



Malawi's Compliance with the African Charter on Human and Peoples' Rights
Report for the 56th Ordinary Session of the African Commission on Human and Peoples' Rights
for the Commission's Examination of Malawi's Initial and Combined Periodic Country Report on the Implementation of the African Charter on Human and Peoples' Rights in Malawi

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Reporting Organization

The Advocates for Human Rights. Founded in 1983, The Advocates for Human Rights is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide *pro bono* assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition against the Death Penalty.

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EXECUTIVE SUMMARY

1. This report addresses Malawi's compliance with its human rights obligations with regard to the death penalty, pretrial detention, adequate legal resources, and prison conditions. Although executions are not currently being carried out, Malawi must formally abolish the death penalty to address the many prisoners in Malawi who remain under sentence of death and who could be executed if executions are resumed. The Government of Malawi has revealed little willingness to abolish the death penalty altogether, but the African Commission should encourage it to do so as soon as possible.
2. This report addresses problems with respect to due process in Malawi's justice system. Pretrial detention in Malawi is excessively long, and detained persons do not have access to a trial within a reasonable time and may be held for years. Although the Legal Aid Act of 2011 established enhanced access to defenders, Malawi's legal infrastructure is still strained with too few resources and legal aid lawyers. Likewise, there is a lack of sufficient prosecutors and judges, which contributes to further delays in court proceedings. Overall, the lack of adequate staffing and resources in Malawi's justice system deprives defendants of adequate legal representation and the right to be tried within a reasonable time. These problems are compounded on the appellate level, where legal representation is not consistently provided to defendants seeking to appeal their death sentences. In addition, numerous capital inmates sentenced to death under the now-abolished mandatory death penalty still await resentencing.
3. This report also addresses the detention and prison conditions for people accused or convicted of crimes in Malawi. Detainees and prisoners, many of whom have been awaiting trial for years, are held in conditions that violate basic human rights. Although the Government of Malawi has begun to address these conditions, it must dedicate more State resources to ensure adequate provision of food for prisoners and to relieve overcrowding, as well as providing for an efficacious justice system to reduce the number of pretrial detainees.
4. Malawi's *de facto* moratorium of the death penalty and its recognition of its harsh prison conditions are a first step toward protecting human rights. Also, the abolition of a mandatory death sentence is a positive step, but concerns remain about due process and application of the death penalty in Malawi. The Advocates for Human Rights respectfully suggests that the Committee recommend that Malawi take the following measures:
 - a. Abolish the death penalty.
 - b. Ratify the Second Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR).
 - c. Replace the death penalty with a sentence that is fair, proportionate, and respects international human rights standards.

- d. Restrict the application of the death penalty to only the most serious crimes, as defined by the United Nations.
- e. Conduct resentencing hearings for those individuals who previously received automatic death sentences murder or treason.
- f. Systematically review prison conditions—especially at Zomba Central Prison—with the goal of relieving overcrowding and poor living conditions.
- g. Provide death row detainees—and the general prison population, more broadly—with adequate legal assistance before, during, and after trial.
- h. Increase the resources and personnel available to the justice system so there are sufficient judges, lawyers, and paralegals to minimize the sizable backlog and reduce the pretrial detention periods to durations that comply with international standards.

I. MALAWI'S REGIONAL, INTERNATIONAL, AND DOMESTIC HUMAN Rights COMMITMENTS MANDATE RIGHTS TO DUE PROCESS, LIBERTY AND SECURITY OF PERSON, LIFE AND INTEGRITY OF PERSON, AND PROTECTION AGAINST CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT.

African Charter on Human and Peoples' Rights

5. Article 3 of the African Charter on Human and Peoples' Rights (African Charter) demands “[e]very individual shall be equal before the law” and “shall be entitled to equal protection of the law.” All humans are “inviolable” and every person, without qualification, is “entitled to respect for his life and the integrity of his person,” which includes not being “arbitrarily deprived of this right.”¹ The death penalty violates this “right to life.”² Similarly, all individuals under the Charter have “the right to liberty and to the security of person,” and one’s freedom can be taken only “for reasons and conditions previously laid down by law.”³ Article 5 prohibits cruel, inhuman or degrading punishment and treatment. Specifically, “no one may be arbitrarily arrested or detained.”⁴ Article 7 also states that every person has the “right to have his cause heard,” which includes:

- The right to an appeal to competent national organs;
- The right to be presumed innocent until proved guilty;

¹ African Charter on Human and Peoples' Rights, art. 4, October 1986, as cited in “Report on the Death Penalty and Detention Conditions in the Republic of Cameroon Under the African Charter on Human and Peoples' Rights,” Advocates for Human Rights, April 2013.

