Pre-trial detention in Malawi:

Understanding caseflow management and conditions of incarceration

01

OPENLEARNING

This publication was funded jointly by the Open Society Initiative for Southern Africa, the Open Society Foundations Global Criminal Justice Fund and the Open Society Foundation for South Africa.

OSISA
Open Society Initiative
for Southern Africa

AUDIT OF PRE-TRIAL DETENTION AND CASE FLOW MANAGEMENT IN MALAWI

This report was prepared as part of a research project on pre-trial detention and case flow management in Malawi. The project was a collaboration between the Open Society Initiative for Southern Africa (OSISA), the Open Society Foundations Global Criminal Justice Fund (GCJF), the Open Society Foundation for South Africa (OSF-SA), the University of the Western Cape – Community Law Centre (CLC), the Paralegal Advisory Service Institute (PASI), the Catholic Commission for Justice and Peace (CCJP), the Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Centre for Human Rights and Rehabilitation (CHRR). The project was governed by a Memorandum of Understanding with the Malawian Ministry of Justice.

Open Society Foundation for South Africa

OPEN SOCIETY FOUNDATIONS
RIGHTS INITIATIVE
GLOBAL CRIMINAL JUSTICE FUND

OSISA
Open Society Initiative
for Southern Africa

Malawi executive summary and key recommendations

Like elsewhere in Africa, the excessive and extended use of pre-trial detention in Malawi is symptomatic of failings in the criminal justice systems relating to the effective and efficient management of case flow. Excessive and extended pre-trial detention violates a number of rights, key among which are the right to liberty, dignity, a fair and speedy trial, and to be free from torture and other ill treatment. It is especially the poor and powerless who bear the brunt of excessive and extended pre-trial detention. But the impact of pre-trial detention, even for short periods, reaches well beyond the individual concerned, affecting families and communities.

In order to better understand the use of pre-trial detention in southern Africa and its impact on the rule of law, access to justice and adherence to human right standards, the Open Society Initiative for Southern Africa (OSISA) – in partnership with the Open Society Foundation for South Africa (OSF-SA) and the Open Society Foundations Global Criminal Justice Fund (GCJF) – commissioned an audit of a sample of police stations, prisons and courts in Malawi to gather information on both the legal status of awaiting trial detainees and issues pertaining to conditions of detention in prisons and police stations.

Following a review of the literature, data was collected from a number of police stations, prisons, subordinate courts and High Courts. This focused on quantitative data on case flow management and qualitative data on conditions of detention.

The institutions of the criminal justice system and their functions

Limited resources place constraints on all criminal justice institutions in a variety of ways. However, cost effective and sustainable solutions need to be sought to improve record keeping and monitoring of case flow.

In respect of the **police**, it was found that excessive arrests, lack of knowledge of the law, lack of prosecution skills, poor coordination and lack of supervision by the Directorate of Public Prosecutions (DPP) contribute to delays in case flow management. Therefore, it is recommended that alternatives for arrest and detention must be better utilised, or established if lacking, and that officers should receive the necessary training to perform their duties in accordance with the Constitution and laws of Malawi.

The **DPP** lacks enabling legislation, a binding prosecution policy and a code of ethics for prosecutors. The DPP also lacks the capacity to effectively supervise police prosecutors. Therefore, it is recommended that appropriate legislation be enacted and that the Draft National Prosecution Policy be finalised and adopted. A key element for reform is the decentralisation of the DPP's authority as outlined in the DPP Strategic Plan 2009-2014. The DPP needs to build on effective interventions, such as the Homicide Working Group.

The **prison service** is regulated by antiquated legislation (1955) and houses prisoners in even older buildings. The 2003 Prisons Bill, when enacted, will provide strategic direction to the service.

The **judiciary** has a key role to play in improving case flow management by exercising effective oversight when accused people are in detention for excessive periods. The subordinate courts need to be provided with the necessary resources to enable the effective handling of cases. Members of the judiciary also need to be trained to stay abreast of latest developments in law (e.g. amendments to the Criminal Procedure and Evidence Code, and the Child Justice Act).

Access to **legal aid** remains extremely difficult but the Legal Aid Act (2011) provides hope that this will change. All efforts should be made to implement this legislation as soon as possible and enable cooperation between the Legal Aid Bureau and civil society organisations.

The legislative framework for pre-trial detention

The Constitution and recent case law provides a solid legal framework for regulating pre-trial detention, in particular the fair trial rights of accused people. The recent enactment of pre-trial detention time limits further strengthens these provisions. In view of this, it is recommended that officials (especially members of the judiciary) receive the necessary training to enable them to exercise firm judicial control over the criminal justice process and enforce custody time limits. All efforts should be made to improve coordination between functionaries – for example, through court users meetings and the Homicide Working Group.

Conditions of detention – police cells

While some good practices were identified, the overwhelming picture is that conditions of detention in police cells are poor, violate the rights of detainees in material ways and frequently exceed the 48-hour rule. The ageing state of many Malawian police stations and the insufficient capacity and nature of cell accommodation are the cause of many of the major concerns. Sufficient funds will remain a challenge for the foreseeable future, but this should not prevent an incremental process of reform and improvement.

The Malawian Police Service should develop a time bound and monitored plan of action to incrementally improve conditions of detention, while police management should provide assertive and demonstrable leadership in relation to the human dignity of detainees and their right to physical and moral integrity – as well in relation to transparency and accountability, which are the cornerstones of a human rights-based detention system. The police training curriculum needs to be reviewed in relation to its focus on human rights standards and refresher training should be conducted on a regular basis.

Conditions of detention – prisons

As with police detention, some good practices were identified, but the overwhelming picture is that conditions of detention are poor and fall short of what is generally accepted as humane detention. An important development in Malawian case law is the Gable Masangano decision, which placed an obligation on the state to improve conditions of detention within 18 months; this deadline expired in May 2011.

The government of Malawi is encouraged to improve the systems for monitoring conditions in prisons, while the prison service needs to seek and advocate for alternatives to excessive and prolonged pre-trial detention. The service should similarly aspire to increase self-sufficiency and seek more environmentally-friendly, low-cost and low-tech solutions to some of the practical challenges relating to conditions of detention. Meanwhile, a comprehensive cost analysis of improvements in the prison system should be undertaken in order to accurately inform the budget of the prison service. The costing should also be informed by the 2003 Prisons Bill and the Gable Masangano decision.

Case flow management data

The quality of record keeping, the accessibility of records and challenges in the data collection process placed significant limitations on the scope and veracity of the data collected in this part of the project. The overall aim was to gain an understanding of the time lapses between different stages in the criminal justice process and, in particular, to identify bottlenecks in the processing of cases.

The research results indicated a great deal of variation among the various sites in Malawi, not only in terms of time periods but also in terms of the profile of the people in the remand population. This strongly suggests that trends in the Malawi criminal justice system are determined by local conditions.

The available data also suggests that the custody time limits for the commencement of cases recently imposed by the Malawi legislature are probably not met for half the cases in some courts. Unless changes are made to the criminal justice process, and a mechanism for implementing these limits is created, arbitrarily assigned limits will probably not be met considering the trends in the recent past.

Cases can take an extremely long time to reach the High Court in Blantyre. The data collected in this project confirms that the delays are mostly prior to commencement of the trial in High Court.

The data suggests that 8,000 people, mainly young men, are admitted on remand to the six selected prisons every year – amounting to 1 out of every 250 men in Malawi. Since there are 23 prisons in Malawi, the actual yearly exposure of the population to prison on remand may be as high as 1 in 100. On this scale, the socio-economic impact of pre-trial detention at a societal level becomes significant.

By far the most common offences are theft and burglary. Violent offences are a relatively small percentage, although they appear to be somewhat more prevalent in the north. However, of concern are small but significant categories such as illegal immigrants, 'rogue and vagabond' and touts. In some constitutional jurisdictions many of the offences leading to incarceration in Malawi would not be considered crimes at all. There is a need for an overhaul of the criminal code in the light of Malawi's human rights obligations and to ease the burden of remand detention on the poor.

The court outcomes suggest a significant proportion of cases end in acquittal or are otherwise discharged. This provides a strong indication that a person charged with a serious offence may not ultimately be found guilty in a court of law, after spending long periods of time on remand.

Incomplete records and lost files are the most problematic findings of this study. A person on remand, whose records or files have been lost, has little hope of getting out of the system unless he receives external help. A further consequence of poor record keeping is that it limits the extent to which any intervention aimed at improving case-flow management can be monitored and assessed to determine if it is having the desired effect.

Further research and reform is recommended to:

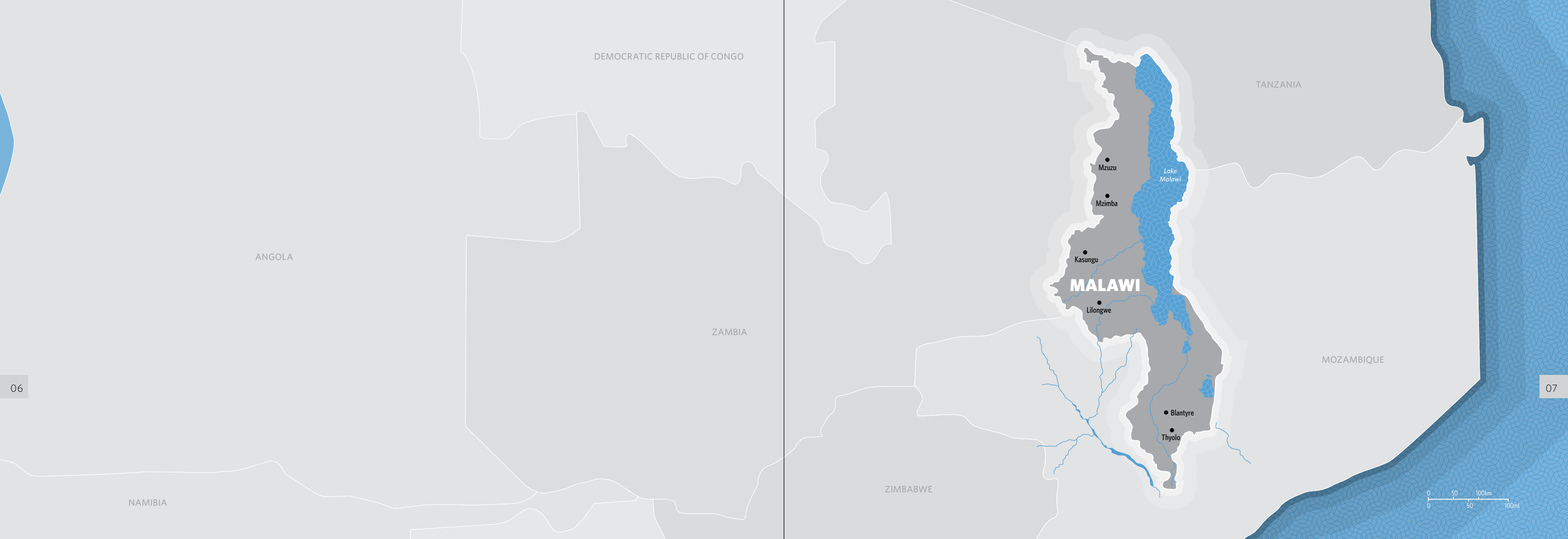
- Identify local factors affecting the speed and application of criminal justice;
- Streamline the process of referral to the High Court;
- Develop a consistent national system of record-keeping and archiving in all criminal justice institutions;
- Develop a mechanism, which will be implemented nationally, to trigger the release of people on remand when custody time limits are exceeded; and,
- Review offences in the Malawi Criminal Code with the view to decriminalising certain acts.

Acknowledgments

The following people are acknowledged for their assistance to the project: Alex Nkunika; Alexander Mwandira; Alfred Munika; Anthony Kamanga; Boniface Mhango; Charles Banda; Chimwemwe Ndalahoma; Clifford Msiska; Doreen Kasalika; Dyton Nkhoma; Edward Kuntuseya Gama; Enock Kamundi Phiri; Francis Kumwenda; John Mhango; Luke Tembo; Lusako Phambana; MacDonald Kaipa; Melonisa Kachimanga; Muteyu Banda; Natasha Maganga; Nickson Ngwira; Norah Khonje; Peter Chinkota; Peter Chinoko; Prince Kulemeka; Ruth Kaima; Siphiwe Malihera; Steve Sikwese; Undule Mwakasungura; Victor Mhango; and Wezi Kayira.

We are also grateful to the many officials at police stations, prisons and courts who assisted the fieldworkers in their work.

CONTENTS


DEMOCRATIC REPUBLIC OF CONGO
ANGOLA
ZAMBIA
NAMIBIA
TANZANIA
MOZAMBIQUE
ZIMBABWE
Mzuzu
Lake Malawi
Mzimba
Kasungu
MALAWI
Lilongwe
Blantyre
Thyolo
0 50 100km
0 50 100mi

1. INTRODUCTION

By Lukas Muntingh and Louise Ehlers

"there are an estimated three million people in pre-trial detention globally"

A global problem

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides extensive protection against the arbitrary deprivation of liberty as well as enshrining the right to challenge the deprivation of liberty and the right to a fair trial.[1] Despite this there are an estimated three million people in pre-trial detention globally and more than nine million are detained each year – with many remaining in custody for weeks, months or even years before they go to trial, if at all.[2] This deprivation of liberty exposes detainees to a range of human rights violations, particularly torture and ill treatment.

According to the Global Campaign for Pre-trial Justice, people in pre-trial detention risk:

- Exposure to institutional violence, initiation rituals and gang violence, which contribute to the significantly higher homicide and suicide rates among pre-trial detainees compared to sentenced prisoners;
- Contracting infectious diseases due to overcrowded and unsanitary conditions – diseases which the detainees carry back to their home communities when they are released;
- Social stigmatisation, including estrangement from family and community, and difficulty finding and retaining employment;
- Increased propensity for crime since those who experience prolonged pre-trial detention are more likely to commit a criminal offense after release and their children are also more likely to commit a criminal offense later in life; and,
- Losing their employment during excessive periods of detention and watching their families slip deeper into poverty, hunger and homelessness.[3]

The African context

African prison systems face a host of serious problems, including poor conditions of detention; torture and ill treatment; dilapidated and inadequate infrastructure; overcrowding; no or limited services; antiquated legislation; poorly trained staff; and, a lack of oversight. These problems are widely acknowledged and several declarations by African stakeholders have demonstrated their concerns about the continent's poor prison conditions[4]. One of them – the Ouagadougou Declaration, adopted by the African Commission on Human and People's Rights (ACHPR) in 2003[5] – pays particular attention to un-sentenced prisoners and recommends:

- Better co-operation between the police, the prison services and the courts to ensure trials are speedily processed and to reduce delays in remand detention through regular meetings of caseload management committees, including all criminal justice agents at the district, regional and national levels; making costs orders against lawyers for unnecessary adjournments; and, targeting cases of vulnerable groups;
- Ensuring that people awaiting trial are only detained as a last resort and for the shortest possible time through increased use of cautioning, greater access to bail by expanding police bail powers and involving community representatives in the bail process, restricting time in police custody to 48 hours, and setting time limits for people on remand in prison;
- Good management of case files and regular reviews of the status of remand prisoners; and,
- Greater use of paralegals in the criminal process to provide legal literacy, assistance and advice at the earliest possible stage.

However, despite the aims of the Ouagadougou Declaration and the efforts of numerous stakeholders, progress towards prison reform has been limited across the continent and in most countries, prison conditions do not meet minimum standards of humane detention. In poor nations, conditions generally fall well below accepted international standards and frequently amount to ill treatment. Overcrowded facilities, inadequate nutrition, poor health and hygiene standards, exposure to communicable diseases, inter-prisoner violence and victimisation, and limited supervision contribute to detention conditions that are an affront to human dignity.

And pre-trial prisoners are frequently worse off than their sentenced counterparts.

It has been noted by other researchers[6] that the average detention duration and percentage of prisoners on remand in developing countries is relatively high.[7] In eight countries, for example, over two thirds of prisoners are remand detainees, as seen in Table 1.[8]

PERCENTAGE PRE-TRIAL DETAINEES

RANKING		
1	Mali	88.7
2	Liberia	c.85
3	Togo	c.80
4	Niger	c.76
5	Benin	74.9
6	Congo (Brazzaville)	c.70
7	Nigeria	69.2
8	Republic of Guinea	67.2
9	Burundi	62.6
10	Cameroon	60.7
27	Zambia	35.3
40	Malawi	18.5

TABLE 1

As Ballard notes, "such figures indicate that remand detention is not considered an exceptional measure or seen as a last resort, but used excessively and frequently without sufficient justification." This 'last resort' principle is articulated in Article 9(3) of the ICCPR:

"It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

But along with the excessive number of pre-trail detainees in many African countries, there are a number of other issues that need to be understood. It is primarily the poor and the powerless that are discriminated against.[9] Without the means to secure legal representation, they often spend months – if not years – in detention while waiting for the wheels of justice to slowly grind, if at all. Where corruption is pervasive in the criminal justice system, the situation is further distorted.[10] The poor, the uneducated, ethnic minorities and other vulnerable groups may be targeted for bribes and other forms of corruption and manipulation. Unaffordable bail also prevents poor people from securing their release.[11] Accused people who are released on condition that they report to a police station or court on a regular basis may find this extremely difficult to comply with given the distances involved, lack of financial resources and poor public transport.[12] And the result may well be that bail is revoked.

The right to a fair trial is also compromised since a lengthy detention may be an incentive to plead guilty. In addition, detained people encounter numerous difficulties in defending themselves because they are unable to contact witnesses who may assist their defence or seek legal advice. Lengthy detentions also deplete the financial resources of the accused and their ability to employ the services of legal representatives.[13]

But imprisoning people unnecessarily and for extended periods also incurs significant costs for the state. Funds are needed to cover extra meals, additional staff to supervise the prisoners, increased health care bills due to poor conditions and the added cost of ferrying the detainees to and from court – funds that could be spent on delivering better social services, health care, housing and education.[14]

Excessive pre-trial detention also has a broader socio-economic impact:

"Pre-trial detainees may lose their jobs, be forced to abandon their education and be evicted from their homes. They are exposed to disease and suffer physical and psychological damage that lasts long after their detention ends. Their families also suffer from lost income and forfeited education opportunities, including a multi-generational effect in which the children of detainees suffer reduced educational attainment and lower lifetime income. The ripple effect does not stop there: communities and States marked by the over-use of pre-trial detention must absorb its socioeconomic impact."[15]

Many accused people are eventually acquitted or have their cases struck from the roll after spending lengthy periods in detention. Their detention ultimately serves no purpose, except to harm them and their families – and the legitimacy of the criminal justice system itself.

Compromising the right to liberty and dignity

Excessive pre-trial detention threatens people's basic right to liberty and dignity. Poor living conditions undermine the right to dignity, especially when facilities are overcrowded and the state lacks the capacity and/or the willingness to provide accommodation compliant with minimum standards of humane detention. While the longer the detention, the more the right to liberty is compromised.

In Article 9(3), the ICCPR acknowledges that pre-trial detention may be a necessity in some instances. However, it is clear that detention before trial should be avoided wherever possible and alternatives sought to secure the attendance of the accused at trial.[16] It is therefore within the context of the rights to liberty and dignity that Article 9(3) states that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer

"lengthy pre-trial detention is not legally justifiable under international and regional human rights instruments"

authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

International jurisprudence recognises the right to liberty and the growing obligation on the state to justify continued detention. What may initially have been good enough reasons for detention may no longer be sufficient or justified with the lapse of time, as the European Court of Human Rights (ECHR) concluded in the Bakhmutskiy case:

135. The Court reiterates that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention. However after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings.

136. The presumption is in favour of release. As the Court has consistently held, the second limb of Article 5 § 3[17] *does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continued detention ceases to be reasonable.*[18]

From this perspective, the obligation rests firmly with the state to justify continued detention: it must present good reasons why the accused should remain in custody, and the longer the duration of detention, the more onerous this obligation on the state becomes.

The African Charter on Human and Peoples' Rights (the Charter) provides for the right to liberty in Article 6:

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

The ACHPR has also been firm in interpreting the fair trial rights in Article 7(1) of the Charter:

Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b) The right to be presumed innocent until proved guilty by a competent court or tribunal;

c) The right to defence, including the right to be defended by counsel of his choice;

d) The right to be tried within a reasonable time by an impartial court or tribunal.

In Huri-Laws v. Nigeria, the ACHPR ruled that detaining two suspects – one for five months and the other for little more than a month – before bringing them to court violated their right to appear before a judge and be tried within a reasonable time.[19] In Alhassan Abubakar vs. Ghana, the Commission found that detaining a person for seven years without trial violated the 'reasonable time' standards set in Article 7(d) of the Charter.[20]

Therefore, the message is clear from both African and European jurisprudence – lengthy pre-trial detention is not legally justifiable under international and regional human rights instruments and states must take measures to prevent and eradicate this phenomenon.

Background to the research project

Recognising the challenges described above and in order to better understand the use of pre-trial detention in southern Africa and its impact on the rule of law, access to justice and adherence to human right standards, the Open Society Initiative for Southern Africa (OSISA) – in partnership with the Open Society Foundation for South Africa (OSF-SA) and the Open Society Foundations Global Criminal Justice Fund (GCJF) – commissioned an audit of a sample of police stations, prisons and courts in Malawi to gather information on both the legal status of awaiting trial detainees and issues pertaining to conditions of detention. A similar process was undertaken in Zambia and a separate report has been compiled for that country.

The information contained in this report provides rigorously researched, empirical evidence, which can be used to underpin future efforts by both government and civil society to influence legislation, policy and practice with a view to ensuring the appropriate use of pre-trial detention, promoting the speedy resolution of trials and improving prison conditions in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners.

OSISA and its partners will also explore how this information and the tools that were designed during the audit process might contribute to regional work on criminal justice reform e.g. how might this research be used in the development of regional standards for the management of pre-trial detainees.

As noted above, a similar project was undertaken in Zambia. Given both countries' histories as well as their socio-economic and demographic profiles, the findings are in many instances very similar and so are many of the recommendations. Indeed, there may be significant scope for cooperation and synergy between the two countries in respect of criminal justice reform.

2. METHODOLOGY

By Lukas Muntingh and Jean Redpath

"The overall goal of the project was to collect accurate and reliable information relating to pre-trial detainees (PTDs)"

2.1 Partners and institutional arrangements

The project was the result of an agreement between the Government of Malawi and the Open Society Initiative for Southern Africa (OSISA) with the Community Law Centre (CLC) at the University of the Western Cape, South Africa. CLC was responsible for overseeing the research while four Malawian non-governmental organisations were responsible for conducting the fieldwork and commissioning the literature reviews – the Centre for Human Rights and Rehabilitation (CHRR), the Catholic Commission for Justice and Peace (CCJP), the Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Paralegal Advisory Service Institute (PASI). Over the course of the project a number of partner meetings were held to review progress and plan the following phases.

2.2 Goal and objectives

The overall goal of the project was to collect accurate and reliable information relating to pre-trial detainees (PTDs) so that future policy reform and development in Malawi would be based on firm evidence. To achieve this, the partners agreed to:

- Conduct a comprehensive assessment and analysis of case flow management in the Malawian criminal justice system in so far as it relates to PTDs;
- Conduct a comprehensive assessment of the PTD population with respect to the conditions of detention and the management of the PTD population; and,
- Provide the Government of Malawi and other stakeholders with a comprehensive report, including detailed recommendations, on the realities of pre-trial detention.

In pursuit of these objectives, the partners committed themselves to:

- Undertake an in-depth review of the current legislative and policy architecture, any pending legislation and all previous research on Malawi's criminal justice system that had been conducted in the last five years;
- Use data collection tools that were appropriate to case flow

*"The project was divided into five broad phases - **scoping** of the project, research on **case flow management**, **conditions of detention and prison management**, and the consolidation and **release of the findings**."*

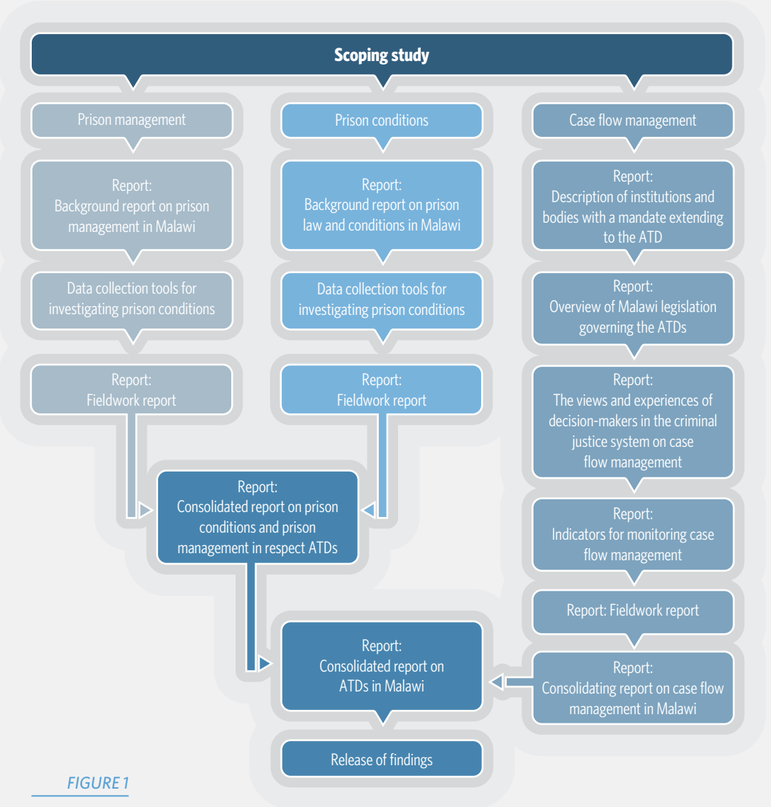


FIGURE 1

management, the conditions in police cells and prisons, and prison management;
- Collect primary data through fieldwork at selected prisons and courts;
- Produce a final report in printed and electronic form containing all the findings from the study as well a set of recommendations for further intervention; and,
- Organise a seminar to present the findings.

2.3 Structure

The project was divided into five broad phases - scoping of the project, research on case flow management, conditions of detention and prison management, and the consolidation and release of the findings (see Figure 1).

2.3.1 Scoping of the project

The aim of this phase was to determine the exact scope of the project and to ensure that as much relevant information as possible was gathered. To this end, the partners undertook a number of key activities, including:

- Verifying sources of information with reference to documented records at prisons and courts, including the availability of, and information contained within, case files and registers. What information was recorded by which official during the case flow process and in what form – paper archive, electronic archive or in disarray – was also analysed. Particular attention was paid to archiving rules at courts and prisons.
- Identifying specific sites for the fieldwork phase to ensure an appropriate cross-section. Data was gathered from nine sites – Blantyre, Kasungu, Lilongwe (two prisons), Mzimba, Mzuzu, Ntcheu, Thyolo and Zomba – where there is a police station, a court and a prison. Data was also collected from the High Courts with jurisdiction over these sites.

2.3.2 Research on case-flow management

The link between case flow management during trials and the detention of PTDs has been thoroughly described at the global level[1] – so a detailed analysis of case-flow management in Malawi was always going to be a central component of this project with the research focusing on:

- The number of prisoners currently awaiting trial - including their age, gender, geographical distribution and charges as well as their knowledge of the legal system and the rights of accused people;
- The current ratio of sentenced to un-sentenced prisoners – including age, gender, offence and bail conditions;
- The length of time spent in police cells prior to transfer to the prison – including age, gender, offence and bail conditions;
- The average length of time spent in prison awaiting trial – including time in custody, court level, geographical distribution, age, gender, charges and bail conditions;
- The length of time that it takes for cases to be finalised – including an analysis of the adjudication of cases: conviction, acquittal, struck from roll or withdrawn;
- The number of court appearances per prisoner;
- The reasons for the postponement of cases – including further investigations, availability of information and witnesses;
- The level of access to qualified legal counsel;
- The level of access to legal aid services; and,
- The time from conviction to sentence.

In order to understand case flow management in Malawi thoroughly, the partners also:

- Prepared a report providing a structural-functional description of the institutions and bodies that have a mandate in respect of case flow management and the detention of PTDs;
- Compiled a report detailing current Malawian legislation and subordinate legislation governing pre-trial detention;
- Held a workshop on case flow management with key stakeholders, including magistrates, prosecutors, attorneys, paralegals and NGO representatives, which provided critical data on current practices and – along with the two reports focusing on the legal and institutional arrangements – assisted the researchers to

identify the correct variables to investigate in the subsequent stages of the project; and,
- Collected data from a sample of case file records and registers to investigate case flow management based on the range of identified outcomes, indicators and measures.

2.3.3 Research on conditions in prisons and police cells

In this third phase, the researchers assessed access to basic services – such as health care, food, water, sanitation, exercise, recreation etc. – in prisons and police cells as well as whether detainees had contact with their families and the outside world.

In relation to PTDs, the researchers also:

- Prepared a report describing Malawian prison law and conditions of detention from the available literature to provide the background information necessary for subsequent data collection;
- Conducted fieldwork using structured data collection instruments at five prisons and five police stations where PTDs are detained; and,
- Compiled reports on conditions in prisons and police cells based on the fieldwork data.

2.3.4 Research on prison management

Prison management refers to the complex set of intertwined functions relating to security, human resource management, administrative functions, financial management, services management and interactions with external stakeholders. For the purposes of this project a particular understanding of prison management was adopted based on a human rights approach to prison management.[2] The following were regarded as important dimensions of prison management: record-keeping in respect of PTDs at prison level; access to services; accessibility to visitors; efforts by heads of prisons to address problems around PTDs; and, access to legal representation by PTDs at prisons.

As part of this component, the researchers conducted fieldwork at five prisons where PTDs are detained.

2.3.5 Consolidation and release of findings

All the research findings and project reports were combined into this final report – with a focus on ensuring that the recommendations:

- Prioritise reforms that will produce the maximum benefit at the lowest cost;
- Identify government officials who will be responsible for implementing the recommendations; and,
- Estimate the cost and resources required for implementing the recommendations.

2.4 Fieldwork and data collection

Six different data collections tools were used. Two forms related to conditions of detention – in police cells and prisons. The four other data collection tools required the drawing of random samples from registers at police stations, prisons or courts. Forty entries for each of the past five years were recorded, except for the High Courts, where 40 entries from the whole five-year period were recorded. A sample of 40 per year was chosen to allow for some missing data – so that the eventual sample would still be sufficiently large (n>30) for statistically valid estimates to be made. A smaller sample was drawn from the High Court registers since these courts process fewer cases each year.

The institutions, data collection tools and sources are summarised in Table 1.

