**Joint Stakeholder Submission to the UN Committee against Torture**

**Written Information for the Examination of the State Party Report of Malawi**

**(75th session – October-November 2022)**

Submitted by:

1. Centre for Human Rights Education, Advice and Assistance (CHREAA)
2. International Bar Association’s Human Rights Institute (IBAHRI)
3. Irish Rule of Law International (IRLI)
4. Reprieve
5. **Introduction**
   1. The Malawi Centre for Human Rights Education, Advice and Assistance (CHREAA), International Bar Association’s Human Rights Institute (IBAHRI), Irish Rule of Law International (IRLI) and Reprieve submit this written information to the UN Committee against Torture for the examination of the report of the State party of Malawi.
   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.
   3. The International Bar Association, established in 1947, is the world’s leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 160 countries. The International Bar Association’s Human Rights Institute (IBAHRI) is an autonomous and financially independent entity, which works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.
   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.
   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.
6. **Methodology**
   1. The content of this briefing is based on information obtained by CHREAA, IBAHRI, 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 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In particular, it highlights the issues of: the permissive legislative framework with regards to forced confessions, prevalent and systematic torture and ill-treatment carried out by police officers (including sexual assault), extra-judicial killings, illegal pre-trial detention, and lack of accountability for perpetrators of torture and other cruel, inhuman or degrading treatment or punishment. It also speaks to the problem of overcrowding in prisons, lack of adequate nutrition for inmates, lack of adequate treatment for inmates with mental illness, and conditions on death row. These concerns are reflected in a series of individual complaints expounded in the various sections below. Finally, recommendations are made to Malawi to strengthen the prohibition and prevention of torture and ensure that the country complies with its obligations prescribed under the CAT.
7. **Normative framework**
   1. Malawi ratified the CAT on 11 June 1996. Although Malawi is a dualist state requiring an act of parliament to give effect to international law, most of the fundamental human rights promulgated in the CAT have been transposed nationally by the Malawian Constitution. Malawi has not ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).
   2. Malawi has also ratified the International Covenant on Civil and Political Rights (ICCPR), 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 (ICRMW), the Convention of the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD), all of which offer further protection to citizens with regards to the aforementioned rights.
   3. 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.
   4. Despite ratifying the above instruments, there are several instances where Malawi has breached its international obligations under the CAT, some of which are highlighted below.
8. **Substantive issues**
   1. **Articles 1 and 4: Definition and criminalisation of torture**
      1. **Constitutional and Legislative Framework**
         1. Whereas in keeping with international standards, the prohibition of torture is absolute,[[1]](#footnote-2) a criminal legislative framework to underpin this Constitutional guarantee is yet to be put in place. 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 said prohibition. Sections 19 and 45 are to be made fully operational by statutory norms on the prohibition of torture.
         2. In its initial report to the Committee against Torture, the State of Malawi submitted that the Penal Code[[2]](#footnote-3) criminalises acts that could amount to torture as per the definition provided in article 1 of the CAT, in so far as it relates to infliction of physical pain.[[3]](#footnote-4)
         3. However, all penal offences with any links to the definition of torture under the CAT criminalises only acts that have an effect on the bodily integrity of another person. The Penal Code leaves unregulated torture that manifests mentally and psychologically.
         4. Furthermore, the penal offences, having been designed to criminalise conduct between private individuals, are less likely to capture the essential elements of the crime of torture, which among other things require that the infliction of pain must be for specific purposes delimited by article 1 of the CAT.
         5. The reliance on a generic penal code to deal with the specific crime of torture is also prone to produce suboptimal results because acts that amount torture—particularly, psychological torture—are not captured in crimes such as battery and assault.
         6. A further point of concern with relying on the generic penal code, as opposed to a statute specifically designed to address torture, is that utilising the current penal offences may lead to the conflation of torture on one hand and cruel, inhuman or degrading treatment or punishment on the other. For instance, it is unclear as to which offences under the penal code criminalise torture as opposed to cruel, inhuman or degrading treatment or punishment.
      2. **Country Updates**
         1. The Malawi Government conceded in its initial report to the Committee against Torture that the most recent amendments to the Penal Code did not consider including the definition of torture. The government further committed to having the issue considered by the Ministry of Justice and Constitutional Affairs (MoJCA) in collaboration with the Law Commission (LC).[[4]](#footnote-5) Two years later, the Malawi Government has yet to move to define torture under its penal laws.
         2. Under the Constitution of Malawi, an international agreement like the CAT can only be directly invoked if an Act of Parliament has domesticated it.[[5]](#footnote-6) However, the situation is different where an international agreement codifies a norm of customary international law. In those circumstances, the Supreme Court has held that customary international law has force in Malawi unless it is inconsistent with the Constitution.[[6]](#footnote-7) The definition of torture under article 1 of the CAT is slowly gaining acceptance as a norm of international law, as some African countries have wholly or substantially incorporated the definition.[[7]](#footnote-8) Despite the absence of an act of parliament providing for the direct application of the CAT, Malawian courts have still applied its provisions.
         3. The High Court of Malawi had recourse to the CAT in the case of *Gable Masangano v Attorney General and others*, stating:

In fact the international community has struggled against torture and other cruel, inhuman or degrading treatment or punishment such that in December 1975 the General Assembly of the United Nations adopted a resolution on the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Declaration preceded the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which defines torture as:

“……..any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”[[8]](#footnote-9)

* + - 1. In *State (On the Application of Pemphero Mphande and another) v Blantyre City Council*, the High Court also invoked the preamble to the CAT in the following terms:

The claimants aptly observed that the UDHR goes further by stating in article 1 that “[a]ll human beings are born free and equal in dignity and rights.” And that the preambles to the ICCPR and ICESCR state that the “equal and inalienable rights of all members of the human family … derive from the inherent dignity of the human person.” Similarly, that the UN Convention against Torture states in its preamble that “recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and goes on to expressly state that “those rights derive from the inherent dignity of the human person.[[9]](#footnote-10)

* + - 1. The High Court in *Magombo v Attorney General* was guided by the provisions of the CAT after having recourse to a submission made by Reprieve, which cited the Convention. The court stated as follows:

This Court had recourse to Reprieve’s ***Submission to the Accountability for Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Thematic Report of the Special Rapporteur on Torture to GA76 – submitted in May 2021. The relevant parts are quoted thus***:

. . .

