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Joint Stakeholder Submission to the UN Human Rights Committee

For the LOIPR to be considered in relation to Malawi

(131st session- 1st - 26th March 2021)

Submitted by: A. Centre for Human Rights Education, Advice and Assistance (CHREAA);

B. Southern Africa Litigation Centre (SALC)

C. Irish Rule of Law International (IRLI)

D. Reprieve

1. Introduction

- 1.1. The Malawi Centre for Human Rights Education, Advice and Assistance (CHREAA), the Southern Africa Litigation Centre (SALC), Reprieve and Irish Rule of Law International (IRLI) submit this information to the Human Rights Committee (HRC) for the drafting of the list of issues prior to reporting (LOIPR) ahead of the upcoming review by the HRC of Malawi.
- 1.2. CHREAA was established as a not-for-profit non-governmental organisation dedicated to the promotion and protection of human rights. The establishment of the organisation followed Malawi's history of oppression and human rights abuse. In the past years CHREAA's work has focused mainly on key populations. In the past, the organisation documented serious violations of Malawi's international obligations, including the breach of international standards on the prohibition on torture and other forms of ill-treatment.
- 1.3. The Southern Africa Litigation Centre (SALC) is a regional human rights organisation that promotes and advances human rights and the rule of law in Southern Africa through strategic litigation, research, capacity strengthening, training and advocacy. SALC conducts its advocacy in partnership with our national partners in the region, including partners in Malawi.
- 1.4. Irish Rule of Law International (IRLI) is a non-governmental programme and an initiative of the Law Society of Ireland, the Bar of Ireland, the Law Society of Northern Ireland and the Bar of Northern Ireland, dedicated to promoting the rule of law. It operates access to justice programmes in various countries including: Malawi, Tanzania, South Africa, Zambia, Myanmar and Vietnam, though Malawi is the only country in which IRLI operates a year-round programme, with in situ personnel. IRLI works towards building capacity within the criminal justice system by seconding its lawyers to the Judiciary, Office of the DPP, the Malawian Police Service and the Legal Aid Bureau.
- 1.5. Reprieve is an international legal action charity that was founded in 1999 (UK charity registration no. 1114900). Reprieve provides support to some of the world's most vulnerable people, including people sentenced to death and those victimized by states' abusive counter-terrorism policies. Based in London, but with offices and partners throughout the world, Reprieve is currently working on behalf of 70 people facing the death penalty in 16 countries, including Malawi. Reprieve's vision is a world free of execution, torture and detention without due process.



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2. Methodology

2.1. The content of this briefing is based on information obtained by CHREAA, SALC, IRLI and Reprieve in the course of their work. The document highlights some of the main areas of human rights concerns of these partner organisations in Malawi in relation to the provisions of the International Covenant on Civil and Political Rights (ICCPR). In particular, it highlights the issues of: the permissive legislative framework with regards to both forced confessions and the death penalty, torture carried out by the police officers (to include sexual assault), extra-judicial killings, illegal pre-trial detention, lack of accountability for police officers and the equal treatment of LGBTQI+ persons. It also speaks to the problem of overcrowding in prisons, lack of adequate nutrition for inmates, inadequate treatment for inmates with mental illness. These concerns are reflected in a series of individual complaints expounded in the various sections below. Recommendations are made for Malawi to improve the system and ensure that the country lives up to its obligations prescribed under the ICCPR.

3. Normative framework

3.1. Malawi ratified the ICCPR on 22 December 1993. Though Malawi is dualist state requiring an act of parliament to give effect to international law, most of the fundamental human rights promulgated in the ICCPR have been transposed nationally by the Malawian Constitution.

3.2. The ICCPR enjoins State parties to take effective legislative, judicial, administrative and other measures to give effect to and protect fundamental human rights, including the following:

- The right to not to be arbitrarily deprived of life (Article 6);
- The right to be free from torture and cruel, inhuman or degrading treatment or punishment (Article 7)
- The right to liberty and security of person, and the right not to be arbitrarily arrested or detained (Article 9)
- If deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the human person (Article 10)
- The right to a fair trial and due process, which includes, inter alia, the right to silence, the right against self-incrimination, the right to have a trial without undue delay (Article 14)
- Right to associate freely (Article 22)

3.3. It is commended that at the international level, Malawi ratified the ICCPR and its first optional protocol. Malawi has also ratified the Convention Against Torture (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, The Convention of the Elimination of Discrimination Against Women (CEDAW) as well as the Convention on the Rights of Persons with Disabilities (CRPD), all of which offer further protection to citizens with regards to the aforementioned rights. At the regional level, Malawi is a State party to the African Charter on Human and Peoples' Right (ACHPR), which again enjoins state parties to give effect to the same rights.

3.4. Despite ratifying the above instruments, there are several instances when Malawi breached its international obligations under the ICCPR, some of which are highlighted below.



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4. Torture and cruel, inhuman or degrading treatment or punishment (Article 7)

(i) Relevant Concluding Observation from previous HRC Review (2014)

4.1. “13. The Committee is concerned at the high number of reported cases of torture by law enforcement officers. It is also concerned that the law does not comply with international standards in regard to the use of firearms by police officers (arts. 7 and 10)

The State party should:

(a) Establish expeditiously the independent Police Complaints Commission and allocate adequate human and financial resources to it;

(b) Establish a central system to keep track of all complaints and make them publicly accessible;

(c) Investigate all cases of torture, prosecute the alleged perpetrators and compensate the victims;

(d) Ensure that the Police Act complies with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and strengthen its efforts to train police officers in human rights.”