Staff members from the four partner NGOs were trained to conduct the fieldwork and to provide training to other researchers to enhance the capacity of the team. The training included classroom based training as well as practical training at a subordinate court, a police station and a prison to ensure that the researchers gained a thorough understanding of the fieldwork process. A copy of the fieldworker training manual developed for the project in Zambia is attached as Appendix 7. Since the fieldwork in Zambia commenced after the fieldwork in Malawi it was possible to incorporate some of the lessons already learnt in Malawi into the Zambian manual.

Institution	Data collection tool	Sources
Prison	Data form: Conditions of detention – awaiting trial prisoners	• Observation and existing records
	Data tool: Remandee prison register	• Remandee prison register
Police	Data tool: Police station custody book	• Custody book
	Data form: Conditions of detention – police detention	• Observations and existing records
Subordinate Court	Data tool: Subordinate court register and case files	• Register (Criminal) • Case files
High Court	Data tool: High Court register – murder cases	• Registry for murder cases

TABLE 1

The project planned to collect quantitative data from a number of prisons, police stations and courts from 2006 – 2011. Despite extending the fieldwork period for a considerable time, not all the planned data was captured. The shaded blocks in Table 2 show the years that data was successfully gathered.

It was also planned to collect qualitative data on detention conditions at nine prisons and eight police stations. Table 3 shows the prisons and police stations for which data was received. Kachere prison in Lilongwe was included in the sample as it is a juvenile detention facility.

2.5 Research methods and limitations

The primary objective of the case flow management section of the project was to estimate the amount of time accused people spend in custody. The estimates were reliant on data that is usually stored by institutions of the criminal justice system. While a large amount of relevant data was made available, the researchers did face a number of limitations.

2.5.1 Police dataset

During the scoping study it was determined that at the police station custody reception, each detainee is given a serial number that is recorded in the custody diary along with other relevant information, including name, date, detention cell number, police station, place of arrest, time of arrest and offence. Fieldworkers were instructed

Shaded blocks represent successful data capture

	2006	2007	2008	2009	2010	2011
Blantyre Chichiri Prison	■	■	■	■	■	
Blantyre Court	■	■	■	■	■	
Blantyre High Court	■	■	■	■	■	■
Blantyre Police	■	■	■	■	■	
Kasungu Court	■	■	■	■	■	
Kasungu Police	■	■	■	■	■	
Kasungu Prison		■	■	■	■	
Lilongwe Court				■	■	
Lilongwe High Court						
Lilongwe Kachere Prison	■	■	■	■	■	■
Lilongwe Maula Prison	■	■	■	■	■	■
Lilongwe Police						
Mzimba Court						
Mzimba Police	■	■				■

	2006	2007	2008	2009	2010	2011
Mzimba Prison	■	■	■			■
Mzuzu Court	■	■	■			
Mzuzu High Court	■	■	■	■	■	■
Mzuzu Police				■	■	■
Mzuzu Prison					■	■
Ntcheu Court						
Ntcheu Police	■	■	■			
Ntcheu Prison						
Thyolo	■	■	■	■	■	
Thyolo Court	■	■	■	■	■	
Thyolo Police	■	■	■	■	■	
Zomba Court						
Zomba Police						
Zomba Prison						

TABLE 2

Site	Location	Data Received
Prisons	Blantyre – Chichiri Prison	
	Kasungu	
	Lilongwe – Kachere Prison	
	Lilongwe – Maula Prison	
	Mzimba	
	Mzuzu	
	Ntcheu	
	Thyolo	
	Zomba	
Police stations	Blantyre	
	Kasungu	
	Lilongwe	
	Mzimba	
	Mzuzu	
	Ntcheu	
	Thyolo	
	Zomba	

TABLE 3

to record a random sample from the custody diary for each available year dating back to 2006. The random sample was selected by establishing how many entries there were in the custody diary in each year and then dividing that by 40 to determine the selection interval.

The main limitation involved access to the custody diary. In some police stations this was not permitted or was granted too late for the data to be incorporated into the dataset. Therefore, the police dataset does not reflect the time periods for police stations that were unwilling to provide access to their custody diaries.

2.5.2 Subordinate court dataset

During the scoping study it was determined that subordinate court records are kept in court registers with one for each magistrate. Fieldworkers were instructed to record a random sample for each year dating back to 2006. These were selected from the registers of all magistrates presiding at each court. The total number of cases in any particular year was divided by 40 to obtain the selection interval.

Fieldworkers were required to draw the files of the selected cases to obtain the necessary information, including case number, date filed, age and gender of accused, village, tribe, offence, date of first hearing, whether bail was granted, bail amount, whether surety was requested, date the case concluded, custody status prior to conclusion, outcome and sentence (where relevant).

The major limitation lay in accessing the case files. These were not necessarily stored systematically and when in use (i.e. the

matter was before court) could not be perused by the fieldworkers. Therefore, the subordinate court dataset does not reflect time periods for cases that were before court or where the files had been lost.

2.5.3 Prison dataset

During the scoping study it was determined that there is a remandee prison register in each prison. Fieldworkers were instructed to record a random sample form the remandee register for each available year dating back to 2006. The random sample was selected by establishing how many entries there were in the register each year and dividing the total by 40 to determine the selection interval.

The register – and the warrants for each person that were reflected in it – provided vital information relating to the date of admission to prison, prison number, gender, village, tribe, offence, police docket number, court case number, whether discharged and date of discharge (where recorded).

The major limitation was that the date of discharge was not systematically recorded and it could not always be established whether the accused had been discharged or not. Therefore, it was not always possible to calculate the time between arrival and the date of discharge.

2.5.4 High Court dataset

During the scoping study it was determined that there is a court register for murder cases heard in the High Court. However, very little information was recorded in the register and very few cases were heard each year. Fieldworkers were instructed to select 40 cases from each High Court over the five year period. The selection interval was determined by dividing the total number of cases for each High Court since 2006 by 40.

The registers provided information relating to case number, age, gender, offence, date of offence, date of arrest, date of committal, plea, outcome, date of sentence (where relevant) and sentence (where relevant).

The major limitation involved lack of access to the case files, which were not necessarily stored systematically and which could not be studied when the matter was before court. Furthermore, the pertinent information was not written on the case file cover but had to be gleaned from documents inside the file, which were often handwritten. Where these were missing or illegible the information could not be recorded. Therefore, the High Court dataset will not reflect time periods in relation to cases that were before court or where the files had been lost, were in disarray or were incomplete.

2.5.5 Detention conditions in police cells and prisons dataset

Data on conditions of detention in police cells and prisons were collected by means of a structured instrument that looked into a number of thematic areas, including the right to physical and moral integrity, prisoner's property, the right to an adequate standard of living, adequate food and drinking water, clothing and bedding, health care, safety and security, contact with the outside world, complaints and inspection procedure, women in prison, children and management. Questions pertaining to each thematic area were adapted to suit police detention and prison detention.

The data collection instrument included some open-ended questions and some questions that could be answered yes or no. However, fieldworkers were instructed to record comments and/or a motivation if the answer were yes or no since more information means a more accurate analysis.

The level of recorded detail was the major limitation in these two datasets. Fieldworkers would sometimes tick the Yes/No option but provide no motivation so the response means very little. In other instances, fieldworkers did not record the responses to certain questions.

2.6 Lessons learned

Sites differ: During the scoping exercise attention was paid to sites in and around Lilongwe. However, during the fieldworker training in Blantyre, it was noted that there are minor differences between how records are kept in Lilongwe and how there are kept in Blantyre. Therefore, it must not be assumed – in a national survey of this nature – that everything will be the same everywhere.

Maintain flexibility during development of the data collection tools: Since sites differ, it is necessary to be flexible so that last minute adjustments can be made to the data collection tools. This was done as far as possible.

Use international standards due to antiquated domestic law: In the development of the qualitative data collection tools to assess conditions of detention, it was decided to rely on accepted international norms and standards due to the antiquated Malawian legislation regulating conditions of detention.

Give practical training to fieldworkers: Providing practical training on the use of the data collection tools is essential since classroom-based training was clearly not sufficient to deal with the practicalities of gaining access, finding records and establishing a good rapport with officials in the various government departments. In hindsight, more time should have been spent on this.

Use small training groups: When training fieldworkers it is advisable to work with groups of five or less. Larger groups present problems, especially during practical training as records' offices in courts, police stations and prisons are often small, since they do not allow every trainee to participate fully.

Senior level authorisation does not always filter down to lower levels: Even though the partners followed the required procedure at national level by informing the relevant government departments about the project and obtaining the necessary authorisation, this did not always mean that officials at a particular police station, for example, were aware of the project and understood that access to certain records had been approved. Much time and energy can be saved by ensuring that officials at the local, operational level are informed of the project well in advance.

Authorisation must be very specific: Detailed authorisation is needed so that officials at the operational level are clear about which records will be accessed, how data will be recorded and what data collection instruments will be used. Maximum transparency will greatly assist the process.

3. MALAWIAN CRIMINAL JUSTICE SYSTEM

By Pacharo Kayira

"regrettably none of the key justice institutions have undergone the necessary, radical reform"

1. Introduction

In 1995, Malawi adopted a new Constitution that included fair trial rights but regrettably none of the key justice institutions have undergone the necessary, radical reform – creating a gap between the ideals articulated in the Constitution and day-to-day practice. Both formal and informal measures have been implemented to try and bring the system into line with the demands of the new constitutional order but to little, or no, avail.

There is clearly a need for a penetrating functional and structural review of the entire criminal justice system but this chapter focuses more narrowly on those institutions and bodies that are involved with case flow management and pre-trial detainees (PTDs) – the Malawi Police Service, the Directorate of Public Prosecutions, the Judiciary, the Malawi Prison Service and the Legal Aid Bureau.

These institutions were identified by looking at four key processes in the handling of PTDs – namely the arrest of a suspect, the decision to continue detaining him, the decision to prosecute him and the conduct of the trial. In each of these processes, key decision-makers and interveners (people or institutions that can influence decisions relating to PTDs) were identified.

For purposes of this research, PTDs include detainees who have not been formally charged; who have been formally charged and are waiting for their trials to start; whose trials are underway; and, who have been convicted but not sentenced.

The chapter identifies key bottlenecks and areas of concern and makes recommendations – as well as highlighting initiatives undertaken by the Malawian government and its partners (e.g. donor agencies) to improve the criminal justice system.

2. Malawi police service

The operations of the Malawi Police Service in terms of PTDs are regulated by the:

- The Constitution of Malawi 1995;
- The Police Act No. 12 of 2010;
- The Criminal Procedure and Evidence Code (CPEC) as amended by Act No.14 of 2010, Chapter 8:01 of the Laws of Malawi; and,
- The Penal Code, as amended in 2010, Chapter 7:01 of the Laws of Malawi.

2.1 Organisational structure

The Malawi Police Service was established by the Constitution as an independent organ of the executive charged with the responsibility for ensuring public safety and protecting the rights of people in line with the Constitution and any written law in Malawi.[1] The Police Service is under the political authority of the Minister of Internal Security and Public Safety. The complete structure of the Police Service is established by Section 5 of the Police Act and is as follows:

- Inspector General (appointed by the President and confirmed by the National Assembly[2]);
- Deputy Inspector General;
- Commissioners;
- Assistant Commissioners;
- Deputy Commissioners;
- Senior Assistant Commissioners;
- Senior Superintendents;
- Assistant Superintendents;
- Inspectors;
- Sub Inspectors;
- Sergeants; and,
- Constables.

The Service's national headquarters are in Lilongwe with four regional offices in the south, east, centre and north. There are currently 34 police stations across the country as well as smaller sub-stations, posts and units. The Service is also divided up into a number of operational branches. The branches that are relevant for this research are:

- Administration – responsible for the day-to-day running of the service;
- Community policing services – responsible for working with communities to prevent and detect crime;
- Criminal investigations department – responsible for detecting and investigating crime and for apprehending suspected offenders; and,
- Prosecutions and legal services – responsible for prosecuting cases in Magistrates' Courts.

Each police station is headed by an officer-in-charge and assisted by a station officer, who deals with the day-to-day operations, such as handling crime reports.[3]

2.2 Core functions

The functional description of the Malawi Police Service is provided for in Section 4(1) of the Police Act as amended in 2010 and includes the:

- Prevention, investigation and detection of crime;
- Apprehension and prosecution of offenders;
- Preservation of law and order;
- Protection of life, property, fundamental freedoms and the rights of individuals; and,
- Due enforcement of all laws with which the Police are directly charged.

This research focused on two of these core functions – the apprehension and prosecution of offenders.

2.2.1 Apprehension of offenders

Most arrests in Malawi are carried out by the police, either on their own initiative or on the directives of other agencies such as the Directorate of Public Prosecutions and the Anti-Corruption Bureau. The police play a crucial role not only in the decision to arrest suspects but also in the decision about what happens immediately after the arrest – such as detaining the suspect until first appearance or granting bail. Under certain conditions, the police can grant bail to suspects in minor cases, who are required to report regularly to the police while awaiting trial.

The apprehension of offenders is largely led by the Criminal Investigations Department. Once a suspect is apprehended, the department prepares a case docket, which is then passed on

to prosecutions for court proceedings. A critical area of concern is the failure by the police in many instances to meet basic legal requirements in dealing with suspects during and immediately after apprehension. Section 42 of the Constitution and Section 20A of the CPEC require offenders to be informed of their rights on arrest and to be brought before a court of law as soon as is practically possible and certainly within 48 hours of arrest – but these requirements are often not fulfilled.

2.2.2 Prosecution of offenders

It has been suggested that police prosecutors handle about 95 per cent of all criminal prosecutions in Malawi with little or no supervision.[4] These prosecutors are not lawyers and are only competent to handle minor cases in Magistrates' Courts, although it is expected that they will also handle cases in the local courts once they are established. Before the 2010 amendment to the CPEC, it was a requirement that police prosecutors could not be below the rank of assistant superintendent.[5] However, in practice this requirement was consistently ignored with very junior officers handling cases as prosecutors.

Section 79 of the CPEC, as amended, completely removed this requirement – giving the power to the Director of Public Prosecutions (DPP) to 'appoint generally, or in any case or in any class of cases, any person employed in the Public Service or such other legally qualified person to be a public prosecutor'. It has generally been understood that this provision covers the appointment of police prosecutors and DPP has declared in writing that police officers of the rank of sub-inspector and above can prosecute cases in subordinate courts.

Although the law expressly states that public prosecutors are under the direction of the DPP, practice suggests otherwise.[6] As part of the police service, police prosecutors are under a different ministry and hierarchy of command, which means that they are only minimally supervised by the DPP. A classic example involves cases where the DPP's express consent is required before prosecution can commence, e.g. in incest cases.[7] In most cases, police prosecutors commence and conclude such cases without the consent of the DPP's office.

In addition, the referral of cases by local prosecutors to regional and national headquarters strictly follows the police bureaucracy. For example, a homicide case docket cannot be sent directly to the DPP's office without first being channelled through the police's regional prosecutions office. While this is good for record keeping, it does unfortunately also result in delays. Police prosecutors do sometimes seek direct guidance from the DPP's office but this is very much the rare exception rather than the rule.[8]

Considering that there is very little likelihood that prosecution by police officers will be phased out soon, it is vital to find ways to improve training methods for police prosecutors.

2.3 Key gaps

The research identified the following concerns relating to the operations of the police service:

- Acute lack of basic resources such as copies of the Constitution, CPEC and Penal Code at police stations;
- Serious shortage of prosecution skills;
- Insufficient supervision of prosecutions by the DPP;
- Slow pace of institutional reform to incorporate basic human rights standards into police practice, such as treatment of suspects and observance of the 48-hour rule; and
- Lack of consistent coordination with other criminal justice players such as the courts and the DPP.

2.4 Recommendations

The research shows that there is a need for:

- The police service to move away from a culture of arrest and detention, especially when there are other ways of ensuring that suspects attend court; and,
- Officers to be trained so they are more aware of constitutional and human rights requirements.

3. Directorate of Public Prosecutions

The following laws and documents cover the structure and functions of the DPP:

- The Constitution of Malawi 1995;
- The Criminal Procedure and Evidence Code;
- Ministry of Justice Strategic Plan 2009-2014;
- Draft National Prosecution Policy; and,
- Democratic Governance Policy Framework Paper

3.1 Organisational Structure

The Directorate of Public Prosecutions is responsible of all criminal prosecutions in Malawi and is a department within the Ministry of Justice. The mandate of the DPP is provided by the Constitution (sections 99-102) and to a lesser extent by the CPEC. The DPP is appointed by the President with the approval of the Public Appointments Committee of Parliament.[9]

The law requires the complete independence of the office of the DPP.[10] However, he is subject to general and special directions from the Attorney General in line with Section 101(2) of the Constitution and this – couple with the location of the office in the Ministry of Justice – has raised concerns about the independence of the office and prompted suggestions that this provision should be removed.

While the DPP's office has regional branches in Blantyre and Mzuzu, it is not readily accessible in much of the country and this has hampered its ability to supervise other agencies, especially police prosecutors.

In terms of structure and operations, the DPP is assisted by the Chief State Advocate, Deputy Chief State Advocate, Senior Assistant Chief State Advocate, Assistant Chief State Advocate, Principal State Advocate, Senior State Advocate and Paralegal Officers of various grades.[11] For budgetary allocations, the Directorate has a separate vote approved by Parliament, but the controlling officer of the vote remains the Secretary for Justice.

The structure of the DPP's office has not changed for over 40 years[12] despite the adoption of the new Constitution in 1995 – and this out-dated structure cannot cope with all the demands placed on it.

3.2 Core functions

The functions and powers of the DPP are primarily outlined in section 99-102 of the Constitution. Section 99(2) of the Constitution provides that:

The Director of Public Prosecutions shall have power in any criminal case in which he or she considers it desirable so to do:

(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any criminal proceedings which have been instituted or undertaken by any other person or authority; and,

(c) subject to subsection 5, to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

The DPP also has powers to appoint public prosecutors and delegate prosecutorial authority as provided in Section 100, which states that:

1) Save as provided in section 99 (3), such powers as are vested in the office of the Director of Public Prosecutions may be exercised by the person appointed to that office or such other persons in the public service, acting as his or her subordinates and in accordance with his or her general and specific instructions in accordance with an Act of Parliament.

2) Notwithstanding subsection (1) –

(a) The person appointed to the office of Director of Public Prosecutions shall be accountable to the Legal Affairs Committee of Parliament for the exercise of such powers in his or her own behalf and those powers exercised on his or her behalf by subordinates in accordance with subsection (1); and

b) An Act of Parliament shall prescribe restrictions relating to the exercise of powers under this section by any member of the Malawi Police Force.

The CPEC, in sections 76-82, provides greater detail on the powers of the DPP, particularly with regard to the appointment of public prosecutors and the delegation or prosecutorial powers. Section 79 of the CPEC states that:

(1) The Director of Public Prosecutions may by writing under his hand, appoint generally or in any case or any class of cases, any person employed in the Public Service or such other person legally qualified person to be a public prosecutor.

(2) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions.

In summary, the DPP has the mandate to institute and undertake criminal proceedings; take over and continue criminal proceedings instituted by another person or authority; discontinue criminal proceedings; appoint public prosecutors, and supervise the prosecution of criminal proceedings.

In addition to its key roles, the DPP's office is also a member of informal justice sector groups, which were established to improve the operations of the criminal justice system – such as the Homicide Working Group that is chaired by the Ministry of Justice and involves key players involved in the prosecution of homicide cases in Malawi.

3.2.1
Institution and conduct of criminal proceedings

Section 76(1) of the CPEC entrusts the DPP with the duty to prosecute all crimes and offences against the laws of Malawi. While the DPP can institute criminal proceedings on his own motion, the office does not have investigative powers. As such, the institution of criminal proceedings by the office often follows investigations, arrests and recommendations by competent investigative institutions such as the police, the Anti-Corruption Bureau and the immigration service among others. For serious offences that can only be tried by the High Court – such as murder and treason – the investigation docket is sent to the DPP to decide whether to institute proceedings or not or for further directions to the police. In most cases, the suspect would have already been detained.

The period between the arrest and detention of a suspect and when the matter or file is handed over to the DPP varies. In the treason case of Republic vs. Brigadier Mtende and Others, the suspects were arrested by the police and brought to court within the required 48-hour period. In this case, the criminal proceedings were instituted directly by the DPP and the arrest of the suspects came to the attention of the DPP at the earliest opportunity primarily because this was a high profile case.[13]

3.2.2
Discontinuing criminal proceedings

The DPP has the power to discontinue proceedings at any stage before judgment is entered. Section 99(3) of the Constitution requires that reasons should be given in writing within ten days to the Legal Affairs Committee of the National Assembly. However, the Constitution does not provide guidance as to what factors should be considered by the DPP when exercising this power. This also raises the question of whether the DPP is required to provide the court or indeed the victims in the case with the reasons for discontinuing proceedings since there is no requirement under the law.

An additional question concerns the lack of consistency in the practical implementation of this power. Ideally, a Certificate of Discontinuance issued by the DPP should be produced in court before any discontinuance is properly recorded. However, in practice, discontinuance is acceptable in oral form.

3.3
Key gaps

Based on the research, the following shortcomings were identified:

- Lack of enabling legislation for the DPP to build on the constitutional provisions relating to the office;
- The office is not - in practice – the central prosecuting authority in Malawi;
- Lack of a legally binding policy and code of ethics for all prosecutors, which results in inconsistent prosecutorial practices;
- Insufficient capacity to effectively supervise police prosecutors;
- Inconsistency in the discontinuance of cases; and,
- Questions over the independence of the office.

3.4
Recommendations

In view of the above, the report recommends:

- Restructuring the DPP's office in line with the draft National Prosecution Policy to ensure speedy decision-making processes;
- Adopting and implementing the National Prosecution Policy to guide prosecutors in key decision making processes;
- Implementing the Strategic Plan of 2009-2014, particularly in relation to decentralising the DPP's authority;
- Considering enabling legislation for a single independent prosecutions agency; and,
- Building on current inter-agency cooperation initiatives such as the Homicide Working Group.

4.
Malawi Prison Service

The legal framework that provides for the operations, structure and mandate of the Malawi Prison Service is contained in the Constitution and the 1955 Prison Act.

4.1
Organisational Structure

The prison service is headed by a Chief Commissioner, who is tasked with ensuring the proper and efficient administration of the prisons, protection of human rights, respect for judicial orders and directions, and adherence to international standards. The Chief Commissioner is assisted by other officers such as the Assistant Commissioner, Senior Superintendent, Superintendent, Assistant superintendent, Warder class I, Warder class II and Warder class III.[14]

The service oversees all penal institutions, labour camps, special and secure schools, and other bodies that are used to house, detain and rehabilitate people sentenced to imprisonment in whatever form such imprisonment may take – but does not include holding cells in police stations.[15] The Prisons Act, which provides for the administration and structure of the service, was enacted in 1955 and is in urgent need of a total overhaul.

The Service has its headquarters in Zomba with regional offices in the south, centre and north. Every prison is headed by an Officer-in-Charge[16], who is the supervisor and controller of both prison officers and prisoners.

4.2
Core functions

The main responsibility of the Chief Commissioner for Prisons is to ensure the proper and efficient administration of the penal institutions that comprise the Malawi Prison Service.[17] According to the Prisons Act, a prisoner means any person, whether convicted or not, under detention in any prison.[18] An un-convicted prisoner means any person, not being a convicted prisoner, duly committed to custody under a writ, warrant or order of any court, or any order of detention issued by any person authorised by any Malawi law, or by order of a court- martial.[19]

The Malawi Prison Service has a significant role to play in ensuring that the rights of PTDs are not violated. With regard to pre-trial detainees, prison authorities are responsible for:

- Ascertaining that the detention of pre-trial detainees is legally sanctioned by a remand warrant, order of detention, warrant of conviction or of committal from any person authorised to sign or countersign such a warrant or order under any law[20];
- Ensuring that pre-trial detainees are held

separately from convicted prisoners and males separate from females[21];
- Guaranteeing that pre-trial detainees are held in humane conditions, not subjected to torture or cruel treatment, and provided with an adequate diet; and,
- Liaising with other criminal justice institutions in relation to the status of pre-trial detainees, such as the expiry of remand warrants, as well as the submission of lists of pre-trial detainees to the prosecution service, legal aid, civil society organisations and courts.

4.3 Key gaps

The prison system and its challenges are described in more detail in other chapters in this report but the following areas of concern were noted:

- Lack of sufficient resources and capacity;
- Dilapidated prison infrastructure; and,
- Antiquated legal framework i.e. Prisons Act (1955).

4.4 Recommendations

The following recommendations would help to improve the operations of the service:

- Adoption of a National Prison Policy; and,
- Enactment of the 2003 draft Prisons Act.

5. The Judiciary

The legal framework for the Judiciary is enshrined in the Constitution, the Courts Act (chapter 3:02 of the Laws of Malawi), the Supreme Court Act (chapter 3:01 of the Laws of Malawi) and the Local Courts Act Number 9 of 2011.

5.1 Organisational Structure

The judiciary consists of the Supreme Court, High Court, Magistrates' Courts and the anticipated Local Courts. The judiciary is headed by the Chief Justice and then the Justices of Appeal (not less than three)[22], judges[23], registrars, chief resident magistrates, deputy chief magistrates, senior assistant chief magistrates, assistant chief magistrates, senior resident magistrates, first grade magistrates, second grade magistrates, and third grade magistrates.

5.1.1 Supreme Court of Appeal

The Supreme Court of Appeal is established in section 104 of the Constitution which states that:

1) There shall be a Supreme Court of Appeal for Malawi, which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law.

2) The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe.

The Supreme Court of Appeal is exclusively an appellate court without any original jurisdiction. Being the highest court of the land, it handles very few criminal cases. However, the Court plays a significant role in ensuring the protection of the rights of pre-trial detainees by making decisions that are binding on all courts in Malawi.

5.1.2 High Court

Section 108(1) of the Constitution provides that

'There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.'

The High Court exercises its power in three instances. Firstly, it is a court of original jurisdiction and hears serious criminal offences such as homicides, treason and fraud.[24] Secondly, the court hears appeals from subordinate courts.[25] And thirdly, the court exercises general supervisory powers over subordinate courts[26] and can review decisions of magistrates' courts at any stage of the proceedings in the lower court. Section 360 of the CPEC gives the High Court the power to call for and examine the records of any criminal proceedings before a subordinate court for purposes of satisfying itself as to the correctness, legality and propriety of any sentence, finding or order passed by the court and as to the regularity of any proceedings before the subordinate court.

The exercise of such review powers is triggered at the instigation of the High Court itself or when a particular file is forwarded to the High Court by a resident magistrate under Section 361 of the CPEC or when the High Court is moved by any of the parties to criminal proceedings in a subordinate court. As part of its review powers the court is required to confirm certain decisions of subordinate courts. Section 15 of the CPEC requires that where a subordinate court has imposed certain fines or sentences, the court should immediately send a record of the proceedings to the High Court for the High Court to exercise powers of review. A record of proceedings should be forwarded when a fine exceeds K1000; when any sentence of imprisonment is imposed on a first offender and is not suspended; and, when a sentence imposed by a resident magistrate exceeds two years, by a first or second grade magistrate exceeds one year, and by a third or fourth grade magistrate exceeds six months.

However, the review powers of the High Court are sparingly exercised. Indeed, the requirement to confirm sentences imposed by subordinate courts is rarely fulfilled and the confirmation process has in essence collapsed.[27]

There are four High Court registries in Malawi – in Blantyre in the south, Zomba in the east, Lilongwe in the centre, and Mzuzu in the north. Each High Court Registry is headed by a Judge President. There are plans to create a Criminal Division of the High Court with a specified number of judges handling criminal cases only. It is hoped that this will ensure that criminal cases are speedily dealt with by the High Court.

Most criminal cases handled by the High Court are referred to the court through a process known as a summary committal procedure. Ordinarily where a subordinate court does not have jurisdiction to handle a criminal case or feels that the case should be handled by the High Court, the subordinate court will conduct a preliminary inquiry before referring the matter to the High Court.[28] During the inquiry, the subordinate court records witness statements under oath and when it is satisfied that there is enough evidence to warrant a trial, the court will commit the accused to the High Court having either granted him bail or remanded him in prison pending the trial.[29]

The preliminary inquiry can be dispensed with where the DPP under section 289 of the CPEC issues what is called a committal certificate indicating that a particular case should be tried in the High Court. Upon production of such certificate, a subordinate court has to commit the suspect to the High Court and immediately transmit a record of the committal proceedings to the registrar of the High Court and the DPP.[30] The essence of transmitting such a record to the Registrar is to list the matter for hearing at the next session.

However, no records of committal proceedings are ever transmitted to either the registrar or the DPP. Hopefully, the introduction of pre-trial custody time limits will help to keep track of suspects committed to the High Court and remanded in custody.

The listing of criminal cases is supposed to be court driven. Section 302 of the CPEC states that accused people are to be tried during the current session or failing that during the next session. The court reserves the discretion to postpone the trial to any other session, while the prosecution can also move the court for postponement. However, in practice, matters are listed by the courts in consultation with the prosecution and cases are likely not to be listed unless the prosecution has indicated its readiness to proceed with the trial.

5.1.3 Magistrates' courts

Section 110(1) of the Constitution permits the existence of courts subordinate to the High Court:

There shall be such courts, subordinate to the High Court, as may be prescribed by an Act of Parliament which shall be presided over by professional magistrates and lay magistrates.

Section 33 of the Courts Act lists the following magistrates' courts:

- Court of Resident Magistrate – presided over by professional magistrates;
- Court of First Grade Magistrate – presided over by lay magistrates;
- Court of Second Grade Magistrate – presided over by lay magistrates; and,
- Court of Third Grade Magistrate – presided over by lay magistrates.

Section 13 of the CPEC limits the jurisdiction of magistrates' courts, which cannot hear serious cases such as treason, murder or homicide. However, magistrates' courts handle the majority of criminal cases in Malawi. The resident magistrates supervise the lay magistrates under them and – under section 361 of the CPEC – a resident magistrate can call for a record of proceedings from an inferior court and forward this on to the High Court to ascertain whether any finding by the inferior court is illegal, improper or irregular.

Magistrates' courts are severely hampered by a lack of adequate resources. So acute is the situation that some magistrates do not even possess copies of critical legislation such as the Constitution, the Penal Code and the CPEC. As a result, most magistrates are unaware of recent legislative reforms, which naturally compromises the quality of the proceedings before these courts.

5.1.4
Local courts

The Local Courts Act seeks to establish local courts with a jurisdiction to preside over minor criminal cases under the Penal Code or any other written law.[31] It is intended that these courts will be easily accessible to people in rural areas and alleviate some pressure on the subordinate courts.