² See e.g. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (“Convinced that everyone’s life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings”).

³ African Charter on Human and Peoples' Rights, art. 6, 1986 as cited in “Report on the Death Penalty,” 2013.

⁴ African Charter on Human and Peoples' Rights, art. 6, 1986 as cited in “Report on the Death Penalty,” 2013.

- The right to defend himself, including the right to be defended by counsel of his choice;
- The right to be tried within a reasonable time by an impartial court.

Article 16 establishes that everyone has “the right to enjoy the best attainable state of physical and mental health.” All people are equal under the African Charter, enjoying “the same respect,” having the “the same rights,”⁵ and having “the right to existence.”⁶

Convention against Torture

6. Malawi is obligated under the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment to “take effective legislative, administrative, judicial or other measures to prevent “acts of cruel, inhuman, or degrading treatment or punishment.”⁷ Finally, the government should review its practices surrounding arrest, detainment, and imprisonment as a means of preventing acts of cruel, inhuman, or degrading treatment or punishment.⁸

International Covenant on Civil and Political Rights

7. Article 6 of the ICCPR establishes that every human being has an inherent right to life, of which they cannot be arbitrarily deprived. A sentence of death is to be reserved for only the most serious crimes, and subject to a final judgment by a competent court.⁹ Article 7 prohibits cruel, inhuman or degrading treatment or punishment. Article 9 protects the right to liberty and security of person and prohibits arbitrary arrest or detention. It further states that anyone who is arrested is to be informed, at the time of arrest, of the reasons for his arrest and any charges, and brought promptly before a judge or other authorized officer and be entitled to trial within a reasonable time or to release.¹⁰ Anyone who is arrested or detained is entitled to appear before a court that must decide without delay on the lawfulness of the detention and order release if the detention is unlawful.¹¹ Under Article 14, Malawi must provide all individuals with equal rights to appear before a competent and impartial tribunal.

Domestic Legal Framework

8. The Malawi Constitution expresses a right to life (Art 16(1)), under which “no person shall be arbitrarily deprived of his or her life.”¹² The death penalty in Malawi may only be administered when, according to the Malawi government, it

⁵ African Charter on Human and Peoples’ Rights, art. 16, 1986 as cited in “Report on the Death Penalty,” 2013.

⁶ African Charter on Human and Peoples’ Rights, art. 20, 1986 as cited in “Report on the Death Penalty,” 2013.

⁷ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, June 1987 as cited in “Report on the Death Penalty,” 2013.

⁸ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 11, June 1987 as cited in “Report on the Death Penalty,” 2013.

⁹ International Covenant on Civil and Political Rights, art. 6, December 1966, as cited in “Report on the Death Penalty,” 2013.

¹⁰ International Covenant on Civil and Political Rights (1976), Art. 9.

¹¹ International Covenant on Civil and Political Rights (1976), Art. 9

¹² Constitution of the Republic of Malawi, Art. 16, 1994.

“cannot be deemed as arbitrary deprivation.”¹³ The Constitution also states that no person may be subjected to “cruel, inhuman, degrading treatment or punishment.”¹⁴

9. Murder and genocide are capital offenses in Malawi. Non-homicidal capital offenses include treason, piracy, rape not resulting in death, robbery not resulting in death, burglary not resulting in death, and housebreaking (defined as “breaking and entering into any building, tent, or vessel used as a human dwelling with intent to commit a felony therein”).¹⁵ Nevertheless, since 1995, only prisoners who have been convicted of murder have been sentenced to death.¹⁶ Individuals under the age of 18 at the time of their crime, pregnant women, and the mentally ill are exempt from the death penalty in Malawi.¹⁷ As of April 2014, there are 29 people on death row, but no executions have taken place since 1992.¹⁸ The primary method of execution is hanging.¹⁹

10. Recent developments include the elimination of the mandatory death penalty. A conviction on charges of murder previously received a mandatory death sentence, but a 2011 amendment to Section 210 of Malawi’s Penal Code eliminated the mandatory death penalty for murder and treason. The amendment was in response to the 2007 *Kafantayeni* decision by the Malawi High Court, which found the mandatory death penalty to be unconstitutional.²⁰ The imposition of the death penalty is no longer mandatory in murder cases, and courts have discretionary sentencing power.²¹ This amendment has been implemented,²² and a larger array of sentencing options have been imposed for murder.²³

¹³ United Nations Human Rights Committee, “Consideration of reports submitted by States parties under article 40 of the Covenant,” U.N. Doc. CCPR/C/MWI/1, July 13, 2012, para. 18, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

¹⁴ *Constitution of the Republic of Malawi*, Art. 19, 1994.