“Section 19(3) of the Constitution of Malawi prohibits the use of torture or cruel, inhuman and degrading treatment or punishment. The standard in Section 19(3) is complemented by Section 44 of the same, which bars the State from derogating from torture or any other forms of cruel, inhuman and degrading treatment or punishment. The Malawian Constitution also prohibits the use of forced confessions under Section 42(2)(c) and protects the right to a fair trial under Section 42(2)(f), which include the right to silence at Section 42(2)(f)(iii) and the right against self-incrimination at Section 42(2)(f)(iv). Malawi further has various international law commitments against the use of torture or cruel, inhuman and degrading treatment or punishment such as the Convention against Torture and the African Charter on Human and Peoples’ Rights.”[[10]](#footnote-11)

* + - 1. There is a lack of legal mechanisms for bringing perpetrators of torture to account with appropriate penalties. For instance, when police officers are found guilty of heinous offences amounting to torture, the punishments that are prescribed under the Police Act are simply administrative in nature.
      2. As an institution, the police have an internal system for disciplining errant police officers. According to section 54 of the Police Act, police officers ought to abide by the Discipline Code of Conduct, which creates offences against discipline. The offences are listed in the schedule attached to the Police Act and include incidents where a police officer uses unwarrantable personal violence to any person in his custody.[[11]](#footnote-12)
      3. Another offence against discipline under the Act is when a police officer ill-uses or ill-treats any person in his custody. A police officer also commits an offence against discipline when he or she discharges a firearm without just orders or cause.
      4. Section 54 of the Police Act provides that an offence against discipline committed by a police officer shall be investigated, tried and determined through disciplinary proceedings before the Police Service Commission or before a police disciplinary committee. The punishments for offences against discipline include: reprimand; severe reprimand; stoppage of increment of salary; reduction in rank or grade; and dismissal.[[12]](#footnote-13)
  1. **Article 2: Effective legislative, administrative, judicial, or other measures to prevent torture**
     1. **Constitutional and Legislative Framework**
        1. Section 42(2) of the Constitution of Malawi provides arrested persons the right to be brought before a court of law within 48 hours of arrest. The Constitution also provides procedural safeguards for accused persons, including the right not to be compelled to make a confession and the right to be segregated from convicted persons.[[13]](#footnote-14) The Criminal Procedure and Evidence Code sets the maximum period for pre-trial detention for a person accused of committing an offense triable in a subordinate court to 30 days. For offenses triable in a High Court, the maximum period is 60 days. For treason, genocide, murder, rape, and other serious offenses, the maximum period is 90 days.[[14]](#footnote-15)
        2. Section 42(1)(c) of the Constitution of Malawi provides the right to all detained persons to be provided with legal representation “where the interests of justice so require”. Section 42(2)(f) provides the right to stated-provided legal representation at trial to every accused person.
     2. **County Updates: Pre-Trial Detention**
        1. Although the Constitution places temporal limits on pre-trial custody, no formal procedure exists to track this once a person is arrested.[[15]](#footnote-16) The responsibility to monitor custody time periods is not assigned to any public official or office. As a result, many people without charges or convictions are held beyond the custody time limits because they are not informed of their rights.
        2. Many pre-trial detainees are uninformed of their right to bail by the police and the magistrates at their first court appearance. About 75% of pre-trial detainees were unaware of their right to bail, due to the lack of access to legal assistance and the failure of police officers and court magistrates to inform them of this right.[[16]](#footnote-17) The Malawi Bail Project reported that people are often forgotten in the system and detained in overcrowded and inhumane conditions because their case files are simply lost.[[17]](#footnote-18)
        3. Some people reported that police officers imprisoned them without taking them to court, despite the right of an arrested person to be brought before a court within 48 hours.
        4. The Malawi Inspectorate of Prisons found that many people were being detained for bailable offenses, including offenses where maximum sentences are only three to six months.[[18]](#footnote-19) In some cases, the length of pre-trial detention was equal to the maximum sentence for the alleged offense.[[19]](#footnote-20)
        5. In our experience, it has been the case that persons who are arrested for murder are brought to court within the required 48 hours so that the case is committed to High Court. However, after their first court appearance, they spend years in custody without any attempts by the State to prosecute them. Some detainees have been on remand, awaiting trial, for the past five years.[[20]](#footnote-21) The situation is worse in the northern judicial region of Malawi and, in September 2019, YOWSO noted that Mzimba Prison had 70 Homicide Remandees while Mzuzu Prison had 65 Homicide Remandees.
        6. In a 2011 audit, Open Society found that pre-trial detainees were frequently detained beyond legal time limits.[[21]](#footnote-22) Despite laws to limit the length of pre-trial detainment, the audit found that lengthy pre-trial detention periods were due to a lack of appropriate record-keeping and lack of a mechanism to ascertain how long people have been held in custody. In addition, the audit found that government officials, including magistrates, have little incentive to comply with the limits and follow the laws.[[22]](#footnote-23)
        7. In a study by Reprieve of people sentenced to death prior to 2007, the average time spent in remand was 4.5 years, which is 18-times the statutory maximum period of 90 days.[[23]](#footnote-24)
        8. In one case, an accused person was held in detention for 14 years without trial.[[24]](#footnote-25) His lawyers could not find a warrant of commitment or any documentation of his detention. Upon an application to court, the High Court of Malawi found that the applicant’s detention violated the right to personal liberty and ordered the Malawi Prison Service to establish precautionary measures to prevent future human rights violations.[[25]](#footnote-26) However, we are concerned that these measures have not been adopted or shared with the public.
        9. In its initial report, the Government of Malawi reported that the Malawi Prison Service maintains and updates detention registers of all people in detention or in police custody. In our experience, most police stations and prisons have names of people in custody recorded in a hard-copy file. However, there is no centralized register that captures all people in detention or in custody at any given time in the country. The lack of coordination between different police stations, prisons, and jurisdictions have also led to errors in the administration of justice.
        10. Misspellings and recording errors have also delayed lawful release, as well as accidental releases of the wrong person.
        11. According to the Malawi Prison Inspectorate report, some courts did not take into account pre-trial detention periods in sentencing, despite the fact that the convicted person was held for a lengthy period of time before the conclusion of their trial.[[26]](#footnote-27)
     3. **Country Updates: Access to Legal Aid**
        1. The Legal Aid Act created the Legal Aid Bureau to provide legal aid to persons in civil and criminal matters if the person has insufficient means and if it is in the interests of justice.[[27]](#footnote-28)
        2. However, the lack of legal aid lawyers and the rates of poverty of accused persons means that 90% of people who are caught in the criminal justice system are unrepresented.[[28]](#footnote-29)
        3. The Legal Aid Bureau is woefully underfunded. In the 2022-2023 budget, the office submitted a budget plan for K6.3 billion but was only allocated K699 million (USD 684,960) for operations. In response, the Director said that the allocation was “as good as closing the office”.[[29]](#footnote-30) He reported that the office has 26,561 cases to handle among 41 lawyers.[[30]](#footnote-31)
     4. **Country Updates: Independent Police Complaints Commission (IPCC)**