5.2
Core functions

The Judiciary has the responsibility of interpreting, protecting and enforcing the Constitution and all laws in accordance with the constitution in an independent and impartial manner with regard only to legally relevant facts and the prescription of law.[32] In interpreting the provisions of the Constitution, the courts have to take full account of the Bill of Rights in Chapter IV of the Constitution[33] - so courts have to ensure that PTDs can enjoy their fair trial rights as well as the broader rights available to detainees.[34]

The judiciary remains the most independent institution dealing with PTDs and can intervene at practically any stage during criminal proceedings. However, the ability of the courts to intervene is challenged by the failure of the state to comply with

"some magistrates do not even possess copies of critical legislation such as the Constitution, the Penal Code and the CPEC. As a result, most magistrates are unaware of recent legislative reforms, which naturally compromises the quality of the proceedings before these courts."

the requirement to bring suspects before a court within 48 hours of their arrest. As a result, pre-trial detainees do not come under the jurisdiction of the courts as early as envisaged by the Constitution. The exception to this regular course of events is when a PTD is represented by a legal practitioner, who promptly makes a habeas corpus application for the suspect to be brought to court.

Traditionally, the pace of criminal cases has been prosecution-driven. However, with the amendments to the CPEC establishing pre-trial custody time limits, it is envisaged that the judiciary will assume firm control of criminal proceedings.

5.3
Key gaps

The following gaps were identified during the research:

- Criminal cases are largely prosecution driven thereby limiting firm judicial control of pace of proceedings;
- Severe capacity constraints, particularly in magistrates' courts where most criminal cases are heard;
- The collapse of the review and confirmation system where higher courts analysed decisions of the lower courts; and,
- Lack of awareness of recent criminal justice reforms, such as amendments to the CPEC and the enactment of Child Justice Act.

5.4
Recommendations

- Increase resource allocation to the judiciary – funding it as a full arm of government and not a mere department;
- Provide more resources to magistrates' courts, which handle most criminal cases; and,
- Establish the recommended Criminal Division in the High Court.

6.
Legal Aid Bureau

The legal framework for the Legal Aid Bureau is established by the Constitution and the Legal Aid Act, 2011.

6.1
Organisational Structure

The Legal Aid Department was previously a department within the Ministry of Justice tasked with providing legal aid to Malawians. However, the enactment of the Legal Aid Act in early 2011 has revolutionised legal aid services in Malawi by establishing the Legal Aid Bureau as a separate entity outside the ministry. Once it is established, the Bureau will perform its functions and duties independent of any person or authority and will help to address the huge shortfalls in the provision of legal aid services. In particular, the operations of the Bureau will be decentralised with the establishment of Legal Aid Centres across the country, which will improve access to legal aid services for those most in need of them. Previously, the Legal Aid Department only had offices in Blantyre, Lilongwe and Mzuzu.

6.2
Core functions

Section 4 of the Legal Aid Act provides for the duties and functions of the Bureau as follows:

- Provide legal aid;
- Liaise and cooperate with civil society organisations and other bodies in the provision of legal aid;
- Undertake research into aspects of legal aid; and,
- Prepare reports and make recommendations to the Minister of Justice

This report will focus on the provision of legal aid and cooperation with civil society organisations.

6.2.1
Provision of legal aid

Legal aid has been broadly defined as legal advice, legal assistance, representation in any court, tribunal or similar body or authority, and the provision of civic education and information about the law.[35] The mandate of the Bureau is broad, particularly as it includes the provision of civic education and information about the law as part of legal aid services. The Bureau is also expected

to open more offices across the country, thereby making legal aid more accessible.

6.2.2
Liaison with civil society organisations

Section 28 of the Act permits the Bureau to enter into what are called 'cooperation agreements' with civil society organisations in the provision of legal aid. This is significant given the considerable presence of civil society organisations in the justice system. While the role of civil society organisations has previously been noted, the specific provision for cooperation between them and the Bureau gives these organisations legal recognition in the criminal justice system for the first time.

6.3
Key gaps

The main challenge is limited accessibility to legal aid due to resource constraints and because the existing Legal Aid Department only has offices in three major cities.

6.4
Recommendations

- Implement the Legal Aid Act; and,
- Foster more cooperation between legal aid authorities and civil society.

7.
Civil Society

In recent years, there has been a sharp increase in the involvement of civil society in the criminal justice system and the role of civil society organisations has been duly recognised in the new Legal Aid Act, which states that the Legal Aid Bureau can enter into cooperative agreements with them in the provision of legal aid. Previously, similar arrangements were largely informal.

The work of civil society organisations in the criminal justice system – mainly through paralegals – has been recognised in several international declarations. The Dakar Declaration of the African Commission on Human and Peoples' Rights notes that paralegals should be enabled to provide legal assistance to suspects at the pre-trial stage[36], while the 'Plan of Action' of the Ouagadougou Declaration on Accelerating Prison and Penal Reforms in Africa promotes the 'greater use of paralegals in the criminal process to provide legal literacy, assistance and advice at a first aid level'.[37]

8.
Summary of key steps in the criminal justice process

8.1
Arrest of suspects

The key players are law enforcement agencies, primarily the police but also other institutions with investigative powers such as the Anti-Corruption Bureau and the Immigration Department. Early interveners include the DPP, who can advise the police on the conduct of the case, including releasing the suspect on bail, withdrawing the charges or deciding what charges to bring against suspect. The Legal Aid Department can also intervene to challenge the legality of the arrest, apply for habeas corpus or demand that the suspect be released on bail. Civil society is also able to act at this stage, not necessarily by making court applications but by offering basic legal advice to the suspect about his rights or bringing particular cases to the attention of key criminal justice players such as the Legal Aid Department and the DPP. There are numerous challenges during this part of the criminal justice process, including:

- Institutional capacity of the police both in terms of resources and knowledge about the rights of pre-trial detainees;
- Violation of the 48-hour rule; and,
- Inadequate record keeping relating to detained suspects and the movement of dockets.

8.2
Decision to prosecute

The decision to prosecute a suspect is made at the discretion of the prosecutor. However, such a decision has to be made objectively based on available evidence and a solid legal basis.

Clear and binding enabling legislation for the prosecution services in Malawi or a detailed prosecutorial policy would provide the necessary legal basis. This will in turn ensure that there are no delays in making decisions to prosecute offenders after arrest, and that any decision to prosecute is properly supported by a clear legal threshold and sufficient evidence.
8.3 Decision to keep the suspect in detention

The decision to hold suspects in custody pending trial is usually made by the prosecution with the courts, legal aid body and civil society organisations as potential interveners. The key challenge remains a culture of detaining suspects even when the matter does not warrant it. For serious offences, which can only be prosecuted by the DPP, the decision to keep a suspect in detention is normally made well before the docket is brought to the DPP. In addition, poor recording keeping throughout the justice system means that some suspects can be 'lost' within the system without their particulars being traceable.

8.4
Conduct of the trial

In an adversarial system like Malawi's, the pace of cases is driven by the prosecution service. However, there is increasing realisation that – given the basic right to liberty – the prosecution cannot be provided with a blank cheque to conduct cases at their preferred pace. Moreover, considering the poor conditions of detention, a detained person's right to dignity is threatened – if not categorically violated – the longer he is in custody. While lack of resources is well documented, there are other factors which contribute to unreasonable delays in the conduct of trials. These include the lack of firm judicial control over the pace of criminal proceedings and the lack of implementation of recent reforms, such as statutory pre-trial custody time limits.

9.
Good practices

While the Malawian criminal justice system faces a host of serious challenges, there are a number of good initiatives and potential legislation which could markedly improve the system.

The Homicide Working Group has helped to come up with best practices for the conduct of homicide cases, which has significantly reduced the backlog of these cases. A pilot project on diversion, spearheaded by the Catholic Commission for Justice and Peace in conjunction with key justice sector players, has been launched in Lilongwe and if successful will become a role model for adult diversion projects elsewhere in Malawi. Radical legislative reforms have taken place in the last few years with the amendment to the CPEC, the Police Act and the enactment of the Local Courts Act, the Legal Aid Act and the Child Care, Protection and Justice Act. These laws collectively have the potential to help alleviate many of challenges outlined in this report.

In addition, proposed legislation – including the draft Prison Bill, the draft Prison Policy and the draft National Prosecution Policy along with the creation of Criminal Division of the High Court – would build on recent gains made in reforming the criminal justice sector.

10.
Conclusion

The last two years has seen significant legislative reforms in the criminal justice sector. But while well intentioned, these reforms will not have much of an effect unless they are fully implemented and unless practical steps are taken to address the current system's many shortcomings. Along with the much-needed legislative advances, there is also an urgent need for institutional and administrative reforms of the criminal justice institutions.

4. THE LEGISLATIVE FRAMEWORK FOR PRE-TRIAL DETENTION

By Pacharo Kayira

"a holistic rather than a piecemeal approach is necessary to address the major shortfalls crippling the justice."

1. Introduction

Since Malawi adopted a new constitutional order in 1995, the criminal justice system has laboured to adhere to the fair trial and human rights standards set out in the Constitution. The Bill of Rights contains a solid cluster of fair trial rights, which are generally in line with international standards, and this has created substantial obligations for the state to ensure the full enjoyment of rights accorded to people in detention.[1]

Undoubtedly, the criminal justice system has attempted to ensure full enjoyments of these rights, and much progress has been made in reform efforts. Recent amendments to criminal procedure rules represent the most radical overhaul of the criminal justice system to date, especially in relation to pre-trial detention.

The recent amendment to the CPEC[2] has brought radical changes to the law governing pre-trial custody. This is a welcome and practical step towards a significant reduction in the number of pre-trial detainees languishing in Malawian prisons and is essentially built on the pillars of constitutional guarantees of fair trial and personal liberty. But since it is a recent amendment, it is an aspect of the law that has not yet to be tested.

Meanwhile, the enactment of the Child Care, Protection and Justice Act[3] addresses some concerns regarding children in conflict with the law, and reinforces the constitutional requirement that children should not be detained except as a measure of the last resort.

However, the realisation of rights, such as the presumption of innocence and the right to be released on bail pending trial, have remained big challenges – as have difficulties in ensuring the speedy conclusion of criminal cases and the alarming numbers of pre-trial detainees (PTDs). These are signs of a system overwhelmed by ineffectiveness and indicate that a holistic rather than a piecemeal approach is necessary to address the major shortfalls crippling the justice.[4]

2. General rights of pre-trial detainees

Section 42 of the Constitution provides what are collectively known as fair trial rights and extends these to people in detention and sentenced prisoners as well as children who are in detention as a special vulnerable group[5], giving everyone the right:

- To be charged within 48 hours;
- To challenge the lawfulness of the arrest;
- To be released where the arrest is unlawful;
- Not to be detained without trial;
- To be presumed innocent;
- To apply for bail pending trial; and
- To have his/her trial concluded within a reasonable time.

2.1 The right to be brought to court within 48 hours

Wanda describes the right to be promptly brought to court as consisting of three independent rights: the right to be brought before an independent and impartial court of law within 48 hours of arrest; the right to be charged or informed of the reasons for continued detention; and, on failing to be charged or informed of the reason for further detention, the right to be released from detention.[6]

This requirement affords an opportunity for the detained person to be charged promptly or at least be informed of the reasons for his arrest. It is also an opportunity for the state to continue detaining a suspect with the sanction of the court, thereby ensuring that such detention is lawful. In addition, it offers the court an early opportunity to assess the evidence against a suspect and whether there is any justification whatsoever for continued detention. In Republic vs. Brigadier Mtende and Others, the suspects were detained on allegations of treason and conspiracy to commit murder. The State duly brought them to court within the 48 hour period and applied for their continued detention. The court declined to order further detention on the basis that the evidence presented by the State did not justify it.[7] When the State has failed to bring a suspect to court within 48 hours, his continued detention is unconstitutional and the court should order his immediate release. Therefore, a strict adherence to the 48 hour right is the first legal opportunity to prevent unnecessary pre-trial detention.

As Mwaungulu J stated in The Republic vs. Leveleve:

The right under section 42 (2) (b) of the Constitution should be seen as more than a right. Like most rights, it is an ideal. In my judgment it is also a standard, a measure of the efficiency of our criminal justice system. For separation of powers and removal of arbitrariness in the criminal process, the forty-eight hour right ensures prompt judicial control and check on executive actions affecting citizen's rights. To the citizen, the forty-eight hour right affords the citizen a prompt opportunity to assert and sample rights the Constitution creates for the citizen and test the reasonableness of the state's deprival of those rights. The framers set forty-eight hours as the efficiency standard for our criminal justice system to bring the citizen under judicial surveillance. In my judgment there are no operational problems.[8]

2.2 Presumption of innocence and the right to bail

The right of a suspect to be presumed innocent is at the heart of a fair criminal justice system. It is one of those principles that influences the treatment an accused person experiences from the investigation to the trial to the final appeal.[9] The right is solidly provided for in international instruments, such as Article 11(1) of the Universal Declaration of Human Rights (UDHR), Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR), and Article 7 (1) (b) of the African Charter on Human and Peoples Rights.

Commenting on the right to be presumed innocent under the ICCPR, the Human Rights Committee in General Comment No. 13 stated that:

The principle of presumption of innocence means that the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to

be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.[10]

In Amon Zgambo vs. Republic[11], the Malawi Supreme Court said:

An accused is presumed by the law to be innocent until his or her guilt has been proved in a court of law and bail should not ordinarily be withheld from him as a form of punishment. The court should therefore grant bail to an accused unless this is likely to prejudice the interests of justice

Therefore, pre-trial detention may be ordered only if there are reasonable grounds to believe that the person concerned has been involved in the commission of the alleged offences and there is a danger of the person absconding or committing further serious offences, or that the course of justice will be seriously interfered with if they are free.[12] Once an accused person has been charged, he is still presumed innocent and it has to be shown by the State that the interests of justice demand that he be remanded in custody while awaiting for trial.

The granting of bail in Malawi is governed by the Constitution, the CPEC[13] and the Bail (Guidelines) Act.[14] A detained person can be granted bail either by the police or by the courts. The jurisprudence on the principles to be applied by the courts when deciding to grant bail or not has taken an interesting route – involving the common law approach in cases such as Lunguzi vs. Republic and Amon Zgambo vs. Republic, the Bail (Guidelines) Act approach that seeks to give specific guidelines to be followed by the courts, and the interests of justice approach that is clearly outlined in the Constitution and exemplified by cases such as Tembo vs. Republic and more recently by the Mvahe decision.

The Lunguzi and Zgambo approach developed immediately after the 1995 Constitution and presents a rather cautious approach by the courts to granting bail, especially in relation to what have come to be called 'heavyweight offences', such as murder and armed robbery. This approach recognises bail as a right but requires the suspect in such serious cases to provide exceptional reasons why he should be granted bail. The burden of demonstrating eligibility for bail is thus shifted from the State to the accused.

The Amon Zgambo case summarised the factors to be considered when a court is called upon to decide on granting of bail:

- The requirements of bail are merely to secure the attendance of the accused at his trial and the test is whether it is probable that the accused will appear to take his or her trial.
- The determination of this issue involves a consideration of other issues such as the seriousness of the offence, the severity of the punishment in the event of a conviction, and whether the accused has a permanent place within the jurisdiction where he or she can be located.
- The court will take into account this issue of whether there are reasonable grounds for believing that the accused if released on bail will tamper with witnesses or interfere with the relevant evidence or otherwise obstruct the course of justice.
- The determination of this issue will involve a consideration of the other related issues such as whether the accused is aware of the identity of the witnesses and the nature of their evidence, whether the witness have already made their statements to the police or whether the case is still under investigation, whether it is probable that they may be influenced or intimidated by him or her.
- The court will also consider whether there is reasonable likelihood that if released on bail, the accused will commit further offences

This approach did contribute to the creation of a large population of pre-trial detainees, especially murder suspects. At the same time, there were concerns that courts were becoming too liberal in terms of granting of bail and the Bail (Guidelines) Act was passed to clarify the principles for granting of bail. However, the Act has largely been ignored as courts have opted to build on common law principles for granting bail. For example, the Act states that suspects in certain serious offences, such as treason cannot be granted bail, a provision which has been roundly ignored by the courts.[15] Between 1994 and the decision of the Supreme Court in Mvahe case in 2005, the courts followed common law principles as expounded in the Lunguzi and Zgambo cases. However, the Mvahe decision correctly stressed the provision in the Malawi Constitution that the only consideration when deciding whether to grant bail or not is the interests of justice. Mvahe finally reconciled the common law principles and the Constitutional provision on bail as follows:

- The High Court has power to grant bail in any offence, including murder.
- The right to bail is not absolute and is limited by the interests of justice
- The onus is on the state to show cause why it would be in the interest of justice not to release the accused on bail.

The applicant faced a murder charge and was denied bail since the State argued that the interests of justice required his continued detention. On appeal, the Supreme Court ruled that:

...according to section 42(2)(e) it will fall upon the State to show, by giving reasons, that the interests of justice require that bail should not be granted or, what is the same thing, by giving reasons why it would not be in the interests of justice to grant bail to the accused person. Of course after the State has proffered its reasons in this regard the court will give the accused person an opportunity to respond. [16]

It is important to understand the development of the law and practice relating to bail in Malawi because over a decade of legal uncertainty contributed substantively to a culture tolerant of excessive pre-trial detention. The situation is clearer now and can be summarised as:

- The suspect is always presumed innocent;
- Bail is available in all offences;
- The right to bail is not absolute;
- Bail is limited only by the interests of justice; and,
- The State must show why bail should not be granted.

2.3 The Right to be tried within a reasonable time

All accused people have the right to be tried within a reasonable time. This right is enshrined in section 42 of the Constitution.[17] Commenting on this right under Article 5(3) of the European Convention, the European Court on Human Rights has stated that:

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are 'relevant' and 'sufficient', the Court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings.[18]

The Human Rights Committee has said that the right to be tried within a reasonable time:

Relates not only to the time a trial should commence, but also the time by which it should end and judgement be entered, all stages must take place without undue delay.[19]

The European Court of Human Rights has also stated that once a suspect has been informed that he is facing a charge or that he is under investigation, time starts running for the State to bring him to trial within a reasonable time. In the Özturk Case the court defined a charge as:

The official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, although it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.[20]

Therefore, the enjoyment of this right does not begin and end with the commencement of the trial. The suspect enjoys the right from the moment he faces arrest through to the final decision. So in Pagnoulle (on behalf of Mazou) v Cameroon, failure by the highest Court to deliver a judgement two years after hearing an appeal amounted to a violation of this right.[21]

The right to be tried within a reasonable time remains one of the most burdensome on the Malawi justice system. Typically, the finger of

blame is pointed at the insufficient resources of the police, the prosecution agency and all the components of the judiciary. However, the State cannot use a lack of resources as an excuse to violate a detainee's rights, as was clearly stated by the Malawi High Court:

State organs cannot, however, avoid constitutional duties and responsibilities under the section because of administrative or financial difficulties. The weight a democratic constitution attaches to the citizen's rights should, in my judgment, be matched with prioritizing and desire to attain efficiency levels that uphold and promote rights. Any other approach results in violation of rights.[22]

The Human Rights Committee has also stated, in General Comment 31, regarding the nature of obligations imposed on states parties under the ICCPR, that the requirement to give effect to Covenant rights (which include the right to be tried within a reasonable time) is unqualified and of immediate effect. A failure to comply with the obligations cannot be justified by reference to political, social, cultural or economic considerations within the State.[23]

What amounts to a 'reasonable time' varies and essentially depends on the circumstances of each particular case. Some of the factors to be considered include the complexity of the case[24], the conduct of the parties especially the prosecution[25], the interest of the accused[26], and whether the suspect is in custody pending trial.

There is no judicial decision which has determined what constitutes 'a reasonable time' and what remedies should be available when this right is violated. An attempt was made in Republic v Kutengule, when the suspect was arrested in 2005 for alleged corruption and released on bail although the case did not commence for more than a year. The suspect applied to the High Court to determine whether his right to a fair trial was being violated. Unfortunately, the matter was never pursued and the court missed an opportunity to lay down broad and decent standards on the enjoyment of this right.[27]

In a more recent case, Bakali Bauti vs. Republic[28], the High Court acquitted an accused person on a murder charge, who had been on remand without trial for close to ten years. The High Court observed that it was 'impossible' for him to have a fair trial as his right to be tried within a reasonable time had been violated. This decision is a step in the right direction, for two reasons. Firstly, the courts in Malawi have never really made solid pronouncements on the scope of the right to be tried within a reasonable time. Secondly, when this right has clearly been violated, the victims have not been granted any effective remedy, such as a permanent stay of proceedings or an outright acquittal. In other words, this right has not been firmly observed although it is very significant in the broader scope of fair trial rights.

The situation of the right to a trial within a reasonable time in Malawi can be summarised as:

- It applies to all PTDs;
- It is solidly protected in the Constitution;
- It is not strictly enforced;
- There is a need for more judicial pronouncements; and,
- There is a lack of effective remedy for violations.

3. Recent legislative reforms

3.1 Pre-trial custody time limits

Perhaps the most radical changes in the criminal justice system since 1994 have been recently enacted through the amendment to the CPEC. In Part IVA the Act introduces pre-trial custody time limits, which are specific periods of time accused people may be held in lawful custody while waiting for the commencement of their trials. Lawful custody in the Act entails custody sanctioned by a court order pending trial.[29] According to the Prisons Act[30], no suspect is accepted in any prison unless there is a clear remand warrant, or any order of detention from a court.

For the purpose of this section, time runs from the expiry of the 48 hours after the arrest of an accused person, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry.[31] Where an accused person is in lawful custody in relation to one offence and is subsequently charged with another offence not arising from the same facts or in the course of the same transactions, the time in relation to the subsequent offence shall run from the date when the accused person is charged with the offence.[32]

The pre-trial custody time limits are determined and categorized firstly by the jurisdiction of the court trying an accused and secondly by the seriousness of the offence. A person accused of an offence that can be tried in a subordinate court can only be held in custody pending the commencement of his trial for a maximum period of 30 days.[33] The maximum period that a person accused of an offence triable in the High Court may be held in lawful custody pending committal for trial to that court is 30 days. Where a person accused of an offence triable in the High Court is committed to the High Court for trial, the maximum period that he may be held in lawful custody pending commencement of his trial in relation to that offence is sixty days.[34] The maximum period that a person accused of treason, genocide, murder, rape, defilement and robbery may be held in lawful custody pending commencement of his trial in relation to that offence is ninety days.[35]

3.2 Extension of the pre-trial custody period

The prosecution is at liberty to apply for an extension of the custody time limit as long as the application is lodged before the court that is seized with the matter at least seven days before expiry of the custody time limits. An extension can only be granted when the prosecution provides the court with good and sufficient cause. However, the Act does not define what constitutes good and sufficient cause.

An extension of custody time limits shall not exceed thirty days.[36] The use of the word 'shall' is mandatory, which suggests that there is no room for any extension beyond thirty days. At the expiry of a custody time limit or of any extension thereof, the court may on its own motion or on application by or on behalf of the accused person or on information from the prosecution, grant bail to an accused person.[37]

If adhered to, these pre-trial custody limits can effectively deal with the problem of unnecessary or prolonged pre-trial detention. Firstly, the law is very specific on custody time limits. For example, a person accused of the most serious offence such as genocide can only be held in custody pending his trial for a maximum period of 120 days.

Secondly, the Act firmly places all pre-trial detainees under the jurisdiction and supervision of the courts. Therefore, accused people cannot be held in custody at the pleasure of the State nor can they be held at an unknown location and nor can it be unknown that they are detained. This is important because many accused people have languished in custody anonymously for lengthy periods of time while their cases are stalled in the system. But now, a court can on its own motion order the release of a suspect at the expiry of the custody limit. The scheme, therefore, envisages a situation where all key players in the criminal justice system, namely the presiding court, the prosecution and the defence have to work together to ensure that detainees do not remain in custody beyond the prescribed limits.

And thirdly, section 36 of the CPEC also requires police officers in charge of police stations to report to the nearest magistrates' court whenever an arrest has been made in their respective areas and indicate to the court whether the accused has been remanded or granted bail. This is a major improvement to the law because previously courts were rarely informed about the status of pre-trial detainees.

However, the pre-trial custody time limits alone do not ensure observance of the broader right to a trial within a reasonable time since the limits do not address concerns about the speedy conclusion of cases that have commenced or the speedy delivery of judgments.

In summary, the scope of pre-trial custody laws in Malawi includes:

- The period in pre-trial is determined by seriousness of the alleged offence;
- Extension may only be for a maximum of 30 days;
- Extension may only be granted only if good and

sufficient cause has been demonstrated;
- The right to apply for bail remains available throughout the period;
- There is a mandatory release after expiry of the (extended) period; and,
- Judicial control over detainees.

3.3
Other measures to prevent excessive pre-trial detentions

The CPEC and the Child Care, Protection and Justice Act introduce a wide range of measures that can be used by authorities to prevent the detention of suspects or to help in the quick disposal of cases. These include cautioning and releasing peoples suspected of less serious offences[38], referring cases involving children suspected of less serious offences away from formal court proceedings with or without conditions in a process known as diversion[39], promoting reconciliation in less serious offences[40], and plea bargaining when the accused and the prosecution work out a mutually satisfactory disposition of the case with approval of court.[41]

Where the police decide to caution and release a suspect in a less serious offence the following factors have to be taken into consideration:

- The petty nature of the offence;
- The circumstances the offence was committed;
- Views of the victim or complainant; and,
- The personal condition of the suspect such as age, or any infirmity.

3.4
Comparative analysis of pre-trial custody time limits

United Kingdom
In the United Kingdom, section 22 (3) of the Prosecution of Offences Act 1985 sets pre-trial custody limits that can be extended when there is good and sufficient cause or when the prosecution has acted with all due expedition. Three cases illustrate how the UK Courts have applied this law and how the same practice can be adopted in Malawi.

In Regina v Central Criminal Court, ex parte Abu-Wardeh[42] the court had the opportunity to rule on what the term 'good and sufficient cause' means. The applicant and three others were charged with conspiring to cause explosions in July 1994. Their trial was originally fixed to start on 2 January 1996 – just within the custody time limit of 112 days from the latest committal of joint defendants to arraignment imposed by regulation 5 of the Prosecution of Offences (Custody Time Limits) Regulations 1987. In December 1995, the trial was postponed and the custody time limit extended, until 19 February 1996. In January 1996 the designated judge withdrew from the case because he knew one of the prosecution witnesses. On 26 January 1996, the new judge heard applications by the prosecution and two defendants for a further adjournment, which the applicant opposed. However, due to prior commitments, the judge was unable to start the trial until 1 October 1996. Since no other judge of sufficient seniority was available to try it sooner, the prosecution applied for a further extension of the custody time limit until the new trial date of 1 October. The recorder concurred having concluded that there was 'good and sufficient cause' under section 22(3) of the 1985 Act.

The applicant and the three others then sought judicial review, arguing that the unavailability of the judge did not represent 'good and sufficient cause' for extending their pre-trial custody. The court ruled that:

- The formula of the two adjectives 'good' and 'sufficient' must have some purpose other than mere emphasis;
- 'Good…cause' must mean some cause for the extension of time sought, not the corresponding need to keep the defendant in custody;
- 'Sufficient' means what it says and must require the court when considering a 'good…cause' to evaluate its strength;
- Each case must be decided on its own facts;
- On the issue of sufficiency, the court can look at the nature of the case; and,
- That protection of the public could not in itself be a 'good and sufficient' cause for extending the custody time limit.[43]

In Malawi, 'good and sufficient cause' is the only statutory justification for which the pre-trial custody period can be extended. In the UK, the law specifically provides that the court can also consider whether the prosecution had acted with all due expedition in handling of the case. It is submitted that although this does not appear under Malawian legislation, our courts can still consider the conduct of the prosecution and indeed the accused in determining whether to order an extension of custody time. In general, the conduct of the prosecution should come under scrutiny, especially when considering a suspect's right to be tried within a reasonable time.

In Hadfield vs. Manchester Crown Court,[44] it was considered whether the court had acted with all due expedition. The court approved the test set by Lord Bingham in R v Manchester Crown Court ex parte McDonald:

"To satisfy the court that this condition is met, the prosecution need not show that every stage of representation of the case has been accomplished as quickly and efficiently as humanly possible. That would be an impossible standard to meet, particularly when the court which reviews the history of the case enjoys the immeasurable benefit of hindsight. Nor should the history be approached on the unreal assumption that all involved on the prosecution side have been able to give the case in question their undivided attention. What the court must require is such diligence and expedition as would be shown by a competent prosecutor, conscious of his duty to bring the case to trial as quickly as reasonably and fairly possible. [45]

Lord Bingham concluded by saying that – in considering whether that standard of all due expedition has been met – the court will of course have regarded to:

- The nature and complexity of the case;
- The extent of preparation necessary;
- The conduct, whether cooperative or obstructive of the defence;
- The extent to which the prosecutor is dependent on the cooperation of others outside his control; and,
- Other matters directly and genuinely bearing on the preparation of the case for trial.

It should be noted that these factors are the same as the court would consider in determining whether a suspect's trial has been concluded within a reasonable time.

Uganda
Uganda has gone a step further by including pre-trial custody limits in the Constitution. Section 23(6) (b) and (c) provide that:

(b) in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days;

(c) in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.

Ugandan case law shows that in addition to the pre-trial custody time limits, courts have taken additional steps to enforce fair trial rights when there is undue delay in the prosecution of suspects and even when trial has commenced. In Shabahuria Matia vs. Uganda, the murder suspect appeared in court numerous times over a period of three years and nine months without being committed for trial. The court ordered a permanent stay of prosecution observing that:

Prejudice to the accused, presumptive and real, is extremely grave in the circumstances of this case. The ability of the accused to mount a defense is affected with the passage of time. The witnesses may not be traceable. Their memories may fade with time. If on bail, accused must incur travel and accommodation expenses regularly. If he cannot afford these expenses and jumps bail, he is certain to be re-arrested, as happened in this case. In detention, his right to be presumed innocent becomes a mockery, existing only in name, as he languishes in pre-trial detention. It is no secret that in our penal detention centres for adult prisoners, the conditions are extremely severe. The accused must in the meantime bear anxiety, concern and stigma of exposure to criminal proceedings not headed anywhere. I was satisfied that the unexplained delay of three years and nine months, without the

accused being committed for trial, while bearing the very grave charge of murder on his head, is so oppressive as to amount to an abuse of court process, warranting the extreme step of ordering a stay of prosecution.