¹⁵ Malawi Penal Code, updated 2012 (*murder* Art. 209; *genocide* Art. 217A; *treason* Art. 38; *piracy* Art. 63; *rape* Art. 133; *robbery* Art. 301; *housebreaking and burglary* Art. 309).

¹⁶ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

¹⁷ “Malawi,” Death Penalty Worldwide, April 2, 2011, accessed July 21, 2014, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malawi>.

¹⁸ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 35 (*on file with authors*).

¹⁹ “Malawi,” Death Penalty Worldwide, April 2, 2011, accessed July 21, 2014, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malawi>.

²⁰ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

²¹ United Nations Human Rights Committee, “Consideration of reports submitted by States parties under article 40 of the Covenant,” U.N. Doc. CCPR/C/MWI/1, July 13, 2012, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

²² United Nations Human Rights Committee, “Consideration of reports submitted by States parties under article 40 of the Covenant,” U.N. Doc. CCPR/C/MWI/1, July 13, 2012, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

²³ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 35 (*on file with authors*).

The Government of Malawi's Position

11. During Malawi's last Universal Periodic Review before the U.N. Human Rights Council, despite its *de facto* moratorium on executions, Malawi rejected Spain's recommendation to both impose a *de jure* moratorium "with a view to its final abolition," and ratify the Second Optional Protocol to the ICCPR. Malawi neglected to comment on other similar recommendations called for by other stakeholders and countries.²⁴ Malawi Solicitor General Janet Banda stated in 2014, in response to the United Nations Human Rights Council recommendations, that Malawi has no intentions to ratify the Second Optional Protocol to the ICCPR, though it will "continue to listen to the voices of the people of Malawi regarding the issue of the death penalty."²⁵

II. LEGAL FRAMEWORK

12. The Malawi Constitution expresses a right to life (Art 16(1)), under which "no person shall be arbitrarily deprived of his or her life."²⁶ The death penalty in Malawi may only be administered when, according to the Malawi government, it "cannot be deemed as arbitrary deprivation."²⁷ The Constitution also states that no person may be subjected to "cruel, inhuman, degrading treatment or punishment."²⁸

13. Capital offenses include murder, rape not resulting in death, robbery not resulting in death, burglary not resulting in death, treason, piracy, genocide, and housebreaking.²⁹ Since 1995, however, only prisoners convicted of murder have been sentenced to death.³⁰ Individuals under the age of 18 at the time of their crime, pregnant women, and the mentally ill are exempt from the death penalty in Malawi.³¹ As of May 2014, there are 29 people on death row, but no executions have taken place since 1992.³² The primary method of execution is hanging.³³

²⁴ United Nations Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Malawi," U.N. Doc. A/HRC/16/4, ¶¶ 105.12, 104.7, 104.8, 104.1, January 4, 2011, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MWSession9.aspx>.

²⁵ "Malawi will not Abolish the Death Penalty, UN Told," *Nyasa Times*, July 11, 2014, <http://www.nyasatimes.com/2014/07/11/malawi-will-not-abolish-the-death-penalty-un-told/>.

²⁶ Constitution of the Republic of Malawi, Art. 16, 1994.

²⁷ United Nations Human Rights Committee, "Consideration of reports submitted by States parties under article 40 of the Covenant," U.N. Doc. CCPR/C/MWI/1, July 13, 2012, para. 18, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

²⁸ *Constitution of the Republic of Malawi*, Art. 19, 1994.

²⁹ "Malawi," Death Penalty Worldwide, April 2, 2011, accessed July 21, 2014, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malawi>.

³⁰ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

³¹ "Malawi," Death Penalty Worldwide, April 2, 2011, accessed July 21, 2014, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malawi>.

³² Sandra Babcock, Cornell Law School, affiliated with the International Center for Human Rights, Northwestern University, Email to DPW, DPW Malawi Doc. E-2, May 5, 2014. Amnesty International, *Death Sentences and Executions in 2013*, p. 53, ACT 50/001/2014, Mar. 26, 2014.

³³ "Malawi," Death Penalty Worldwide, April 2, 2011, accessed July 21, 2014, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malawi>.

