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CHREAA

International
Human Rights Clinic

USC Gould
School of Law

THE SURVIVOR BEHIND THE ACCUSED: GENDER VIOLENCE AND DUE PROCESS FAILURES IN MALAWI

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TRIALWATCH REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

A. ABOUT THE AUTHORS

Centre for Human Rights Education, Advice and Assistance (CHREAA) is committed to promoting and safeguarding the rights of vulnerable and marginalized groups including prisoners, sex workers, women, and children. It operates across Malawi, working to enhance access to justice through advocacy, legal aid, research, and civic education. Members of CHREAA who contributed to the report are Ruth Kaima, Victor Mhango, Apatsa Mangwana Mhango, Lisa Tembo Mbiri, Chisomo Mwasinga, Vivian Kasunda, Temwa Mhango Mataya and Brenda Khwale.

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B. ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice** that provides free legal aid in defense of free speech. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. Orubah Sattar Ahmed, Legal Program Manager TrialWatch led the project for the TrialWatch team and co-drafted the report. Shirin Asgari, Legal Fellow contributed to data analysis, research and report review.

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The legal assessment and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice (CFJ).

Additionally, the Clooney Foundation for Justice assumes and accepts no responsibility for and gives no guarantees or warranties for the legal assessment, analysis, and opinion expressed herein. The views expressed are not necessarily those of CFJ, its Board of Directors, or its leadership.

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FOREWORD



By Honourable Justice Jean Kayira, High Court of Malawi, Principal Registry

Regardless of the offence one is suspected to have committed or convicted of, all persons are entitled to humane and dignified treatment in the criminal justice system. This right includes the right to access an effective remedy before the courts. This right is of particular importance for women who are in detention, many of whom face unique vulnerabilities as this report highlights. For instance, the report reveals that a significant number of women interviewed had endured prolonged domestic and gender-based violence and were prosecuted in the context of gender-based violence or defending themselves against violent intimate partners.

As such, all duty bearers are under a mandate to extend and accelerate their efforts in promoting, respecting and upholding human rights and equality before the law through protecting the least considered in the society which includes women in detention. Section 42 of the Constitution of Malawi is gender neutral. It provides for fair trial regardless of being male or female. It recognizes that humane treatment is a right of both male and female persons. As we ensure that the right to be heard is respected, we must also ensure that women who are in detention because of retaliating against an abusive intimate partner are granted due process without any gender bias or stereotype. It is imperative that the voices of women in detention must be provided a platform of action so that they are able to properly deal with the multi-faceted challenges which they endure whilst incarcerated. Many of the women interviewed navigated the justice system with little to no legal aid, suffered excessive pre-trial detention, and experienced serious due process violations.

The rights of women who are in detention are interrelated and interdependent. As such, there is need for comprehensive, deliberate and results oriented efforts from both State and non-State actors in ensuring that the women enjoy their rights even whilst in detention. Although the Constitution of Malawi recognizes the importance of equality before the law in Section 20, it is important to note that some women endure abuse due to socio-cultural and financial challenges. Since women are particularly vulnerable to sexual and gender-based violence perpetrated by intimate partners, the courts and all stakeholders must provide judicial services that are not only gender sensitive but are also sensitive to the particular needs of women.

The report is a clear indication of the significant gaps that the justice system has and highlights the need for urgent reform. The failure to speedily dispose of the matters re-victimizes the women who are either accused or convicted of offences. The results call for contextualized trials for women in detention so that justice is not only done but is manifestly seen to be done. It is clear that fundamental shortfalls in the justice system

demand concerted efforts in ensuring mental and general well-being of the female suspects and convicts so that their rights are enjoyed to their fullest.

EXECUTIVE SUMMARY



This report is based on interviews conducted and documentation gathered in 2023 in relation to 63 women detained for serious violent offenses across nine Malawian prisons.¹ This sample reflects a significant number of the women across Malawi who were detained for violent offences against a person at the time.

This research was geared towards understanding 1) the offenses for which women are incarcerated; 2) the vulnerabilities female detainees face, including survivors of gender-based and specifically intimate-partner violence; and 3) whether these women's due process and fair trial rights are being respected.

Our findings were stark: nearly half of these incarcerated women had been criminalized, charged, detained, and convicted when seeking to defend themselves against violence, often from intimate partners, or their charge originated in the context of gender-based violence.