In this regard, the approach adopted by the High Court of Malawi in Bakali Bauti vs. Republic is progressive and in line with the position both in Uganda and in South Africa.[46]

3.5 Prosecution time limits for trials

The CPEC also sets down periods for the commencement and completion of a trial. For cases triable in a subordinate court or the High Court, the law provides that trial shall commence within twelve months from the date the complaint arose and be completed within twelve months from commencement of the trial.[47] The only exception is that this does not apply to offences punishable by imprisonment for more than three years. When a trial does not commence or is not completed within the prescribed period, the accused shall be discharged. The only exception is when the cause of the delay cannot be attributed to the prosecution, in which case the court shall order an extension in time to ensure the completion of the trial.

4. Conclusion and recommendations

The Constitution lays a solid foundation for the observance of fair trial rights for all accused people, including pre-trial detainees. The challenge has been to reconcile these constitutional standards with criminal procedure rules. The starting point should be strict adherence to the 48 hour rule within which all suspects ought to be brought before a court of law.

The pre-trial custody limits set in the CPEC are a welcome development and will go a long way in ensuring that suspects are not simply detained at the pleasure of the State while awaiting trial. The criminal justice system should connect the time limits to the broader fair trial rights such as presumption of innocence and trial within a reasonable time. In this case, all categories of pre-trial detainees will be duly protected.

The major challenges facing the Malawi criminal justice system are due to structural and functional failures within key institutions. The situation can be improved dramatically by:

- Promoting greater awareness, and full implementation, of recent legal reforms in the CPEC and the Child Justice Act by all key institutions;
- Increasing the use of non-custodial measures such as diversion;
- Enhancing cooperation between criminal justice institutions through mechanisms such as court users meetings and the homicide working group; and,
- Ensuring that there is firm judicial control over every stage of criminal proceedings.

5. PRISON LAW AND CONDITIONS OF DETENTION

By Pacharo Kayira

"prison conditions in Malawi remain a serious blot on the country's human rights record."

1. Introduction

On 6 November 2005, the New York Times published an article entitled 'The Forgotten of Africa, Wasting Away in Jails without Trial', which painted a grim picture of the general criminal justice system in Malawi and particularly the appalling conditions in Malawian prisons[1] – despite the Constitution's robust human rights provisions for people in detention, which is largely on par with international norms and standards. However, the enforcement of these standards has remained an enormous challenge and prison conditions in Malawi remain a serious blot on the country's human rights record. In 2009, the High Court decided a case that comprehensively addressed the issue of prison conditions and made several recommendations to the authorities for major improvements, which has resulted in some progress.

The Malawi Prison Service is required by law to efficiently administer all penal institutions subject to, and in accordance with, the protection of rights in the Constitution or any other law.[2] This report analyses international legal standards relating to the rights of people in detention, and discusses how Malawi has implemented these standards based on the extant literature. The major international instruments and standards on detention rights are the:

- International Covenant on Civil and Political Rights (ICCPR);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
- Universal Declaration of Human Rights (UDHR);
- Standard Minimum Rules for the Treatment of Prisoners (UNSMR);
- Basic Principles for the Treatment of Prisoners;
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and,
- African Charter on Human and Peoples' Rights.

2. General legal framework on conditions of detention

2.1 The Prohibition of torture, cruel and inhuman treatment

The prohibition of torture, cruel and inhuman treatment has been described as 'one of the fundamental values of democratic societies'.[3] The prohibition came to international prominence immediately after the Second World War with its inclusion in the Universal Declaration of Human Rights adopted in 1948 by the United Nations General Assembly.[4] This was followed by the adoption of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975.[5]

The prohibition of torture is now universally accepted as a peremptory norm of general international law – as has been highlighted by the United Kingdom House of Lords and the International Criminal Tribunal for the Former Yugoslavia (ICTY),[6] as well as by major international instruments such as the ICCPR and UNCAT. Article 7 of the ICCPR states clearly that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and, in particular, that no one shall be subjected without his free consent to medical or scientific experimentation.

Commenting on this Article, the Human Rights Committee has stated that:

It is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States Parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel and inhuman and degrading treatment in any territory under their jurisdiction.[7]

Article 7 of the ICCPR is complemented by Article 10 (1) of the Covenant, which specifically deals with people in detention:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 2 of UNCAT also urges States to take effective legislative, judicial, and administrative measures to prevent acts of torture.[8] Meanwhile, the judiciary is under an obligation to ensure that individuals are fully protected from torture and, where there is violation of such rights, that the victims are fully compensated. On their part, prison authorities have to put in place administrative measures and practices to prevent acts of torture and inhuman treatment, and mechanisms to detect and report any violations.

It should also be noted that Article 16 of UNCAT also prohibits other forms of ill treatment that do not amount to torture, although there is no requirement that these other forms must be criminalised in domestic law.[9] For example, severe overcrowding over a prolonged period of time may amount to other forms of ill treatment and would then be prohibited under UNCAT.[10]

Malawi's 1995 Constitution prohibits torture, cruel, inhuman and degrading treatment or punishment in Section 19(3):

No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.

In addition, Section 44(1)(b) of the Constitution states that this prohibition is not subject to any derogation, restriction or limitation. The prohibition of torture, cruel, inhuman and degrading treatment in the Constitution is therefore absolute and in line with international legal standards. However, Malawi has not yet criminalised torture and has used Penal Code offences such as assault and attempted murder to prosecute those accused of torture. The recent Penal Code amendment, which included the grave crime of genocide in Section 271A, did not unfortunately include torture. The continued use of Penal Code offences to prosecute suspected torturers is inadequate as stated by the Committee against Torture:

By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention's overarching aim of preventing torture and ill treatment. Naming and defining this crime will promote the Convention's aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also emphasize the need for a) appropriate punishment that takes into account the gravity of the offence, b) strengthening the deterrent effect of the prohibition itself and c) enhancing the ability of responsible officials to track the specific crime of torture and d) enabling and empowering the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention.[11]

While Malawi acceded to UNCAT, it has not yet implemented its major provisions as required by the instrument. In addition, Malawi has not yet submitted a report to the Committee against Torture as required by article 19 of UNCAT. Furthermore, although the Constitution clearly prohibits torture, practical steps and procedures that would prevent, detect and punish cases of torture have still not been adopted by the criminal justice system.

2.2 General conditions of detention

2.2.1 Treatment of detainees with humanity and dignity

Major international human rights instruments are clear that people deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[12] In reference to Article 10 of the ICCPR, the Human Rights Committee has said that the following apply:

- Detainees may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty;
- Respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons;
- Detainees must enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment; and,
- Treating detainees with humanity and with respect for their dignity is universally applicable minimum standard, which should not be dependent on the material resources available in a particular state.[13]

Section 42(1) (b) of the 1995 Constitution specifically provides that all people in custody should be detained under conditions consistent with human dignity. This provision builds on Section 19, which is a broader provision on the right to be treated with dignity. This entails that the all detention conditions should be humane, healthy and not degrading.

The African Commission on Human and Peoples' Rights (ACHPR) has had occasion to discuss the general conditions under which suspects are being held in view of Article 5 of the African Charter. The shackling of prisoners, solitary confinement and overcrowding offend the dignity of detainees – the finding of the Commission in Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi.[14]

The Commission further stated that holding prisoners in their cells for up to 14 hours at a time, the lack of sports and medical treatment, poor sanitary conditions and the lack of opportunity to be visited were all violations of Article 5 of the Charter.[15] Similarly the Human Rights Committee has held that Article 10 (1) of the ICCPR was violated when a suspect was held in a two square metre cell, confined to his cell for hours on end,[16] and not given food for five days.[17]

In the case of Malawi, Section 42 (1) (b) of the Constitution provides that detained people have the right to be held under conditions consistent with human dignity, which includes at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State.

The Malawi Prisons Act Regulations deal with the admission and confinement of prisoners, among others. The Third Schedule to the Act deals with the diet of prisoners, while the Fourth Schedule deals with prisoners' clothing and accessories, and the Fifth Schedule covers cell equipment, such as the number of blankets for both hot and cold seasons, the sleeping mat and mug. In each

of the Schedules, there is a scale listing the quantities to be provided.

Following a 2001 visit to Malawi prisons, the ACHPR Special Rapporteur on Prisons and Conditions of Detention in Africa noted that the quality and quantity of food supplied to prisoners was inadequate and that prisoners receive only one meal per day and the meals are not balanced as prisoners eat the same thing every day.[18] In its 2004 Report, the Malawi Prison Inspectorate summarised the status of the food in Malawi prisons as follows:

In most of the prisons visited, the inspectorate noted that diet for prisons continues to be poor. Prisoners complained that they are always served with a monotonous diet of nsima (mgaiwa or maize porridge) and beans/pigeon peas once a day. However, it is pleasing to note that this diet is supplemented by vegetables in almost all the prisons.

"the major problem in most Malawian prisons is overcrowding."

However, the major problem in most Malawian prisons is overcrowding. Overcrowding means an excessive inmate population in a particular correctional centre (prison) with limited accommodation.[19] In some cases, cells hold double their intended capacity. In its 2010 Annual Human Rights Report, Amnesty International summarised the general conditions in Malawi prisons as:

Overcrowded cells with most holding more than twice their capacity. In December, for example, Maula Prison (Central region), built for 700 prisoners, housed about 2,200; Zomba Prison (South region), built for 900 inmates, housed 2,176; Chichiri Prison in Blantyre, built for 700 prisoners, housed 1,800; and Mzuzu Prison (Northern region), built for 200 inmates, housed 412. The overcrowding resulted in the spread of contagious diseases, including tuberculosis and scabies[20]

The Malawi Prison Service cannot solely be blamed for such inhuman and overcrowded conditions. The prisons are at the receiving end, and overcrowding is a sign of a broken criminal justice system.

The combined impact of poor conditions of detention, particularly overcrowding, has been well documented. A Malawi government study in November 2005 noted that diseases commonly found in prisons include tuberculosis, scabies, diarrhoea, sexually transmitted infections, coughs, malnutrition, malaria and bilharzia.[21] Efforts to address the problem have included the deployment of health personnel in the prisons and by the end of 2004 to each prison in the country.

2.2.2 Prohibition of discrimination

Discrimination on any basis is prohibited in all major international instruments.[22] The prohibition of discrimination against detained people is found in Article 2 of the African Charter, which states that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Section 20 of the Constitution of Malawi prohibits discrimination on any basis or status.[23] Non-discrimination clauses have been interpreted broadly both domestically and in international law. Detainees are entitled to enjoy all their constitutional rights – a view that is in line with South African constitutional jurisprudence in August and Another v. the Electoral Commission and Others, where the Constitutional Court held that:

It is a well-established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed. Of course, the inroads which incarceration necessarily makes upon prisoners' personal rights and liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations, which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights, which they may not be denied; and if they are denied them, then they are entitled to legal redress[24]

However, there is a form of discrimination between different categories of prisoners that is necessary and acceptable within the law. Principle 5 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment recognises the need for different treatment of detained people as necessitated by their special needs:

Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Flagrant discriminatory practices based on the status or race of detained people is deplorable. But it does occur as the Malawi Human Rights Commission noted:

The apparent discriminatory treatment being afforded to the prisoners was evidenced by the putting of an Indian male sick prisoner in hospital when other equally sick prisoners or even more seriously ill prisoners were not taken to the hospital. In addition, even this male prisoner was given a separate room, which by design is supposed to be a female ward, thus depriving a seriously ill female prisoner of the use of the ward. Apparently this Indian male prisoner was suffering from a disease to do with the liver (gall stones), which at any rate is not contagious, entailing that he should have been in the general male ward.[25]

2.2.3 Segregation of different categories of people in custody

The Human Rights Committee has stated that the need to separate awaiting trial detainees from convicted people is to emphasise their right to be presumed innocent.[26] In this regard, the segregation of detainees from convicted prisoners is acceptable and they are entitled to much more favourable conditions since they are presumed innocent until found guilty.[27] Rule 8 (a) of the UNSMR broadly provides that:

The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.

Therefore, men and women have to be kept in separate quarters in detention institutions that receive both men and women. The Malawi Prison Act broadly provides for the segregation of a variety of detainees on the basis of sex, including un-convicted prisoners, convicted prisoners,

young prisoners, adults, first offenders, prisoners with previous convictions, prisoners suspected of being of unsound mind, and other classes outlined by the Commissioner.[28]

International law clearly recognises the vulnerability of children and there are specific provisions regarding their treatment while in custody. Article 37 (c) of the Convention on the Rights of the Child complements the prohibition on ill treatment in article 37 (a) by providing that:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of persons of his or her age.

Article 17 (1) of the African Charter on the Rights and Welfare of the Child states that:

Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

Furthermore, children in custody have to be separated from adults and convicted prisoners. Article 37 (c) provides that:

In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.

Article 17 (2) (b) of the African Charter on the Rights and Welfare of the Child requires that State parties:

Shall ensure that children are separated from adults in their place of detention or imprisonment.[29]

It is generally expected that the interests of the child will rarely require that the child be detained with adults. The Constitution of Malawi recognises the special needs of the child detainee in section 42 (2) (g) and provides for separation from adults, that the child is allowed to maintain contact with his family and that the child should be treated in a manner consistent with promotion of the child's dignity.

However, it has been observed that prison authorities in Malawi have failed to adhere to the strict requirement of segregating detainees in line with the standards set by international instruments, the Constitution and the Prison Act. There have been instances when juvenile detainees have not been separated from adults.[30] The Committee on the Rights of the Child has specifically urged Malawi to ensure that full juvenile justice standards, such as separation from adults, are strictly and fully complied with.[31]

The case of Evance Moyo vs. Attorney General, which was decided by the constitutional division of the High Court, illustrates the problems of detaining children together with adults.[32] The applicant was 16 years old when he was arrested in August 1997 on suspicion of having committed murder. He was remanded at a maximum security prison in the adult section until 2002 when he went for trial and was duly found guilty. However, the court held that detaining the applicant with adults while he was a juvenile violated the constitution of Malawi as well as the Convention on the Rights of the Child.

In 2009, the High Court of Malawi delivered a landmark judgment on prison conditions in an action brought by a convicted prisoner. In Gable Masangano vs. Attorney General, Ministry of Home Affairs, and Malawi Prison Service,[33] the applicant alleged a wide range of undesirable conditions of detention in which he and his fellow prisoners were being held. The government argued that the lack of resources was the major reason for failure to comply with minimum standards – an argument that was flatly rejected by the Court:

The argument that it is impossible to provide clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocation of funds is tantamount to arguing that the Respondents cannot obey the law for the reason given. There is a specific law on provision of specific quantities of clothing and accessories to male and female prisoners. That is a valid law of the land, which must be complied with. The law as is put in the Prison Regulations is not a mere aspiration which has to be progressively attained, nor is it the ideal that the law represents. It is in fact the minimum requirement. The framers of the law setting the minimum standards surely must have known that the minimum standards are achievable and must be achieved. No one should be allowed to disobey the law merely on the ground that he or she does not have sufficient resources to enable them obey the law and fulfil their obligations under the law. The minimum standards place an obligation on the duty bearer to meet those standards and not to bring excuses for not complying with those standards. We therefore hold that the Respondents have a responsibility to comply with the minimum standards set in the Prison Regulations by providing the minimum number of clothing and accessories as specifically stipulated in the Regulations.

The Court recognised international and regional standards on conditions of detention and specifically rejected the lack of resources as a reason for not meeting minimum standards of detention. The Court made significant use of Malawi Inspectorate of Prisons reports on the general conditions of prisons and ordered the government to improve general prison conditions within 18 months.

While overcrowding was highlighted as the major problem, the case highlighted a range of violations of international norms, including

- Insufficient food;
- Unbalanced diet;
- Insufficient amount, or lack, of clothing and accessories;
- Insufficient cell equipment;
- Overcrowding;
- No visitation rights;
- Torture;
- Inadequate medical attention; and,
- Lack of exercise.

The case was important because it fully discussed the rights of detained people as provided for in the Constitution, the Prison Act and international instruments. Several areas of major concern and clear failure by the authorities were also pronounced. However, the Court also noted major improvements being undertaken by the prison authorities – such as plans to build new purpose built prisons.

3. Independent inspection and monitoring of detention centres

International standards require an independent and effective prison inspectorate system, which regularly inspects places of detention.[34] The Special Rapporteur on Torture regards the regular inspection of places of detention, especially when carried out as part of a system of periodic visits, as one of the most effective preventive measures against torture and ill treatment.[35] These inspections should be conducted in all penal institutions by independent experts, who will have full and private access to all detainees, and will make their findings public.[36] The Committee against Torture has stressed that independent governmental bodies should be formed and tasked with inspecting and monitoring conditions of detention.[37] These bodies must work systematically.[38]

In the case of Malawi, four separate institutions have oversight over detention centres and are positioned to detect and report instances of human rights violations – namely, the Malawi Inspectorate of Prisons, the Malawi Human Rights Commission, lay visitors to police stations and the Independent Police Complaints Commission.

Section 169 of the Constitution created the Inspectorate of Prisons, which is tasked with monitoring prison conditions; is independent of any authority or direction; is headed by a judge; has investigative powers; can apply international standards; can visit penal institutions without hindrance; issues reports for debate in parliament; and, makes proposal for legal reform.

While the Constitution provides for an independent Inspectorate of Prisons with a wide mandate, there are challenges. Firstly, the capacity of the Inspectorate is severely limited since it operates on a part time basis without a Permanent Secretariat. The last time the Inspectorate issued a report was in 2004. Therefore, attempts to strengthen the Inspectorate by creating a secretariat with permanent staff in Section 100 of the 2003 Prison Bill are commendable – but inadequate because

the Inspectorate would still depend on resources allocated to it by the Ministry of Internal Security.

Secondly, the independence of the Inspectorate is seriously compromised by its lack of capacity. The Inspectorate's secretariat, if it can be referred to as such, is housed in the Ministry of Internal Security, with one desk officer responsible for Inspectorate matters. This is evidently inadequate and gives rise to concerns about the institution's independence.

Thirdly, the recommendations and observations made by the Inspectorate are hardly taken seriously and largely ignored by Parliament. This may explain why serious moves towards prison reform have taken such a long time. The new Prison Bill was drafted in 2003 and eight years down the line it is yet to find its way through Parliament.

Prisons can also be inspected by High Court judges, who are empowered by Section 33 of the Prisons Act to visit any prison at any time and who can inquire into any complaint or request made by a prisoner. The effectiveness of this mechanism is not clear and further research is required on it.

The Malawi Human Rights Commission also has the power under its enabling legislation to visit prisons or any place of detention, including police cells, with or without notice – and without hindrance.[39] In this regard, the Commission has previously organised extensive prison visits and included its findings in its annual report.[40] Indeed, the Commission has been more successful in raising concerns about poor prison conditions than the Inspectorate.[41] However, the reports of the Commission on prison conditions have suffered the same fate as reports by the Inspectorate, and Parliament has hardly taken note of the Commission's annual reports.

The Police Act[42] established a community-based lay visitors scheme in Section 124. The scheme is composed of a panel of at least eight members per police station, who are tasked with reporting on detention conditions, observing the implementation of rules governing detention, and ensuring that police respect the rights of detainees. The scheme is significant as it brings an element of community involvement into the monitoring of conditions of detention in police cells. This is also part of the agreement creating a scheme of independent prison visitors under section 98 of the 2003 draft Prison Bill.[43]

Another significant inclusion in Part VIII of the Police Act is the unprecedented decision to create an Independent Complaints Commission, which will help to address the gross violations of rights committed by the police. The Commission is independent of the police service, headed by a Commissioner appointed by Parliament, can receive and investigate complaints, can investigate deaths or injuries in police custody, and issue annual reports to Parliament.

The Malawi Human Rights Commission has previously voiced concerns about general police brutality, and more particularly about methods of handling suspects including beatings, and the deaths of suspects in police custody.[44] It is hoped that the Complaints Commission will be truly independent in its operations without any undue influence from certain quarters.[45]

Lastly, both local and international civil society organisations have consistently highlighted the need to address prevailing prison conditions. For example, the Paralegal Advisory Services Institute has a solid presence in almost all prisons in Malawi, not only to provide basic legal advice to detained people, but also to monitor of prison conditions.

4. Draft Prison Bill 2003

The High Court in the Gable Masangano case observed that the dietary standards in the current Prison Act were outdated. In essence, the Act is long overdue for an overhaul. In 2002, the government, with the assistance of consultants from Penal Reform International, set up a steering committee with representatives from the Ministry of Home Affairs, the Ministry of Justice and the Malawi Prison Service to draft a Prisons Bill and relevant subsidiary legislation. The resulting 2003 Prison Bill addressed some of the shortcomings of current prison law and sought to meet constitutional and international standards.[46] The Bill also made revolutionary proposals relating to the general functioning and administration of prisons, as well as conditions of detention. Major elements of the Bill included:

- Devising principles that guide the prison service;
- Enforcing standards set out in the Constitution;
- Providing for minimal detention conditions of prisoners;
- Expanding the capacity of the Prison Inspectorate;
- Giving more powers to officers-in-charge of PTDs; and,
- Creating an independent prison visitors scheme.

The Bill was a commendable attempt to reconcile prison law relating to the treatment of detained people with the standards in the 1995 Constitution. However, the Bill has been in draft form since 2003 and there is a need for its provisions to be reviewed to take into account recent developments in the criminal justice sector, such as amendments to the CPEC, the Police Act and the enactment of the Child Care, Protection and Justice Act.

5. Conclusion and recommendations

It is generally accepted that prison conditions in Malawi need significant improvement. This has been highlighted by reports of the Human Rights Commission, the Prisons Inspectorate, local and international civil society organisations, and the High Court in the Gable Masangano case. The government was given 18 months by the High Court, which expired in May 2011, to improve prison conditions. The past year has seen significant steps in implementing such improvements.

The management of prisons should be based on both a security and rights-based approach, with authorities aware that people in detention do not lose their rights. Any major changes in prison conditions in Malawi will hinge on a legislative framework that is on a par with constitutional requirements and international standards. In this regard, the 2003 Prison Bill has to be reviewed first and then enacted into law.

Purpose built prisons would be a welcome development, but it has to be understood that prisons are at the receiving end of the criminal justice system. As such, all other measures that can alleviate the pressure on the prison system should be fully implemented. Recent legal reforms have introduced innovative schemes such as diversion, plea-bargaining and the promotion of reconciliation among others, which – if properly used – can contribute to a reduction in pre-trial detention.

In view of the preceding findings, this report recommends that:

- The 2003 Draft Prison Bill must be reviewed and then enacted without delay to set clear standards for prison administration and conditions of detention;
- A review of reforms undertaken in line with the Gable Masangano case is required to assess compliance;
- The government and its partners must, as obliged by Article 2 of UNCAT, domesticate the Convention to give effect to the absolute prohibition of torture and other ill treatment;
- The government must, as required by Articles 12 and 13 of UNCAT, set up structures and procedures to detect and investigate instances of torture and other ill treatment, such as the Independent Complaints Commission in line with the Police Act of 2010;
- The operations of the Prison Inspectorate need to be strengthened in order to provide effective oversight over the prison system and to give further effect to international obligations under Articles 12 and 13 of UNCAT; and,
- Infrastructural work on prisons – including the rehabilitation of old prisons and the construction of new purpose-built prisons – must be undertaken in order to improve conditions of detention.

6. SURVEY OF CONDITIONS OF DETENTION IN POLICE CELLS

By Lukas Muntingh

"Conditions of detention refer to the infrastructural and physical attributes of a detention facility that impact on the human experience of incarceration."

1. Introduction

Conditions of detention are important in respect of a range of rights and the UN Working Group on Arbitrary Detention stated the following on the right to a fair trial:

Where conditions of detention are so inadequate as to seriously weaken the pre-trial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees are otherwise scrupulously observed.[1]

Conditions of detention refer to the infrastructural and physical attributes of a detention facility that impact on the human experience of incarceration. Their establishment, utilisation and management should be aimed at contributing to the safe, secure and humane treatment of all detainees. These attributes include the:

- physical characteristics of the detention facility, including sleeping, eating, working, training, visiting and recreation space;
- provision of beds, bedding and other furnishings;
- nature and conditions of the ablution facilities;
- cleanliness of the living space and maintenance of buildings and infrastructure; and,
- level of occupation of the facility, individual cells and common areas with reference to two and three dimensional space measurements and ventilation.

Whilst an emphasis is placed on the physical attributes, it should be borne in mind that these are strongly influenced by other factors such as staff capacity and the willingness of management to resolve problems or at least ameliorate their negative effects.

International norms and standards in respect of prison conditions are much more developed than standards for conditions in police detention cells. This is despite the fact that many detainees across the world and in Malawi spend extended periods in police detention cells.

The Malawi Constitution in section 42 (1) deals with conditions of detention and section 42 (1) (b) requires conditions of detention to be 'consistent with human dignity'. Former South African Chief Justice, Arthur Chaskalson, concluded that in a broad and general sense, respect for human dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.[2] Therefore, it is with this purpose – to prevent a person from being devalued as a human being – that one needs to view conditions of detention.

2. Police stations

The survey collected data from five police stations across Malawi – Blantyre, Lilongwe, Mzimba, Thyolo and Zomba. Table 1 summarises the information that was collected during the fieldwork visit to each station.

Station	Nr. of detainees	Nr. of women	Nr. of children	Longest in custody
Blantyre	55	0	2	5 days
Lilongwe	87	4	7	7 months
Mzimba	6	0	0	5 days
Thyolo	10	0	0	4 days
Zomba	20	0	4	4 days

TABLE 1

3. Detainees right to physical andmoral integrity

Key international instruments:

- Art. 5 of the Universal Declaration of Human Rights (UDHR);
- Art. 7 of the International Covenant on Civil and Political Rights (ICCPR);
- Arts. 2 and 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT);
- Arts. 2 and 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
- Rule 31 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 1 of the Basic Principles for the Treatment of Prisoners
- Principle 6 of the Body of Principles for the Protection of All

Training on the prohibition of torture: Article 10 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) requires officials working with people deprived of their liberty to be informed and educated regarding the absolute prohibition of torture. Malawi has never submitted an initial or periodic report to the Committee against Torture (CAT) but nonetheless it was reported that all officers undergo general training and that the prohibition of torture is addressed in this training. However, refresher training appears to be irregular and only one such training course took place in Lilongwe in September 2010.

Investigation of deaths: It was reported that if a detainee dies in police custody then the Criminal Investigations Department (CID) would be tasked with investigating the death. Principle 34 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also requires that:

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Impartiality and independence of the investigating authority has been commented upon as follows:

Impartiality is therefore central to effective investigations and the term 'impartiality' means free from undue bias and is conceptually different from 'independence', which suggests that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators. The two notions are, however, closely interlinked, as a lack of independence is commonly seen as an indicator of partiality.[3] The ECtHR (European Court of Human Rights) has stated that 'independence' not only means a lack of hierarchical or institutional connection, but also practical independence.[4] The ECtHR has also stressed the need for the investigation to be open to public scrutiny to ensure its legitimacy and to secure accountability in practice as well as in theory, to maintain public confidence in the adherence to the rule of law by authorities, and to prevent any appearance of collusion in or tolerance of unlawful acts.[5] [6]

In Lilongwe, the Malawi Human Rights Commission is involved in the investigation along with the CID, but this does not appear to be the case in the other police stations. The fact that the police investigate deaths in police custody is reason for concern since they should be investigated by an impartial and independent authority.

Record of detainees: Principle 12(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that the following records must be maintained:

- Reasons for the arrest;
- Time of the arrest and when the arrested person is taken to a place of custody as well as the time of his first appearance before a judicial or other authority;
- Identity of the law enforcement officials concerned; and,
- Precise information concerning the place of custody.

At the five police stations surveyed, it was found that, with minor variations, proper records are maintained for people being detained there. The Cell Book (or Custody Book) details the name, date and time of arrest, place of arrest, village of origin, traditional authority, tribe, district, the reasons for the detention, the date of admission and the date of release. However, in some instances, it was found that the time of admission and release were not recorded. At the Blantyre station, the date of release (e.g. transfer to court) is recorded in the Crime Movement Register and not in the Custody Book.

Information given to detainees: Despite the deprivation of liberty, detained people must be treated with dignity[7] and fairness.[8] In this regard, it is an important preventive measure in respect of rights violations that detained people are informed in writing upon admission about the rules of the institution, the disciplinary code and procedures, and any other matters necessary for the detained person to understand his/her rights and responsibilities.[9] If the detained person is illiterate, this information must be conveyed to him verbally.[10]

The extent to which detainees are provided with information regarding their rights and responsibilities gives rise to some concern. In Lilongwe, detainees are informed that they have the right to remain silent and that they can contact their relatives and/or legal representative. In Blantyre and Zomba, it was reported that this is done, but the scope of the information was not specified. Meanwhile, in Thyolo, detainees are not informed of the rules of the detention facility. However, in general, it appears that detainees in police stations are informed of their right to apply for bail.

The 48-hour rule: Section 42(2) of the Malawi Constitution requires that:

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right-- (b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released.

In Lilongwe, 11 of the 87 suspects in custody had been there for more than five days at the time of the fieldwork. At Mzimba police station, two suspects had been in custody for more than 48 hours, while seven had been held for longer than that in Zomba. At Blantyre and Thyolo, there were an undisclosed number of detainees in custody for longer than 48 hours.

Therefore, the overall impression is that a substantial number of detainees are spending longer than 48 hours in police custody in violation of section 42 (2) (b) of the Constitution. Along with violating people's constitutional rights, this also places detainees at risk since police stations are not built to cater humanely for the long-term detention of people.

Vulnerable groups: It was reported that in Lilongwe and Zomba, the Victim Support Unit (VSU) attends to the needs of vulnerable detainees such as women and children. At Lilongwe police station, PASI and the Department of Social Welfare also assist with vulnerable people. However, in Mzimba it was reported that there are no protective measures in place 'due to a lack of facilities'.

6.3 Property belonging to a detainee

Key international instruments:

- Rule 43 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 35 of the United Nations Rules for the Protection of Juveniles Deprived

There appears to be a well-established system for recording the property (cash and valuables) of detainees and this is recorded in the Custody Book. Reportedly each detainee has a property bag that is kept in the storeroom. Detainees sign in a dedicated column in the Custody Book for property handed in or returned.

Detainees who are arrested with medication on them are not permitted to take the medication into the cells, with the exception of Zomba police station. At the other stations, the custody officer and the station officer decide how the medication will be managed and assurances were given that the detainee will receive his medication on time.