        1. In the initial report of Malawi, it stated that the Police Act established the Independent Police Complaints Commission (IPCC). The IPCC’s mandate is to: (i) receive complaints by the public against the Malawi Police Service, (ii) to investigate deaths or injury caused by police, and (iii) to investigate all deaths and injuries that occur in police custody.[[31]](#footnote-32) The IPCC was established to be a complaints procedure that operates independently of the Malawi Police Service.[[32]](#footnote-33)
        2. In its initial report, Malawi reported that the Commission has not been operationalized.[[33]](#footnote-34) In the Judgement of the Msundwe Case, the High Court ordered that the Commission be established immediately. Although a Commissioner has been appointed, the Commission is still not fully operational.
        3. The IPCC is under-resourced. The Commissioner stated in September 2021 that the commission had received 99 complaints but were only handling 14 complaints, due to resource constraints. He stated that while the work of the commission demands 30 people, he can only recruit 15 full-time staff due to budget constraints.[[34]](#footnote-35)
     5. **Country Updates: Inspectorate of Prisons**
        1. Section 169 of the Constitution of Malawi establishes the Inspectorate of Prisons, which is charged with monitoring conditions of detention. However, there is no constitutional or statutory requirement to inspect places of detention at regular intervals.
        2. The Inspectorate of Prisons reported that prison inspections occurred in 2018, 2014, and 2009.[[35]](#footnote-36)
  2. **Article 10: Training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment**
     1. **Country Updates: Training of Law Enforcement Personnel**
        1. In its initial report, Malawi stated that it has made significant strides in educating law enforcement on the rights of individuals who are involved in the criminal process. The Malawi Police Service runs training schools for police offices and recruits. In its curriculum, there is a human rights course which covers the provisions of the CAT. The Malawi Human Rights Commission has also developed a manual which is used in various Police Training Schools.
        2. The Malawi Government further stated that the same applies to newly recruited prison officers that are trained in schools run by the Malawi Prisons Service. The Department has reviewed its training curriculum and it now incorporates both domestic and international human rights instruments. Among the books used, the Department has developed a separate human rights trainer’s manual and human rights handbook for both instructors and trainees.
        3. The State in its initial report further stated that the prison department also distributed at least three copies of the Penal Code, Criminal Procedure and Evidence Code (CP & EC) and GEA to each prison station for the officers in charge to be used during the staff lecture sessions to emphasise that torture is criminalised under the State party’s statutes. The Department monitors the effectiveness of training and educational programmes in reducing cases of torture and ill-treatment through daily, weekly and monthly situation reports, which are submitted to the office of the Chief Commissioner, who then consequently directs the affected prison station to take action.[[36]](#footnote-37)
        4. The State further submitted that the Human Rights Section in the Ministry of Justice and Constitutional Affairs, in corroboration with the Malawi Prisons and other key stakeholders, is developing an implementation tool kit for both the Robben Island Guidelines and the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines).
        5. Civil society organizations, such as Centre for Human Rights Education, Advice and Assistance (CHREAA), also train police and prison officials on human rights including provisions of the Convention. African Policing Civilian Oversight Forum (ARPCOF) has also conducted training sessions with police officers on the Guidelines on the Luanda Guidelines.[[37]](#footnote-38) In its initial report, the State Party did not provide details on the frequency and the number of trainees who receive this training.
        6. In consideration of the initial report of Malawi, we believe that the Government is engaging with the relevant stakeholders and aptly providing human rights training to police and prison officers. Further trainings with human rights organizations, such as CHREAA and the Malawi Human Rights Commission (MHRC), ensure that police and prison officers are updated on human rights principles throughout their careers.
        7. The regular incidents of torture within the criminal process, despite the comprehensive training that various stakeholders within the criminal process have and continue to receive, indicate that the problem lies in the implementation of the knowledge and information that is acquired from the training.
     2. **Country Updates: Roundtable of Judicial Officers**
        1. The Judiciary of Malawi, IBAHRI, IRLI, and Reprieve participated in a two-part roundtable, titled: “The Prohibition of the Use of Torture and Torture-Tainted Evidence: Theoretical Approaches to the Exclusionary Rule”. The roundtable first engaged in a two-day virtual seminar in November 2021, which was followed by a two-day live engagement in June 2022. All judges from the Criminal Division of the High Court and seven judges from the Supreme Court of Appeal attended. Judges from both the High Court and Supreme Court engaged with the Committee for the Prevention of Torture in Africa (CPTA), academics, and civil society organisations in knowledge-sharing on the prohibition and prevention of torture and, specifically, the implementation of the exclusionary rule. At the end of the session, proposals to address issues of torture were suggested by the participants. The most prominent proposal was the need for the Supreme Court to declare the death penalty unconstitutional.[[38]](#footnote-39)
     3. **Country Updates: Education and Training for Medical Personnel**
        1. In Malawi, victims of torture and cruel or inhuman or degrading treatment tend to be accused persons, detained persons or sentenced prisoners. Under the Constitution, this category of people has been especially singled out as requiring special protection. Thus, under section 42(1)(b) of the Constitution of Malawi, detained persons, including sentenced prisoners, have a right to a fair trial which includes an unqualified right to access to medical treatment at the state’s expense.
        2. With the inevitable interaction between medical personnel and victims of torture, the expectation would be that the State should invest heavily in training medical personnel on investigating and documenting torture and ill-treatment and the rights of victims of torture. Surprisingly, however, the initial report of Malawi did not address the question of how the State party has so far invested in the training of healthcare providers.
        3. To emphasise the challenges that victims of torture face in accessing medical treatment, up until 2022, medical personnel had been, regrettably, demanding that patients who allege physical injuries resulting from police action must present a police report before providing medical assistance. This speaks volumes of the poor levels of education among health workers pertaining to an accused person’s constitutional right to an unqualified access to medical assistance. The rationale behind this unfortunate practice was that such patients were suspected to be criminals. In order to stem the practice of demanding a police report, it required a directive from the Ministry of Health.[[39]](#footnote-40) This is surely an area where the State ought to invest heavily in educating medical personnel on the rights of victims of torture within the criminal process.
  3. **Article 11: Systematic review of interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction**
     1. **Constitutional and Legislative Framework: Coercive Interrogation**
        1. The Constitution of Malawi prohibits law enforcement from compelling accused persons to make admissions or confessions that can be used against them.[[40]](#footnote-41)
        2. The Police Act further prohibits police officers from improper uses of force. Under the First Schedule to the Police Act, use of unwarrantable personal violence by a police officer against a person in the police officer’s custody is an offence against discipline.[[41]](#footnote-42)
     2. **Country Updates: Coercive Interrogation**
        1. Emboldened by a permissive legal environment (see section on article 15), police officers have routinely resorted to torture to elicit confessions out of suspects during interrogations. The most recent example of the police resorting to violent techniques to compel suspects to confess to crimes is that of Clifford Khomba.[[42]](#footnote-43) In that case, which a Reprieve fellow is handling, the suspect narrated his ordeal as follows:

At the police station, Khomba complained that he was manhandled by almost every police officer who got close to him and one of the officers took away his cell phone and a wallet. “While I was lying down on the floor and in pain, there came another officers who started pulling me saying he was taking me to the cells and on the other hand someone was squeezing my throat and others were beating me using mop handles.

“At this time, I was unable to speak. Later I saw someone who seemed to be their boss who stopped them from beating me and upon seeing my condition, he later commanded that I should be taken to the hospital and they did so but it was too harsh.

“They were just pulling me and I was thrown into their car like a dead dog, even the handcuffing itself, it was so tight. I really believe that I lost my speech because of the strangulation, I was willing to speak but it was too painful on my throat,” narrates Khomba.[[43]](#footnote-44)

* + - 1. Khomba stayed for more than a week in the hospital without any treatment, as government hospitals usually treat accused persons with contempt. Medical personnel avoid treating accused persons on the justification that they are dangerous people. Upon being served with an application for immediate release for unlawful detention, the police did not release him. Instead, the police obtained hospital clearance to take Khomba to Zomba Central Hospital. At this point, Khomba could not walk, speak, eat, or even sit, so he was extremely vulnerable to police abuses and at risk of death.[[44]](#footnote-45)
      2. In another case, an 18-year-old man was arrested for homicide. He was then beaten with sticks and attacked with machetes (known as panga knives in Malawi) by police officers for three days until he fell unconscious. He was 18 years old at the time. He eventually confessed to the murder as a result of the inhumane treatment.[[45]](#footnote-46)
      3. During another bail application, a woman was accused of homicide when her 3-year-old child died. She says the child died due to illness, and she went to report the incident to police, who subsequently arrested her for homicide. She was then beaten by a police officer with a leather belt. She was pregnant with her second child during this incident and suffered a miscarriage as a result.[[46]](#footnote-47)
      4. Another man confirmed he was beaten with a hosepipe, and another again reported being placed in leg irons and beaten with belts and boots.[[47]](#footnote-48) In 2020, five men were tortured with electrocuted rods and hot irons were applied to their backs and genitals. One of the men–namely, Buleya Lule–died as a result of the electrocution.[[48]](#footnote-49)
      5. This is a far cry from the tenets espoused under the Méndez Principles, which are grounded on empirical evidence that has clearly shown that the use of torture, ill-treatment and coercion does not work to elicit trustworthy information. Such practices not only harm the areas of the brain responsible for memory and general cognitive functions, thereby physically and psychologically harming the person, they also lead to false confessions and unreliable information as individuals become disoriented and provide fabricated memories or say anything to stop the abuse.[[49]](#footnote-50)
      6. In another case, two men were arrested for murder. There had been no body found, nor witnesses to the murder. The only incident that seemed to have happened was that there was a missing person.
      7. Many people in the missing person’s village suspected the two men. They also suspected a third man who refused to go the police and was subsequently killed in an act of mob violence. No one has been arrested for this incident. The other two men were arrested as a result of pressure from the community.
      8. Both men were tortured into confessing to the missing man's murder. The men were held on remand for two years, until finally the alleged victim was found alive in Mozambique. There was then a mediation with police to have the men discharged, but they are currently still in prison. This case exemplifies many of the faults within the Malawi police system.
      9. First, it shows the widespread use of torture to elicit confessions. Second, it shows the desperately low standard of investigations. Police frequently arrest first and ask questions later, if they even ask questions at all. There is limited or no access to forensic evidence, so confession and witness testimony are still the most commonly used forms of evidence in Malawi, which is why the police continue to rely so heavily on torture and ill-treatment. The weight to apply to this type of evidence has reduced drastically the world over since the advent of forensic evidence, and it has since been widely shown that this type of evidence is very commonly incorrect. Forced confession evidence in particular, as is shown in this case, is often false, and only given to stop torture. Lastly, it shows how police investigations are very much influenced by the majority views of the local village rather than evidence, and the widespread nature of mob violence, which occurs with little accountability. This makes investigations in Malawi extremely unreliable as a whole, as they are plagued with human rights abuses.
    1. **Country Updates: Overcrowding in Detention**
       1. The prisons of Malawi remain severely overcrowded with an overall population of about 12,000 prisoners in the system against a prison capacity of 5,610. Malawi has experienced rapid population growth in recent years, increasing by 35% between 2008 and 2018,[[50]](#footnote-51) which has led to the increase of its prison population as well. This has not been taken into consideration by the Malawian Government, which continues to admit large numbers of new detainees into the preexisting prisons.
       2. 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. In its initial report, Malawi reported that 414 people had died in prison between January 2014 and September 2018, but no cause of death was given for any of these people.
       3. 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 declared that 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.
       4. Between 2018-2019, the Malawi Prison Inspectorate visited all of the prisons of Malawi, 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 overcrowding figure has reduced to about 209%.