Malawi has made laudable efforts to address gender discrimination and domestic violence against women by adopting relevant laws and policies. However, the data suggests that the authorities do not consider the prolonged domestic abuse that women who commit violent offenses may have faced when charging and detaining them. Similarly, the research indicates courts are not consistently applying international best practices in respect of female victims of gender-based violence who are on trial for harming their abusers. These women are being failed at multiple levels of the justice system.

It must also be respectfully noted that Malawi faces, and continues to address, impediments such as institutional deficiencies and widespread poverty that make access to justice and legal aid generally difficult for many citizens. This report finds that the vast majority of interviewees navigated the criminal justice system with no or very limited access to legal aid, while facing lengthy detention periods and fair trial violations. For example, none of the women surveyed had access to counsel when arrested and initially questioned, despite being charged with serious offences. Only 25% of the convicted interviewees had a lawyer at the trial or plea stage of their case. Not a single woman surveyed appealed her sentence.

¹ A majority of interviewees faced murder and manslaughter charges, while a smaller fraction faced grievous bodily harm and unlawful wounding charges.

This research also reveals how survivors of gender-based violence and women who tried to defend themselves from violence, only to be criminalized and detained, are uniquely vulnerable within the criminal justice system.

In April 2025, the draft report was sent to various civil society organizations and government actors, and a virtual convening was conducted to validate the findings.

Summary of Core Findings

- ***Gender-Based Violence***

Of the 63 interviewees, 27 (or 43% of all women) affirmatively indicated that their arrests and/or charges originated in the context of gender-based violence or they had actively tried to defend themselves against a violent intimate partner.

- ***Access to Counsel and Legal Aid***

Only 33.3% of all the women interviewed as part of this study reported that they were informed of the right to counsel when arrested. None of the 63 women interviewed indicated that they had access to counsel after they were arrested, and while being detained during the investigation stage. Only nine out of 63 women (or 14%) interviewed indicated that they had access to counsel during pre-trial proceedings and out of the total of 20 women who were convicted, only five (or 25%) reported access to counsel at the trial or plea stage. Notably, however, all those who were charged with murder/manslaughter, offenses which carry higher sentences, reported having counsel during trial. Worryingly, only half the convicted women indicated that they knew of their right to appeal their convictions and not a single woman appealed her sentence, despite the average sentence being 12.5 years.

Furthermore, although all 63 women appeared to qualify for legal aid, only nine (14%) reported having access to a public defender during at least one stage of the proceedings.

- ***Excessive Pre-Trial Detention***

The average length of time spent by all interviewees in pre-trial detention is a staggering 13.7 months and the average pre-trial detention length for the 27 women who were incarcerated in relation to gender-based violence was 11.9 months — far exceeding Malawi's detention limit as detailed in the report below.

- ***Police Custody and Investigation***

As noted earlier, at the time of arrest, only 33% of women reported that they were informed of their right to counsel by the police. Ten women reported that police physically abused them during their time in custody following arrest. In 60% of the cases where women had purportedly acted directly in self-defense, they reported injuries but none of

these women indicated that the police ordered a medical exam. Alarming, out of the 27 women charged in connection with gender-based violence, police arrested 20 women either immediately or within one day of the incident, suggesting a failure to fully investigate the circumstances of the incident.

Summary of Core Concerns under International Law

- ***Failure to Consider Gender Perspective with Respect to Self-Defense and Mitigating Circumstances During Sentencing:*** From case studies where court records could be obtained, it appears that courts are not considering grounds of self-defense from the perspective of a survivor of gender-based violence, nor are they consistently taking a history of abuse into account at sentencing, in contravention of international best practices.
- ***Right to Counsel:*** From the case studies and data gathered, it appears that women were not informed of their right to counsel upon arrest, and the corresponding lack of legal assistance at critical stages of the proceedings had an impact on their ability to obtain bail, to mount a defense, to tell their story during trial proceedings, and understand any plea deal offered. These instances constitute a violation of Malawi's domestic and international and regional treaty obligations to provide access to counsel and legal aid as detailed below.
- ***Right to Freedom from Arbitrary Detention:*** Many of the female interviewees in Malawi's prisons were subjected to pre-trial detention periods far exceeding the custody time limits prescribed in domestic law. Further, it appears that the authorities consistently failed to conduct the requisite assessment of whether detention was reasonable and necessary. These actions—or inaction—violate the interviewees' right to freedom from arbitrary detention under Malawi's international and regional treaty obligations as well as its domestic law.
- ***Right to Freedom from Discrimination:*** Based on the evidence gathered, police routinely failed to investigate claims of gender-based violence, even when female defendants showed visible injuries and reported acting in self-defense against an intimate partner. This pattern reflects a reliance on gender stereotypes and a broader lack of gender-sensitive practices which would violate the right to freedom from discrimination under Malawi's international and regional treaty obligations as well as its Constitution.
- ***Right to Dignity and Humane Treatment:*** None of the interviewed women whose charges resulted from direct self-defense to gender-based violence were provided with medical care at the time of their arrest, even though