14. Recent developments include the elimination of the mandatory death penalty. A conviction on charges of murder previously triggered a mandatory death sentence, but a 2011 amendment to Section 210 of Malawi's Penal Code eliminated the mandatory death penalty for murder and treason. The amendment was in response to the 2007 *Kafantayeni* decision by the Malawi High Court, which found the mandatory death penalty to be unconstitutional.³⁴ The imposition of the death penalty is no longer mandatory in murder cases, and courts have discretionary sentencing power.³⁵ This amendment has since been implemented,³⁶ and a wide array of sentencing options has been imposed for murder.³⁷

III. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

a. Scope of Crimes

15. Malawi law subjects people to the death penalty for offenses that do not constitute the most serious crimes. Capital punishment is internationally reserved for the most serious crimes, the scope of which “should not go beyond intentional crimes with lethal or other extremely grave consequences.”³⁸ The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has clarified the most serious crimes to mean “cases where it can be shown that there was an intention to kill, which resulted in the loss of life.”³⁹ Many crimes that do not fall under this scope continue to be considered death-eligible offenses in Malawi.

³⁴ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

³⁵ United Nations Human Rights Committee, “Consideration of reports submitted by States parties under article 40 of the Covenant,” U.N. Doc. CCPR/C/MWI/1, July 13, 2012, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

³⁶ United Nations Human Rights Committee, “Consideration of reports submitted by States parties under article 40 of the Covenant,” U.N. Doc. CCPR/C/MWI/1, July 13, 2012, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

³⁷ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 35 (*on file with authors*).

³⁸ United Nations Human Rights, “Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty,” May 25, 1984, accessed August 11, 2014, Para. 1, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx>.

³⁹ United Nations Human Rights, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,” UN Doc. A/HRC/4/20, January 29, 2007, paras. 39-53, 65. Guidance for the classification of crimes as “most serious crimes” has also been given by the Human Rights Committee in its General Comment 6 (16) on the right to life; by the UN Special Rapporteur for extrajudicial, summary or arbitrary executions, see UN Doc. A/HRC/11/2/Add.6, May 26, 2009, para. 84; UN Doc. A/HRC/11/2/Add.5, May 28, 2009, para. 23; see also UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/10/44, January 14, 2009, para. 66; see also UN Secretary-General in his report on the question of the death penalty and his quinquennial reports on capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing execution, see UN Doc. E/2010/10. As quoted in International Commission against the Death Penalty, *The Death Penalty and the “Most Serious Crimes,”* January 2013, page 6, http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf.

16. Murder and genocide are capital offenses in Malawi. Non-homicidal capital offenses include treason, piracy, rape not resulting in death, robbery not resulting in death, burglary not resulting in death, and housebreaking.⁴⁰

Since 1995, Malawi has in practice restricted application of the death penalty to those who commit murder.⁴¹

b. Lengthy Pretrial Detention

17. Pretrial detention is excessively long, depriving incarcerated persons of the right to a trial within a reasonable time or else release.⁴² According to Malawi's report to the African Commission on Human and Peoples' Rights, suspects have the right to "be tried within a reasonable time," and if they are unlawfully held, suspects "can sue for compensation for false imprisonment."⁴³ In reality, the justice system is so flooded that most cases and trials take many months to complete. In fact, some people wait years before their trials.⁴⁴ For instance, inmate Alex Mkula was released on bail nine years after being detained without a trial.⁴⁵

c. Lack of Adequate Staffing in Malawi's Legal System

18. A lack of public defense attorneys and legal aid limits defendants' access to appropriate legal representation at trial and on appeal. Malawi has a large indigent population, with one expert estimating that more than 90 percent of the population qualifies for legal aid.⁴⁶ Yet, few public defenders are available to meet the need; in 2013, there were only 18 legal aid lawyers and 16 paralegals.⁴⁷ The number of legal aid attorneys has rapidly dropped in the past year, and there are now only 11 legal aid lawyers to serve the entire country.⁴⁸ According to one expert, the government has not actively recruited new legal aid attorneys for more than a year,⁴⁹ and those attorneys working in the public interest area often leave to

⁴⁰ Malawi Penal Code, updated 2012, see *murder* (Art. 209); *genocide* (Art. 217A); *treason* (Art. 38); *piracy* (Art. 63); *rape* (Art. 133); *robbery* (Art. 301); *housebreaking and burglary* (Art. 309).

Housebreaking is defined as "breaking and entering into any building, tent, or vessel used as a human dwelling with intent to commit a felony therein." Art. 30.

⁴¹ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁴² United Nations General Assembly, "International Covenant on Civil and Political Rights," 1966, Art. 9(3).

⁴³ "Malawi," Report to the African Commission on Human and People's Rights, 2013, para. 77.

⁴⁴ "Malawi," Report to the African Commission on Human and People's Rights, 2013, para. 78.

⁴⁵ "Annual Report 2011: Malawi," Amnesty International, 2011.

<http://www.amnesty.org/en/region/malawi/report-2011>.

⁴⁶ Personal Communication from Emile Carreau to Rosalyn Park, via email, Aug. 23, 2014 (on file with the authors).