(ii) Malawi’s response to the above Concluding Observation in 2014

“Malawi is deeply concerned about incidents of torture and use of excessive force. Measures taken to combat this include the amendment of the Police Act to establish the Independent Complaints Commission with powers to investigate cases of torture or deaths in police custody. In addition, every reported case of torture is being investigated. Malawi will provide more detailed statistics in this respect in subsequent dialogue with the Committee.”

(ii) National constitutional and legislative framework

4.2. Section 19(3) of the Constitution of Malawi prohibits the use of torture and cruel, inhuman or degrading treatment or punishment. The standard in section 19(3) is complemented by section 45 of the Constitution which bars the State from derogating from torture or any other form of cruel, inhuman and degrading treatment or punishment. Sections 19 and 45 are to be made fully operational by statutory norms speaking to the prevention of torture.

4.3. The Penal Code however, does not criminalise torture. In Malawi, a person who commits torture would be charged with assault or assault occasioning actual bodily harm, however prosecutions of police officers or state representatives rarely take place. The current legislative gaps limit the extent to which complaints can be brought to court for alleged cases involving physical and psychological torture. These gaps violate Malawi’s international obligations under the Convention.

(iii) Country Update

Reports of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

4.4. Despite its assertion that it would “ensure that a culture of torture and inhuman treatment is completely rooted out”¹ in its initial State Party report to the Human Rights Committee in 2012,

¹ Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, UN Doc CCPR/C/MWI/1 (13 July 2012) [26].



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the use of torture and cruel, inhuman or degrading treatment or punishment by police officers continues to be prevalent and systemic in Malawi. Many incidents of torture have been documented in the context of sworn bail statements, but NGO employees have also witnessed police brutality first hand.

- 4.5. One man reported in his bail statement that he was beaten with sticks and attacked with machetes (known as panga knives in Malawi) by police officers for three days until he fell unconscious. Another man confirmed he was beaten with a hosepipe, and another again reported being placed in leg irons and beaten with belts and boots. One woman reported that while in police custody, she was beaten with a belt which caused her to miscarry her baby.
- 4.6. In a recent case, five men were tortured with electrocuted rods and use of hot irons applied to their backs and genitals. One of the men died as a result of the electrocution (see Section 6, Extrajudicial Killings, for further details). Two of the suspects in the case were sentenced to death based on torture-tainted evidence.

Allegations of Rape and Sexual Assault against Police Officers

- 4.7. In June of 2020 Malawi undertook a second presidential election, as irregularities had been found to have occurred during the previous election which had taken place in the previous July 2019. The new election caused controversy in Malawi and many nationwide protests took place. During one such protest, on 8th October 2019, a Malawian police officer from Msundwe Police Station was stoned to death. In retaliation, a group of Malawian police officers sexually assaulted women and girls in the areas of M'bwatalika, Kadziyo and Mpingu, around the capital city of Lilongwe, on the 15th October 2019 ("the Msundwe incident"). The Malawi Human Rights Commission investigated the incident and provided a comprehensive report which found that 13 women and 4 girls were raped and sexually assaulted.²
- 4.8. The Malawi Women Lawyers Association successfully took a judicial review application to the High Court of Malawi in 2020 to address the failures of, and human rights abuses carried out by, the Malawi Police Service ("MPS") in the Msundwe incident, and to seek compensation for the survivors ("the Msundwe Case"). The ruling, delivered on the 13th August 2020, ordered, *inter alia*, that the police fully investigate the matter, and submit an occurrence book to the Court within 14 days of the Judgment, which would give detail of the officers accused of raping and assaulting the women and girls.³ The police have not done this, thereby breaching the court order, and no criminal prosecutions have been brought against any of the officers involved.

Independent Police Complaints Mechanism

- 4.9. In Malawi's first report to the HRC in 2011, and again in 2014, it assured the Committee that it will set up an independent police commission to investigate alleged police brutality and complaints made against the police.⁴

² Malawi Human Rights Commission "Investigation Report into the alleged rape, defilement and indecent assault by police officers on some women and girls in Lilongwe West (M'bwatalika, Kadziyo and Mpingu areas)" 2020

³ *The State v The Inspector General of Police & Others*, Judicial Review Cause No. 7 of 2020

⁴ Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, UN Doc CCPR/C/MWI/1 (13 July 2012) [68].



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4.10. In the Judgement of the Msundwe Case, the High Court ordered that the Commission be established immediately. Though a Commissioner has been appointed, no other investigators have been hired as of yet, and the Commission is still not operational.

5. Forced Confessions (Articles 2, 7 & 14)

(i) General Comment 20 of the HRC

5.1. *“It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.*

(ii) National Constitutional and Legislative Framework

5.2. As above Section 19(3) of the Constitution of Malawi prohibits the use of torture or cruel, inhuman and degrading treatment or punishment.

5.3. The Malawian Constitution also prohibits the use of forced confessions at Article 42(2)(c). Though Article 42 is not listed as one of the non-derogable provisions under S45 of the Constitution, S45 mandates that a right can only be derogated from in a state of emergency.

5.4. The Malawian Constitution also protects the right to a fair trial at Article 42(2)(f), which includes the right to silence at 42(2)(f)(iii) and the right against self-incrimination at 42(2)(f)(iv).

5.5. However, notwithstanding the foregoing constitutional and international provisions, Section 176 of the Malawian Criminal Procedure and Evidence Code (CP&EC), permits the use of forced confessions. It reads as follows:

“Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto.

(2) No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own.

(3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession.”

(iii) Country Update

5.6. Malawi is one of few countries in the world that still retains a permissive legal framework with regards to forced confessions.