       5. During the COVID-19 pandemic, multiple calls were made in order to reduce overcrowding, including calls to release elderly and medically vulnerable people. Some precautionary measures, such as handwashing and separating medically vulnerable people, were introduced. However, these measures were introduced slowly and irregularly. The Government pardoned 499 people in August 2020, but cases of infections were surging at the time[[51]](#footnote-52) and people with significant health issues and the elderly were not necessarily released. These measures were not enough to significantly reduce overcrowding where 14,000 people were being in held in prisons at the time, which is well beyond the recommended prison capacity of about 5,000 people.[[52]](#footnote-53)
       6. Prisons in Malawi remain severely overcrowded. Diseases such as malaria, tuberculosis, COVID-19 and HIV remain rife and threaten the life of inmates.
    2. **Country Updates: Inadequate Resources for Healthcare**
       1. In 2018, people who were incarcerated with HIV reported that health management was made difficult due to overcrowding. Some people reported not being able to take antiretroviral drugs due to a lack of private space to keep their drugs. People also reported that HIV/AIDS easily spreads due to sexual assault and sharing of razor blades and gloves.[[53]](#footnote-54)
       2. Inmates suffering from mental illnesses are usually neglected in prisons. There are reported cases where remand officers used restraints as control mechanisms against these inmates. We submit that the use of such restraint measures is against the prohibition of torture and ill-treatment.
       3. We are also concerned with the fact that many people are kept in de facto solitary confinement in some prisons. Solitary confinement for a period of up to twenty-five days can also be ordered if a person is found guilty of a prison offence.[[54]](#footnote-55) Prolonged solitary confinement amounts to psychological torture[[55]](#footnote-56) and can lead to intense feelings of isolation.
       4. We are further concerned that Malawi is failing undertake proper investigations into crimes committed by people who suffer from mental illness. In May 2019, two men accused of homicide, who were said to be suffering from mental health disorders, were discovered 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 within one month. 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 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, and his trial went ahead in April 2020. After the prosecution’s evidence was presented, the accused person was acquitted with no case to answer.
    3. **Country Updates:** **Pre-trial Detention**
       1. In its initial report, the Government of Malawi stated that the Constitutional right to bail is an effective legislative measure in reducing prison overcrowding. On how prolonged pre-trial detention contributes to torture and other cruel, inhuman or degrading treatment or punishment, see the above section on article 2.
    4. **Country Updates: Lack of Adequate Nutrition**
       1. 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.
       2. Inmates continue to receive 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 must survive without food for 24 hours.
       3. The denial of adequate food as specified in Malawi Prison Regulation 53 is a violation of the State’s obligations under section 42(1)(b) of the Constitution and international human rights law. We submit that failure to provide sufficient food and water to prisoners is contrary to the right to dignity and the prohibition of torture and cruel, inhuman or degrading treatment and constitutes a threat to the right to life protected under sections 19(1), 19(3) and 16 of the Malawi Constitution and international human rights law.
       4. Inmates have suffered devastating consequences under the government’s one meal per day policy. There are many reported examples of victims who lost their lives due to inadequate nutrition in Malawi prisons. For example, 26-year-old male was incarcerated at the Maula Prison on 20 June 2015. 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).
       5. 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 that 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 unable to care of himself (hygiene, cleaning, feeding) and required a fulltime caregiver and medical attention, which was 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 14 March 2017. The medical report in his prison file highlights that he died of severe malnutrition, Pellagra, Psychosis and Pervicasores.
       6. There is currently one woman, S.J., under the sentence of death in Malawi.[[56]](#footnote-57) She is being held in Domasi Prison, where the prison conditions remain similar to those of Maula Prison, which is where the Special Rapporteur on the right to food visited from 12 to 22 July 2013.[[57]](#footnote-58) Much like Maula Prison, Domasi Prison lacks adequate and nutritional food. Most prisoners still only receive one daily meal made up of the traditional Malawian maize meal (nsima) and beans or peas due to budget constraints. S.J. reports that there is no variety in her diet, which significantly affects her health.[[58]](#footnote-59)
       7. Prison conditions in Malawi amount to inhuman and degrading treatment. In Malawi, the average life expectancy for those in prison is a mere 10 years.[[59]](#footnote-60)
    5. **Country Updates: Conditions on Death Row**
       1. Although Malawi has maintained a facto moratorium on the death sentence for 30 years, the risk remains for people to be sentenced to the death penalty in Malawi. The deplorable conditions on death row not only affect the three people who remain there, but also pose a risk to others who may be subject to the same conditions as long as the death penalty is retained as a potential criminal sentence.
       2. Judicial pronouncement in the *Masangano* case in 2007 held that prison conditions in Malawi amounted to torture and other cruel, inhuman or degrading treatment or punishment.[[60]](#footnote-61) In particular, the Court singled out hygiene, food and overcrowding as the major factors which made prison conditions in violation of the prohibition of torture. The court issued consequential orders with a view to improving prison conditions in Malawi. Despite this landmark ruling, prison conditions have largely remained atrocious. The 2019 Malawi Prison Inspectorate report, for instance, states that since 2014, when it started producing the report, the same challenges have blighted Malawian prisons. The report states:

This is the seventh report compiled by the Inspectorate of Prisons. The last immediate past report was for the year 2014. This was preceded by the 2009 report. All these reports reveal common recurrent general problems of overcrowding, poor sanitation, poor diet, poor ventilation.[[61]](#footnote-62)

* + - 1. While the conditions in Malawian prisons afflict all prisoners indiscriminately, they are even more pronounced for death row inmates. Not only do death row inmates contend with poor sanitary and nutrition conditions, they also live under the perpetual fear and uncertainty of a looming execution. In a state of a de facto moratorium, death row inmates are not told of when their execution is due. This failure to inform a death row inmate when his or her execution is anticipated has been held to amount to torture by the Human Rights Committee.[[62]](#footnote-63) Thus, the torture that these death row inmates face is both physical and mental and is above and beyond the one endured by inmates serving sentences other than the death sentence.
    1. **Country Updates: Enact New Prisons Act**
       1. Malawi asserted in its State Party Report to the Human Rights Committee that “a Draft Prison Bill is expected to be passed to replace the current which is outdated and not in line with constitutional requirements”.[[63]](#footnote-64)
       2. 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 has a form of sentence. All of this would contribute to a better legal framework for decreasing the prison population. However, the Prisons Bill has still not been presented before Parliament.
  1. **Articles 12 - 13:** **Right to complain to, and to have his case promptly and impartially examined by competent authorities**
     1. **Country Updates: Independent Complaints Mechanisms**
        1. Individuals have the right to make a complaint against the Malawi Police Service to the IPCC. However, due to budgetary and human resource constraints, the office has a backlog of complaints and reported that it is actively investigating only cases of death by police (see section on article 2 above).[[64]](#footnote-65)
        2. The MHRC, established by section 129 of the Constitution of Malawi, is an independent body that is empowered to investigate human rights violations. The MHRC may make recommendations to government bodies for the promotion of human rights, but it does not have judicial or legislative powers.[[65]](#footnote-66)
     2. **Country Updates: Allegations of Rape and Sexual Assault by Police Officers**
        1. In June 2020, Malawi held a second presidential election, as irregularities had been found in the previous election, which had taken place in July 2019. The new election caused controversy in Malawi and many nationwide protests took place. During one such protest, on 8 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 15 October 2019 (“the Msundwe incident”). The MHRC investigated the incident and provided a comprehensive report, which found that 13 women and 4 girls were raped and sexually assaulted.[[66]](#footnote-67)
        2. 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 13 August 2020, ordered, inter alia, that the police fully investigate the matter and submit an occurrence book to the Court within 14 days, which would give detailed account of the officers accused of raping and assaulting the women and girls.[[67]](#footnote-68) The police have not done this, thereby breaching the court order, and no criminal prosecutions have been brought against any of the officers involved.
        3. In August 2021, MPS leaked a report alleging that the MHRC report was false because the rape victims were coerced by politicians to make false claims.[[68]](#footnote-69) The MHRC defended their investigation and report but agreed to a fresh investigation.[[69]](#footnote-70) The IPCC is now assigned to conduct an investigation into the Msundwe incident. However, the IPCC is limited in funding and human resources in order to conduct the investigation.[[70]](#footnote-71) In September 2021, the IPCC hoped that it would have a report by October 2021,[[71]](#footnote-72) yet a report has not been released to the public.
     3. **Country Updates: Allegations of Extrajudicial Killings by Police Officers**
        1. We are concerned at the culture of extrajudicial killings of people who have been arrested or convicted.
        2. Although the Inquest Act requires that the police undergo a full investigation into all deaths in custody, not a single inquest was conducted into the circumstances of the deaths of 34 people who have died under suspicious circumstances in custody or involving police officers from 2009 to 2018, who were identified by CHREAA.[[72]](#footnote-73)
        3. In 2018, CHREAA also conducted a study of 43 victims who were allegedly killed by police in “Operation Elimination”, an effort to execute previously convicted people in violation of international human rights law. A police officer who spoke to CHREAA bragged how they had killed and eliminated notorious criminals through “Operation Elimination”.[[73]](#footnote-74) An interviewed officer revealed that police would call people recently released from detention in handcuffs to a specific location where the police would shoot and kill them. The bodies were taken to nearby mortuaries with the explanation that the deceased was killed during an armed robbery.[[74]](#footnote-75)
     4. **Country Updates: Lack of Judicial Accountability**
        1. The law does not expressly criminalise torture and other cruel, inhuman or degrading treatment or punishment (see sections on articles 1 and 4), and it is permissive in cases where torture is used to obtain confessions or information (see section on article 15). Thus, prosecutions against police officers are rare.
        2. In a recent judicial colloquium on the prevention of torture, participants indicated that they lacked sufficient guidelines to deal with the evidentiary complexity of the torture cases presented to them, including determining when certain conditions or treatment amount to torture, as defined by international law.[[75]](#footnote-76)
  2. **Article 14: Redress and enforceable right to fair and adequate compensation, including rehabilitation** 
     1. **Constitutional and Legislative Framework**
        1. The right to fair and adequate compensation, including means for rehabilitation, finds expression in the Constitutional right to an effective remedy for violation of rights guaranteed under the Constitution.[[76]](#footnote-77)
     2. **Country Updates: Criminal Proceedings**
        1. In the absence of express criminalisation of torture, compensation in criminal proceedings for torture victims or their families is rare if not non-existent in Malawi. In a criminal case where compensation, either to the victims of torture or their families, was apt, the court declined to order compensation by sticking to custodial sentences. For instance, in the case of *Republic v Cheuka*, where a police officer was convicted of manslaughter for improper use of a firearm, the court sentenced him to life imprisonment, but no compensation was ordered for the victim’s family.[[77]](#footnote-78) This state of affairs is patently undesirable.
     3. **Country Updates: Civil Proceedings**
        1. In civil proceedings however, compensation has been ordered in cases involving police brutality against suspects. A recent case on the point is *Magombo v Attorney General*. In that case, the claimant was beaten with a burglar bar in multiple sessions in one morning by police officers. By the third session, the bone on his arm splintered. Due to the beatings, the claimant could not sit or sleep due to the pain. The injuries have also affected his ability to work. In his witness statement to the court, the claimant provided a detailed account of the torture and the lasting aftermath that was caused by police action.
        2. The High Court found that the actions of the police officers were “oppressive, arbitrary and an unconstitutional action by a servant of the Government”.[[78]](#footnote-79) The court therefore awarded the claimant a sum of K2 million (USD 1,960) for pain and suffering, K1 million (USD 980) for loss of amenities of life, K1 million (USD 980) for disfigurement and K30,000,000 (USD 29,400) as exemplary/punitive damages and costs of the action (to be taxed). In total, this amounted to K34,000,000 (USD 33,300).
        3. However, the Order raises concern where it states: “This court finds that the police officers tortured the Claimant intentionally and without cause tortured the Claimant intentionally and *without cause*”.[[79]](#footnote-80) The implication that this statement raises—that torture may be acceptable *with cause*—is contrary to article 2 of the CAT and section 45(2)(b) of the Constitution of Malawi, which state that the prohibition of torture is non-derogable.
        4. Additionally, the family of Mr. Buleya Lule have waited three years for justice. On 14 September 2022, the High Court of Malawi ruled that 10 of the 13 police officers have a case to answer on the charge of murder.[[80]](#footnote-81) Three police officers were acquitted of murder and causing grievous harm.
        5. Despite agreeing to compensate Lule’s widow K331 million in damages in June 2021,[[81]](#footnote-82) the Government failed to compensate Charity Lule until November 2021 and ultimately reduced final compensation to K44 million.[[82]](#footnote-83)
        6. While there is an avenue for compensation in civil proceedings, it is a very costly avenue that the majority of torture victims cannot afford. Unlike in criminal proceedings, where the State takes up the matter, in civil proceedings, the claimant initiates the suit as a private person. The state agents–namely, the police–on the other hand, are represented by the attorney general in civil suits.
        7. In light of the difficulty that lies in pursuing a civil remedy against state agents for torture by indigent torture victims, most of them suffer injustice without any remedy by way of compensation.
     4. **Country Updates: Reparation Programmes**
        1. Against the backdrop of gross human rights violations suffered by Malawians during the one-party era, the Constitution of Malawi created a National Compensation Tribunal, whose mandate was to investigate and award compensation to the victims of the one-party regime. However, the mandate of the tribunal was limited to 10 years, between 1994 and 2004. Since the expiry of its mandate, Malawi has not established any other reparation programme for victims of torture at the hands of the state.
     5. **Country Updates: Compensation and Rehabilitation for Death Row Prisoners**
        1. No mechanisms have been put in place by the State to rehabilitate people upon their release from death row either through commutations or resentencing.
        2. In a rather grossly unfair manner, during the capital resentencing project, the courts, while commendably releasing several inmates from death row, did not order compensation, even in instances where the released prisoners did not deserve the death sentence in the first place.
  3. **Article 15: Exclusionary Rule**
     1. **Constitutional and Legislative Framework**
        1. Malawi is one of few countries in the world that still retains a permissive legal framework with regards to forced confessions. The State openly summarised the law on this issue in its initial report 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 of Republic v Chinghai 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.[[83]](#footnote-84)