approximately 60% of them recounted injuries related to self-defense at that time. Malawi's reported failure to provide medical care to women in police custody violates Malawi's international, regional, and domestic obligations related to access to medical care in detention.

- ***Right to Psychosocial Services:*** Interview testimony indicates that several women exhibited mental health concerns while in prison. Despite Malawi's international, regional and domestic obligations to provide psychosocial services to individuals with mental health concerns, none of these women reported receiving adequate access to psychosocial services.
- ***Right to be Free from Mistreatment:*** Ten women reported that police physically abused them during their time in custody following arrest. Malawi's domestic law fails to adequately criminalize police violence against accused persons, including female prisoners, in violation of its international and regional obligations.

Recommendations

This report highlights the urgent need for systemic reforms across Malawi's criminal justice system to protect the rights of women accused of violent offenses—many of whom acted in self-defense against intimate partner violence. A comprehensive checklist of specific and practical measures that stakeholders in Malawi's criminal justice system may consider is provided in the [Recommendations](#) section at the end of this report. Law enforcement, prosecutors, and courts must adopt a gender-sensitive, trauma-informed approach from the point of arrest through post-conviction. Investigations should prioritize evidence collection and contextual analysis before arrests are made, particularly where signs of abuse are present. Police must be trained to refer such cases to gender-based violence units and to ensure timely access to medical care and legal counsel.

Additionally, the Legal Aid Bureau requires increased funding and staffing to meet the needs of those requiring legal aid. Legislative expansion of court representation rights to qualified paralegals from civil society could also assist with overwhelming caseloads and enhance access to justice. Prosecutors should develop clear guidelines to identify when alternative, non-carceral responses are appropriate for women who have experienced prolonged abuse. Similarly, courts must proactively assess bail eligibility, prevent unlawful pretrial detention, and ensure individualized remand decisions—regardless of legal representation.

As to sentencing, Malawi's courts and legislature should recognize domestic abuse as a mitigating factor, reform self-defense laws to reflect the realities of abuse cycles and guarantee mental health assessments and support for women in detention. Broader

structural reforms are also essential, including the institutionalization of Camp Courts,² improved prison and court data systems, and expanded psychosocial care for detainees. Implementing these measures is critical to aligning Malawi's justice system with its constitutional obligations and international and regional human rights standards, and to ensuring that the law protects, rather than punishes, survivors of gender-based violence.

² Camps are mobile judicial sessions held within prison facilities that allow magistrates or judges, along with prosecutors and clerks—often supported by paralegals—to review cases of pre-trial detainees, particularly those facing minor offenses. These courts enable on-site hearings, bail determinations, and immediate case resolutions, significantly easing the burden on the formal justice system and reducing unlawful or excessive remand. See World Justice Project, *Implementing the Legal Aid Act in Malawi*. Available at <https://worldjusticeproject.org/our-work/programs/implementing-legal-aid-act-malawi>; Malawi Bail Project *Access to Justice, Legal Empowerment*. Available at <https://www.malawibailproject.com/legal-empowerment>.

POLITICAL, LEGAL, AND SOCIAL CONTEXT



A. GENDER DISCRIMINATION AND VIOLENCE

Prevalence of Gender Discrimination

The prevailing environment, including gender stereotyping or inequality, sets “the underlying context for violence against women.” This can be through “rigid gender stereotyping” “result[ing] in punishment for women ... when they don’t conform to expected roles” or through social or financial discrimination that means “women have less independence and power,” which can make “violence against them more likely.”³

While the Constitution of Malawi guarantees gender equality,⁴ there are reports of widespread gender discrimination and violence. Malawi, for example, received a worldwide ranking of 110 out of 146 countries on the 2023 Global Gender Gap Index and a regional ranking of 24 out of 36 countries in sub-Saharan Africa based on gender gaps found in economic participation and opportunity, educational attainment, health and survival, and political empowerment.⁵ The UN Gender Inequality Index in 2023 ranked Malawi 145 out of 188 countries, using socio-economic indicators related to literacy, school attendance, gender-based violence, attained economic opportunities and

³ OurWatch, “The Link Between Gender Inequality and Violence against Women”. Available at <https://www.ourwatch.org.au/link-between-gender-inequality-and-violence>.