⁴⁷ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁴⁸ Personal Communication from Emile Carreau to Rosalyn Park, via email, Aug. 23, 2014 (on file with the authors).

⁴⁹ Personal Communication from Emile Carreau to Rosalyn Park, via email, Aug. 23, 2014 (on file with the authors).

practice in the more lucrative private law sector.⁵⁰ Although the Legal Aid Act was passed in 2011, it has not lifted the strain of existing legal aid resources. The act established an enhanced legal aid system to be provided throughout the country, independent of any other bureau.⁵¹ The Malawi Government still provides defense lawyers only to those on trial for murder.⁵² But when inmates are able to receive representation through public defenders, they are not often successful in avoiding the death penalty.

19. Detainees do not always have access to effective legal representation. Many public defenders are new lawyers—often hired directly from law school—who are under-qualified to work on capital punishment cases.⁵³ Those who do defend the indigent are overburdened with civil and criminal caseloads.⁵⁴ Given the lawyers’ heavy caseloads, each defendant may only spend a few minutes with their lawyers prior to their cases.⁵⁵ Another major limitation is the lack of adequate resources to conduct proper pre-trial investigations. Background investigations are rarely conducted due to the fact that defendants may live in remote villages that are not accessible given the scarce resources.⁵⁶ At one time, funds were available for lawyers to track down potential witnesses and gather mitigation evidence, but the state no longer provides adequate funding for this work.⁵⁷ Travel expenses are also too high to bring in witnesses for murder trials.⁵⁸ In fact, one expert concluded that, more often than not, the only witness for the defense is the accused himself/herself.⁵⁹ Furthermore, the offices are under-resourced with little equipment or infrastructure.

20. Neither the courts nor legal aid take sufficient measures to ensure that individuals who are sentenced to death receive legal representation on

⁵⁰ Personal Communication from Emile Carreau to Rosalyn Park, via email, Aug. 18, 2014 (on file with the authors).

⁵¹ “Malawi,” Report to the African Commission on Human and People’s Rights, 2013, para. 52.

⁵² U.S. Dept. of State, “2013 Human Rights Report: Malawi, Denial of Fair Public Trials,” February 27, 2014, http://photos.state.gov/libraries/malawi/788/pdf_files/2013%20HRR%20Malawi.pdf; “Report on Malawi’s Death Row,” Center for International Human Rights, Northwestern University School of Law, DPW Malawi Doc. No. M-1, Jun. 15, 2010; Sandra Babcock and Ellen Wight McLaughlin, “Reconciling Human Rights and the Application of the Death Penalty in Malawi: The Unfulfilled Promise of Kafantayeni v. Attorney General,” *Capital Punishments: New Perspectives*, Peter Hodgkinson, 2013. Pages 192-193.

⁵³ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁵⁴ UN Human Rights Council, “Concluding Observations on the Initial Periodic Report of Malawi,” U.N. Doc. CCPR/C/MWI/CO/1/Add.1., Art. 14 (18), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2fCO%2f1%2fAdd.1&Lang=en.

⁵⁵ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁵⁶ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁵⁷ Personal Communication from Emile Carreau to Rosalyn Park, via email, Aug. 23, 2014 (on file with the authors).

⁵⁸ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁵⁹ Personal Communication from Emile Carreau to Rosalyn Park, via email, Aug. 18, 2014 (on file with the authors).

appeal.⁶⁰ Although every person charged with murder receives a legal aid lawyer at trial, legal representation is not routinely provided for prisoners who wish to appeal their death sentences. One expert estimates that no more than half of the 200 prisoners sentenced to death between 1994 and 2007 were able to vindicate their right to appeal their death sentences.⁶¹

21. **The lack of prosecutors slows the judicial process in Malawi.** There are only 350 lawyers in the entire country of Malawi, and few work in the public sector.⁶² Cases are frequently delayed because of a lack of prosecutors, compounding the issue of excessive pretrial detention. For example, in 2013, the Department of Public Prosecutions had only 18 prosecuting attorneys and 20 paralegals.⁶³ The government still lacks sufficient attorneys today, a factor that contributes to lengthy pretrial detentions.⁶⁴
22. **The lack of judges contributes to a backlog of cases and pretrial detainees awaiting trial.** More judicial officers and lawyers are needed to relieve these delays.⁶⁵ In addition, judicial strikes lasting several months have delayed court processes. In 2012, judicial strike spanning two-and-a-half months effectively shut down the Malawian court system. Members of the court, including court clerks, magistrates, administration personnel, and judges, refused to work until they received a wage increase. During this strike, court proceedings remained at a standstill, and prison overcrowding with pretrial detainees worsened.⁶⁶

d. Resentencing after *Kafantayeni* Decision

23. **A vast majority of those sentenced under the now-abolished mandatory death penalty have not been resentenced.** More than 180 prisoners are entitled to be resentenced following the *Kafantayeni* decision, which lifted mandatory

⁶⁰ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁶¹ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁶² “A Shadow Report to the Malawi Government’s First Periodic Report on the Implementation of the International Covenant on Civil and Political Rights,” Centre for Human Rights and Rehabilitation, July 2013, para 3.7,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fNGO%2fMWI%2f14672&Lang=en.