* + - 1. The Criminal Procedure and Evidence Code retains a permissive regime for the use of coercive interrogation techniques in search of evidence. Section 176(1), as read with subsection (3), creates a conducive environment for law enforcement to resort to such techniques including torture when conducting criminal interrogations. The sections in question read as follows:

(1) 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.

. . .

(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.

* + 1. **Jurisprudence on Section 176**
       1. Various High Court judgements have interpreted the application of section 176 differently, and the case law on this provision is inconsistent and contradictory.
       2. Some High Court judges have tried to argue that section 176 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.[[84]](#footnote-85)
       3. 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 section 176(3) means that corroborating evidence should be found so that the confession can be found to be “materially true”.
       4. In the above Supreme Court Judgment, 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.
    2. **Country Updates**
       1. 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. In the many cases that adhere to the precedent set in the *Bokhobokho* judgment, often no investigation is carried out into whether torture or ill-treatment actually occurred. 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.
       2. 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 that he alleged had occurred through police beatings. The court however referred to section 176 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”.
       3. In the recent case of *Republic v Yustino Kamanga* (Confirmation Case No. 952 of 2020) [2021] MWHC 124 (11 October 2021), the accused alleged that he was forced into admitting to the offence and was forced to thumbprint a caution statement written by police officers. However, due to the fact that the allegation of torture only came during cross examination, the court was satisfied that the confession was made voluntarily:

The accused never said anything of the sort in examination in chief. One wonders whether he could skip testifying on such a crucial point in his examination in chief and not to have given the details of the torture during that time. He also did not cross examine the police officer Detective Sub Inspector Ali who recorded it and who came to testify on the allegation of torture. Thus I am of the opinion that the accused made the statement voluntarily.

