation of the law,' Abu Shahdi said. '[In contrast,] the arrest campaigns last three or four days and are more specialized. For example, if we learn that the number of children who sell tissues in a particular neighbourhood has increased, I conduct a campaign in that neighbourhood.'¹²⁷

A 2006 survey of street children in Zambia found that 23 per cent had been arrested and that 60 per cent of this group suffered verbal and/or physical abuse at the hands of the police.¹²⁸ It appears to be a global phenomenon that street children experience a disproportionate degree of law enforcement: in Rwanda they are detained as vagrants; in Egypt children vulnerable to delinquency are targeted; in Vietnam they are rounded up and harshly

¹²¹ Maingi J & Omeje K (2012) 'Policing refugees in fragile states' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 88.

¹²² CoRMSA (2010) *Brief for the Independent Complaints Directorate: Police Harassment and Abuse of Foreign Nationals*, available at <http://www.cormsa.org.za/wp-content/uploads/2009/05/submission-to-the-independent-complaints-directorate-on-police-abuse-of-foreign-nationals.pdf> (accessed 5 October 2015).

¹²³ Mgbako C 'Police Abuse of Sex Workers: A Global Reality, Widely Ignored' *RH Reality Check*, 15 December 2011, available at <http://rhrealitycheck.org/article/2011/12/15/ending-police-abuse-sex-workers/> (accessed 5 October 2015).

¹²⁴ Gould C & Fick N (2008) *Selling sex in Cape Town* (Pretoria: ISS), available at <https://www.issafrica.org/uploads/SSCTCHAP5.PDF>, 56.

¹²⁵ 'South African police 'abuse sex workers'' *PRAAG*, 3 October 2013, available at <http://praag.org/?p=10822> (accessed 5 October 2015).

¹²⁶ 'Prostitutes sick of arrests when they're off duty' *Times Live*, 30 April 2011, available at <http://www.timeslive.co.za/local/2011/04/30/prostitutes-sick-of-arrests-when-they-re-off-duty> (accessed 5 October 2015).

¹²⁷ Human Rights Watch (2003) *Charged with Being Children: Egyptian Police Abuse of Children in Need of Protection*, available at <http://www.hrw.org/reports/2003/egypt0203/> (accessed 5 October 2015).

¹²⁸ Muntingh L (2006) *Report on Survey and Analysis of the Situation of Street Children in Zambia* (Lusaka: UNICEF).

treated in Social Protection Centres; in the DRC they are subjected to police and military abuse and manipulation; and in Ukraine they are harassed by the police more than any other marginalised group.¹²⁹

Whatever the context, it appears that people around the world who are perceived to have less power are particularly at risk of arrest without a warrant. The problem is enabled on the one hand by a myriad of seemingly antiquated laws, municipal by-laws and petty, and on the other hand, notions of social order that have their roots in the colonial era. Where the police has the power to arrest but lacks the integrity to uphold the law, extortion is commonly practiced as a way of avoiding arrest; but those with the least power are frequently unable to avoid arrest or draw attention to unlawful and arbitrary arrest. Moreover, it is difficult to find evidence to support reasonable suspicion and the enforcement of these laws has little bearing on overall public safety.

6. Roadblocks and stop and search

Roadblocks are used extensively in Africa as a means of monitoring travellers and in urban areas stop and search is also used widely. Some roadblocks are even permanent, symbolising the presence and visibility of the state's authority in even the most remote parts of a country. Roadblocks and stop and search are therefore important features of the relationship between the police and the public. Stop and search, or frisking, as it is known in some jurisdictions, relies on the individual police officer to have developed some reasonable sense of suspicion that the person being stopped has done something wrong or is about to commit an unlawful act. How this suspicion is formed has also been the subject of research. Reports from England and Wales note that:

Legal considerations did not feature strongly in the decision-making process, and officer practice varied significantly. In some cases, the law was little more than a resource for reasserting authority and disciplining members of the public, particular those already in long-standing relationships with the police. In these instances, the police were seen to 'rule with law' rather than demonstrate the 'rule of law'. Moreover, the ability of officers to account for their actions after the event, using stock phrases and drawing on their contextual knowledge, also questions the extent to which meaningful oversight of written records is possible.¹³⁰