⁶³ U.S. Dept. of State, “2013 Human Rights Report: [Malawi], Prison and Detention Center Conditions,” 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>; See also, “Malawi,” Report to the African Commission on Human and People’s Rights, 2013, para. 51.

⁶⁴ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁶⁵ UN Human Rights Council, “Concluding Observations on the Initial Periodic Report of Malawi,” U.N. Doc. CCPR/C/MWI/CO/1/Add.1., Art. 14 (18),

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2fCO%2f1%2fAdd.1&Lang=en.

⁶⁶ Ongoing Nationwide Judicial Strike Closes Courts in Malawi, Embassy of the United States, <http://lilongwe.usembassy.gov/service/update-on-judicial-strike.html>, accessed Aug. 26, 2014; Enoch Chilemba, “Impact of Malawi’s Judicial Strike,” Open Society Initiative for Southern Africa, March 27, 2012, accessed August 19, 2014, <http://www.osisa.org/law/blog/impact-malawis-judicial-strike>.

capital punishment for treason and murder cases.⁶⁷ Of the 180 cases, only one person has been granted a resentencing hearing before the High Court.⁶⁸ The Malawi Supreme Court has reviewed 18 cases on appeal for appropriateness of the sentences, but its review does not provide an opportunity to present mitigating evidence and does not signify compliance with *Kafantayeni*.⁶⁹ Furthermore, of the 18 cases reviewed, 13 death sentences have been upheld. *Kafantayeni*'s five co-plaintiffs have also not been resentenced despite the High Court's explicit grant of resentencing hearings for them.⁷⁰ Of note, however, since the *Kafantayeni* decision, fewer death sentences have been imposed for murder convictions.⁷¹

e. Death Row Conditions

24. Malawi's death row conditions constitute cruel and inhumane treatment.

Almost all death row prisoners are held at Zomba Central Prison in southern Malawi, which was condemned in 1997 but is still used today.⁷² Death row inmates are held separately from the general population of inmates.⁷³ In response to its first Universal Periodic Review, the Malawi Government acknowledged that the "the main victims of torture, inhumane, or degrading treatment are persons in Police or Prison custody, mainly due to poor conditions of these detention centres."⁷⁴

25. There is severe overcrowding in Malawi's prisons. The Zomba Central Prison was built to hold 5,000 inmates⁷⁵ but as of 2011, still houses 11,632 people.⁷⁶ Some particularly notable effects of overcrowding include the need for prisoners

⁶⁷ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁶⁸ Personal Communication from Sandra Babcock to Rosalyn Park, via email, Aug. 19, 2014 (*on file with authors*).

⁶⁹ Personal Communication from Sandra Babcock to Rosalyn Park, via email, Aug. 19, 2014 (*on file with authors*).

⁷⁰ Personal Communication from Emile Carreau to Rosalyn Park, via email, August 18, 2014 (*on file with authors*). The High Court of Malawi decision states:

We make a consequential order of remedy under section 46 (3) of the Constitution for each of the plaintiffs to be brought once more before the High Court for a Judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the Judge in regard to the individual offender and the circumstances of the offence.

Kafantayeni v. Attorney General, Constitutional Case No. 12 of 2005 (2007) MWHC 1 in the High Court of Malawi Principal Registry, Constitutional Case No. 12 of 2005, Apr. 27, 2007, at 14.

⁷¹ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁷² U.S. Dept. of State, "2013 Human Rights Report: [Malawi], Prison and Detention Center Conditions," 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>.

⁷³ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014, para. 45 (*on file with authors*).

⁷⁴ United Nations Human Rights Committee, "Consideration of reports submitted by States parties under article 40 of the Covenant," U.N. Doc. CCPR/C/MWI/1, July 13, 2012, para. 25, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

⁷⁵ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014, para. 45 (*on file with authors*).