5.7. Malawi openly summarised the law on this issue in its State Report to the UNCAT in 2020 when it said:

“The Criminal Procedure and Evidence Code under section 176 does not expressly prohibit the use of confession evidence obtained under torture, cruel or inhuman and degrading treatment or punishment. It would be expected that evidence so obtained would generally violate the broader rights to fair trial. This is how the courts in practice have interpreted it. In the High Court decision



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of *Republic v Chinthiti Criminal Case No. 17 of 1997*; the court concluded that section 176 of the Criminal Procedure and Evidence Code violated the right not to self-incriminate in section 42 (2) (c) of the Constitution. The court never considered the relationship between the admission of involuntary confession evidence and absolute prohibition of torture, cruel and inhuman, degrading treatment. However, in the Malawi Supreme Court of Appeal decision of Thomson Fulaye Bokhobokho and Another v The Republic Malawi Supreme Court of Appeal, Criminal Appeal No. 10 of 2000; the Court stated that section 176 settles the law regarding admission of confession statements, this entails that confession evidence is admissible regardless of allegations of torture, and upon admission of such evidence, if the Judge is convinced beyond reasonable doubt that the confession is materially true”.

Jurisprudence on S176 CP&EC

- 5.8. Various High Court judgements have interpreted the application of S176 differently, and the case law on this provision is inconsistent and contradictory.
- 5.9. Some High Court judges have tried to argue that S176 is unconstitutional, such as in the case of *Republic v Chinthiti Criminal Case. No 17 of 1997*. Others have tried to argue that if the confession is found to have been elicited forcibly, it should still be admitted as evidence, but no weight should be given to the confession at all.⁵
- 5.10. Most High Court judgments however adhere to the dicta of the Supreme Court, which remains the law of the land, in the Judgement of *Thomson Fulaye Bokhobokho and Another v The Republic* (Criminal Appeal No. 10 of 2000) [2001] MWSC 5 (17 October 2001). In this case it was pronounced that if torture is alleged, the confession is admissible, but S176(3) means that corroborating evidence should be found so that the confession can be found to be “*materially true*”. In the many cases that adhere to the precedent set in this judgment, often no investigation is carried out into whether torture or ill-treatment actually occurred and furthermore, frequently no corroborating evidence is submitted to prove the confession was “*materially true*”. Torture-tainted confessions are frequently used as the only evidence to secure a conviction against a person.
- 5.11. In the above Supreme Court Judgment Mr Bokhobokho was sentenced to death, despite there being little to no evidence against him except for his confession elicited through torture; he maintains his innocence. Courts have admitted torture-tainted evidence, nearly all of which included forced confessions, in every recent capital case in which a death sentence was handed down.
- 5.12. In the recent case of the *Republic v Humphery Elia & Anor* (Criminal Case No.164 of 2018) [2019] MWHC 77 (26 April 2019), the accused alleged that his caution statement was not given freely, and showed the court scars on his backside which he alleged had occurred through police beatings. The court however referred to S176 of the CP&EC and confirmed that “*any caution statement or confession is admissible regardless of how it was obtained. In other jurisdictions, a confession must be made voluntarily and freely for it to be admissible. That seems not to be the position in this country though with our current section 42 (2)(c) of our Republican Constitution one would have expected the position to be like in those other jurisdictions.*”

Reports of Forced Confessions

- 5.13. In the last 18 months, Reprieve is aware of eleven persons who were tortured, ten of which

⁵ *Palitu and Others v Republic* (Criminal Appeal No. 30 of 2001) ((Criminal Appeal No. 30 of 2001)) [2001] MWHC 43 (19 September 2001)



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were sentenced to death at the end of their trial. They were suspected of crimes involving persons with albinism.⁶ The one arrested person who was not tried and sentenced to death was Mr Buleya Lule, who was killed in detention, after he was electrocuted to death by police officers (further information on this case in the next section).⁷ In the cases of all twelve individuals who have been sentenced to the death penalty since 2019, the court relied upon unsafe 'confessional statements' obtained by the police through threats, coercion and extreme physical violence. In the absence of the formal abolition of the death penalty, due process violations also threaten the right to life in capital cases.

5.14. In sum it is clear that S176 can be used to violate basic fundamental human rights, by both allowing evidence elicited by torture or cruel, inhuman and degrading treatment, and by violating the basic due process rights: the right to silence and the right against self-incrimination.

6. Extrajudicial Killings (Articles 6, 7, 9 & 10)

(i) Relevant Concluding Observation from previous HRC Review (2014)

6.1. "12. The Committee is concerned about reports of cases of extrajudicial killings where the alleged perpetrators have not yet been prosecuted or where the prosecutions are not progressing expeditiously (art. 6).

The State party should prosecute all alleged perpetrators of extrajudicial killings, complete expeditiously any process that has already been initiated, punish those who are convicted, and protect, rehabilitate and compensate the victims."

(ii) Country Update

6.2. Extrajudicial killings not only continue to take place in Malawi, but do so in a systematic and coordinated manner.

CHREAA Report on Extrajudicial Killings

6.3. A comprehensive investigate report undertaken by CHREAA in 2019 exposed an organised police operation, termed "Operation Elimination", which involved police officers killing persons who had served time in prison, mostly those convicted of armed robbery, but who had since been released.⁸ The initial figures discovered by CHREAA indicate that potentially over 60 people were killed by police officers in this operation between the years 2009- 2019.

6.4. The report also found that the victims had suffered torture before being murdered. In one case the report found that the person had received burn marks before he was shot, and in another the victim had had his genitalia removed. There have been no investigations or criminal prosecutions taken in relation to any of the killings discussed in the report.