6.4 Right to adequate standard of living

Key international instruments:

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 9-16, 21, 41 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

States are under an obligation to ensure that people deprived of their liberty shall be treated with humanity and with due respect for the inherent dignity of the human person. This obligation is laid down in Article 10 of the ICCPR, as well as in regional human rights treaties[11] and specific principles and rules on the deprivation of liberty.[12]

Cell capacity and occupation: The police station in Blantyre was not built as a police

station but the police service has been using this building as a temporary measure for the past ten years. The station does not have a specified cell capacity but held 55 detainees at the time of the fieldwork. It is a relatively small building and it must be assumed that the cell occupation is well above what may be deemed acceptable. Lilongwe had a specified capacity of 50 and held 87 detainees – a 174 percent occupancy rate.

Amount of time per day outside of cells: The UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) requires a minimum of one hour of outside exercise per day per prisoner.[13] While prison architecture may enable detainees to spend time outside of their cells, police station infrastructure presents significant challenges in this regard. With the exception of Lilongwe, detainees are not permitted out of their cells unless they are being interrogated, receiving medicine, performing cleaning duties or taking their meals. In Lilongwe, detainees are out of the cells for three hours per day.

General cleanliness, hygiene and vectors for disease: While it was reported that open areas used by detainees were dry and free of rubbish, the ageing nature of the police station buildings cannot be denied. These buildings have received little attention in terms of renovation over the years – except in Lilongwe and Mzimba – despite the high volume of people moving through them.

Mosquitoes are an all-round problem and the presence of lice was reported to be a major concern at Lilongwe police station. Varied measures are taken to control vectors. At Blantyre antiseptic is applied to control mosquitoes and at Mzimba fumigation is done by the Department of Health and floors are mopped with chlorine on a daily basis. Floors are also mopped with chlorine at Thyolo. However, at Lilongwe no measures to control vectors were noted.

Lighting and ventilation: While it was reported that cells are generally well ventilated, this depends very much on the level of occupation and the time of the year. With an occupation level of 174 percent in Lilongwe it must be concluded that ventilation does not meet an acceptable standard. All stations, except Zomba, reported that there is artificial light in the cells. While other stations reported sufficient light during daytime to enable one to read, this was not the case in Thyolo.

Supervision of detainees: Custody officers are, reportedly, on duty 24 hours a day.

Access to ablution facilities and drinking water: Detainees' access to a toilet facility appears to be a problem in both Mzimba and Thyolo. In these stations, the cells do not have toilets and a bucket is used at night. The lack of running water in the cells compounded the problem in Lilongwe, Mzimba and Thyolo. In Blantyre and Zomba, there are water taps in the cells.

In stations where there are no taps in the cells, access to water becomes problematic and detainees must keep water in containers in the cells. The storing of water in containers is problematic, especially when cells are severely overcrowded and detainees lack the means to keep containers clean. This places their health as well as the health of officials at great risk.

6.5 Adequate food

Key international instruments:

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 20 and 87 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 37 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

The right to adequate nutrition and water is fundamental to the right to life and the UNSMR, in Rule 20, requires that:

(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

(2) Drinking water shall be available to every prisoner whenever he needs it.

Provisioning of food: Neither the Malawian Police nor any other government agency provides food to detainees at police stations. The detainees are entirely reliant on friends and relatives for their meals. This must place a terrible burden on the families concerned, especially when it is the breadwinner that is detained. For detainees without families the situation is even more dire as they will be dependent on fellow detainees for food. The only exception is Mzimba police station where maize meal is provided for breakfast and detainees prepare their own food.

Principle 1 of the Body of Principles reads:

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Clearly, the duty on the state is to provide at least basic nutrition to detainees and the current situation in Malawi is a clear violation of Principle 1 of the Body of Principles and of UNSMR Rule 20(1).

Key international instruments:

- Rules 17-19 and 88 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 38 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

6.6 Clothing and bedding

Rule 17 of the UNSMR requires that:

(1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.

(2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

(3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.

Clothing: Detainees are not supplied with a uniform and are permitted to wear their own clothing, as is the practice internationally. However, if the detainee's clothing is no longer suitable, or it has been taken in as evidence, the police service does not supply alternative clothing and so the detainees will be dependent on their relatives to supply them with clothing.

With the exception of Mzimba where soap is provided, detainees are also not provided with the means to wash their clothes. Detainees are dependent on their relatives to provide them with soap to wash their clothes, or send their clothes home with relatives to be washed.

Bedding: In Mzimba, Thyolo and Zomba, blankets are reportedly provided but not at the other stations. The condition of the blankets and the number of blankets per detainee were not established. Regardless of this, the implication is that the detainees sleep on the floor with or without blankets.

6.7 Health care

Key international instruments:

- Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

- Rules 22-26 and 91of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 9 of the Basic Principles for the Treatment of Prisoners
- Art. 6 Code of Conduct for Law Enforcement Officials
- Rules 41-55 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Principles 1-6 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The UNSMR, in Rule 22, states that:

(1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

The role of health sector personnel is of particular importance in places of detention and they must receive training to perform their duties in compliance with the 'Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'.[14]

The Special Rapporteur on Torture recommended as follows:

Health sector personnel should be instructed on the Principles of Medical Ethics for protection of detainees and prisoners. Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in torture. Such prohibition should extend to such practices as examining a detainee to determine his "fitness for interrogation", procedures involving ill-treatment or torture, as well as providing medical treatment to ill-treated detainees so as to enable them to withstand further abuse.

Screening and access to services: From the available information, it appears that the general practice is that if a detainee shows visible signs of illness and/or injury or reports to an officer that he is not feeling well then he is taken to a clinic or hospital. While it was reported that this is done with promptness, accurate information on what the time lapse may be could not be ascertained.

Deaths: None of the police stations reported any deaths (natural and unnatural) in 2010.

6.8 Safety and security

Key international instruments:

- Arts. 4-6 of the African Charter on Human and Peoples' Rights
- Rules 27-34 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 7 of the Basic Principles for the Treatment of Prisoners
- Art. 3 Code of Conduct for Law Enforcement Officials
- Principles 1-11 and 15-17 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 63-71 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Principle 5 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials reads:

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment."

The use of mechanical restraints and use of force should be seen within the context of this requirement.

Use of mechanical restraints: Handcuffs appear to be used in three instances – when detainees are transported (e.g. to court), in cases of 'felonious offences', and when the detainee is likely to place the life of a police officer in danger. In the last two instances, it was not clear from the data whether the detainee is permanently handcuffed or only when he is outside of the cell.

6.9 Contact with the outside world

Key international instruments:

- Rules 37-38, 90 and 92-93 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principles 15-20 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Art. 37(c&d) of the Convention on the Rights of the Child

Principle 19 of the Body of Principles states that:

A detained person shall have the right to be visited by and to correspond with, in particular, members of family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 15 of the Body of Principles stresses that contact shall not be denied for longer than a few days after arrest, while Rule 92 on the UNSMR requires that:

An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

Rules 37 and 92 of the UNSMR provide for family contact and Rule 38 provides for the right of foreign nationals to contact their consular or diplomatic representation. Rule 39 lays down the right to be kept informed of important news.

Notification of families and visits: An important protective measure is that detainees must be able, without delay, to contact their relatives and/or legal representative to inform them of their arrest.[15] The general impression is that many police stations do not have landlines and so do not have the official capacity to assist detainees to contact their relatives or legal representative. What generally seems to happen is that officials allow detainees to use mobile phones – either their own phones or the police officials' phones. These calls are obviously not at the State's expense and must be paid for either by the detainee or the police official. This places destitute detainees in a particularly vulnerable situation as they will have to depend on the willingness of a fellow detainee or police official to provide assistance – without which they will not be able to inform their families or legal representatives of their arrest and so their detention becomes, in effect, incommunicado detention.

Visits by relatives are allowed but different police stations appear to regulate this in different ways. In Lilongwe, visits are allowed for four hours per day, while in Mzimba this is stretched to five and a half hours per day. Several police stations have neither a visitors' room nor a formal visitors' area so visits take place over the charge office counter (Blantyre, Mzimba and Zomba). With the exception of Mzimba, the visitors' facilities are not sufficient for the number of visitors and detainees. In these situations, it must be concluded that visitors' needs are by and large not catered for.

Detainees who are foreign nationals or stateless persons are largely reliant on their own resources to contact their diplomatic or consular representative, or designated organisation in the case of stateless people. In Lilongwe and Mzimba, PASI also provides assistance by contacting the Immigration Department and the UN High Commissioner for Refugees.

Appeal and legal representation: The right to contact a lawyer is a safeguard of great importance. Ongoing contact with a lawyer is of central importance to any judicial review of the legality of continued detention. Besides being a safeguard, contact with the outside world is also an integral part of the obligation to ensure humane treatment.[16]

While detainees are permitted to consult their legal representatives, in Blantyre, Mzimba and Zomba these consultations are not private. In the case of Blantyre, the building was not built to be a police station and the necessary infrastructure is lacking. However, in Lilongwe, there are three interview rooms that are used by legal representatives to consult clients.

There is also a substantial variation in terms of the amount of time a detainee is permitted to consult his legal representative. In Lilongwe, consultations are not permitted after lock-up, while in Thyolo consultations are limited to 30 minutes. The reason for this was not clear and other stations did not impose similar limits.

6.10 Complaints and inspection procedure

Key international instruments:

- Art. 8 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 13 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Rules 35-36 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 72-78 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

After years of monitoring places of detention, it is well-established and accepted that a lack of transparency and accountability pose a fundamental risk to detainees' rights, in particular the right to be free from torture and other ill treatment. The Special Rapporteur on Torture is clear on this issue:

The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials.[17]

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in Principle 29, recognises the importance of visits by independent parties and requires that:

Places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.[18]

Moreover, detained people shall, subject to reasonable conditions to ensure security and good order in places of detention:

...have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment".[19]

Meanwhile, Principle 33(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that:

A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

Complaints mechanism: There appears to be a variety of practices in relation to internal complaints. In Blantyre and Lilongwe, complaints are taken by the custody officer, while in Thyolo they are taken by 'some senior officer'. With the exception of Thyolo, none of the police stations reported that they keep a register for complaints. Instead, complaints are taken verbally. However, not recording a complaint in an official register may result in the matter not being dealt with.

The extent to which detainees have access to an external complaints mechanism (e.g. the Human Rights Commission and lay visitors) is largely dependent on such mechanisms visiting the particular police station. Family members are also permitted to lodge complaints on behalf of a detainee and in Mzimba these complaints are most frequently lodged directly with the police.

Inspections: Four of the stations reported that they are inspected on a regular basis by lay visitors' committees (Blantyre, Mzimba, Thyolo and Zomba). The regularity with which the committees visit police stations was not ascertained, neither were the issues that are inspected by the committees. In Blantyre, inspections are also conducted by NGOs and the Human Rights Commission. Meanwhile, in Lilongwe, inspections are done but not regularly (at most twice per year). All the police stations permit the detainees to speak freely and in confidence with external visitors.

6.11 Women in police detention

Key international instruments:

- Principle 5(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rule 8(a), 23 and 53 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

Segregation: In all the police stations, women were detained separately from men. However, the supervision of female detainees varied. In Lilongwe and Mzimba, both male and female officers supervise female detainees, while in Blantyre, Thyolo and Zomba they were only supervised by female officers. An important protective measure is to ensure that the keys to the female cell(s) are kept by a female officer and this was found to be the practice in Thyolo.

Sanitary towels: The police service does not provide sanitary towels to female detainees so relatives have to bring them.

6.12 Children (juveniles) in police detention

Key international instruments:

- Art. 10(2) of the International Covenant on Civil and Political Rights (ICCPR)
- Art. 37 of the Convention on the Rights of the Child
- Rule 8(d) and 85(2) of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 17 and 18 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJDLs) set out detailed provision for the detention of children. In addition to the general provisions, the UNJDLs state the following in respect of pre-trial detainees:

17. Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following: (a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications; (b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention; (c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

Segregation: Children present a particularly vulnerable group in custodial settings. Only in Thyolo and Zomba were children segregated from adults at all times. In Lilongwe, they are only separated at night, and children and adults mix in the visitors' yard as well as when they are transported to court. In Mzimba, they are detained in the designated female cell when there are no females in custody, while in Blantyre children and adults are not separated.

Notification of a child in detention: If the detainee is a child, the authorities should inform the parents/guardian, family, legal representative or consular representative, as the case may be, about the fact that he/she is detained. In Blantyre, while it is the intention to comply with this requirement, it is not always possible 'due to lack of resources'. In Lilongwe, this responsibility is given to Social Welfare Services and PASI paralegals. In Mzimba, the police contact the probation officer when a child is arrested. In order to limit the amount of time that children spend in custody, it is essential that the police inform, without delay, the authorities are responsible for the welfare of children.

6.13 Management

Key international instruments:

- Art. 5 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Principles 18-20 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 81-87 of the United Nations Rules for theProtection of Juveniles Deprived of their Liberty (JDLR)

Rule 47 of the UNSMR requires that:

(1) The personnel shall possess an adequate standard of education and intelligence. (2) Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests. (3) After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals.

Staff training: All police officials receive basic training in detainee management, while in Mzimba they are given a one-month course on custody management. However, additional research is needed to assess the scope of the curriculum and if the curriculum deals with the relevant international instruments pertaining to people deprived of their liberty. Refresher training also appears to be sporadic rather than regular and structured. In Lilongwe, the training was provided by PASI.

Recommendations

Most detainees stay in the custody of the police for a relatively short period of time, although some do exceed the legal requirement, such as the 12 year-old child who had been in Lilongwe police station for seven months. The ageing state of many Malawian police stations and the insufficient capacity and nature of cell accommodation are the cause of many of the major concerns. Sufficient funds will remain a challenge for the foreseeable future, but this should not prevent an incremental process of reform and improvement. While infrastructure improvement may have significant financial implications, there are other issues that can be addressed at minimal – or indeed no – extra cost. Broadly, efforts to reform and improve conditions must, fundamentally, be based on and reflect a human rights-based approach to police station custody.

Right to physical and moral integrity

1. The Government of Malawi is encouraged to submit its initial report to the CAT in order to assess compliance with Article 10 of the UNCAT – and should call upon the donor community and civil society for technical assistance.

2. The management of the Malawian Police Service must provide assertive and demonstrable leadership in relation to the human dignity of detainees and their right to physical and moral integrity – as well in relation to transparency and accountability, which are the cornerstones of a human rights-based detention system.

3. The police training curriculum needs to be reviewed in relation to its focus on human rights standards in relation to interrogation methods, rights of suspects, treatment of people in custody and guidelines on the use of force (including firearms). The following resources from the UN Office on Drugs and Crime (UNODC) may be of assistance:

   - Model strategies and practical measures on the elimination of violence against women in the field of crime prevention and criminal justice;
   - Compendium of UN standards and norms in crime prevention and criminal justice;
   - UN criminal justice standards for UN police;
   - Practical approaches to urban crime prevention;
   - Handbook on the UN crime prevention guidelines - making them work;
   - Handbook on improving access to legal aid in Africa;
   - Handbook on effective police responses to violence against women; and,
   - Training curriculum on effective police responses to violence against women.

4. Training on the absolute prohibition of torture and other ill treatment must not only be part of general training, but also feature prominently in

refresher training – and this must be conducted on an annual basis.

5. All deaths in police custody must be investigated by an independent and impartial authority. Given resource constraints, this may not always be possible and under these circumstances, investigations should be monitored by the Malawi Human Rights Commission or another suitable body and the findings published.

6. Upon admission, detainees must be informed in a comprehensive and comprehensible manner about their rights and responsibilities, as well as the rules of the detention facility. This information should be displayed on a board inside the holding area where detainees would be able to read it, or it could be read to them.

7. All detainees must be brought before a court within 48 hours or as soon as possible thereafter (weekends and public holidays permitting). The officer responsible for detainees must report each case that has exceeded this limit to the officer-in-charge and the local magistrate.

8. To protect vulnerable people:

- Officers responsible for detainees should undergo training in how to deal with vulnerable persons, with particular reference to avoiding custody (e.g. bail) and detecting vulnerable individuals;
- Each police station should have sufficient cell accommodation to separate detainees in respect of age and gender; and,
- Children should not have contact with adults during custody.

Right to adequate standard of living

9. The Malawian Government, in cooperation with its partners, should investigate the medium term feasibility of a police station infrastructure improvement plan to develop accommodation that meets the minimum standards of humane detention, with specific reference to adequate capacity, ablution facilities, visitors' facilities, eating and cooking areas.

10. The police service in Blantyre urgently requires a purpose-built station to provide staff with appropriate working conditions and detainees with suitable detention facilities.

11. Since many of the problems in relation to conditions of detention will not be resolved overnight, it is therefore recommended that the police service develops a time bound plan of action that can be monitored to incrementally improve conditions of detention, including providing:

- Access to clean drinking water in cells;
- Flush toilets in cells;
- Basic bedding (e.g. sleeping mats and blankets);
- At least one nutritious meal per day, including fresh fruit on a regular basis;
- Regular fumigation of cells to control mosquitoes, lice and other disease vectors; and,
- Electric lighting in cells.

Health care

12. All new admissions must be screened for communicable diseases and injuries upon admission. Since there is a shortage of health care professionals, officers responsible for detainees must undergo basic paramedic training so they can screen new admissions, deal with medical emergencies, and conduct health inspections of facilities.

Contact with the outside world

13. Infrastructural improvements should ensure adequate facilities for visitors.

14. New admissions must be permitted to make at least one phone call or send one SMS at the State's expense to inform relatives or their legal representative of their detention.

Complaints and requests

15. The complaints and requests procedure for detainees needs to be standardised to ensure that detainees have a daily opportunity to lodge complaints and requests.

16. Complaints and requests must be recorded in a dedicated register that is reviewed by the officer-in-charge on a weekly basis and is available for inspection by any authorised person.

17. The lay visitors' committee system needs to be assessed and then measures taken to strengthen it so that the committees can conduct effective inspections and file reports.

18. A standardised assessment toolkit should be developed for use by both the Malawi Human Rights Commission and the lay visitors' committees.

Women

19. Female detainees should only be supervised by female officers in all police holding facilities.

20. All female prisoners in need of sanitary towels must be supplied with them by the State at no cost to them.

Children

21. Infrastructure improvements should also ensure that children can be segregated from adults at all detention facilities.

22. The admission criteria for Kachere Remand Prison may require revision in order to allow younger children to be transferred to it and prevent their detention in police stations.

23. Necessary communication procedures and channels need to be established to ensure that the Department of Social Welfare is informed as quickly as possible once a child has been arrested.

24. In urban areas where more children are arrested, it may be necessary to establish a system of 'family finders', whose task it will be to assist both the police and the Department Social Welfare to locate the families of arrested children.

7. SURVEY OF CONDITIONS OF DETENTION IN PRISONS

By Lukas Muntingh

1. Introduction

Concerns around conditions of detention in Malawian prisons have been noted by the African Commission on Human and Peoples' Rights (ACHPR), the media and non-governmental organisations as well as detailed in government-commissioned research. The Malawi High Court, in Gable Masangano v. Attorney General, Ministry of Home Affairs, and Malawi Prison Service expressed deep concerns about detention conditions in prisons and gave the government 18 months to improve them.[1] The extent to which the Malawi Prison Service is able to comply with the High Court's instructions will have significant implications not only for prisoners seeking relief from the courts when conditions of detention become unbearable, but also for the rule of law in general.

It was not part of the scope of this survey to interview prisoners regarding conditions of detention and treatment, but rather to assess the systems and basic infrastructure in place as they relate to conditions of detention. Prisoners' experience of imprisonment was well documented in a 2005 government study of prisoners and offending in Malawi.[2]

7.1 The prison system

Table 1 provides the basic information on the Malawian prison system with specific reference to pre-trial detention.[3]

Category	Number	Percent
Total number of prisons	30	100%
Total number of prisoners	11,672	100%
Total number of pre-trial detainees	2,160	18.5%
Female prisoners	152	1.3%
Children	490	4.2%
Occupation level		197.6%
Prison population rate		
(per 100,000 of national population)	73	

TABLE 1

As far as could be established, there are no recent peer reviewed publications dealing with criminal justice reform in general and pre-trial detention in particular. A 2005 study dealt with prisoners' experience of imprisonment as well as offending and re-offending patterns[4] and there have been a number of health studies looking specifically at TB and HIV and AIDS in the prison context.[5]

7.2 Prisons

The survey collected data from five prisons across Malawi – namely Kachere, Maula, Mzuzu, Mzimba and Thyolo. Since sentenced prisoners and pre-trial detainees are not separated as a rule, it was not possible to make rigid distinctions between these two categories of prisoners and the same conditions apply essentially to both. Table 2 summarises the information that was collected on the date of the research visit to each prison.

Prison	Nr. of detainees	Nr. of women	Nr. of children	Longest in custody	Notes
Kachere	33	0	33(?)	2 years and 8 months	There are reportedly no children, only 'juveniles'.
Maula	895	22		6 years and 6 months	4 infants with their mothers
Mzimba	46	10	0	7 years and 13 days	
Mzuzu	111	0	0	5 years	
Thyolo	64	0	0	2 years	

TABLE 2

7.3 Detainees right to physical and moral integrity

Key international instruments:

- Art. 5 of the Universal Declaration of Human Rights (UDHR);
- Art. 7 of the International Covenant on Civil and Political Rights (ICCPR);
- Arts. 2 and 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT);
- Arts. 2 and 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
- Rule 31 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 1 of the Basic Principles for the Treatment of Prisoners
- Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- Rule 87(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Principle 1 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Prohibition of torture and ill treatment: Malawi acceded to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) on 11 June 1996, but has unfortunately never submitted an initial or periodic report to the Committee against Torture (CAT) as required by Article 19 of the Convention. Neither has a report been submitted in respect of the International Covenant on Civil and Political Rights (ICCPR). A review of such reports would have enriched the data presented here.

It should be noted that the duty of the State to provide safe custody is not limited to ensuring that officials do not torture or ill treat prisoners. The State is also responsible for preventing inter-prisoner violence and ill treatment. Moreover, the State's obligations extend beyond that of its own officials since it has a duty towards non-State actors – in this case, all prisoners.[6] The CAT has been clear in this regard:

The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.[7]

Training: Article 10 of UNCAT requires that officials working with people deprived of their liberty should be informed and educated about the absolute prohibition of torture. This training was part of the course at the Prison Training School and periodic lectures are given by the officers-in-charge. However, the exact content and frequency of these lectures were not established.

Deaths: The investigation of deaths in custody is initiated by the officer-in-charge, who informs the police and an inquest is subsequently conducted by a magistrate. Deaths must be reported within 12 hours.

Expiration of warrants: The detention of a person may only be carried out in strict accordance with the provisions of the law and by competent officials or people authorised for that purpose.[8] According to the Malawi Prisons Act, no suspect is accepted in any prison unless there is a clear remand warrant, or any order of detention from a court.[9] While it is illegal under domestic and international law[10] for pre-trial detainees to be in custody on invalid warrants, data from three prisons indicates that this is not an uncommon occurrence with respect expired warrants. In Kachere, there were 12 detainees on expired warrants and a further 23 in Maula. In Thyolo, there were no exact figures but there were definitely detainees on expired warrants due to the 'unnecessary adjournments of trials'.

Record keeping: Rule 7(1) of the UNSMR states the following:

(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
(a) Information concerning his identity;
(b) The reasons for his commitment and the authority therefore;
(c) The day and hour of his admission and release.

In all five prisons, remandee prison registers are maintained, which record name, age, charge, date and time of admission, date of remand, and police docket number. This information is collected from the remand warrant. While the date and time of admission is recorded it appears that only the date of release is recorded and not the time. Furthermore, the fieldwork undertaken into case flow management (see Chapter 8) found that these registers are not always maintained with the necessary diligence and consistency.

Information provided to detainees: Despite the deprivation of liberty, detained people must be treated with dignity[11] and fairness.[12] It is an important that detained people are informed in writing upon admission about the rules of the institution, the disciplinary code and procedure and any other matters necessary for the detained person to understand his/her rights and responsibilities.[13] If the detained person is illiterate, this information must be conveyed to him verbally.[14] A 2005 study found that only a minority of male prisoners:

...were provided with some information on what was expected of them, or had the prison regulations read to them on their arrival, thus facilitating as seamless a transition into prison life as possible.[15]

The same study found almost the opposite in female prisons where the prisoners reported that:

They were told what was expected and the routines of the prison; they were assisted where necessary and were told to remove personal items such as beads. This largely positive interaction appears to have continued past the arrival at the prison to represent the general interaction during the offenders' incarceration.[16]

At all five prisons, information regarding the rights and responsibilities of detainees are provided verbally upon admission and not in writing as required by UNSMR Rule 35(1). It is good practice to display the rules of the prison in a place where they are accessible and visible to the prisoners. At Kachere and Maula, the rules of the cell – as developed by prisoners – were written on a chalkboard. While these cell rules reportedly encompass the prison rules, they are more specific to the rules of the cell. Regardless of this, the duty rests with the State to inform prisoners of the rules of the establishment as well as their rights and responsibilities.

Children: Children present a particularly vulnerable group in custodial settings and therefore it is essential that the authorities responsible for the welfare of children are when children are taken into custody. Kachere and Maula prisons detain children and in Kachere, officers will phone parents who are contactable to inform them of the detention of their child. However, if the parents are not contactable via the phone, no further effort is made. In Maula, the Paralegal Advisory Service Institute (PASI) and Social Welfare Officers contact the parents.

Work performed: In respect of pre-trial detainees, they may only be required to perform work necessary to keep themselves and their environment clean. All five prisons complied with this requirement.

7.4 Property belonging to a prisoner

Key international instruments:

- Rule 43 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 35 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Upon admission a prisoner's valuables and cash are handed over to officials and recorded in the remandee prison register. A column in the register lists the items and cash and the detainee signs for it. The detainee signs again when his valuables and cash are returned to him – for example, upon his release. Cash is kept in the cash chest and at Thyolo this is recorded in a separate register.

If prisoners are carrying medication when they are admitted, they should see a health care practitioner, who must decide if the prisoner can keep the medicine on him. In Kachere, if the detainee produces a 'medical passport book' – issued by the Department of Health and used to record diagnosis and prescriptions – this will be handled by the clinic and the medical officer, who will decide how the medication will be managed.

7.5 Right to an adequate standard of living

Key international instruments:

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 9-16, 21 and 41 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 31-34, 47 and 48 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

States are under the obligation to ensure that people deprived of their liberty shall be treated with humanity and with due respect for the inherent dignity of the human person.

Available cell capacity and occupation: Since sentenced and unsentenced prisoners are not separated, occupation levels are calculated for the total prison population. All five prisons reflected occupation levels well above their specified capacity with Kachere at 200% occupation, Maula at 298%, Thyolo at 256% and Mzuzu at 248%. These high occupancy levels resulted in available floor space per prisoner of less than 2.5 m2. In Thyolo, it was only 1m2. This is well below what can be regarded as the absolute minimum space per prisoner (3.5–4.5 m2). Cubic space was equally limited. Even if prisoners are outside of their cells for most of the day, a few hours locked up under such cramped conditions must place a terrible physical and mental burden on them.

Amount of time per day outside of cells: The UNSMR requires a minimum of one hour of outside exercise per prisoner per day.[17] At four prisons, the prisoners spend between seven and ten hours per day outside of the cells. However, in Thyolo, prisoners are not permitted to go outside.

General cleanliness, hygiene and vectors for disease: In four of the prisons, the area that the prisoners use for outside exercise is generally clean, dry and free of rubbish. The exception is Thyolo where the prisoners do not go outside. However, there were problems with lice, mosquitoes and red ants. Pesticides are reportedly sprayed at Kachere and Maula on a regular basis (monthly) and ash is used to deter red ants, while weeding and the drainage of stagnant water occur at Thyolo. In Mzimba, the presence of vectors is reported to the District Environment Officer but it is not clear what steps this official takes to address the problem. Despite these efforts, the general level of overcrowding places a severe strain on the prison system and more particularly on hygiene standards.

Quality of infrastructure and building: The buildings were assessed to be in acceptable condition. Roofs were not leaking and walls were not cracked. However, in Maula the floors are very rough and prisoners are required to sleep on the floor due to the absence of beds. These observations should be assessed against the backdrop of the ageing and insufficient infrastructure of Malawi's prisons.

Lighting and ventilation: The cells have enough windows to allow for ventilation but with occupancy levels in excess of 250 percent, it is doubtful that the ventilation will be sufficient. It was also noted in Maula that there are a lot of 'dust hangings' – a combination of dust and cobwebs – in the cells. The cells in all five prisons had electric lights, which reportedly provided sufficient light, but this could not be confirmed as the fieldwork was conducted during daylight hours. Natural light during the day was abundant.

Supervision of prisoners: The overall impression is that the officials on duty at night retreat to the perimeter and there is no active supervision of the prisoners in their cells. This obviously places vulnerable prisoners at risk of victimisation as staff would not be aware of a particular incident, or would take a considerable time to respond. A 2005 study reported high levels of inter-prisoner violence[18], which is enough of a reason to advocate for more active supervision by officials.

Access to ablution facilities and drinking water: In Maula and Mzuzu, there are flush toilets inside the cells but at Kachere three toilets are outside so during the night a 'movable toilet bin' is placed in the cell. The level of overcrowding at Maula and Mzuzu is so severe that one toilet must serve 150 and 100 prisoners respectively at night. This is more than five times the accepted norm of one toilet per 20 people. Nonetheless, the toilets were clean and in good working order. In Maula, the prisoners have developed their own rules for keeping the toilet clean under the severely congested conditions. However, in Thyolo, the toilets are neither sufficient nor in good working order as the sewer line next to the cells is broken.

Shower facilities are available at all five prisons, either inside or outside the cells. At Mzuzu and Thyolo soap is handed out twice per month, while at Kachere soap is provided by religious groups but it was not established if the amount of soap provided is sufficient. At Kachere, scissors and razor blades are provided to detainees (juveniles) who want to shave but these are withdrawn after use for security reasons. From the data it is not clear if razor blades are provided but it was reported that at Mzuzu all prisoners are forced to shave. A 2005 study on the transmission of HIV in Zambian prisons found, amongst others, that 63 percent of prisoners reported sharing razor blades[19] and similar findings were also reported in a study at a select number of Malawian prisons.[20] However, accurate figures relating to the sharing of razor blades among Malawian prisoners are not available.

Access to recreation and religious services: While prisoners are out of their cells for most daylight hours, recreational facilities are lacking. At Mzuzu, convicted prisoners are permitted to go outside but pre-trial detainees must remain inside where there are no recreational facilities. All prisoners appear to have unrestricted access to religious services and it was reported that a number of religious groups visit the prisons. Mzuzu also has a prison chaplain.