⁷⁶ "Malawi Questionnaire," Death Penalty Worldwide, June 21, 2014, para. 45 (*on file with authors*).

to sleep in shifts and in rows “laying on their sides, head to foot” on the floor due to lack of space.⁷⁷ Furthermore, most prisoners are locked into cells from 4 p.m. until 6 a.m., during which “200 men will share a single bucket as a toilet.” Death row prisoners are also subject to this treatment, and at Zomba, their cells are “roughly 8x6 feet” and shared by two to three prisoners.⁷⁸

26. Unsanitary conditions, lack of hygiene, and food shortages result in death and widespread sickness in prison. High rates of tuberculosis, HIV, and pneumonia are present throughout the prison population. Prisoners receive inadequate amounts of food. Most prisoners rely on one meal per day consisting of a maize-based paste called *nsima* (the staple food of most Malawians). Prisoners are encouraged to grow crops in the land surrounding the prison, but many rely on their families to bring them food.⁷⁹ In recent years, food shortages due to budget cuts and lack of awareness have become life-threatening.⁸⁰ Between January 2013 to September 2013, 38 prisoners died because of disease and malnutrition.⁸¹ In Malawi, the average life expectancy for those in prison is a mere 10 years.⁸²

27. Death row prisoners, like the general population, are denied access to education and proper medical care. Though some NGOs provide bibles, most death row inmates spend their time in cramped cells with only a small courtyard in which to spend time outside.⁸³ Their cells have only one small window for ventilation.⁸⁴

28. Death row prisoners are subject to protracted imprisonment. Although no executions have been carried out in over two decades,⁸⁵ current prisoners on death row must wait indefinitely for their eventual execution. Several prisoners were first sentenced to death in 2005, and have endured nearly 10 years of uncertainty regarding their death sentences. Prolonged imprisonment or “unreasonable delay” on death row has been found to constitute inhumane and degrading treatment in various jurisdictions.⁸⁶ Although there is a *de facto* moratorium on the death

⁷⁷ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 45 (on file with authors).

⁷⁸ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 45 (on file with authors).

⁷⁹ “Annual Report 2011: Malawi,” Amnesty International, 2011,

<http://www.amnesty.org/en/region/malawi/report-2011>.

⁸⁰ “Malawi Prison Treatment Unconstitutional-MHRC,” *The Nation*, January 15, 2014, accessed August 11, 2014, <http://mwnation.com/malawi-prison-treatment-unconstitutional-mhrc/>.

⁸¹ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 45 (on file with authors).

⁸² Emile Carreau, “Malawi- Five Years after Abolishing the Mandatory Death Penalty,” World Coalition against the Death Penalty, September 19, 2014, accessed August 19, 2014,

<http://www.worldcoalition.org/Malawi---five-years-after-abolishing-the-mandatory-death-penalty.html>.

⁸³ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 45 (on file with authors).

⁸⁴ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 45 (on file with authors).

⁸⁵ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 40 (on file with authors).

⁸⁶ “‘Stop Crime, Not Lives,’ 2013 World Day Leaflet,” World Coalition against the Death Penalty, October 10, 2013, accessed August 12, 2014, pg. 4,

http://www.worldcoalition.org/media/resourcecenter/EN_2013WorldDayLeaflet.pdf; See also Pratt & Morgan v. Attorney General of Jamaica, Judicial Committee of the Privy Council, November 2, 1993,

penalty, prisoners on Malawi's death row are still forced to wait—under knowledge they are sentenced to death—for their potential executions.⁸⁷

29. The gallows where executions are conducted at Zomba are visible from death row, and condemned prisoners are forced to see where they may eventually be killed each day.⁸⁸ Such mental anguish can arguably constitute “cruel, inhuman, or degrading treatment or punishment,” according to the UN Human Rights Committee and the Committee against Torture.⁸⁹

f. Justification of the Death Penalty through Public Opinion

30. Malawi justifies its continued retention of the death penalty based on public opinion. Section 8 of the Malawi Constitution states that laws shall always reflect the interests of the people in Malawi. Malawi's 2013 report to the African Commission states, “Malawi will continue to listen to the voices of its people regarding the issue of the death penalty.”⁹⁰ According to the Malawi government, Malawi does not intend to ratify the Second Optional Protocol to the ICCPR.⁹¹

31. Malawi's justification runs counter to the international trend towards narrowing the scope of and abolishing the death penalty worldwide. Today, there are more abolitionist than retentionist countries, and as of July 21, 2014, 140 countries have abolished the death penalty or are abolitionist in practice.⁹² The United Nations has encouraged retentionist countries to abolish the death penalty, and many countries that have not expressly committed themselves to abolition have narrowed the scope of the death penalty.⁹³ Countries must abolish the death penalty to join the European Union, and all 28 member countries are abolitionist. On the African level, the trend and commitment is toward abolition, as well. In July 2014, Africa held its first continental conference on the abolition of the death

Privy Council Appeal No. 10 of 1993,

<http://www.eji.org/files/Pratt%20and%20Morgan%20v.%20Jamaica.pdf>; In 2009, Kenyan president Mwai Kibaki commuted over 4,000 death row prisoners because their prolonged stays on death row “causes undue mental anguish and suffering, psychological trauma, anxiety...constitut[ing] inhuman treatment.” “4000 Kenyans on Death Row get Life,” Amnesty International, August 5, 2009, accessed August 12, 2014, <http://www.amnesty.org/en/news-and-updates/good-news/4000-kenyans-death-row-get-life-20090805>.