The Torture and Killing of Buleya Lule

6.5. On 13th February 2019, Goodson Fanizo, a boy with albinism, was allegedly abducted by unknown persons. He has not been found to date. Following the alleged abduction, the Malawi Police Service conducted investigations and arrested 6 suspects on charges of abduction and eventually homicide, despite a body never having been found. One of the suspects in the case, Mr. Buleya

⁶ File with Reprieve, *Malawi Death Penalty Chart*, 24 November 2020.

⁷ Further information on paragraphs 6.5-6.6.

⁸ CHREAA, "Operation Elimination, A report into Extrajudicial Killings in Malawi", 2019.



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Lule, died as a result of police torture on 20th February 2019.

6.6. The Malawian Human Rights Commission undertook a special investigation into the death of Mr Lule and found that he had been electrocuted to death by police.⁹ In July 2020, 13 police officers, including the Commissioner of Police for the Central Region, were arrested and charged. All 13 police officers were granted bail at the end of July 2020. The prosecution has not progressed beyond this to date.

7. Death Penalty (Article 6)

(i) Relevant Concluding Observation from previous HRC Review (2014)

7.1. *“While welcoming the de facto moratorium on executions in the State party, the Committee is concerned that death sentences are still imposed and that these are not only applicable to the most serious crimes. The Committee is also concerned about the fact that the right to seek a pardon is not effectively ensured (art. 6).*

The State party should:

(a) Consider abolishing the death penalty and acceding to the Second Optional Protocol of the Covenant, aiming at the abolition of the death penalty, on the occasion of the twenty-fifth anniversary of the Protocol;

(b) Review the Penal Code and ensure that the death penalty, if imposed at all, is applicable only to the most serious crimes as defined by article 6, paragraph 2, of the Covenant, a category to which aggravated robbery, for example, does not belong;

(c) Provide adequate funds for a prompt process for resentencing prisoners who have received a mandatory death penalty and ensure the right to seek pardon or commutation of the death sentence.”

(ii) Country Update

7.2. Between 2014 and 2017, 158 people were provided with resentencing hearings, thanks to the work of a coalition of stakeholders who supported and raised funds for this process. The resentencing project marked a significant achievement for the Malawian justice sector and for Malawi’s move away from use of the death penalty.

7.3. Continuing this progress, between 2016 – 2019, no new death sentences were handed down, in a sign that Malawian courts were upholding the rule that only the most serious crimes should be eligible for a death sentence.

Renewed Use of the Death Penalty

7.4. Unfortunately, since this excellent progress limiting the application of the death sentence, which made Malawi a regional leader, there have been a spate of death sentences handed down in the past 18 months. There are now 27 people on Malawi’s death row – 26 men and one woman. Hundreds more are charged with capital offenses and are at risk of a death sentence.

7.5. In 2019 and 2020, twelve people were sentenced to death in Malawi for crimes involving attacks on people with albinism. These convictions were the first death sentences imposed following a

⁹ Malawi Human Rights Commission, *“A Report of an Investigation into the Death of Mr. Buleya Lule in Police Custody”* 2019.



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three-year hiatus by the Malawian courts. Crimes against people with albinism have been a serious issue in Malawi for many years. Perpetrators of attacks on people with albinism should be brought to justice, but there is a well-founded concern amongst rights groups and the albinism community that the use of the death penalty is merely a face-saving mechanism for a government that refuses to address the root causes of these crimes, obstructing true justice for the victims.

Use of the Death Penalty in Homicide Cases involving Persons with Albinism

7.6. The Government of Malawi promised consultation with persons with albinism as they focused on addressing the targeted violence.¹⁰ Unfortunately, it appears the community has not been sufficiently consulted and their primary concerns for protection, education, and justice for victims, have largely gone unanswered, despite some late attempts to be seen to engage them. The issuing of death sentences is a key example of where the nuanced requests from voices of the community have been ignored.

7.7. Ian Simbota, President of the Association of Persons with Albinism stated that the community is not advocating for the death penalty. Instead, it “believes that peoples’ lives should be preserved” when tackling attacks against people with albinism.¹¹ In 2017, in a Report by the Independent Expert on the enjoyment of human rights by persons with albinism¹² in the United Republic of Tanzania, Ms Ikponwosa Ero said, “strategies upholding the human rights of persons with albinism must be firmly grounded in international human rights law” and “that the death penalty had no place in the twenty-first century.”¹³ It is apparent that the death sentence is inappropriate as a response to the grave attacks on people with albinism, as it is when imposed for any other crime.

7.8. Furthermore, the Office of the Director of Public Prosecutions has persistently sought the death sentence in cases involving victims with albinism, without regard to the culpability of the accused persons and other mitigating circumstances, as required by law. In the cases of the twelve persons sentenced to death in 2019 and 2020, their culpability should have been regarded and relevant mitigating circumstances considered during sentencing.

7.9. There is a real risk that those arrested in crimes involving persons with albinism are being assigned blame or deliberately silenced to shield the true perpetrators or scapegoats,¹⁴ with insufficient efforts made to sensitise and educate communities about the real harms faced by people with albinism, or debunk the myths that surround this vulnerable group.¹⁵ In her 2016 report to the UN Human Rights Council, the Independent Expert on albinism explained, that the attacks result from “*dangerous myths*” that body parts of persons with albinism “*will induce wealth, good luck and political success*”.¹⁶

¹⁰ National Action Plan on Persons with Albinism in Malawi 2018 – 2022, [47].