* + - 1. Reprieve is aware of 11 people who were tortured, 10 of whom were sentenced to death at the end of their trial, who were suspected of crimes involving persons with albinism.[[85]](#footnote-86) The one arrested person who was not tried and sentenced to death was Buleya Lule, who was killed in detention after he was electrocuted to death by police officer. In the cases of all 12 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.
      2. In sum, section 176 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 basic due process rights—the right to silence and the right against self-incrimination—that seek to prevent torture.
  1. **Article 16: Cruel, inhuman or degrading treatment or punishment** 
     1. **Constitutional and Legislative Framework**
        1. Section 19(3) of the Constitution of Malawi protects people against “cruel, inhuman or degrading treatment or punishment”. Such acts are not defined in statute. In *Masangano*, the High Court referred to article 1 of the CAT in interpreting section 19(3) of the Constitution (see section on articles 1 and 4).[[86]](#footnote-87) In the judgement, however, the court used “torture” and “cruel, inhuman or degrading treatment and punishment” interchangeably without distinction, which evidences our concerns about conflation of the two terms. In the Msundwe Case, the High Court held that rape and sexual assault constitutes a violation of section 19(3) of the Constitution of Malawi.[[87]](#footnote-88)
        2. Section 20(1) of the Constitution of Malawi ensures that all persons are guaranteed equal protection from discrimination “on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition”.
     2. **Country Updates: Attacks on People with Albinism**
        1. Crimes against people with albinism, including kidnapping and murder, have been a serious issue in Malawi for many years. In 2017, the Malawian government refused to bring suspects accused of attacking and killing people with albinism to account.[[88]](#footnote-89) In 2018, the Government of Malawi created a National Action Plan on Persons with Albinism[[89]](#footnote-90) to improve accountability for acts of cruel, inhuman or degrading treatment or punishment perpetrated against persons with albinism. The Government stated that it would establish effective legal frameworks to ensure the prosecution of crimes against persons with albinism and provide safety and support for individuals and their families.
        2. Between 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 three-year hiatus by the Malawian courts.
        3. 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.
        4. Various stakeholders have also stated that, despite the abovementioned Plan, not much has been achieved to protect and impact the lives of persons with albinism.[[90]](#footnote-91) Despite urging from the United Nations to continue implementation of the National Action Plan,[[91]](#footnote-92) the Government announced budget cuts in the Plan’s implementation from K400 million to K200 million in June 2022.[[92]](#footnote-93)
        5. 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,[[93]](#footnote-94) 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.[[94]](#footnote-95) 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”.[[95]](#footnote-96)
        6. The National Action Plan also falls short of protecting people with albinism where it does not ensure accountability for individuals who are involved in trafficking albino body parts. A police spokesperson has denied the existence of a market for body parts of people with albinism and has refused to crackdown on such markets.[[96]](#footnote-97)
     3. **Country Updates: Ill-treatment of LGBTQI+ people**
        1. In December 2021, a transgender woman was arrested in Mangochi and charged for having sexual intercourse against the order of the nature contrary to section 153(c) of the Penal Code. She was also charged with theft. The Senior Resident Magistrate convicted and sentenced her to eight years’ imprisonment with hard labour. The court seemed to rely on the fact that she dressed as a woman and that she traded as a sex worker. Both of these factors are not necessary to prove any of the offences that she was charged with. Further, there is a moratorium on the use of section 153, which has been in effect since 2012. Therefore, this judgement is irregular at best and illegal at worst. The arrest and detention of the client in this case is complicated by the fact that she is being detained in the male section, where she is likely to suffer both sexual and physical abuse.[[97]](#footnote-98)
        2. Additionally, there is an on-going matter in the High Court which is challenging the application of sections 137(a), 153, 154 and 156 of the Penal Code, based on the fact that they violate section 20 of the Constitution of Malawi, which prohibits discrimination on any grounds. In July 2014, the then Solicitor-General and Secretary of Justice Janet Chikaya-Banda affirmed to the United Nations Human Rights Committee that these laws would not be enforced pending the High Court review of their constitutionality.[[98]](#footnote-99)

1. **Recommendations**
   1. We respectfully ask the Committee against Torture to take the above into account in examining the State report of Malawi.
   2. We further ask that the Committee:
      1. Encourage the Malawian Government to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT);
      2. Urge the Malawian Government and Parliament to enact statutes that criminalise torture and ill-treatment, including psychological torture, and punish such acts with appropriate penalties in line with article 1 of the CAT;
      3. Call on the Malawian Government to amend the Criminal Procedure and Evidence Code to comply with article 15 of the CAT by repealing section 176
      4. Request the Malawian Government to immediately enact the draft Prisons Bill;
      5. Encourage the Malawian Government to address and dismantle the culture of torture and ill-treatment in police investigations and interrogations;
      6. Impress upon the Malawian Government, Executive and Judiciary the urgent need to provide trainings on effective interrogation and investigation techniques pursuant to international human rights law, standards and norms, including the Méndez Principles, to all police officers, investigatory officials, judiciary officers, and other actors in criminal investigations and procedures;
      7. Request the Malawian Government to invest in the education and training of medical personnel on the rights of victims of torture;
      8. Encourage the Malawian Government and Judiciary to continue engaging in roundtables and colloquia on the prohibition and prevention of torture, such as the recent roundtables which have already brought to light the key legislative, procedural, and institutional elements needed to respect international law;
      9. Call on 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;
      10. Request the Malawian Government and Executive to provide its incarcerated citizens with sufficient food and nourishment;
      11. 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 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;
      12. Urge the Malawian Government and Parliament to abolish the death penalty, continue to maintain a moratorium on executions as it has done for the past 30 years and institute a de jure moratorium on executions;
      13. Call on the Malawian Government to ensure accountability for torture and ill-treatment;
      14. Call on the Malawian Government and Executive to ensure that the Order of the Court in the Msundwe Case is strictly adhered to, and that the investigation of the Msundwe incident is investigated fully and that criminal charges are brought against those involved as soon as possible;
      15. Ask the Malawian Government and Judiciary to ensure transparent accountability for the actions of police officers who tortured and murdered Buleya Lule and to engage in consultations with Mr. Lule’s family members and to provide them redress;
      16. Impress upon the Malawian Government the need to adequately fund institutions that protect and promote human rights, strengthen accountability, and uphold the rule of law, including the Legal Aid Bureau and the Independent Police Complaints Commission;
      17. Urge the Malawian Government to provide redress and compensation, including rehabilitation, in both law and practice to people who have been tortured and their families with an emphasis on counselling and therapy in mental health and trauma;
      18. Urge the Malawian Government to improve access to civil remedies for victims of torture;
      19. Urge the Malawian Government and Judiciary to consult with victims of torture and other cruel, inhuman or degrading treatment or punishment to adopt a trauma-informed approach to legislative, judicial, administrative, and institutional cultural change;
      20. Urge the Malawian Government to commit to continued implementation of the National Action Plan on Persons with Albinism so that individuals and families directly benefit from protective measures; and
      21. Urge the Malawian Government to continue the moratorium on enforcement of section 153 of the Penal Code in order to prevent torture and other cruel, inhuman or degrading treatment or punishment inflicted on LGBTIQ+ persons and to provide equal protection of the law to all persons.

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