7.6 Adequate food and drinking water

Key international instruments:

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 20 and 87 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 37 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

The right to adequate nutrition and water is fundamental to the right to life and the UNSMR, in Rule 20, requires that:

(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

(2) Drinking water shall be available to every prisoner whenever he needs it."

General prison conditions and specifically diet was the focus of the 2009 case of Gable Masangano vs. Attorney General, Ministry of Home Affairs, and Malawi Prison Service.[21] In this case the applicants objected to the one meal that was served per day and the High Court agreed that three meals should be served. The monotonous diet also did not escape the Court's attention:

We would however wish to encourage the Respondents to remove the monotony in the maize meal/peas or beans diet by diversifying within the options given in the Third Schedule of the Prisons Act. We make these observations and comments not because the Respondents have fallen below minimum standards, which we think they have not, but because of the realization that we need to raise the level of minimum standards if not by law then by taking some progressive steps through policy.[22]

Diet: Three meals are served per day, but the intervals between the meals are both too short and too long. In Maula, the interval between breakfast and lunch is four hours, between lunch and dinner three and a half hours and between dinner and the next breakfast sixteen and a half hours. By comparison the South African Correctional Services Act (111 of 1998) requires that:

Food must be well prepared and served at intervals of not less than four and a half hours and not more than six and a half hours, except that there may be an interval of not more than 14 hours between the evening meal and breakfast.[23]

In terms of the actual diet, it remains fairly monotonous – consisting of a combination of rice porridge, pigeon peas, maize and beans, although beef is reportedly served once every fortnight in

Mzuzu. Since Mzuzu is a prison farm, it is also able to supplement the diet with fresh fruit and vegetables but at Kachere and Maula prisoners are dependent on NGOs and family members to supply them with fresh fruit and vegetables.

Pre-trial detainees are permitted to purchase food from outside and this is normally done for them by relatives or prison officers, such as the prisoner welfare officer.

At Kachere, medically prescribed meals are provided (e.g. for prisoners on ART) but this was not possible at Mzuzu due to a lack of resources and. Similarly in Thyolo, medical diets cannot always be provided due to limited resources. At Maula, only prisoners involved in home-based care schemes receive medically prescribed meals, while at Mzimba, prisoners with stomach ulcers receive 'special grand maize meal'.

Religious requirements in respect of diet are observed at all five prisons.

Preparation of food: Food at Kachere, Mzuzu, Mzimba and Thyolo is prepared on open fires in large pots, while electric pots are used at Maula. The use of fires is a necessity but the impact on the prison environment due to the continuous smoke and all the soot as well the contribution to deforestation should not be underestimated. Fetching firewood, often from far away, places an added financial strain on the prison service's limited budget.

Eating utensils: At Kachere and Maula, prisoners are given plates only, while at Mzuzu they also receive a plastic cup. It is generally the practice that prisoners keep some food to eat later, especially when the last meal is served in the early afternoon. Considering this, it is essential that they are supplied with proper containers as open food attracts flies and cockroaches.

Water: Water for the five prisons is supplied by the local authority (e.g. Lilongwe Water Board) and from boreholes. The cells at Mzuzu and Thyolo do not have taps inside and prisoners keep water in containers overnight. The cells at Maula and Mzimba have taps inside, while only one cell in Kachere has taps but renovations are underway to install taps in other cells. The use of containers to keep water overnight poses a risk of waterborne diseases as the cleanliness of containers cannot be assured, especially in the absence of detergents and in severely overcrowded cells.

7.7 Clothing and bedding

Key international instruments:

- Rules 17-19 and 88 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 38 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Rule 17 of the UNSMR requires that:

(1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.

(2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

(3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.

Clothing: Pre-trial detainees are permitted to wear their own clothing and their families may also bring them additional clothing. At three prisons, clothes were also donated to prisoners by religious organisations and t-shirts were donated by the United Kingdom's Department for International Development. However, general observations at a number of prisons indicate that many prisoners are dressed in clothes that are in an extremely poor state and not very clean. If a pre-trial detainee's clothing is no longer suitable or has been taken as evidence, the prison service does not supply alternative clothing and his family will have to provide other clothes or ask for a donation from elsewhere. Soap to keep clothes and bedding clean are not provided at Kachere and Maula but two bars are supplied each month in Mzuzu, Mzimba and Thyolo.

Bedding: Prisoners are not supplied with beds. Mattresses are provided at Kachere but prisoners only have blankets at the other four prisons. Given the condition of the floors, this is a less than satisfactory situation.

7.8 Health care

Key international instruments:

- Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rules 22-26 and 91 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) medical services
- Principle 9 of the Basic Principles for the Treatment of Prisoners
- Art. 6 Code of Conduct for Law Enforcement Officials
- Rules 49-55 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Principles 1-6 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The UNSMR, in Rule 22, states that:

(1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

In other research, the following have been identified as common illnesses and ailments suffered by Malawian prisoners: tuberculosis, scabies, diarrhoea, sexually transmitted infections, coughs, malnutrition, malaria and bilharzia.[24]

Screening and access to services: The medical screening of new admissions is of particular importance in any prison environment, and even more so when facilities are overcrowded. The aim is to ensure that medical conditions receive prompt treatment and that communicable diseases are detected and prevented from spreading into the general prison population.

However, newly admitted prisoners are not properly screened nor do they undergo a health status examination, although prison officers do reportedly perform a 'layman's screening'. It is only when a prisoner complains or is visibly sick that he will be taken to a clinic or hospital. If the prisoner has a medical passport book, this will be consulted. None of the prisons have their own medical facilities or medical staff (although Mzimba has a microscope that is used to screen for TB) and sick or injured prisoners are taken to government hospitals or clinics for general and specialist services. While pre-trial detainees are permitted to consult their own medical practitioners at their own expense, this appears to be a very rare occurrence.

Medical supplies: Since the prisons do not have their own medical facilities they do not have access to basic supplies. This is of great concern as the most pressing medical problems were reported to be TB, malaria, and HIV and AIDS – conditions that can be effectively managed and to a large extent prevented through well established and proven practices. Instead, prisons remain totally reliant on the public health care system for all health care services.

Inspections: During the fieldwork, the researchers enquired whether the prisons are regularly

inspected by a health care practitioner to verify the suitability of food, hygiene, cleanliness, sanitation, lighting, ventilation, clothing, bedding, and opportunities for exercise. While the Prisons Inspectorate, the Malawi Human Rights Commission and PASI paralegals do inspections, the regularity of these inspections could not be confirmed. In Mzimba, an environmental officer is part of the court user committee that visits the prison but this was the only prison where reference was made to this committee. In respect of the Prisons Inspectorate, Kayira remarked:

While the Constitution advocates for an independent Prison Inspectorate with a wide mandate there is room for compromise for a number of reasons. Firstly, the capacity of the Inspectorate is severely limited, as the Inspectorate works on a part time basis without a Permanent Secretariat. This has seriously affected the fulfilment of its mandate. The last time the Inspectorate issued a report was in 2004. The attempts to strengthen the operations of the Inspectorate with the creation of a Secretariat with permanent staff in Section 100 of the proposed Prisons Act, is therefore commendable, though inadequate because the Inspectorate would still depend on resources allocated to it by the Ministry of Internal Security. This lack of presence by the Inspectorate renders it incapable of carrying out its constitutional mandate.[25]

The overall impression is that prisons are not inspected by health care practitioners.

Deaths: While no deaths due to unnatural causes were reported in 2010, 14 prisoners died at Maula and 12 at Mzuzu due to natural causes. No deaths were recorded at Kachere.

HIV and TB: Efforts to curb the spread of HIV and TB appear to be limited in the five prisons. Periodic information sessions are conducted at Kachere and Maula by counsellors and prisoners are encouraged to take medication and go for voluntary counselling and testing. But no activities are undertaken at Mzuzu to prevent the spread of HIV and AIDS. Prisoners who require ARV treatment access this through the Lighthouse Programme at district hospitals, while prisoners diagnosed with TB are taken to district hospitals where they receive treatment. However, further investigation is required to ascertain if there is continuity of treatment when released.

Disabled prisoners: There is very little, if any, provision made for the needs of physically disabled prisoners. Indeed, only Mzuzu prison made any effort by using St. John of God Community Health Services. However, the nature of this assistance was not described. Mentally ill prisoners are referred to the mental care units at district hospitals or transferred to Zomba Central prison.

7.9 Safety and security

Key international instruments:

- Art. 10(2)(a) of the International Covenant on Civil and Political Rights (ICCPR)
- Arts. 4-6 of the African Charter on Human and Peoples' Rights
- Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rules 27-34 and 85(1) of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 7 of the Basic Principles for the Treatment of Prisoners
- Art. 3 Code of Conduct for Law Enforcement Officials
- Principles 1-11 and 15-17 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 63-71 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Separation of categories: In none of the prisons are sentenced and unsentenced prisoners segregated during the day. At night, sentenced and unsentenced prisoners are segregated at Maula but not at the other prisons – in violation of Rule 8 (b) of the UNSMR. However, men and women are separated.

Prevention of contraband entering prison: All prisoners are searched upon admission but no incident register is maintained to record confiscated items, except at Thyolo.

Use of mechanical restraints: Mechanical restraints are reportedly used when transporting prisoners to court or to hospital or to another prison.

Enforcement of discipline and punishment: Rule 28 of the UNSMR states that:

No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.

While it was reported that this is not done, it was also reported that cell leaders (known as nyapalas) are used to 'help officers supervise others'. The roles and responsibilities of the nyapalas are not clear and require further investigation. Allegations have been made in the past that the nyapalas are involved in assaults on other prisoners and also in sex trafficking.[26] Similar allegations were made in a 1999 report that directly implicated nyapalas in the administration of discipline.[27]

The disciplinary code applicable to prisoners is described in the Prisons Act and Standing Orders but it is doubtful if prisoners are familiar with this. Given that the rules of the prison are not displayed and that prisoners develop their own rules, it must be assumed that the disciplinary process is open to manipulation. It was also confirmed that no registers are maintained to record disciplinary actions against prisoners.

Certain sanctions imposed on prisoners may amount to torture, cruel, inhuman or degrading treatment or punishment.[28] Therefore, the following are expressly prohibited under international law: corporal punishment[29]; lengthy solitary confinement[30]; collective punishment[31]; punishment affecting diet (unless approved by a medical officer)[32]; long term shackling of prisoners[33] and forced labour.[34] Due to the fact that solitary confinement threatens not only the individual's mental and physical health, but also endangers his due process rights, special care must be taken to limit its use to only exceptional circumstances. The Special Rapporteur on Torture regards the use of prolonged solitary confinement as falling within the range of psychological methods of torture, leaving lasting emotional scars on victims:

The establishment of psychological torture methods is a particular challenge. Mock executions, sleep deprivation, the abuse of specific personal phobias, prolonged solitary confinement, etc. for the purpose of extracting information, are equally destructive as physical torture methods. In most cases, victims of mental abuse are left dependant on counselling and other psychological or psychiatric support for long periods of time. Moreover, their suffering is very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations.[35]

From the available data, it appears that three types of punishment are used: transfer to another prison, removal of remission (if convicted) and verbal warnings. Since 1994 solitary confinement can no longer be used, but it is apparently still in use in Mzimba, where prisoners are reportedly placed in solitary confinement for a maximum of three days.

Prisoners who are unhappy with a punishment imposed on them may appeal to the officer-in-charge, the regional prison officer or the Chief Commissioner of Prisons. However, no data was collected on how frequently this happens and what the results of such appeals are. The situation was perhaps best summarised at Mzuzu: "[There are] no proper procedures in place. Only use warnings, transfers and talking to their relatives."

Use of force: Force is reportedly used to 'prevent juveniles from fighting' in Kachere, and to prevent escapes. Electric shock batons are used, while firearms are also employed to prevent escapes. The use of force may only be authorised by the commanding officer. There is no compulsory medical assessment following the use of force and it is only if the prisoner complains that he will be taken to a hospital. At Kachere, a register is kept of the use of force, which records the name of

the prisoner, nature and time of the incident, and nature of force applied. At the other prisons no such register is maintained.

7.10 Contact with the outside world

Key international instruments:

- Rules 37-38, 90 and 92-93 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principles 15-20 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rules 59-62 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Art. 37(c&d) of the Convention on the Rights of the Child

Principle 19 of the Body of Principles states that:

A detained person shall have the right to be visited by and to correspond with, in particular, members of family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 15 of the Body of Principles stresses this contact shall not be denied longer than a few days upon arrest. Rule 92 on the UNSMR requires that:

An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

Rules 37 and 92 of the UNSMR provide for family contact and Rule 38 provides for the right of foreign nationals to contact their consular or diplomatic representation. Rule 39 lays down the right to be kept informed of important news.

Notification of families and visits: The data reveals different practices at different prisons. At Kachere and Maula, detainees can contact their relatives through the officers' phones, presumably not for free. At Mzuzu, there is reportedly access to phones at the state's expense, but this appears to only be for emergencies and in such a case, the speakerphone setting is activated, presumably so that an officer can monitor the conversation. At Kachere, there is a phone available for juveniles in the event of an emergency, while in Mzimba it was reported that the prisoner welfare officer assists with calls to relatives, but it was not clear if the calls are made at the State's or the prisoner's expense. Maula prison no longer has a landline.

Contact with diplomatic representatives for foreign nationals is reportedly facilitated by PASI at Kachere, and elsewhere by the Immigration Department and the UN High Commissioner for Refugees.

Daily visits are permitted in the prisons. At Mzuzu, visiting hours are from 0830-1200 and from 1330-1500. At Kachere, there is a visitors' room and detainees communicate with their visitors through an open window. It is perhaps for this reason that visits are limited to approximately an hour since only one detainee and his visitor(s) are allowed in the room at one time. At the other prisons, there does not appear to be a time limit. Visits are not denied or curtailed as a result of disciplinary action. At Maula, there is no formal visitors' room and conversations take place through the fence.

Appeal and legal representation: At all prisons, detainees are informed upon admission that they can challenge their detention (i.e. apply for bail). At Mzuzu, this is done by paralegals (presumably PASI staff). Similarly, detainees are able to consult their lawyers in private and for a sufficient period of time. However, at Kachere, there is no suitable venue for consultations and they sit in the remand registry, while at Maula they meet in the prison yard. Furthermore, it was confirmed that officers remain within sight but not sound of the detainee and his lawyer. Access to a legal representative may not be restricted as a disciplinary measure and this was the case at all five prisons.

Information from outside: Radios are available at all prisons – either individually or through a centrally controlled speaker system (Maula). Detainees are permitted newspapers and magazines at their own cost. Newspapers and magazines are also brought by relatives and NGOs. However, in Maula, newspapers and magazines are not permitted in the cells. Prisoners are permitted to write letters and at Kachere paper is provided, but it is unclear if the same practice exists at the other four prisons. Kachere prison reportedly uses its stamp so there are no postage fees involved. Illiterate prisoners are assisted by fellow prisoners or the prisoner welfare officer if necessary. However, all incoming and outgoing correspondence is censored with the exclusion of correspondence from the detainee's legal representative.

7.11 Complaints and inspection procedure

Key international instruments:

- Art. 8 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 13 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Rules 35-36 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 72-78 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

After years of monitoring prison conditions and the rights of prisoners, it is well established and accepted that a lack of transparency and accountability pose a fundamental risk to prisoners' rights, particularly the right to be free from torture and other ill treatment. The Special Rapporteur on Torture is clear on this issue:

"The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials."[36]

Complaints mechanism: Prisoners have the opportunity to lodge complaints on a daily basis with the prisoner welfare officer, who refers it to the officer-in-charge if he cannot resolve it. Prisoners may also lodge complaints directly with the officer-in-charge. A 2005 study found that the nyapalas also function as a complaints mechanism and that they route complaints to the officials.[37] This is an undesirable practice for a number of reasons, primarily because it is the duty of officials, and not certain selected prisoners, to receive and deal with prisoner complaints in confidence.

According to the UNSMR prisoners are also entitled to lodge complaints without censorship on prescribed forms with external authorities, including central prison authorities, judicial authorities, national human rights institutions or any other body concerned with their rights and well-being. Prisoners can lodge complaints with external bodies (e.g. the Human Rights Commission) during a visit by such a body or in writing. However, if all outgoing correspondence is monitored and potentially censored, it raises questions about the accessibility of external bodies.

Inspections: The Prisons Inspectorate, the Human Rights Commission and PASI inspect prisons. In Mzuzu, the Inspectorate does quarterly visits. However, since the Inspectorate's last annual report was published in 2004, it is uncertain how progress is monitored. The Parliamentary Legal Affairs Committee reportedly also inspects prisons, while the court users committee visits the Mzimba prison. None of the other prisons made any reference to visits from the court users committee. It was confirmed that prisoners are able to communicate freely with the members of any visiting body.

7.12
Women in prison

Key international instruments:

- Principle 5(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rule 8(a), 23 and 53 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

A 2005 study on Malawian prisoners asked female prisoners what they regarded as key health issues and the following were noted: cramped and congested sleeping and accommodation conditions; sharing blankets; lack of mosquito nets; sleeping on the cold floor; poor hygiene and sanitation; poor bathing facilities and materials; poor hygiene in the preparation of food; poor diet; and, lack of exercise.[38] A more focussed assessment on the treatment of women in prison may be required.

Segregation: During the fieldwork, there were only women prisoners at Maula and Mzuzu. They were segregated from male prisoners at all times and supervised only by female officers. The officer-in-charge is also female and if any men wish to enter the women's section they are accompanied by a female officer. The keys to the female section are kept by the officer-in-charge.

Pre- and post-natal care: At Maula, the prison dispensary nurse assists detainees in need of pre- and post-natal care, but at Mzuzu these women are dependent on well-wishers and donors. Pregnant women are taken to district hospitals to give birth. Nutritional supplements are available for breastfeeding mothers and infants but only if they are donated. In Thyolo, supplements were given in the past but this has not happened since 2010.

Sanitary towels: The provision of sanitary towels to female prisoners appears to be practiced inconsistently. They are supplied by the prison service at Maula, Mzimba and Thyolo as well as by religious groups. At the other prisons, they are entirely dependent on donations.

7.13
Children (juveniles) in prison

Key international instruments:

- Art. 10(2)(b) of the International Covenant on Civil and Political Rights (ICCPR)
- Rule 8(d) of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 17 and 18 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJDLs) set out detailed provision for the detention of children, including segregation from adults.

Segregation: Only Kachere prison detains children and no adults are detained there. No firearms are carried inside Kachere yard. When there is a need, a government social worker visits the prison. However, it was not established how regularly the social worker visits and how long it takes to respond to a request for a consultation.

7.14
Management

Key international instruments:

- Rule 47 of the UNSMR
- Art. 5 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Principles 18-20 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 81-87 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Rule 47 of the UNSMR requires that:

(1) The personnel shall possess an adequate standard of education and intelligence.

(2) Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests.

(3) After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals.

Staff training: From the available information it does not appear as if officers receive training specific to pre-trial detainees but only general training. However, staff at Kachere did receive training from the National Juvenile Justice Forum in 2007. Refresher training also appears to be sporadic and at Kachere this was last conducted in 2009. At Maula refresher training is organised by NGOs but no details were given about when the last course was run. Similarly, no recent examples of refresher training were reported at Mzuzu.

Staff to prisoner ratio: Since sentenced and unsentenced prisoners are not segregated, the ratios reported reflect the total number of prisoner at a particular prison. At Kachere the ratio was 1:17; at Mzuzu 1:6.7; at Thyolo 1:11; and at Maula, it was a massive 1:150. Part of the reason for these high ratios is very high vacancy rates. At Kachere 23% of prison service posts were vacant, while 21% were unfilled at Maula and a staggering 57% at Mzuzu.

Recommendations

While a broad range of challenges were identified during the fieldwork, many good practices were also highlighted – such as ample time out of the cells. Due to the fact that sentenced and unsentenced prisoners are not segregated, the recommendations apply across the board and are aimed at ensuring minimum standards of human detention. The recommendations are made in cognisance of current resource constraints and also acknowledge that one of the main causes of the challenges is the size of the prison population, something that the Malawi Prison Service has little control over. Together with its partners, the Malawi Prison Service needs to seek and advocate for alternatives to excessive and prolonged pre-trial detention. It should similarly aspire to increase self-sufficiency and seek more environmentally-friendly, low-cost and low-tech solutions to some of the practical challenges relating to conditions of detention.

Right to physical and moral integrity

1. The Government of Malawi is encouraged to submit its initial report to the CAT in order to assess compliance with Article 10 of the UNCAT – and should call upon the donor community and civil society for technical assistance.
2. The management of the Malawian Prison Service must provide assertive and demonstrable leadership in relation to the human dignity of detainees and their right to physical and moral integrity – as well in relation to transparency and accountability, which are the cornerstones of a human rights-based detention system.
3. The prison service training curriculum needs to be analysed and adjustments made to specifically reflect human rights standards as articulated in the international instruments. Refresher training is essential to ensure sustainability and continuity. The following resources produced by the UN Office on Drugs and Crime (UNODC) can provide assistance:

Key international instruments:

- Art. 8 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 13 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Rules 35-36 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

- Rules 72-78 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

- Handbook on prisoners with special needs;
- Handbook for prison managers and policymakers on women and imprisonment;
- Handbook on prisoner file management;
- Handbook for prison leaders; and,
- UN rules for the treatment of women prisoners and non-custodial measures for women offenders.[39]

4. A further review of the training curriculum will be required once the Prisons Bill (2003) is enacted.
5. The investigation of deaths in custody should be conducted by an independent body. Given the limited resources available, it is recommended that all deaths should also be reported to the Malawi Human Rights Commission and the Prisons Inspectorate and monitored by these institutions and the findings published.
6. The detention of pre-trial detainees on expired warrants must be avoided and the courts and the prison service must jointly ensure strict compliance. The Prisons Inspectorate can play a valuable role together with the judiciary, while a system should also be devised and implemented to provide an early warning when a warrant is about to expire.
7. Upon admission, a detained person must be informed in writing of the rules of the institution, the disciplinary code and procedures, and any other matters that will help him to understand his rights and responsibilities. They should equally be informed of their fair trial rights, the fact that they may challenge their detention, and have access to legal representation. A signboard detailing this information should be placed inside the prison yard where it is visible to all detainees.
8. When children are detained, the prison service should inform the Department of Social Welfare without delay of the child's presence – even if this is only to confirm that the department is aware of the child's detention. A record of this should be made in the remandee register.
9. While the long-term solution to overcrowding lies with other agencies in the criminal justice system, the Malawi Government, in cooperation with its partners, should investigate the medium term feasibility of a prison infrastructure improvement plan in order to establish accommodation that meets the minimum standards of humane detention.
10. The prison service should ask for research to be conducted to identify low-cost and low-tech sustainable solutions that will assist in improving conditions of detention. Particular attention should be paid to finding alternatives for electricity and firewood (e.g. solar and bio-gas) as well as enhanced food production, dietary improvements and affordable disinfect-ants. Emphasis should also be placed on self-sustainability and the optimal use of prison farms.
11. A number of problems related to the conditions of detention will not be resolved overnight, it is therefore recommended that the prison service develops a time bound plan of action that can be monitored to incrementally improve conditions of detention, as per the Gable Masangano decision, including providing:

- Access to clean drinking water in cells;
- Access to ablution facilities 24 hours a day;
- Basic bedding;
- A nutritious diet, including fresh fruit;
- Sufficient quantities of soap and other detergents; and,
- Regular fumigation of cells to control mosquitoes.

Key international instruments:

- Principle 5(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rule 8(a), 23 and 53 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

Health care

- All new admissions must be screened for communicable diseases and injuries upon admission. Since there is a shortage of health care professionals, a select group of prison officers must undergo basic paramedic training so they can screen new admissions, deal with medical emergencies, conduct health inspections of facilities and provide training and education on the prevention of HIV and TB. The International Committee of the Red Cross may be able to assist in the provision of this training.

Safety and security

12. Future prison building programmes and the upgrading of existing facilities should ensure that sentenced and unsentenced prisoners can be segregated.
13. The rules of the prison and disciplinary offences, as well as the disciplinary process, should be displayed on a board where it is visible to all prisoners.
14. The disciplinary system for prisoners needs to be formalised and records accurately maintained.
15. Prisoners should be actively supervised by officials, especially at night, while the role of the nyapalas in daily prison management requires further investigation.
16. All incidents involving the use of force need to be recorded in a designated register at all prisons and these should be reported to the Prisons Inspectorate.
17. All inmates subjected to the use of force must immediately undergo a medical examination.

Contact with outside world

18. Infrastructure improvements should incorporate adequate facilities for visitors and prisoners.
19. New admissions should be permitted to make at least one phone call or send one SMS at the State's expense to inform relatives or legal representative of their detention. Where it is not yet practice, prisoners should be provided with paper and envelopes to correspond with relatives.

Key international instruments:

- Art. 10(2)(b) of the International Covenant on Civil and Political Rights (ICCPR)
- Rule 8(d) of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 17 and 18 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

20. Paralegal services should be available to all pre-trial detainees on a regular basis.

Complaints, requests and inspections

21. The Prisons Inspectorate should be provided with the necessary resources and training so that it can fulfil its broad mandate by playing a greater role in promoting awareness about, and actively monitoring, prison conditions.
22. Whether inspections are conducted by internal or external inspectors, there needs to be a specific schedule to ensure consistency and continuity and to provide the officer-in-charge with appropriate feed-back – since the overall purpose of inspections is to provide a basis for dialogue aimed at resolving problems.
23. A lay visitor's scheme should be established for every prison so that visitors can inspect, and report on, the conditions of detention and the treatment of prisoners.[40] A training programme should be developed and selected individuals trained to be independent prison visitors.
24. All prisoners should have the opportunity on a daily basis to lodge complaints or make requests. A register for this purpose should be maintained and reviewed by the officer-in-charge on a weekly basis.

25. Complaints to external bodies should not be subject to censorship.

Women

Key international instruments:

- Rule 47 of the UNSMR
- Art. 5 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Principles 18-20 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 81-87 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

26. All pregnant women, breastfeeding mothers and infants must receive nutritional supplements, especially if the diet is not sufficiently varied.

27. All female prisoners in need of sanitary towels must be supplied with them at no cost to them.[41]

28. A focussed assessment on the situation of women and children is required to ensure that law, policy and practice reforms accommodate their needs.

Management

29. A comprehensive cost analysis of improvements in the prison system should be undertaken in order to accurately inform the budget of the prison service. The analysis should make provision for recurring operational expenditures (i.e. daily care of prisoners), large infrastructure projects, and the costs of staff capacity development. The costing should also be informed by the 2003 Prisons Bill and the Gable Masangano decision.

30. While it may be one solution to fill vacant positions, such a decision should be carefully considered in the light of efforts to reduce the size of the prison population and in particular the pre-trial detainee population.

31. The prison service and its partners in the criminal justice sector should consider the establishment of a police-court-prison liaison function supported by a clear set of performance monitoring indicators to be used on a continuous basis to measure the impact of the function. Monitoring should focus on the (a) number and profile (i.e. locality, age, charge, gender) of children in detention; (b) duration of pre-trial detention; (c) granting of bail; and, (d) expiration of warrants.

32. The prison service should consider the development of a legislative compliance toolkit in view of the Gable Masangano decision and the 2003 Prisons Bill.

8. CASE FLOW MANAGEMENT RESEARCH

By Jean Redpath

1. Introduction

The estimation of time periods spent in custody by accused people in the criminal justice system in Malawi was the primary objective of the case flow management section of this report. In addition, it was hoped that analysis might reveal the characteristics of the remand population, as well as the characteristics of people being arrested and being brought before the courts.

Methodology and limitations

The estimations of time periods and analysis of the characteristics of the remand population are reliant on sources of data that are usually kept in the institutions of the criminal justice system. The four institutions targeted in this research were the police, the courts (subordinate and High Court) and the prisons – all of which keep registers. In general, a sample of 40 from each register was chosen for each year back to 2006 to allow for some entries to have missing data and for the sample still to be sufficiently large.

A smaller sample of 40 for the entire period 2006-2011 was drawn from the High Courts, as these courts process fewer cases each year. Although eight sites were targeted, data was only available for institutions in six of the targeted sites at the time of analysis.

Fieldworkers were instructed to record a random sample for each available year of the relevant register (custody diary in the police, court register in the courts, and remand prison register in the prisons) dating back to 2006. The random samples were chosen by establishing how many entries there were in the relevant register in a year and then dividing by 40 to determine the selection interval. Details from each randomly selected entry were recorded from the relevant register and also from any associated documentation. In particular, in the courts it was necessary to locate the relevant case files for each selected entry to establish much of the information required in the dataset, while in the prisons the relevant warrants associated with the remand record selected had to be perused.

Unfortunately, the dates necessary to measure time periods were missing in a great deal of the data. In many of the sites, the prison dataset yielded very few records in the large sample for which time periods could be calculated, as the date of release was not systematically recorded in the remand prison register and expired warrants were not available. Therefore, the calculated prison time-periods should be treated with caution and checked against estimates of time periods calculated from the court data. However, in the courts, case files were frequently missing or not available, which also vastly reduced the number of observations for which time periods could be calculated. Relevant information that may have provided rich detail on the criminal justice system, such as bail, sureties, plea and the like was missing from the majority of the court data collected.

At the outset it was intended that there would be a large enough representative dataset covering enough sites to make a reliable estimate of average time periods in the various stages of the criminal justice process for the whole of Malawi, as well as an accurate description of the characteristics of the people before these institutions. However, given the limited number of observations with the necessary dates and the starkly different results emerging from the various sites, a decision was taken to present the data on each site separately. Therefore, results are presented by site in alphabetical order.

The number of observations for which time period estimates were made appear in each time period summary table for each of the sites. The total population from which the sample is drawn, the number of years that the total population refers to and the average turnover per year are also presented in the table.

The table describes the time periods measured (e.g. at a police station – the time from detention to admission) and presents the calculations for each time period – the number of days, the mean (or the average), the minimum in the sample (the shortest number of days), the first quartile (the number of days that a quarter of the sample was less than), the median (the middle number of days), the last quartile (the number of days that a quarter of the sample was more than) and the maximum (the longest number of days).

For each site, data is also presented on the characteristics of the population in the relevant institution where sufficient data was collected. Usually more observations were available with this data than with time period data. Unfortunately, because sites differed vastly in terms of available data, it was not possible to be consistent among the sites in the nature of the data presented for each site. Where characteristics such as age and tribe amongst remand admissions are reported on, these are compared to the relevant regional or national population figures as obtained from the website of the National Statistical Office of Malawi (http://www.nso.malawi.net/).