¹¹ Malawi News, Will Chakwera endorse that those sentenced to death should be executed? 26 September 2020 [translated from Chichewa].

¹² (‘Independent Expert on albinism’).

¹³ Human Rights Council, *Report of the Independent Expert on the enjoyment of human rights by persons with albinism on her mission to the United Republic of Tanzania*, UN Doc A/HRC/37/57/Add.1 (20 December 2017) [11].

¹⁴ Action on Albinism Malawi Database, available at: <https://actiononalbinism.org/page/c6cd5zky9qtvx7viqtw0o1or>.

¹⁵ Action on Albinism Malawi Database, available at: <https://actiononalbinism.org/page/c6cd5zky9qtvx7viqtw0o1or>.

¹⁶ Human Rights Council, *Report of the Independent Expert on the enjoyment of human rights by persons with albinism*, UN Doc A/HRC/31/63 (18 January 2016) [6].



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- 7.10. Considering the existence of these motives and the rumours being spread through communities, mitigating circumstances that demonstrate reduced culpability should not be ignored. After the Malawian Penal Code was amended in 2011 to remove the mandatory death sentence for murder, the courts have had discretion to consider the mitigating circumstances of the offender before it determines a sentence. If the courts in Malawi are to sentence persons to death for the most serious crimes,¹⁷ they must consider mitigating factors such as but not limited to, acting under the influence of someone powerful, a present mental condition or genuine remorse.¹⁸
- 7.11. All 27 cases resulting in a death sentence are the product of deeply flawed trials in which the accused were denied their right to a fair trial resulting in unsafe convictions.
- 7.12. A combination of factors contributed to the deprivation of basic due process rights in these cases, including political pressure, lack of resources, lack of capacity, lack of training, lack of clear standards/guidelines, all of which prevented defendants from meeting with legal counsel until their trials had already begun. Furthermore, officials did not give lawyers the necessary time or access to evidence that was submitted by the prosecution in order to prepare adequate defences, and defendants were not permitted to participate fully in their own defences. All of these represent violations of the fair trial rights enshrined in ICCPR Article 14, and incorporated into Malawi's domestic law, rendering all resulting death sentences unlawful.
- 7.13. Malawi's capital trial process denies the right to due process in the following ways:
- Excessive pre-trial detention, contributing to undue delay;
 - Denial of access to effective legal counsel;
 - Denial of right to understand the nature of charges against defendant in cases where defendant suffers from severe mental illness;
 - Denial of the right to prepare an adequate defence;
 - Denial of the right to present mitigating evidence at sentencing;
 - Denial of the presumption of innocence;
 - Denial of adequate notice by the Prosecution that they would seek the death sentence; and
 - Denial of the right to appeal, contributing to denial of right to present newly discovered facts showing conclusively that there has been a miscarriage of justice, as well as contributing to undue delay.

8. Illegal Pre-trial Detention (Articles 9 & 10)

(i) Relevant Concluding Observation from previous HRC Review (2014)

8.1. "15. The Committee is concerned about the high number of persons in pretrial detention and that pretrial detainees are not always held separately from convicted prisoners. It is also CCPR/C/MWI/CO/1/Add.1 6 concerned that the alternative measures to detention are not adequately applied in practice (arts. 9–10).

The State party should:

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6, paragraph 2.

¹⁸ Reprieve et al, *Malawi Mitigation Investigation Guide*, available at: <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/malawi-mitigation.pdf>.



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- (a) Take immediate action to reduce the number of persons in pretrial detention and provide effective remedies and compensation for those unlawfully held in custody;
- (b) Take appropriate action to ensure that convicted persons are not detained with pretrial detainees;
- (c) Increase the use of non-custodial penalties taking into account the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), General Assembly resolution 45/110.”

(ii) National Constitutional and Legislative Framework

8.2. Under s.35(2) and Part IVA of the CP&EC and s.42(2)(b) of the Constitution, an accused person can be held legally for up to 48 hours until they must be brought before a Magistrate (the 48-hour rule) and for up to three months thereafter before their trial commences.

(ii) Country Update

8.3. In its State Party report the UN Committee Against Torture in 2020 Malawi noted the following:

“The Government of Malawi has employed several measures in order to reduce prison overcrowding. The legislative measures taken include the requirement provided under section 42 (2) (b) of the Constitution that a person should be released on bail if they have not been brought before a judge within 48 hours or as soon as practically possible. The CP & EC under Part IVA provides for pre-trial custody time limits in order to ensure that a detainee is not on remand for a long period”.

8.4. In the sentence rehearing case of Republic v Bisket Kunitumbu (Sentence Rehearing Cause No. 59 of 2015) (unreported), the convict had been held on remand for six years prior to his trial.

In that case, Chirwa J ruled that the delay: “means that the Convict had suffered pre-trial detention in contravention of his Constitutional right under section 42(2)(e) of the Constitution. The conduct of the State in failing to prosecute the Convict within a reasonable time as provided for in Section 42(2)(f)(i) of the Constitution is a gross violation of the constitutional right of the Convict herein.”

8.5. In 2010 Part IVA ‘Pre-Trial Custody Time Limits’ was inserted into the CP & EC, in a legislative response to the acute problem of pre-trial detention and prison over-crowding, which includes a requirement that homicide trials commence within 90 days of arrest. This measure was welcomed at the time of its introduction by the then DPP who stated he was “keen” to see pre-trial custody time limits being respected by prosecutors.

8.6. Notwithstanding the above, illegal pre-trial detention is still widespread in Malawi. A recent survey of homicide remandees at Zomba Central Prison found multiple people who had been in prison on remand since 2006, serving 14 years in prisons without trial or conviction.