In the US, particularly in New York, a considerable amount of research was conducted on the city's police department's practice of racially profiled frisking, ultimately resulting in litigation that declared the practice unconstitutional.¹³¹ The research also found that extensive frisking used by the New York Police Department (NYPD) did not, as claimed by the Mayor, reduce crime (including murder) and remove guns from the streets, and was indeed discriminatory.¹³² Stopping and searching a person in public and questioning them about who they are and where they are going or coming from is a substantive invasion of privacy.

Reliable figures on roadblocks and stop and search on the continent could only be found for South Africa, and the numbers are indeed staggering. Marks notes that 'Roadblock operations in South Africa are principally staged events with symbolic significance; they give some citizens a sense of relief that something positive is being done by the police, while others are left feeling targeted, scrutinised and restricted in exercise of their basic rights.'¹³³ In 2013/14 SAPS held in excess of 39 000 roadblocks and more than 23 million people were subjected to stop and

¹²⁹ Thomas de Benitez S (2011) *The State of the World's Street Children* (London: Consortium for Street Children), 56.

¹³⁰ Quinton P (2011) 'The Formation of Suspicions: Police Stop and Search Practices in England and Wales' *Policing and Society: An International Journal of Research and Policy* 21(4), 366. References omitted.

¹³¹ New York Civil Liberties Union, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices> (accessed 5 October 2015).

¹³² New York Civil Liberties Union, <http://www.nyclu.org/node/1598> (accessed 5 October 2015).

¹³³ Marks M (2011) 'The Fantastical World of South Africa's Roadblocks: Dilemmas of a Ubiquitous Police Strategy' *Policing and Society: An International Journal of Research and Policy* 21(4), 408-19.

search and/or person searches.¹³⁴ When assessing these figures against the number of arrests for crimes dependent on police action for detection (for example, when during stop and search an illegal firearm is found), one arrest is made for every 80 stop and search actions. This is by all accounts a labour intensive process consuming vast quantities of police resources and yielding few results. Moreover, the bulk of these arrests are categorised as ‘drug-related crime’ and are in all likelihood for the possession of small quantities of marijuana. In the UK and India the arrest yield from roadblocks and stop and search has also been found to be low.¹³⁵ The extensive use of stop and search as well as the use of roadblocks raise questions about the utilisation of police resources and whether it would not be more productive to emphasise the investigation of crime when resources are scarce.

Although most police forces will deny that they have arrest targets, it is perhaps an open secret that they do. Media statements by the police claiming high numbers of arrests following sweeping operations are not uncommon and an indication of the desirability, in the police’s view, of high arrest rates. Even if there is no professed arrest target, other police performance indicators may facilitate high volumes of arrests for non-serious offences such as the number of identity checks performed over a given period.¹³⁶ The Khayelitsha Commission (South Africa) noted that intermediate performance targets may also contribute to abusive arrest practices.¹³⁷ A good example of this is using the amount of alcohol confiscated by the police from unlicensed traders as a performance indicator, which will be reflected in the police annual report as an achievement and thereby encourage arrests.¹³⁸ A change in policy in Dorset, England, demonstrated the impact of scrapping arrest targets: over a five-year period the number of children arrested fell by 74 per cent and resulted in the development of alternative measures to deal with problem behaviour.¹³⁹

The key issue to be taken from the above is that when there are arrest targets (explicit or mediated) the police will arrest to reach the target. If it is a mediated target, this will be used to make themselves appear to be effective and people who potentially offer the least resistance – the homeless, immigrants, street children, sex workers – will be targeted for arrest to make up the quota. These arrests have little if any impact on crime reduction and may indeed be counter-productive.

7. Towards reform

The problems besetting African policing (and thus the abuse of powers of arrest) have their roots in the particular model of policing implemented by the colonial powers, the authoritarian regimes that developed post-independence, poor governance, poor training of police officials, low pay and little adherence to the rule of law. There is also little accountability of police officers who exceed their powers of arrest and the excessive use of force.