Results

Blantyre

Data was available from all the relevant entities in Blantyre. The time periods measured from these observations appear in the table below. Most notable are the exceptionally long time periods indicated for the Blantyre High Court (although from a small number of observations), as well as the fact that the median time period for release from police detention is two days – suggesting that half of the detainees spend more than two days in custody at Blantyre police station. The fourth quartile indicates that a quarter of detainees spend more than five days in police detention in Blantyre.

Blantyre Summary Table

Site	Population	Years	Average turnover	Time Measure	Obser-vation	Mean	Mini-mum	1/4	Median	3/4	Maxi-mum
Police	6612	5	1333	Detention to release	83	14	1	1	2	5	371
Sub. Court	6335	5	1267	Filing to first appearance	68	23	2	32	87	182	305
Sub.											
Court	6335	5	1267	First appearance to conclusion	25	97	1	2	42	195	371
High Court	669	5	134	Filing to first appearance	17	974	113	379	886	1451	2054
High Court	669	5	134	Committal to Conclusion	10	140	6	16	41	223	567
Chichiri											
Prison	14968	5	2994	Admission to Release	41	9	1	4	7	10	36

Chichiri Prison

Chichiri prison serves the southern region of Malawi. On average, 2,994 remandees entered Chichiri prison each year – a similar figure to Maula in Lilongwe.

There were 200 observations from Chichiri prison but only 41 had both a release date and admission date. However, if it is assumed that these are representative then it is still possible to estimate time periods spent in Chichiri prison by remandees.

The average time spent by remandees in the sample whose admission and release were recorded was 9 days, while the minimum period was 1 day and the maximum was 36 days. The lower quartile is 4 days, the median is 7 days and the upper quartile is 10 days. However, these figures are well below the estimates of time periods measured in both the subordinate and High Court, suggesting the observations are not sufficiently representative of Chichiri remand admissions. Indeed, the two time periods from filing to conclusion in the subordinate courts suggest a median value of around four months for a subordinate court matter and in excess of three years in the High Court.

A further indication that the calculated time periods are an under-estimate lies in the fact that as many as 32 of the remandees in the sample of 200 (or 16 percent) had either not been released at the time the data was collected in May 2011 or it was not clear whether or not they had been released. The earliest admission date among these remandees was 2007 (suggesting more than 1,000 days on remand if they were actually still on remand). This suggests the court time period data is a better indication of time periods spent in Chichiri prison by people on remand than the prison time periods reported above.

The vast majority of all remand prisoners in the Blantyre sample (96%) were held on only one charge, while the rest faced two offences. Around 38 percent were there on a theft or burglary charge, while only 2 percent were being held on murder charges and just 9 percent on robbery charges. The following table presents the most common offences recorded.

Chichiri admissions on remand: offences

Offence	Remandee admissions (%)
Theft and burglary	43
Robbery	9
Illegal immigrant	4
Murder	2
Touting	2
Assaultv	2
Other	38

Around 91 percent of the sample was male and 1 percent female. The sex of the rest was not recorded. Neither age nor tribe was recorded in the Blantyre prison dataset.

Blantyre Courts

Data was available from both the Blantyre subordinate court and the High Court. However, information was missing. There was insufficient information on bail, outcomes and sentence at the Blantyre subordinate court (90% of data missing) to report on these issues.

However, it was possible to report on the available data in the High Court, where at least 15 percent of charges in the sample were ultimately withdrawn (even though 50% of the data was missing). Given the exceptionally long time periods suggested by the data for the Blantyre High Court, it is of great concern if remand prisoners spend long time periods in prison only to have their matters withdrawn. Information was also available on sentencing, which ranged from a suspended sentence to life in prison.

Blantyre High Court Outcome

Outcome	Freq.	Percent	Cum.
Missing	20	50.00	50.00
Continuing	6	15.00	65.00
Sentenced	8	20.00	85.00
Withdrawn	6	15.00	100.00
Total	40	100.00	

Blantyre High Court Sentences

Sentence	Freq.
Missing	20
10 Years	1
12 Years	1
6 Years	1
7 Years	1
9 Months suspended	1
Life	3
N/A	12
Total	40

Blantyre Police

Regarding the reasons for release from the Blantyre police, it seems that the police do make good use of bail, with 47 percent of detainees being released on bail.

Reasons for release from the Blantyre police station

Reason for Release	Freq.	Percent	Cum.
Missing	64	40.00	40.00
Bail	75	46.88	86.88
Case withdrawn	5	3.13	90.01
Caution	1	0.63	90.64
Court	8	5.00	95.64
Court bail	1	0.63	96.27
Mental illness	2	1.25	97.52
Paid fine	3	1.88	99.40
Taken to chileka	1	0.63	100.00
Total	160	100.00	

Kasungu

Data was available from the relevant entities in Kasungu (there is no High Court in Kasungu). The median time period for release from police detention is two days, suggesting that half of the detainees spend more than two days in custody at Kasungu police station. The fourth quartile indicates that a quarter spend more than five days in police detention. The subordinate court time period estimates are longer than the estimates from the prison data.

Kasungu Prison

There were 160 observations from Kasungu prison but only 15 had both a release and admission date in the dataset (or just 9%). This is a very small sample with which to estimate time periods spent in Kasungu prison on remand. Nevertheless, it was calculated that the average time period is 37 days, while the minimum time period is 2 days and the maximum in this dataset is 252 days. The lower quartile is 12 days, the median is 17 days and the upper quartile is 26 days. These figures are less than the estimates of time periods measured in court. This may partially be explained by the longer time periods spent in police detention, suggesting that people in Kasungu may spend

Kasungu Summary Table

	Population	Years	Average turnover	Measure	Observa-tion	Mean	Min	1/4	Median	3/4	Max
Police	10462	2	5231	Detention to release	46	6	1	1	2	5	122
Sub. Court	834	1	834	Filing to first appearance	195	6	4	10	30	365	731
Sub.											
Court	834	1	834	First appearance to conclusion	156	21	1	5	13	43	349
Kasungu											
Prison	2063	4	516	Admission to Release	15	37	2	12	17	26	252

longer in police custody before being transferred to Kasungu prison.

Among the remandees in the sample of 160, it was not known whether the majority had been released or not (88%) or whether they had not yet been released at the time the data was collected in May 2011. The earliest admission date among these remandees was 2007 (more than 1,000 days on remand), which suggests that the court time period data is a better indication of time periods spent in Kasungu prisons by people admitted on remand than the prison time periods, especially as the court data indicates that most accused were not granted bail.

Kasungu Court

The Kasungu court data suggests that most of the accused (82%) whose cases are brought before the Kasungu court do not have bail granted to them. This is particularly important considering that the outcomes in this court show that only 41 percent were convicted, while 30 percent of cases were withdrawn and 13 percent ended in an acquittal or with a discharge.

Kasungu Court Bail

Bail.	Freq.	Percent	Cum.
Missing	11	5.50	5.50
No	163	81.50	87.00
Yes	26	13.00	100.00
Total	200	100.00	

Kasungu Court Outcome

Outcome	Freq.	Percent	Cum.
Missing	31	15.50	15.50
Acquitted	24	12.00	27.50
Discharged	2	1.00	28.50
Guilty	81	40.50	69.00
Sent to HC	3	1.50	70.50
Withdrawn	59	29.50	100.00
Total	200	100.00	

Kasungu Court Sentences

Sentence	Frequency
Fined	32
40 hrs community service	1
1 Month imprisonment	1
2 Months imprisonment	1
3 Months imprisonment	5
4 Months imprisonment	1
6 Months imprisonment	12
9 Months imprisonment	2
10 Months imprisonment	1
15 months imprisonment	1
18 Months imprisonment	4
21 Months imprisonment	2
30 Months imprisonment	2
42 Months imprisonment	1
1 Year imprisonment	5
2 Years imprisonment	2
3 Years imprisonment	2
3 Years imprisonment	2
4 Years imprisonment	3
5 Years imprisonment	1
6 Years imprisonment	1
7 Years imprisonment	2
12 Years imprisonment	1
14 years imprisonment	1
18 years imprisonment	1
Total	87

Kasungu Police

Around 45 percent of people in the sample, who were held at the Kasungu police station, were released on bail, and a further 10 percent on 'free bail'.

Kasungu Police reasons for release

Reason for release	Freq	Percent	Cum.
Missing	7	11.67	11.67
Case Withdrawn	2	3.33	15.00
Free release	6	10.00	25.00
Released by court	5	8.33	33.33
Released on bail	27	45.00	78.33
Sentenced by court	1	1.67	80.00
Sent to LL CID	1	1.67	81.67
Sent to prison	11	18.33	100.00
Total	60	100.00	

Lilongwe

Data was available from Maula prison (240 observations), Kachere prison (240 observations) and Lilongwe subordinate court (40 observations). The most notable aspects of this data are that the subordinate court estimates and Maula prison estimates are of similar magnitudes. Furthermore, the medians fall within the 30 day custody time limit recently enacted into law by the Malawi Parliament.

Maula Prison

Maula prison serves the central region and has an average yearly turnover of 2,979 remandees. While there were 240 observations from Maula prison, only 46 had both an admission and a release date in the dataset (or 19%). If it is assumed that these 46 are representative then it is possible to estimate time periods spent in Maula prison by remandees over the last six years.

The average time period spent by remandees in the sample whose admission and release were recorded was 61 days. However, this average masks a great deal of variation. The minimum time period is less than a day, while the maximum

Lilongwe Time Periods Summary Table

	Population	Years	Average turnover	Measure	Obs.	Mean	Min	1/4	Median	3/4	Max
Police				Detention to release							
Sub. Court	1160	1	1160	Filing to first appearance							
Sub.											
Court	1160	1	1160	First appearance to conclusion	16	43	2	10	24	59	231
High Court				Filing to first appearance							
High Court				Committal to Conclusion							
Maula											
Prison	17875	6	2979	Admission to Release	46	61	0	3	21	78	529
Kachere Prison	38000	6	6333	Admission to Release	24	23	0	7	16	36	76

in this dataset was 529 days – or one year and seven months).

Various other values provide a better picture of the situation. The lower quartile is 3 days, the median is 21 days and the upper quartile is 78 days. Among all remandees in the sample of 240, around 9 percent (22 remandees) had not yet been released at the time the data was collected in May 2011. The earliest admission date among these remandees was May 2009 – indicating two years on remand.

Almost every remandee in the Maula sample was charged with one offence (99%). Theft accounted for more than a third of offences, while 13 percent were charged with being prohibited immigrants, 6 percent with robbery and 4 percent with murder.

Maula admissions on remand: offences

Offence	Remandee admissions (%)
Theft	38
Prohibited Immigrants	13
Robbery	6
Murder	4
Other	39

Around 95 percent of the sample was male, 2 percent female and the rest were not recorded. The following table suggests that the 20-29 year age-group is over-represented amongst the Maula prison population.

Maula admissions on remand: age

Age	Maula prison remandee admissions (%)	Malawi population over 20 (%)
Under 18	<1	-
18-19	14	-
20-29	53	40
30-39	20	25
40 or older	10	32

In terms of tribal composition, the Chewa tribe (which makes up 70 percent of the population of the central region) was under-represented among admissions to Maula – registering only 45 percent. The Yao and the Lomwe from the south were over-represented in Maula, as were foreign nationals.

Maula admissions on remand: tribe

Tribe	Maula prison remandee admissions (%)	Central region population (%)
Chewa	45	70
Ngoni	15	15
Yao	13	6
Lomwe	9	3
Foreign	9	<1
Other	8	5

Lilongwe Court

Data was only available from the Lilongwe subordinate court and only then from a single year (40 observations). Data on bail, outcomes and sentencing was available and the results indicate that a third of accused people appearing at the Lilongwe subordinate court were denied bail, while in the remainder of the cases it was unclear whether bail was granted or not.

Lilongwe subordinate court bail

	Freq.	Percent	Cum.
Missing	27	67.50	67.50
No	13	32.50	100.00
Total	40	100.00	

The data suggests that 58 percent of concluded cases resulted in a conviction, while 28 percent ended in an acquittal, discharge or withdrawal.

Lilongwe sub-ordinate court outcomes

Outcome	Freq.	Percent	Cum.
Missing	5	12.50	12.50
Acquitted	3	7.50	20.00
Convicted	23	57.50	77.50
Discharged	6	15.00	92.50
Not concluded	1	2.50	95.00
Withdrawn	2	5.00	100.00
Total	40	100.00	

The sentences handed down ranged from community service to fines to over four years in prison with hard labour.

Lilongwe sub-ordinate court sentences

Sentence	Frequency
Fined	4
80 hrs community service	1
2 months but suspended for 1 month	1
2 months imprisonment with hard labour	2
6 months	1
6 months suspended to 1 year	1
9 months	1
12 months	1
18 months	1
1 Year	1
2 Years	3
3 Years	2
4 years and 4 months imprisonment with hard labour	1
10 years suspended to 1 year	1
Total	21

Kachere Prison

Kachere prison houses juveniles and serves the central region. On average, 6,333 juvenile remandees enter Kachere prison each year.

There were 240 observations from Kachere prison covering the past six years but just 24 (or only 10%) had both a release and admission date. If it is assumed that these 20 are representative then it is possible to estimate time periods spent in Kachere prison by remandees.

The average time period spent by remandees in the Kachere sample whose admission and release were recorded was 23 days. The minimum time period was less than a day while the maximum in the dataset was 76 days.

Various other values provide a better picture of the situation. The lower quartile is 7 days, the median is 16 days and the upper quartile is 36 days. This latter figure indicates that a quarter of children, who were recorded as being admitted and released, spent more than a month on remand at Kachere prison.

Only 7 had not been discharged at the time the data was collected in May 2011. The earliest admission date among remandees who had not been discharged was January 2011 – indicating 5 months on remand. Almost every remandee in the sample (99%) was charged with one offence. By far the most common offence was theft or burglary (64%), while 3 percent were charged with being 'rogue and vagabond, 2 percent with murder and another 2 percent with defilement.

Kachere remand admissions: offences

Offence	Remandee admissions (%)
Theft, burglary or illegal entry	64
Robbery	8
Assault	3
Rogue and vagabond	3
Murder	2
Defilement	2
Hemp offences	1
Other	17

44 percent were recorded as male, while the remainder were not recorded. For those whose ages were recorded, the age distribution is reflected in the table below.

Kachere Remand Admissions: Ages

Age	Freq.	Percent	Cum.
12	1	1.54	1.54
14	9	13.85	15.38
15	6	9.23	24.62
16	13	20.00	44.62
17	22	33.85	78.46
18	12	18.46	96.92
19	1	1.54	98.46
21	1	1.54	100.00
Total	65	100.00	

Mzimba

Mzimba Prison

Mzimba prison serves the northern region. On average, 343 remandees enter Mzimba prison each year.

There were 240 observations from Mzimba prison – 87 of which had both a release and admission date (or 36%). If it is assumed that these are representative then it is possible to estimate time periods spent in Mzimba prison.

The average time period spent by remandees in the sample whose admission and release dates were recorded was 73 days. However, this average masks a great deal of variation. The minimum time period was less than a day, while the maximum in this dataset was 639 days – or one year and nine months.

Various other values provide a better picture of the situation. The lower quartile is 11 days, the median is 31 days and the upper quartile is 63 days.

Among all remandees in the sample, it was not clear whether 124 (53%) had been released at the time the data was collected in May 2011. The earliest admission date among these remandees was 2006 – or around 5 years in detention.

Mzimba Summary Table

	Population	Years	Average turnover	Time Measure	Obs.	Mean	Min	1/4	Median	3/4	Max
Police	2411	3	804	Detention to release	101	3	1	1	2	3	31
Sub. Court	1123	5	225	Filing to first appearance	126	16	1	2	3	6	156
Sub.											
Court	1123	5	225	First appearance to conclusion	66	51	1	7	17	28	358
High Court				Filing to first appearance							
High Court				Committal to Conclusion							
Mzimba											
Prison	2055	6	343	Admission to Release	87	73	1	11	31	63	639

All offenders were charged with one offence. The most common offence was theft or burglary.

Mzimba remand admissions: offences

Offence (Mzimba)	Remandee admissions (%)
Theft or burglary	34
Murder	13
Assault or grievous harm	9
Robbery	5
Rape	4
Other	35

Most of the Mzuzu prison sample was male (90%), while the rest was female (10%). In terms of age, once again the 20-29 age group was over-represented.

Mzimba remand admissions: Age

Age	Mzimba prison remandee admissions (%)	Malawi population over 20 (%)
Under 18	2	-
18-19	9	-
20-29	53	40
30-39	29	25
40 or older	7	32

As for tribal composition, the Tumbuka tribe was slightly under-represented in Mzimba prison, while the Chewa were in line with their share of the population in the region. However, there was a large proportion of missing values (35%) in this dataset.

Mzimba remand admissions: Tribe

Tribe	Mzimba prison remandee admissions (%)	Northern region population (%)
Tumbuka	50	54
Chewa	6	6
Foreign	3	10
Other	6	30
Missing	35	-

Mzimba Court

Only 26 percent of cases before the Mzimba court ended in a guilty verdict.

Mzimba Court Outcomes

Outcome	Freq.	Percent	Cum.
Missing	60	31.91	31.91
Acquitted	19	10.11	42.02
Continuing	5	2.66	44.68
Committed to High Court	3	1.06	45.74
Convicted	17	9.04	54.78
Discharged	26	13.83	68.61
Dismissed	1	0.53	69.14
Guilty	50	26.60	95.74
Transfer	5	2.66	98.40
Withdrawn	3	1.06	100.00
Total	188	100.00	

Mzimba Police

Bail was the reason for the release for 35 percent of people detained at the Mzimba police station.

Mzimba Police Reasons for release

Reason for release	Freq.	Percent	Cum.
Missing	7	5.83	5.83
Bail	42	35.00	40.83
Freely	8	6.67	47.50
Taken to court	58	48.33	95.83
Taken to Mzuzu	3	2.50	98.33
Taken to prison	2	1.67	99.17
Total	120	100.00	

Mzuzu

Data was available from all the relevant institutions in Mzuzu. The most pertinent information appearing from the Mzuzu data is the apparently long periods spent in police detention.

Mzuzu Prison

Mzuzu prison serves the northern region and, on average, 1,010 remandees entered the prison per year over the last two years.

There were 80 observations from Mzuzu prison covering the past two years (2010 and 2011). The number of observations which had both a release and admission date in the dataset was 20 (25%). If it is assumed that these 20 are representative then it is possible to estimate time periods spent in Mzuzu prison by remandees.

The average time period spent by remandees in the Mzuzu sample whose admission and release were recorded was 26 days. However, this average masks a great deal of variation. The minimum time period was less than a day, while the maximum in this dataset was 323 days (almost 11 months).

Various other values provide a better picture of the situation. The lower quartile is 4 days, the median is 7 days and the upper quartile is 14 days. On the face of it, these figures suggest a much better situation than at other prisons, such as Maula.

Mzuzu Time Periods Summary Table

	Population	Years	Average turnover	Time period measure	Obs.	Mean	Min	1/4	Median	3/4	Max
Police	10113	3	3371	Detention to release	30	41	28	30	31	61	243
Sub. Court	253	3	84	Filing to first appearance	23	3	1	2	5	10	22
Sub.											
Court				First appearance to conclusion	13	15	1	10	15	57	115
High Court	204	6	34	Filing to first appearance							
High Court				Committal to Conclusion	26	56	1	6	87	375	635
Mzuzu											
Prison	2020	2	1010	Admission to Release	20	26	0	4	7	14	323

However, for 41 of observations in the sample (or 52%) it could not be determined whether the person had been discharged or not at the time the data was collected in May 2011. It was determined that a further 7 remandees had not yet been discharged (or another 9%). The earliest admission date among the remandees who had not discharged was January 2010 (more than 500 days on remand). This number is far higher than the maximum for Mzuzu in the earlier data and strongly suggests that the time periods presented above are an under-estimate as they reflect the time periods spent in custody by remandees both admitted and already released at Mzuzu since January 2010.

The majority of all remandees in the sample (94%) were charged with one offence, while the rest were charged with two offences. The most common offence was theft or burglary, followed by assault, being prohibited immigrants, being 'rogue and vagabond' and contempt of court.

Mzuzu remand admissions: Offences

Offence	Remandee admissions (%)
Theft or burglary	33
Assault	10
Prohibited immigrants	10
Rogue and vagabond	8
Contempt of court	6
Other	33

90 percent of the Mzuzu prison sample was male, while the remaining 10 percent was female. In terms of age, once again the 20-29 year age group was over-represented in the sample.

Mzuzu remand admissions: Age

Age	Mzuzu prison remandee admissions (%)	Malawi population over 20 (%)
Under 18	<1	-
18-19	13	-
20-29	59	40
30-39	24	25
40 or older	4	32

In terms of tribal composition, the Tumbuka tribe was slightly under-represented among admissions to Mzuzu prison, while the Chewa were slightly over-represented. The proportion of foreign nationals was twice as large as predicted by the population of the northern region.

Mzuzu remand admissions: Tribe

Tribe	Mzuzu prison remandee admissions (%)	Northern region total population (%)
Tumbuka	49	54
Chewa	10	6
Foreign	20	10
Other	21	30

Mzuzu Courts

Mzuzu subordinate court data related to the last three years. Outcomes indicated that just under a third of cases ended in a conviction, while less than 4 percent ended in an acquittal or were withdrawn.

Mzuzu Subordinate Court Outcomes

Outcome	Freq.	Percent	Cum.
Missing	14	12.96	12.96
Acquitted	2	1.85	14.81
Continuing	30	27.78	42.59
Sentenced	33	30.56	73.15
Transferred	27	25.00	98.15
Withdrawn	2	1.85	100.00
Total	108	100.00	

The offences profile in the Mzuzu subordinate court showed some local differences. As many as 13 percent of cases related to copyright infringement (found in possession of infringed materials), while only 10 percent of offences related to theft – yet this offence comprises a third of the prison population at Mzuzu.

Mzuzu High Court Outcomes

Outcome	Freq.	Percent	Cum.
Missing	52	35.62	35.62
Acquitted	23	15.75	51.37
Continuing	10	6.85	58.22
Died	1	0.68	58.90
Discharged	13	8.90	67.80
Convicted	1	0.68	68.48
Sentenced	41	28.08	96.56
Withdrawn	5	3.42	100.00
Total	146	100.00	

In the Mzuzu High Court, just under 30 percent of cases ended in a conviction, while 16 percent resulted in an acquittal.

Mzuzu Police

At the Mzuzu police station, around 43 percent of people were released on bail, while 21 percent were transferred to prison.

Mzuzu Police Reason for release

	Freq.	Percent	Cum.
Missing	20	16.67	16.67
Bail	51	42.50	59.17
Discharged	6	5.00	64.17
Fined	1	0.83	65.00
Taken to Chiputula police unit	1	0.83	65.83
Taken to court	7	5.83	71.67
Taken to Hospital	1	0.83	72.50
Taken to immigration	1	0.83	73.33
Taken to prison	25	20.83	94.17
To Mpemba	1	0.83	95.00
Withdrawn	6	5.00	100.00
Total	120	100.00	

Mzuzu Police Detention Age Profile

Age	Freq.	Percent	Cum.
12	1	0.88	0.88
13	3	2.63	3.51
14	1	0.88	4.39
16	2	1.75	6.14
17	2	1.75	7.89
18	8	7.02	14.91
19	4	3.51	18.42
20	7	6.14	24.56
21	5	4.39	28.95
22	7	6.14	35.09
23	5	4.39	39.47
24	8	7.02	46.49
25	9	7.89	54.39
26	5	4.39	58.77
27	8	7.02	65.79
28	3	2.63	68.42
29	3	2.63	71.05
30	6	5.26	76.32
31	3	2.63	78.95
32	5	4.39	83.33
33	2	1.75	85.09
34	2	1.75	86.84
35	1	0.88	87.72
36	4	3.51	91.23
37	1	0.88	92.11
38	2	1.75	93.86
40	2	1.75	95.61
41	1	0.88	96.49
43	1	0.88	97.37
48	1	0.88	98.25
52	1	0.88	99.12
62	1	0.88	100.00
Total	114	100.00	

Thyolo

Data was available from the police, the subordinate court and the prisons in Thyolo.

Thyolo Prison

Thyolo prison serves the southern region and, on average, 495 remandees entered the prison each year between 2006-2010.

There were 200 observations from Thyolo prison but only 29 (or 15%) had both a release and admission date. If it is assumed that these 29 are representative then it is possible to estimate time periods spent in Thyolo prison by remandees.

The average time period spent by remandees in the sample whose admission and release were recorded was 21 days. The minimum time period was one day, while the maximum in this dataset was 142 days.

Various other values provide a better picture of the situation. The lower quartile is 4 days, the median is 8 days and the upper quartile is 22 days.

Among all remandees in the sample of 200, it was not clear whether or not 34 of them (17%) had been released at the time the data was collected in May 2011.

Most of the remandees in the sample (93%) were charged with one offence, while the rest were

Thyolo Summary Table

	Population	Years	Average turnover	Measure	Obs.	Mean	Min	1/4	Median	3/4	Max
Police	6612	5	1322	Detention to release	71	24	1	2	3	30	183
Sub. Court	3844	5	769	Filing to first appearance	127	1	9	50	182	182	342
Sub.											
Court	3844	5	769	First appearance to conclusion	50	32	1	7	31	87	365
High Court				Filing to first appearance							
High Court				Committal to Conclusion							
Thyolo											
Prison	2476	5	495	Admission to Release	29	21	1	4	8	22	142

charged with two offences. The most common offence was theft or burglary followed by assault.

Offence	Remandee admissions (%)
Theft or burglary	39
Assault or grievous harm	22
Robbery	6
Murder	4
Other	29

95 percent of the sample was male, 1 percent was female and the rest were not recorded. Once again, the 20-29 age-group was over-represented.

Age	Mzuzu prison remandee admissions (%)	Malawi population over 20 (%)
Under 18	3	-
18-19	14	-
20-29	50	40
30-39	25	25
40 or older	8	32

Tribal affiliation was not recorded in the Thyolo prison dataset.

Thyolo Court

The large amount of missing data in the court outcomes dataset may include cases that are still continuing.

Thyolo Court Outcomes

Outcome	Freq.	Percent	Cum.
Missing	128	64.00	64.00
Acquitted	4	2.00	66.00
Convicted	38	19.00	85.00
Discharged	14	7.00	92.00
Withdrawn	16	8.00	100.00
Total	200	100.00	

Thyolo Police

A significant proportion of people (31%) were released on bail from the Thyolo police station. Most people detained in Thyolo were people in their 20s.

Thyolo Police reasons for release

Reason for release	Freq.	Percent	Cum.
Missing	34	17.00	17.00
Acquitted	1	0.50	17.50
Bail	61	30.50	48.00
Withdrawn	15	7.50	55.50
Cautioned	1	0.50	56.00
Released	3	1.50	57.50
Taken to Bumbwe for investigation	1	0.50	58.00
Taken to court	81	40.50	98.50
Transferred to prison	3	1.50	100.00
Total	200	100.00	

Thyolo Police Detention Age profile

Age	Freq.	Percent	Cum.
	36	18.00	18.00
14	2	1.00	19.00
15	3	1.50	20.50
16	3	1.50	22.00
17	5	2.50	24.50
18	6	3.00	27.50
19	7	3.50	31.00
20	18	9.00	40.00
21	8	4.00	44.00
22	9	4.50	48.50
23	5	2.50	51.00
24	10	5.00	56.00
25	13	6.50	62.50
26	3	1.50	64.00
27	10	5.00	69.00
28	11	5.50	74.50
29	4	2.00	76.50
30	5	2.50	79.00
31	3	1.50	80.50
32	5	2.50	83.00
33	1	0.50	83.50
34	2	1.00	84.50
35	5	2.50	87.00
37	5	2.50	89.50
38	5	2.50	92.00
40	1	0.50	92.50
41	1	0.50	93.00
42	4	2.00	95.00
43	1	0.50	95.50
44	1	0.50	96.00
46	1	0.50	96.50
50	1	0.50	97.00
51	1	0.50	97.50
56	1	0.50	98.00
58	1	0.50	98.50
60	1	0.50	99.00
74	1	0.50	99.50
M	1	0.50	100.00
Toatl	200	100.00	

Analysis and conclusion

The impact of local factors

The results presented above indicate a great deal of variation amongst the various sites in Malawi, not only in terms of time periods but also in terms of the profile of the people in the remand population. This strongly suggests that trends in the Malawi criminal justice system are determined by local conditions (such as the proximity of courts to police and prisons or the tendency for particular offences to be policed, perhaps even leniency towards the majority population of the area) and not by factors that apply across the entire country, such as the impact of legislation or policy. Local human resource capacity and staff skills levels may also play a role. A further locally relevant fact is access to legal aid and paralegals, which is not evenly distributed across the country.

Subordinate courts may not meet time limits

The available data suggests that the custody time limits for the commencement of cases recently imposed by the Malawi legislature are probably not met for half the cases in some courts (Blantyre and Kasungu had median time periods from filing to first appearance in excess of 30 days). Unless changes are made to the criminal justice process, and a mechanism for implementing such limits is created, arbitrarily assigned limits placed on case commencement will probably not be met considering the trends in the recent past. The current way that records are kept does not lend itself to the easy identification of inordinate delays in the system or to triggering release when time limits have been exceeded. As it stands now, it is unclear which institution is responsible for monitoring compliance with the custody time limits and what steps must be taken by whom when the limit is exceeded.

High Court delays are mainly prior to commencement

The extremely long time that a case takes to reach the High Court in Blantyre suggests that the major delays occur when serious cases are transferred to the High Court. The High Court deals with homicides including manslaughter, as well as treason and certain types of corruption. One of these cases would first obtain a case number in the magistrates' court before it can be 'committed' to the High Court for trial. For committal to the High Court, the police first send the case file to the DPP. In fact, the file goes from the police prosecution to the regional police prosecution to the DPP, who then issues a certificate to the police saying that they may apply for committal to the High Court.

After committal in the magistrates' court, the file is sent to the High Court, but no date for trial is set. Only after the DPP has sent the High Court a list of all disclosures and witnesses that the prosecution intends to call, does the High Court give a date for the hearing and production orders can be issued.

During the scoping study officials at the DPP registry office informed us that of the almost 1000 people then in custody for murder, the DPP's office only had 70 files relating to those cases. Their view was that the delay is usually linked to the post mortem report, for which the police have to pay the hospitals and which is needed before the files are forwarded to the DPP. Using the list of prisoners in detention, the DPP registry enquires at the police station every month about when the files might be ready. The data collected in this project confirms that the delays are mostly prior to commencement of the trial in High Court.