8.7. As many as 40% of those arrested are not released, given police bail or brought before a magistrate within 48 hours¹⁹, and remand warrants, which authorise the legal detention of the person, frequently expire without the person being granted bail. Recently it was reported that in Maula prison there were over 300 expired remand warrants. In practice, in many cases suspects are not taken to the magistrate’s court for months, or magistrates will extend remand warrants without the suspect actually appearing before the court giving a false impression the suspect has been given the opportunity to apply for bail.

¹⁹ Data taken by IRLI



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8.8. Furthermore, once a plea is taken a trial has technically commenced, and thereafter the person may be held for years on remand before trial is completed and judgment delivered. S42(2)(f) of the Malawian constitution mandates that a trial must take place “within a reasonable time”, but there is no accepted definition as to what a “reasonable time” is.

8.9. We have various documented cases of persons being detained in Malawi’s prisons for many years without conviction. One child (14) was arrested and charged with homicide. He was granted bail, but due to a risk of mob violence in his home village, he was held on remand in a children’s prison. His file was subsequently lost, which meant there was no proof of his having ever being granted bail. A fresh application was made, where he was successfully granted bail, six years after first being taken into custody. This case exemplifies the administrative and legal failures of the Malawian state which not only impugned this child’s due process rights, but also Malawi’s obligations to prioritise the best interests of the child.

8.10. Another woman who was accused of the murder of her baby, and who is suffering from psychological and emotional trauma, was held in custody for three years before being granted bail in 2020, having never had her trial hearing. Another man arrested in 2014 was released on bail in 2020, which was described by the judge as an *‘illegal pre-trial sentence which should be condemned in the strongest terms’* also never having had his trial, and, as above, we have evidence of many more people being held in pre-trial detention for as long as 14 years.

Children in police custody with adults

8.11. Under Section 42(2)(g)(iii) of the Constitution of Malawi, children are prohibited from being kept in custody with adults, unless it is in their best interests to do so. Under the Child Care, Protection and Justice Act 2010, children are never allowed to be detained in police custody. If special orders are obtained to detain a child in an appropriate safety home or reformatory centre, it is prohibited to keep that child in the same place as any adult who is a detainee. Notwithstanding the foregoing safeguards, children are regularly arrested and detained in police cells and are put in the same cells as other adult detainees, making them extremely vulnerable to abuse and exploitation. There have been reports of child sex abuse occurring in such circumstances.

9. Prison Conditions (Articles 7 & 10)

(i) Relevant Concluding Observation from previous HRC Review (2014)

9.1. “Conditions of detention

16. The Committee is concerned about the conditions of detention in prisons. It is also concerned about the capacity of the Inspectorate of Prisons to adequately discharge its functions (arts. 7 and 10). The State party should:

(a) Expedite the adoption of the Prison Act in conformity with international standards;

(b) Strengthen the capacity and independence of the Inspectorate of Prisons and establish mechanisms to consistently consider its recommendations and make them public;

(c) Facilitate complaints from detainees.”

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- 9.2. Malawi's prisons remain severely overcrowded with an overall population of about 12,000 prisoners in the system against an overall prison capacity of 5,610. Malawi has experienced rapid population growth in recent years, it increased 35% between 2008 and 2018²⁰, which has led to the increase of its prison population as well. This has not been taken into consideration by the Malawian Government, who continue to admit large numbers of new detainees into the pre-existing prisons.
- 9.3. We have witnessed detainees having to sleep in a kneeling position or side by side on the ground, due to the lack of space. Inmates suffer from long-term knee problems and other ailments that are related to being placed in a confined space for prolonged periods.
- 9.4. In 2007, The Constitutional Court of Malawi found, in the case of Gable Masangano v. Attorney General (Constitutional Case No. 15 of 2007) that prison overcrowding and poor ventilation in prison facilities violated the right to be free from torture and cruel, inhuman or degrading treatment. The court said, overcrowding and poor ventilation breached the Malawi Constitution and international law norms. The Court also held that overcrowding could be inhumane or amount to torture, particularly when it led to unsanitary conditions increasing the risk of the spread of diseases as happens in most prisons. The court ordered the government to reduce the prison population by half, within 18 months, and thereafter eliminate overcrowding periodically.
- 9.5. Between 2018-2019, the Malawi Prison Inspectorate visited all of Malawi's prisons, which at that stage were at 260% capacity, and also found the situation to be tantamount to torture and cruel, inhuman and degrading treatment. Based on the above estimated current figure of 12,000 prisoners against a prison capacity of 5,640, the figure has reduced to about 209%. Though there have been some commendable actions taken recently by the Government to reduce the population in light of the COVID-19 crisis, such as pardons and remissions of sentences, the prisons remain severely overcrowded, and diseases such as malaria, tuberculosis, COVID-19 and HIV remain rife and threaten the life of inmates.
- 9.6. In its report submitted to the CAT in 2020, Malawi reported that 414 people had died in prison between January 2014- September 2018²¹, but no cause of death was given for any of these people.

Enact new Prisons Act

- 9.7. Despite Malawi's assertion in its previous State Party Report to the HRC, where it noted that "*a Draft Prison Bill is expected to be passed to replace the current which is outdated and not in line with constitutional requirements*"²² the Prisons Bill has still not been presented before parliament. The Bill proposes to repeal the current Prisons Act, which was enacted during colonial oppression and focused predominantly on punishment and retribution. The new Prisons Bill will attempt to put human rights at the core of the prison system of Malawi. It will enable the Minister for Constitutional and Home Affairs to build open prisons, grant further powers to the Prison Inspectorate, create a parole system, grant further powers of release to various duty-bearers, and create house detention as a form of sentence. All of this would contribute greatly to decreasing the prison population.