⁸⁷ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014 (*on file with authors*).

⁸⁸ “Malawi Questionnaire,” Death Penalty Worldwide, June 21, 2014, para. 45 (*on file with authors*).

⁸⁹ “The Inhumanity of the Death Penalty,” World Coalition against the Death Penalty, 2011, page 4, <http://www.worldcoalition.org/media/resourcecenter/EN-FactsheetInhumaneDP.pdf>.

⁹⁰ “Malawi,” Report to the African Commission on Human and People's Rights, 2013.

⁹¹ *Consideration of reports submitted by States parties under article 40 of the Covenant*, (13 July 2013), U.N. Doc. CCPR/C/MWI/1, para. 18, Also available online at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en.

⁹² “Abolitionist and Retentionist Countries [updated December 31, 2013],” Death Penalty Information Center, last modified December 31, 2014, accessed July 21, 2014,

<http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140>.

⁹³ “2002-2012, 10 years of World Coalition against the Death Penalty, World Day 2012,” World Coalition against the Death Penalty, October 10, 2012.

penalty in Benin, and a Protocol on the African Charter on the Abolition of the Death Penalty has been launched.⁹⁴ Of the 54 member countries in the African Union, 17 have abolished the death penalty, and 19 more are *de facto* abolitionist.⁹⁵ As a member of the African Union, Malawi's position on the death penalty runs counter to the developments in its own region.

IV. RECOMMENDATIONS

32. Malawi's *de facto* moratorium of the death penalty and its recognition of harsh prison conditions are a first step toward protecting human rights. Further, the abolition of a mandatory death sentence is a positive step, but there are still concerns about conditions and application of the death penalty in Malawi. The Advocates for Human Rights respectfully suggests that the Committee recommend that Malawi take the following measures:

- a. **Abolish the death penalty.** Until complete abolition is achieved, Malawi should impose an official moratorium on the death penalty.
- b. **Ratify the Second Optional Protocol of the International Covenant on Civil and Political Rights.**
- c. **Replace the death penalty with a sentence that is fair, proportionate, and respects international human rights standards.** Current death sentences should be commuted. Malawi should adhere to international standards on prison sentences and punishments.
- d. **Restrict the application of the death penalty to only the most serious crimes, as defined by the United Nations.** Non-serious, non-violent crimes—such as aggravated robbery—should not be death-eligible offenses.
- e. **Conduct resentencing hearings for those individuals who previously received automatic death sentences murder or treason.** In light of the 2007 *Kafantayeni* decision, the case of every prisoner given a mandatory death sentence must be reviewed in light of all available mitigating evidence. The government should provide funds for this to support meaningful review and effective legal representation.
- f. **Systematically review prison conditions—especially at Zomba Central Prison—with the goal of relieving overcrowding and poor living conditions.** Funds should be provided for the construction of new prisons, and Malawi should provide clean, safe, and adequate prison conditions, along with adequate food for prisoners, in compliance with international standards for prisoners and pretrial detainees.
- g. **Provide death row detainees—and the general prison population, more broadly—with adequate legal assistance before, during, and**

⁹⁴ “African Leaders and Abolitionists hold Anti-Death Penalty Summit in Cotonou,” World Coalition Against the Death Penalty, July 7, 2014, accessed August 20, 2014, <http://www.worldcoalition.org/cotonou-african-conference-abolition-death-penalty-treaty.html>.

⁹⁵ “African Leaders and Abolitionists hold Anti-Death Penalty Summit in Cotonou,” World Coalition Against the Death Penalty, July 7, 2014, accessed August 20, 2014, <http://www.worldcoalition.org/cotonou-african-conference-abolition-death-penalty-treaty.html>.

after trial. Promote adequate legal representation by training and encouraging lawyers to represent indigent defendants, and fund more lawyers to join the field. Implement procedures to ensure that prisoners sentenced to death are provided with legal representation on appeal.

- h. Increase the resources and personnel available to the justice system so there are sufficient judges, lawyers, and paralegals to minimize the sizable backlog and reduce the pretrial detention periods to durations that comply with international standards.** Allow for bail hearings and reasonable lengths of time between arrest and trial.