High exposure of the Malawi population to remand

The data suggests that 8,000 people – mainly young men – are admitted on remand to these six prisons every year, with a further 6,000 admitted to Kachere juvenile prison. Given that the total male population over the age of 15 is around 3.5 million, the data suggests that close to 1 in 250 males in Malawi enter these six prisons each year. Since there are 23 prisons in Malawi, the actual yearly exposure of the population to prison on remand may be as high as 1 in 100. On this scale, the socio-economic impact of pre-trial detention at a societal level becomes significant.

Outdated offences

By far the most common offences are theft and burglary. Violent offences are a relatively small percentage, although they appear to be somewhat more prevalent in the north. However, of concern are small but significant categories such as illegal immigrants, 'rogue and vagabond' and touts. A remand prison is probably not the most suitable means of dealing with these categories of offences. Indeed, in some constitutional jurisdictions many of the offences leading to incarceration in Malawi would not be considered crimes at all. Many of these offences date back to colonial times and there is a need for an overhaul of the criminal code in the light of Malawi's human rights obligations and to ease the burden of remand detention on the poor.

Outcomes not always guilty

Prisoners on remand often elicit little public sympathy because it is assumed that they are guilty of the offences for which they have been charged. However, the court outcomes uncovered in this study suggest a significant proportion of cases end in acquittal or are otherwise discharged (at least 15% acquitted in the Mzuzu High Court and 15% are withdrawn in Blantyre High Court). This provides a strong indication that a person charged with a serious offence may not ultimately be found guilty in a court of law, after spending long periods of time on remand.

Missing information and files

Incomplete records and lost files are the most problematic findings of this study. A person on remand, whose records or files have been lost, has little hope of getting out of the system unless he receives external help. Without rigorous record-keeping serious miscarriages of justice may occur. There is a need for an overhaul of the nature and form of information kept in the criminal justice system and for its systematic implementation across the country, particularly in light of the custody time limits introduced by the Malawi legislature. A further consequence of poor record-keeping is that it limits the extent to which any intervention aimed at improving case-flow management can be monitored and assessed to determine if it is having the desired effect.

Recommendations

Further research and reform is recommended to:

- Identify local factors affecting the speed and application of criminal justice;
- Streamline the process of referral to the High Court;
- Develop a consistent national system of record-keeping and archiving in all criminal justice institutions;
- Develop a mechanism, which will be implemented nationally, to trigger the release of people on remand when custody time limits are exceeded; and,
- Review offences in the Malawi Criminal Code with the view to decriminalising certain acts.

Endnotes

Chapter 1

1. *Article 9 (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*
2. *Why We Need a Global Campaign for Pre-trial Justice – Fact Sheet, Open Society Justice Initiative http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrialjustice_20090903/pretrialjustice_20090903.pdf*
3. *Ibid*
4. *See Kampala Declaration on Prison Conditions 1996; Kadoma Declaration on Community Service Orders in Africa 1997; and the Arusha Declaration on Good Prison Practice 1999.*
5. *ACHPR /Res.64(XXXIV)03: Resolution On The Adoption of the "Ouagadougou Declaration And Plan Of Action on Accelerating Prison and Penal Reform in Africa"*
6. *Ballard C (2011) Research report on remand detention in South Africa: an overview of the current law and proposals for reform, CSPRI Research Report, Community Law Centre, p. 4.*
7. *In 2003, the average length of pre-trial detention in 19 of the 25 European Union member states was 167 days. In Nigeria, for example, the figure is 3.7 years.*
8. *International Centre for Prisons Studies, World Prison Brief, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=africa&category=wb_pretrial Accessed 21 June 2011.*
9. *Schönteich M (2008) 'Pre-trial detention and human rights in Africa' in J Sarkin (ed) Human Rights in African Prisons, Cape Town: HSRC Press, pp 105.*
10. *Ibid, p. 106*
11. *Ibid, p. 106*
12. *Ibid, p. 107*
13. *Ibid, p. 111*
14. *Ibid, p. 107*
15. *Berry D (2011) "The Socioeconomic Impact of Pre-trial Detention: A Global Campaign for Pre-trial Justice Report", Open Society Foundation and United Nations Development Programme.*
16. *For a more detailed analysis see Ballard C (2011) Research report on remand detention in South Africa: an overview of the current law and proposals for reform, CSPRI Research Report, Community Law Centre*
17. *Article 5(3) of the European Convention on Human Rights "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."*
18. *Case of Bakhmutskiy v. Russia, (Application no. 36932/02)*
19. *Schönteich M (2008) 'Pre-trial detention and human rights in Africa' in J. Sarkin (ed) Human Rights in African Prisons, Cape Town: HSRC Press, p. 95.*
20. *Ibid, p. 95.*

Chapter 2

1. *Schoenteich M, The scale and consequences of Pre-trial detention around the world, Justice Initiatives, A publication of the Open Society Justice Initiative, 2008*
2. *Coyle A (2002) A Human Rights Approach to Prison Management, International Centre for Prison Studies. London.*

Chapter 3

1. *Section 152(2)*
2. *Section 154(2) of the Constitution*
3. *For a broad description on the structural organization of the Service see http://www.communitypolicing.mw/about-mps/ Accessed 4 February 2011.*
4. *Mhone, Draft National Prosecution Policy for Malawi, p. 28, Copy on file with author.*
5. *Section 79(2) of the CPEC as amended in 1994, but now repealed in 2010.*
6. *Ibid*
7. *Section 160 of the Penal Code states that prosecution of an offence of incest under Section 157 of the Code shall not commence without the consent of the DPP*
8. *Such guidance is sought in cases involving high profile suspects, or where the case is complicated. This action, however, largely depends on the initiative of individual police officers handling the respective cases.*
9. *See 101 (1) of the 1995 Constitution*
10. *See 101 (2) of the 1995 Constitution*
11. *Director of Public Prosecutions (DPP), A citizens Guide to the Administration of Justice in Malawi.*
12. *Mhone at page 7 of Prosecution Missions Report*
13. *Miscellaneous Application Number 62 of 2008, High Court, Lilongwe District Registry, unreported*
14. *Section 8 of Prisons Act and see again first schedule of the same Act*

15. *Section 163 of the Constitution*
16. *Section 14 of the Prisons Act*
17. *Section 164 (2) of the Constitution*
18. *Section 2 of Prisons Act (Cap. 9:02)Laws of Malawi*
19. *Ibid*
20. *Section 59 of the Prisons Act(Cap. 9:02)Laws of Malawi*
21. *Section 64 of the Prisoners Act (Cap. 9:02) Laws of Malawi. Most Prisons face problems when it comes to separate detention of children and adults.*
22. *See section 105 (1) of the Constitution*
23. *See section 109 of the Constitution*
24. *See Sections 18-20 of the Courts Act and 68 and 294 of the CPEC.*
25. *See Section 346 of the CPEC*
26. *See Sections 25 and 26 of the Courts Act, Section 360 of CPEC.*
27. *Only the Mzuzu High Court Registry consistently holds confirmation sessions.*
28. *Section 263 of the CPEC*
29. *Section 270 of the CPEC*
30. *See sections 290 to 293 of the CPEC.*
31. *Section 22 of the Act – the list of offences over which local courts can exercise jurisdiction is provided in the First Schedule of the Act*
32. *See section 9 of the Constitution*
33. *See section 11 (2) of the Constitution*
34. *See section 42 (2) b of the Constitution*
35. *Section 16 of Legal Aid Act*
36. *The Dakar Declaration was issued at the end of a seminar on the right to fair trial called by the African Commission on Human and Peoples' Rights in September 1999 in Dakar, Senegal. The Declaration can be accessed at www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr2.doc*
37. *Adopted by the African Commission on Human and People's Rights, 30th November 2003, ACHPR /RES.64(XXXIV)03 See also Statement Submitted by the Open Society Justice Initiative and the Paralegal Advisory Service Institute for Consideration by the United Nations Human Rights Council at its Ninth Session, on the occasion of its Universal Periodic Review of the Republic of Malawi November 2 – December 3, 2010, submitted in April 2010 and can be accessed at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/MW/JS2_OSJI_Joint%20submission2.pdf*

Chapter 4

1. *The Bill of Rights in the 1995 Constitution is found in Chapter IV*
2. *CPEC, Chapter 8:01 of the Laws of Malawi, as amended by Act No. 14 of 2010.*
3. *Act No. 22 of 2010, published on 30th July 2010.*
4. *Kayira, P. (2007) The Right to Fair Trial: Malawi's Quest to Meet International Standards, Lund University, p. 86*
5. *42(1) Every person who is detained, including every sentenced prisoner, shall have the right -*
(a) to be informed of the reason for his or her detention promptly, and in a language which he or she understands;
(b) to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State;
(c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State;
(d) to be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religion counsellor and a medical practitioner of his or her choice;
(e) to challenge the lawfulness of his or her detention in person or through a legal practitioner
before a court of law; and,
(f) to be released if such detention is unlawful.
(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right--
(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;
(c) not to be compelled to make a confession or admission which could be used in evidence
against him or her;
(d) save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;
(e) to be released from detention, with or without bail unless the interests of justice require otherwise;
(f) as an accused person, to a fair trial, which shall include the right--
(i) to public trial before an independent and impartial court of law within a reasonable time after having been charged;
(ii) to be informed with sufficient particularity of the charge;
(iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
(iv) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
(v) to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;
(vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
(vii) not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;
(viii) to have recourse by way of appeal or review to a higher court than the court of first instance;
(ix) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and
(x) to be sentenced within a reasonable time after conviction;
(g) in addition, if that person is a child, to treatment consistent with the special needs of children, which shall include the right--
(i) not to be sentenced to life imprisonment without possibility of release;
(ii) to be imprisoned only as a last resort and for the shortest period of time;
(iii) to be separated from adults when imprisoned, unless it is considered to be in his or her best interest not to do so, and to maintain contact with his or her family through correspondence and visits;
(iv) to be treated in a manner consistent with the promotion of his or her sense of dignity and worth, which reinforces respect for the rights and freedoms of others;
(v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role; and,
(vi) to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.
6. *Wanda B (1996) The Rights of Detained and Accused Persons in Post Banda Malawi, Journal of African Law, Vol 40 No. 2, p. 230.*
7. *Miscellaneous Application Number 62 of 2008, Lilongwe District Registry, unreported.*
8. *Misc. Criminal Application No. 195 of 2002, Principal Registry, unreported.*
9. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, at 219, available at http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf*
10. *General Comment No. 13 (Article 14), in UN Compilation of General Comments, p. 124, paragraph7.*
11. *MSCA Criminal Appeal No. 11 of 1998 (unreported)*
12. *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, August 27 –September 7, 1990.*
13. *Section 118 of the CPEC*
14. *Bail (Guidelines) Act 2000, Chapter 8:05 of the Laws of Malawi.*
15. *It is interesting to note that Mvahe, which is now considered the leading case on bail, did not even mention the Bail (Guidelines) Act.*
16. *Malawi Supreme Court Criminal Appeal No. 25 of 2005 (unreported)*
17. *See also Article 9(3) of the International Covenant on Civil and Political Rights, Article 7(1) (d) of the African Charter, Article 7(5) of the American Convention on Human Rights, and Article 5(3) of the European Convention on Human Rights.*
18. *European Court of Human Rights, Case of Assenov and Others v. Bulgaria, judgment of 28 October 1998, Report 1998-VIII, p. 3300, paragraph. 154; See also Case of Bakhmutskiy v. Russia, ECtHR (Application no. 36932/02) paragraph 135*
19. *Human Rights Committee General Comment Number 13*
20. *Özturk v Germany 1984 6 EHRR 409*
21. *Communication 39/90, Pagnoulle v Cameroon, (2000) AHRLR 57 (ACHPR 1997)*
22. *Mwaungulu J, In the Matter of Charles Khasu and Louis Khasu, Principal Registry High Court Miscellaneous Application No. 61 of 2003(unreported).*
23. *Human Rights Committee General Comment No. 31, Doc. CCPR/C/21/Rev.1/Add.13 (General Comments). The Committee also emphasized this point in Lubuto v Zambia Communication No. 390/1990, U.N.Doc. CCPR/C/55/D/390/1990/Rev. 1(1995)*
24. *Wemhoff v Germany, 1968 1 EHRR 55*
25. *Bruce Robert Anderson v Attorney General Eastern Cape, Case CCT 10/97*
26. *Portington v Greece, 1998 ECHR 94*
27. *Republic v Kutengule Criminal Case No. 181 of 2005.The application was made under Miscellaneous Application No. 91 of 2006, Lilongwe District Registry. Interestingly, the trial eventually commenced but has been stalled since January 2010.*
28. *Misc. Criminal Application No. 174 of 2006, Lilongwe District Registry.*
29. *Section 161 B of the CPEC (cap 8:01) Laws of Malawi*
30. *Section 59(1) of Prisons Act, Cap 9:02, Laws of Malawi.*
31. *Section 161C (1) of the CPEC(cap 8:01) Laws of Malawi*
32. *Section 161 C (2) of the CPEC, (cap 8:01) Laws of Malawi*
33. *Section 161 D of the CPEC(cap 8:01) Laws of Malawi*
34. *Section 161F of the CPEC, (cap 8:01) Laws of Malawi*
35. *Section 161 G of the CPEC, (cap 8:01) Laws of Malawi*
36. *Section 161H (1) (2) (3) of the CPEC*
37. *Section 161I of the CPEC*
38. *Section 32 of the CPEC, and section 94 of the Child Care, Protection and Justice Act*
39. *Section 2 of the Child Care, Protection and Justice Act – for more details on conditions for diversion see section 112 of the said Act.*
40. *Section 161 of the CPEC See also section 25 of the Draft Local Courts Act*
41. *Section 252A of the CPEC*
42. *As reported in The Independent Newspaper of 18th June 1996, Pre-trial custody extended for want of a judge, accessed on 15th August 2010.*
43. *Here the court disagreed with the reasoning in R v Luton Crown Court, ex p Neaves [1992] Crim LR 721where the court was of the*

view that protection of the public could be a good and sufficient cause for extending pre-trial custody period.

44. *[2007] EWHC 2408 (Admin)*

45. *[1999] 1 Cr.App.R 409*

46. *See Sanderson v Attorney General Eastern Cape*

47. *Sections 261 and 302A of the CPEC*

Chapter 5

1. *'The forgotten of Africa, wasting away in jails without trials' by Michael Wines, New York Times, at http://www.nytimes.com/2005/11/06/international/africa/06prisons.html?pagewanted=1&_r=1*

2. *Section 163(2)(a) of the 1995 Constitution*

3. *Soering v United Kingdom, 1999 11 EHRR 439 at 88*

4. *Article 5*

5. *Adopted by United Nations General Assembly resolution 3452 (XXX) of 9 December 1975.*

6. *See the House of Lords decision in A (FC) and others (FC) v Secretary of State for the Home Department (2004); A and others (FC) and others v Secretary of State for the Home Department [2005] UKHL 71 at 33. See also R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147, 197-199; Prosecutor v Furundzija ICTY (Trial Chamber) judgment of 10 December 1998 at Paragraphs 147-157*

7. *General Comment Number 20 of the Human Rights Committee*

8. *See also Article 5 of the African Charter. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, and torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. Malawi acceded to UNCAT in 1996.*

9. *Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*

10. *102. In the light of the above, the Court finds the applicant's conditions of detention, in particular the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment.*
103. Accordingly, there has been a violation of Article 3 of the [European] Convention. Kalashnikov v Russia, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002

11. *Committee against Torture (2007) General Comment No. 2 on the implementation of Article 2, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, paragraph 11*

12. *Article 10(1) of the ICCPR, Article 5(2) of the American Convention, Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Principle 1 of the Basic Principles for the Treatment of Prisoners.*

13. *General Comment No. 21, in United Nations Compilation of General Comments, paragraph 3.*

14. *Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994, paragraph. 34 of the text of the decision as published at http://www.up.ac.za/chr*

15. *Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*

16. *Communication No. 625/1995, M. Freemantle v. Jamaica (Views adopted on 24 March 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 19, paragraph. 7.3.*

17. *Communication No. 526/1993, M. and B. Hill v. Spain (Views adopted on 2 April 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 17-18, paragraph. 13.*

18. *African Commission on Human and People's Rights Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Malawi 2001 Report pages 17 to 18.*

19. *Judicial Inspectorate of Prisons in South Africa 2008-2009 Annual Report, at page 17.*

20. *See Amnesty International Report 2010 at page 216. This information on prison population was obtained in December 2009. See also the 2004 Report of the Malawi Prison Inspectorate on general problem of overcrowding.*

21. *Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office, page 54. See also the 2010 Amnesty International Report, p. 216.*

22. *See also generally, Articles 2(1) and 26 of the ICCPR, Articles 1(1) and 24 of the American Convention on Human Rights, Article 14 of the European Convention on Human Rights and also Article 6(1) of the Standard Minimum Rules for the Treatment of Prisoners, Principle 2 of the Basic Principles for the Treatment of Prisoners and Principle 5(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.*

23. *Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.*

24. *1999 (4) BCLR 363 at paragraphs 17 and 18. See Also Whittaker and Morant v Roos and Bateman (1911 AD) for the residuum principle.*

25. *Malawi Human Rights Commission Annual Report 2004 at page 14.*

26. *General Comment No. 21, in United Nations Compilation of General Comments, page 142-143 at paragraph 9.*

27. *See generally Article 10(2)(a) of the International Covenant and Article .5(4) of the American Convention.*

28. *Section 64 of the Prisons Act (Cap 9:02) Laws of Malawi*

29. *See also Article 10(2)(b) of the International Covenant on Civil and Political Rights, which states, "accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication". Article 5(5) of the American Convention on Human Rights stipulates in this respect that minors "while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors".*

30. *Malawi Human Rights Commission Annual Report 2004, p. 13.*

31. *Committee on the Rights of the Child Concluding Remarks on Malawi, CRC/C/MWI/CO/2 paragraph 76.*

32. *High Court of Malawi, Principal Registry, Constitutional Case no. 12 of 2007, decided on 26th August 2009.*

33. *High Court of Malawi, Lilongwe Registry, Constitutional Case No. 15 of 2007, delivered on 9th November 2009.*

34. *A/HRC/13/39/Add.5 paragraph 157; ICJ EJP Report, p. 157 and p. 162; HRC General Comment 21, paragraph. 6 and E/CN.4/2003/68, 17 December 2002, paragraph 26 (f).*

35. *E/CN.4/2003/68, 17 December 2002, paragraph 26(f). The regular inspection of places of detention is a central motivation behind OPCAT and is described as such in the Preamble to the protocol: "Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention".*

36. *UN doc. E/CN.4/1995/34, Report of the Special Rapporteur on Torture, paragraph. 926(c)*

37. *See the Committee's recommendations to Namibia, UN doc. GAOR, A/52/44, p. 37, paragraph 244*

38. *Council of Europe doc. CPT/Inf (92) 4, Report to the Swedish Government on the Visit to Sweden Carried out by the European Committee for the Prevention or Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 14 May 1991, p. 57, paragraph 5 (a).*

39. *Section 15(d) of the Act*

40. *Malawi Human Rights Commission, Annual Report for 2004*

41. *See Malawi Human Rights Commission, Mfulu – The Malawi Human Rights Commission Bulletin (May 2006), p. 9.*

42. *Act No. 12 of 2010*

43. *Compare with section 134 of the Prison Act of Botswana, which also establishes Visitors Committees.*

44. *See MHRC Speaks on Police Brutality, by Steven Pembamoyo Banda, The Nation, dated 23 October 2006 at http://www.nationmalawi.com/articles.asp?articleID=19212*

45. *At the time of writing this report, the Commission has not been established yet.*

46. *See Kanyongolo F (2006), Malawi: Justice Sector and Rule of Law. A review by AFRIMAP and Open Society Initiative for Southern Africa, Open Society Initiative for Southern Africa: Cambridge. p. 122.*

Chapter 6

1. *E/CN.4/2005/6, para 69*

2. *Chaskalson, A. (2002). Human dignity as a Constitutional Value. In Kretzmer, D., and Klien, E. (Eds.) The Concept of Human Dignity in the Human Right Discourse, The Minerva Centre for Human Rights the Hebrew University of Jerusalem Tel Aviv University, p. 134.*

3. R*edress Trust 2004Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities The Redress Trust, London, p. 17.*

4. *Finucane v United Kingdom (2003) 22 EHRR 29 para 68*

5. *Assenov and Others v Bulgaria (n 125) para 140*

6. *Muntingh L (2011) A Guide to the UN Convention against Torture in South Africa, Bellville: Community Law Centre*

7. *ICCPR, Art. 10(1)*

8. *ICCPR, Art. 14. The Basic Principles for the Treatment of Prisoners, in Principle 5, emphasise the residuum of other rights and fundamental freedoms despite the deprivation of liberty: "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."*

9. *UNSMR Rule 35 (1): "Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution." See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: Principle 13 Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.*

10. *UNSMR Rule 35 (2): "If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally." See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: Principle 14 A person who does not adequately understand or speak the language used by the authorities*

responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

11. *Art. 10 ICCPR: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." See also Art. 5 ACHPR

12. *See e.g. Principle 1 of the Body of Principles and Rule 60 (1) UNSMR. This Rule reads as follows: "The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings." See also the CoE Guidelines, Art. XI (1)*

13. *Rule 21(1)*

14. *E/CN.4/1995/34 12 January 1995 para 926(i) See also CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, para 7(k) "Intensify training of medical personnel with regard to the obligations set out in the Convention, in particular in the detection of signs of torture or ill-treatment and the preparation of forensic reports in accordance with the Istanbul Protocol"*

15. *Principle 19, Body of Principles: "A detained person shall have the right to be visited by and to correspond with, in particular, members of family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations." Principle 15 stresses this contact shall not be denied longer than a few days upon arrest.*

16. *See Body of Principles: Principle 18 on communication with legal counsel, Principle 19 on contact with family and Principle 20 on placement reasonably near to place of residence. Principle 19, however, clearly states the right to be visited by and correspond with family is "subject to reasonable conditions and restrictions as specified by law or lawful regulations." Rule 37 of the UNSMR includes the phrase "under necessary supervision" with regard communication with family members. Rule 38 stresses the right of foreign nationals to communicate with diplomatic or consular representations, while Rule 39 lays down the right to be kept informed regularly of the more important items of news.*

17. *A/HRC/13/39/Add.5 para 157*

18. *Body of Principles, Principle 29(1)*

19. *Body of Principles, Principle 29(2)*

Chapter 7

1. *High Court of Malawi, Lilongwe Registry, Constitutional Case No. 15 of 2007, delivered on 9th November 2009.*

2. B*urton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office*

3. *International Centre for Prison Studies, World Prisons Brief, Accessed 26 June 2011, http://www.prisonstudies.org/info/worldbrief/*

4 .*Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office*

5. *See Ntata P, Muula A and Siziya S (2008) Socio-demographic characteristics and sexual health related attitudes and practices of men having sex with men in central and southern Malawi. Journal of Health Research Vol. 10 (3) 2008: pp. 124-130. Banda, H. et al (2009) Prevalence of smear-positive pulmonary tuberculosis among prisoners in Malawi: a national survey [Short communication] The International Journal of Tuberculosis and Lung Disease, Volume 13, Number 12, pp. 1557-1559(3). Mtiboa, C, Kennedy, N and Umar E (2011) Explanations for child sexual abuse given by convicted offenders in Malawi: No evidence for "HIV cleansing" Child Abuse & Neglect Volume 35, Issue 2, February 2011, Pages 142-146*

6. *Muntingh L and Satardien Z (2011 forthcoming) Sexual violence in prisons – Part 1: The duty to provide safe custody and the nature of prison sex, SA Journal of Criminal Justice.* 7. *Committee Against Torture, General Comment 2, CAT/C/GC/2/CRP.1/Rev. 4, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement, para 18*

8. *Body of Principles, Principle 2*

9. *As cited by Kayira in this report. See section 59(1) of Prisons Act, Cap 9:02, Laws of Malawi.*

10. *Rule 7(2) of the UNSMR*

11. *ICCPR, Art. 10. (1)*

12. *ICCPR, Art. 14. The Basic Principles for the Treatment of Prisoners, in Principle 5, emphasise the residuum of other rights and fundamental freedoms despite the deprivation of liberty: "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."*

13. *UNSMR Rule 35 (1): "Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution."*

14. *UNSMR Rule 35 (2): "If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally."*

15. *Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office p. 37*

16. *Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office p. 53*

17. *Rule 21(1)*

18. *Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office, p. 38.*

19. *Simooya O and Sanjobo N (2005) 'Responding to the challenge of HIV/AIDS behind bars – the In but Free project in Zambia' Sexual Health Exchange 2005 Vol 1 p. 1*

20. *Jolofani D and DeGabriele J (1999) HIV AIDS in Malawi Prisons - Study of HIV transmission and the care of prisoners with HIV / AIDS in Zomba, Blantyre and Lilongwe Prisons, Penal Reform International, Paris.*

21. *High Court of Malawi, Lilongwe Registry, Constitutional Case No. 15 of 2007, delivered on 9th November 2009.*

22. *Gable Masangano vs. Attorney General, Ministry of Home Affairs, and Malawi Prison Service p. 46*

23. *Section 8(5)*

24. *Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office p. 41.*

25. *Chapter 6 in this report: Kayira P Prison law and conditions of detention*

26. *"Sex slavery at Zomba Prison" by Henry Chilobwe, 22 October 2006, http://groups.yahoo.com/group/MALAWIANA/message/11349*

27. *Jolofani D and DeGabriele J (1999) HIV AIDS in Malawi Prisons - Study of HIV transmission and the care of prisoners with HIV / AIDS in Zomba, Blantyre and Lilongwe Prisons, Penal Reform International, Paris.*

28. *Art. 7 ICCPR*

29. *Rule 31 See also E/CN.4/1997/7/Add.2 (Special Rapporteur on Torture - Visit to Pakistan 1996). The CCPR in General Comment 20 (para. 5) notes in respect of Art. 7 of the ICCPR that "The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.*

30. *General Comment 20 on the ICCPR para. 6. The Istanbul statement on the use and effects of solitary confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic. [Adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.]*

31. *The provisions of the UNSMR (Rule 30) clearly require an individualised response by the authorities meeting the requirements of due process. Group punishments inflicted because one or a few prisoners violated a rule cannot meet this requirement.*

32. *Rule 32(1). Despite the requirement in the UNSMR that a medical officer must approve the restriction of diet as a punishment, it is increasingly the trend in regional instruments and national legislation that the use of restricted diet as punishment is being prohibited. Rule 22(1) of the European Prison Rules (2006) allows only for a change in diet based on medical reasons. See also the Inter-American Commission on Human Rights (2002) Report on Terrorism and Human Rights, para. 161-162.*

33. *Rule 33*

34. *Art. 8 of the ICCPR. This should be read together with Rule 71(1) of the UNSMR that work performed by prisoners must not be of an "afflictive nature".*

35. *A/HRC/13/39/Add.5 para 55*

36. *A/HRC/13/39/Add.5 para 157*

37. *Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office, p. 39.*

38. *Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office, p. 54.*

39. See UNODC website at http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuside

40. This has been implemented successfully at South Africa's 237 prisons in a cost effective manner.

41. *A successful project in Sothern Sudan (Juba Prison) was completed in 2010 where female prisoners were taught how to make reusable sanitary napkins. At http://sites.google.com/site/padsforprison/*

CHRR
The Centre for Human Rights and Rehabilitation 's mission statement is to contribute towards the protection, promotion and consolidation of good governance by empowering rural and urban communities in Malawi to become aware of and exercise their rights through research, advocacy and networking in order to realize human development.

CLC
The Civil Society Prison Reform Initiative is a project of the Community Law Centre (CLC) at the University of the Western Cape and focuses on prisons and corrections, with the aim of improving the human rights situation in South African prisons through research-based lobbying and advocacy, and collaboration with civil society structures. By stimulating public debate and participation in government structures, the aim is to influence the development of appropriate human rights oriented prison reform.

CHREAA
CHREAA's vision is a Malawian society that upholds human rights, justice and the rule of law. Its mission is to promote and protect human rights by assisting the vulnerable and marginalised people in Malawi to access justice through civic education, advocacy and assistance.

PASI
The Paralegal Advisory Service Institute's vision is 'to make justice accessible to all people in Malawi through improving the efficiency and effectiveness of the justice system and making it responsive to the needs of all users, particularly the poor and vulnerable'.

CCJP
The Catholic Commission for Justice and Peace works to contribute to the creation of a god-fearing, just, loving and peaceful Malawian society.

CHRR

COMMUNITY LAW CENTRE

Center for Human Rights Education, Advice and Assistance (C.H.R.E.A.A)

PASI Paralegal Advisory Service INSTITUTE

Catholic Commission for Justice and Peace
The Diocese of Lilongwe, MALAWI

Pre-trial detention in Malawi:

Understanding caseflow management and conditions of incarceration

On any given day around the world, about three million people are held in custody awaiting trial. During the course of an average year, 10 million people are held in pre-trial detention. Some of them are detained for a few days or weeks, but many will spend months or years in custody. It is common cause that conditions for pre-trial detainees are in most instances far worse than for their sentenced counterparts. Unsentenced inmates often have limited access to legal aid/legal defence, they receive little or no training or schooling and have little access to recreational activities. They also struggle to get access to medical treatment, reading material, bedding and exercise. The irony is that after spending lengthy periods of time in prison, a significant number of detainees are acquitted or, once convicted, given a noncustodial sentence. Compounding this situation in Southern Africa are broader problems of poverty, underdevelopment, the HIV/Aids epidemics, food shortages, social inequities, vast economic inequalities and, in some countries, political instability and conflicts, which place criminal justice and penal reform relatively low down on a list of pressing priorities for government, donors and civil society organisations.

Recognising these challenges, and in an effort to more fully understand the situation in respect of the use of pre-trial detention in Southern Africa, the Open Society Initiative for Southern Africa (OSISA), in partnership with the Open Society Foundation for South Africa (OSF-SA) and the Open Society Foundations Global Criminal Justice Fund (GCJF) commissioned an audit of eight police station/court/prison precincts in Malawi to gather information on both the legal status of awaiting trial detainees and issues pertaining to conditions of incarceration in that country. A similar process is currently underway in Zambia and OSISA is exploring the possibility of conducting this research in both Zimbabwe and Mozambique.

The information contained in this report provides rigorously researched, empirical evidence which can be used to underpin future efforts by both government and civil society to influence legislation, policy and practice with a view to ensuring the appropriate use of pre-trial detention, promoting the speedy resolution of trials and improving prison conditions in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners. OSISA also plans to explore how this information and the tools that were designed during the audit process might contribute to regional efforts in respect of criminal justice reform e.g. how might this research be used in the development of regional standards for the management of pre-trial detainees.