Lack of adequate nutrition

²⁰ <https://malawi.unfpa.org/en/resources/malawi-2018-population-and-housing-census-main-report>

²¹ Committee Against Torture, *Initial report submitted by Malawi under article 19 of the Convention pursuant to the simplified reporting procedure, due in 1997**, 6 March 2020

²² Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the covenant*, UN Doc CCPR/C/MWI/1 (13 July 2012) [28]



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- 9.8 We are concerned about the lack of sufficient food for prisoners, which results in inmates becoming more susceptible to communicable and opportunistic diseases, including, but not least, COVID-19. There have been many reports of food shortages in the country's prisons and of malnourished inmates, risking death, illness, and severe suffering.
- 9.9 Inmates continue receiving one meal per day. Often the single meal per day of beans and nsima lacks the recommended nutrients. Many prisoners rely on their relatives to travel to the prisons to supplement their meals, which is clearly a highly unreliable source of food. For example, for a period of months in 2020, relatives of inmates were not allowed visit the prisons due to the COVID-19 pandemic. Prisoners only have one opportunity a day to eat. If they are taken to court, they may spend the day there without eating and will have missed their opportunity to eat in prison and thereby have to survive without food for 24 hours.
- 9.10 The denial of adequate food as specified in Malawi Prison Regulation 53 is a violation of the State's obligations under s.42(1)(b) of the Constitution to and international human rights law, to protect the lives and wellbeing of inmates. We submit that failure to provide sufficient food and water to prisoners is contrary to the right to dignity and the prohibition against torture, inhuman and degrading treatment and it constitutes a threat to the right to life protected under sections 19(1), 19(3) and 16 of the Malawi Constitution and in general international law standards.
- 9.11 Inmates have suffered devastating consequences under Malawi's one meal per day policy. There are many reported examples of victims who lost their lives due to inadequate nutrition in Malawi prisons. A 26-year-old male was incarcerated at the Maula Prison on 20 June 2015.
- 9.12 At the time of incarceration, the victim did not suffer from any terminal illness. About a year later, in May 2016, he was diagnosed with malnutrition and pellagra. In December 2016, the victim was diagnosed with psychosis. The then medical diagnosis stated that victim showed signs of strange behaviour. It also said that he showed signs of restlessness, mutism, confusion, and suspiciousness (paranoia).
- 9.13 On 28 February 2017 this man was assessed by a doctor who said that he showed features of progressive dementia, which was likely caused by malnutrition and pellagra and the lack of vitamin B3/niacin. The doctor also said that the man was severely malnourished with large pelvic bedsores, and unkempt with faecal and urinary incontinence. Speaking about the mental state of the victim, the doctor noted that there were signs of confusion and lack of orientation to time, place and persons. The medical expert also highlighted that the victim was slow to respond and he showed signs of incoherent or confused speech. The doctor recommended his release from the prison facility and immediate transfer to a chronic care or mental health facility. Alternatively, the man should have been released to the care of his family as he was not able to care of himself (hygiene, cleaning, feeding), and required a fulltime caregiver and medical attention where not available at the place where he was being held. The man was taken to Kamuzu Central Hospital a few days before he passed away while still in police custody on the 14th March 2017. The medical report in the prison file highlights that he died of severe malnutrition, Pellagra, Psychosis and Pervicasesores.

Inadequate treatment for inmates with mental illnesses

- 9.15. Inmates suffering from mental illnesses are usually neglected in prisons. There are reported cases where remand officers used restraints measures as control mechanism against these inmates. We submit that the use of such restraint measures is against the prohibition of torture. We are also concerned that Malawi is failing undertake proper investigations for crimes that are committed by people who suffer from mental illness.



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9.16. In May 2019, two men accused of homicide, who were said to be suffering from mental health disorders, were discovered being held in police cells in Lilongwe. One had been there since January 2018, and the other since June 2018. Neither had ever been taken to Court, which violated pre-trial custody limits. The first accused person, who had been in custody for over a year, had received a mental health assessment stating that he was unfit to stand trial and could be reintegrated into the community, yet no progress had been made on the file. The cases were eventually listed in late July 2019. The presiding Judge ordered that a fresh assessment be made for the first accused person, and that an initial assessment be made for the second accused person; there was a timeline of a month given. Unfortunately, the transport to Zomba Mental Hospital and back, and the period of assessment while there, took much more than a month. The accused persons did not appear in Court again until April 2020. The fresh assessment for the first accused person had yielded the same result of being unfit, and he was discharged, over two years after his initial arrest. In the case of the second accused person, he had been declared fit to stand trial, his trial went ahead in April 2020, and after the Prosecution evidence was presented, the accused person was acquitted with no case to answer.

10. Sexual Orientation/Freedom of Association (Articles 2, 17 & 22)

(i) Relevant Concluding Observation from previous HRC Review (2014)

10.1. "Sexual orientation

The Committee is concerned that consensual same-sex sexual activity among consenting adults is still criminalized. It is also concerned about reports of cases of violence against lesbian, gay, bisexual, transgender and intersex persons and that, owing to the stigma, these persons do not enjoy effective access to health services (arts. 2 and 26).