¹³⁴ SAPS *Annual Report 2013/14*, 106.

¹³⁵ Qureshi F & Grove L (2011) ‘Thirty Years of Police Stops: Findings from the Crime Survey for England and Wales’ *International Journal of Police Science & Management* 15(2), 166. Belur J (2011) ‘Police Stop and Search in India: Mumbai nakabandi’ *Policing and Society: An International Journal of Research and Policy* 21(4), 420-31.

¹³⁶ Tóth BM & Kádár A (2011) ‘Ethnic Profiling in ID Checks by the Hungarian Police’ *Policing and Society: An International Journal of Research and Policy* 21(4), 392.

¹³⁷ *The Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha*, available at <http://www.khayelitshacommission.org.za/final-report.html> (accessed 5 October 2015), 288.

¹³⁸ Faul A (2013) ‘Policing Taverns and Shebeens: Observations and Experiences’ *SA Crime Quarterly* 46, 35-48.

¹³⁹ ‘Scrapped Police Targets See Less Children Arrested in Dorset’ *WessexFM*, 27 May 2014, available at <http://www.wessexfm.com/news/dorset-news/1294610/scrapped-police-targets-see-less-children-arrested-in-dorset/> (accessed 5 October 2015).

Against this background, arrest without a warrant is not only used extensively to extort bribes but also targets the least powerful in society in a particular context. The challenges facing African police forces are both structural and functional in nature. Even if structural features are in place, such as progressive constitutions and subordinate law, the functional performance of police forces (for example, trends in arrest practices) leaves much to be desired and is frequently far removed from any form of oversight and accountability.

On a more general level it is clear that substantial police reform is required in probably most African states to fundamentally change the nature of policing and to undo the colonial legacy. There have been clearly observable consistencies between pre- and post-independence policing in Africa. Furthermore, the work being done to advance pre-trial justice needs to broaden its scope to also address structural and functional concerns of policing and, more specifically, arrest practices, the decriminalisation of offences that feed the current mode of policing and the abuse of powers of arrest without a warrant.

Throughout this paper it was evident that there exist substantial knowledge gaps. This not only limited the analysis here, but also places a significant hurdle in the development of appropriate policy and legislative responses. To this end, it is necessary to conduct extensive quantitative and qualitative research on arrest patterns and the consequences of arrest for the arrested persons, their families and broader society, as well as the extent to which arrests translates into successful prosecutions. It was shown that there is a considerable body of research from the developed world on policing and arrest and that these methodologies can make a valuable contribution to African research, but it should also be accepted from the outset that understanding policing in Africa may require a different approach, one that will emerge from broad-based and exploratory empirical research.

Regarding legislative responses to the problem, a two-pronged approach is required, emphasising firstly the curtailment of powers of arrest without a warrant, and secondly to abolish the range of petty offences and other vague charges open to abuse of powers of arrest without a warrant.

The police need to focus on investigations and this need to be part of an overall crime reduction strategy. The role of arrests without a warrant needs to be clearly articulated in such a strategy.¹⁴⁰ Such a strategy also needs to enable the management of performance in a manner that supports a crime detection and investigation focus. It appears that police performance is generally not assessed against a set of indicators that would show whether or not the police is effective in advancing public safety through effective law enforcement, meaning crime detection, resolution, and bringing successful prosecutions to the courts. The emphasis appears to be placed on police outputs such as the number of arrests, number of roadblocks held, stop and search, response time and so forth. These do not provide a comprehensive picture of police performance aimed at advancing public safety and improved relations with the public.¹⁴¹

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¹⁴⁰ From Uganda it is reported that apart from a policing plan dating back to 1998/9, there is no documented strategy or policy guidelines on community policing (Musime A (2012) 'From repressive to community policing in Uganda' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 97).

¹⁴¹ Musime A (2012) 'From repressive to community policing in Uganda' in Francis D (ed) *Policing in Africa* (New York: Palgrave MacMillan), 117.

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