The State party should:

(a) Review its legislation to explicitly include sexual orientation and gender identity among the prohibited grounds of discrimination and repeal the provisions that criminalize homosexuality and other consensual sexual activities among adults (arts. 137 (A), 153, 154 and 156 of the Penal Code);

(b) Introduce a mechanism to monitor cases of violence against lesbian, gay, bisexual, transgender and intersex persons and undertake all necessary measures to prevent those cases, prosecute the perpetrators and compensate the victims;

(c) Ensure that public officials refrain from using language that may encourage violence and raise awareness to eliminate stereotyping and discrimination;

(d) Guarantee effective access to health services, including HIV/AIDS treatment, for lesbian, gay, bisexual, transgender and intersex persons."

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10.2. Whilst Malawi's Constitutional and international obligations protect people from violence and discrimination, these protections are not implemented by the Government of Malawi in relation to discrimination based on sexual orientation and/or gender identity and expression. Given the levels of discrimination and violence that LGBT Malawians experience due to their sexual orientation and gender identity, the Malawian Government has failed to adequately protect them according to its constitutional and international obligations. Section 32 of the Malawi Constitution provides for the protection of freedom of assembly and association: "Every person shall have the right to freedom of association, which shall include the freedom to form associations."



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- 10.3. On 26 July 2016, the Board of Trustees of Nyasa Rainbow Alliance (NRA) filed with the Registrar General's Department, an application to incorporate and register the Registered Trustees of NRA.
- 10.4. On 18 May 2017, the Minister of Justice and Registrar General, refused to register the organization on the ground that the 'membership practices' are recognized as an offence under the Laws of Malawi. The Minister and Registrar General's refusal to incorporate and register the Registered Trustees of Nyasa Rainbow Alliance takes away the ability of citizens to associate in a manner recognised by the State and to share their opinions in a collective manner, which is fundamental to any democratic society, as recognised by the Constitution. SALC is supporting the case of NRA vs the Minister of Justice and Registrar General in order to compel the Minister to incorporate and register the Registered Trustees of NRA.

11. Recommendations

- 11.1. We respectfully ask the HRC to take the above into account in preparing the List of Issues Prior to Reporting (LOIPR) to be addressed by Malawi.
- 11.2. We further ask that the Committee:
 - (a) Urge the Malawian Government and Legislature to amend the Penal Code so as to include a provision that criminalises the use of torture and cruel, inhuman and degrading treatment or punishment, and which sets out appropriate punishments for these offences;
 - (b) Urge the Malawian Government and Legislature to adhere to its constitutional and international obligations and amend S176 to the extent that it expressly prohibits the use of forced confessions as evidence;
 - (c) Impress upon the Malawian Government to explain what steps have been taken to investigate all reported allegations of and ensure accountability for, all acts of torture and extra-judicial killing in the country, including those involved in the instances documented above examples.
 - (d) Ask the Malawian Government to ensure that the Order of the Court in the Msundwe Case is strictly adhered to, and the investigation of the Msundwe incident is investigated fully and that criminal charges are brought against those involved as soon as possible;
 - (e) Request the Malawian Government to ensure that the Independent Police Complaints Commission begins to operate immediately;
 - (f) Request again that the Malawian Government ratifies the Second Optional Protocol to the ICCPR and and abolish the death penalty at law, through revision of the Penal Code, in order to prevent further injustices caused in part by a consistently overstretched legal system;
 - (g) Urge the Malawian Government and Judiciary to continue to maintain a moratorium on executions as it has done for the past 27 years and institute a de jure moratorium on executions with a view to abolition of the death penalty;
 - (h) Ask the Malawian Government to facilitate appeals for all those convicted and sentenced to death, including by providing adequate funding and training to the Legal Aid Bureau to represent indigent clients;
 - (i) Request that the Malawian Government and Judiciary to reinstitute regular commutations of death sentences and make transparent the pardon and commutation processes;
 - (j) Urge the Malawian Government to stop the political use of the death penalty against those who have been convicted of crimes against people with albinism under the guise of deterrence, as the death penalty has not been shown to have any deterrent effect, and instead focus all efforts on protecting people with albinism from harm by addressing the root causes



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of these attacks and to strengthen nationwide campaigns to raise awareness, conduct robust investigations and trials in all cases, increase protection for victims, and finance and implement all necessary measures,” to redouble efforts to protect these vulnerable citizens.

- (k) Urge the Malawian Government and Judiciary to ensure that pre-trial custody limits are strictly adhered to, and to ensure that any prisoner held on an expired remand warrant is immediately released or granted bail;
- (l) Ask the Malawian Government to ensure that no child is held in police custody, and to ensure in particular that no child is kept in the same cell as an adult detainee;
- (m) Ask the Malawian Government to review the training of police and prison officers in an effective way to ensure adherence to human rights standards by these institutions, particularly standards speaking to the prohibition of torture. The Government should not only recognise that the police and the prisons have a role in ensuring that human rights are adhered to, but should also ensure that these institutions are exemplary in dealing with human rights violations. The Government must investigate and follow up reported cases of violation of human rights duties by state officers and activate accountability mechanisms;
- (i) Urge the Malawian Government to continue to take further necessary actions to decongest Malawi’s prisons;
- (j) Ask the Malawian Government to provide its incarcerated citizens with sufficient food and nourishment as required the Malawian constitution, Malawian law and international law;
- (k) Request the Malawian Government immediately enact the draft Prisons Bill;
- (l) Urge the Malawian Government to ensure the rights of accused persons people with mental illness are protected considering their vulnerability within the criminal justice system and release those who have been assessed as unfit to stand trial and prioritise trials for those who have been deemed fit, as they are often refused entry into the prisons and held in police cells;
- (m) Urge the Malawian Government to respect citizens’ rights to associate irrespective of their sexual orientation or gender identity.