⁴ See Constitution of Malawi, 1994, Section 12 (Grants all people equal status under law and tasks the state, state authorities, and all persons responsible for the exercise of state powers with protecting the rights of all individuals, groups, and minorities); Section 13 (Mandates that the state actively promote the welfare and development of the people by affirmatively adopting legislation and policies to achieve gender equality. Section 13 further notes that achieving gender equality necessitates “the implementation of policies to address social issues such as domestic violence, security of person, lack of maternity benefits, economic exploitation, and rights to property” among others); Section 22 (Mandates that all members of a family enjoy equal respect and be protected under law against all forms of neglect, cruelty or exploitation); Section 24 (Guarantees women full and equal protection of law, and the right not to be discriminated against on the basis of gender or marital status. Further, according to Section 24 (2) any laws that discriminate against women are invalid and legislation must be passed to eliminate customs and practices that discriminate against women, particularly where practices involve sexual abuse, harassment, or violence; discrimination in work, business, or public affairs; and deprivation of property).

⁵ World Economic Forum, “Global Gender Gap Report”, June 2023, pgs. 11, 26. Available at https://www3.weforum.org/docs/WEF_GGGR_2023.pdf. See also AFROBarometer, “Malawians demand greater government efforts for gender equality”, April 25, 2023. Available at <https://www.afrobarometer.org/wp-content/uploads/2023/04/AD633-Malawians-demand-greater-government-efforts-for-gender-equality-Afrobarometer-23april23.pdf>.

ownership of assets: “women in Malawi fare worse than their male counterparts” on all of the above indicators.⁶ The UN has specifically identified “violence against women [as] a major barrier to the fulfillment of human rights and a direct challenge to women’s inclusion and participation” in Malawi.⁷

Gender-based discrimination in Malawi takes multiple forms. Child marriage, for instance, is a significant issue.⁸ UN findings from 2019 quantified Malawi as having the 11th highest rate of child marriage worldwide⁹ and in 2025, it was reported that “42% of girls in Malawi are married before the age of 18.”¹⁰ Child marriage, among other factors, creates significant barriers to education.¹¹ The World Bank estimated that in Malawi, “out of every 100 girls who begin standard one, only three will enter secondary education and of those, only one will make it to university.”¹²

⁶ United Nations Malawi, “Common Country Analysis 2023”, pg. 18. Available at https://malawi.un.org/sites/default/files/2023-07/UN%20CCA%20Malawi_Final_0.pdf.

⁷ UN Resident Coordinator for Malawi, “Eliminating Gender Based Violence is Possible”, November 25, 2019. Available at <https://reliefweb.int/report/malawi/eliminating-gender-based-violence-possible>.

⁸ *Id.*

⁹ *Id.*

¹⁰ United Nations Malawi, “International Women’s Day Statement: All Women and Girls: Rights, Equality, and Empowerment”, March 8, 2025. Available at <https://malawi.un.org/en/290428-international-womens-day-statement-all-women-and-girls-rights-equality-and-empowerment>.

¹¹ Girls Not Brides, “Malawi: What is the Prevalence Rate?”. Available at <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/malawi/#:~:text=In%20Malawi%2C%2042%25of%20girls,married%20before%20their%2015th%20birthday>.

¹² The World Bank, “Malawi Must Step Up Efforts to Address Critical Gender Gaps to Unlock Untapped Economic Potential and Empower Women”, June 9, 2022. Available at <https://www.worldbank.org/en/news/press-release/2022/06/09/malawi-must-step-up-efforts-to-address-critical-gender-gaps-to-unlock-untapped-economic-potential-and-empower-women>.

Gender-Based and Intimate Partner Violence

Women in Malawi find themselves disproportionately impacted by gender-based violence, and specifically intimate partner violence.¹³ Gender-based violence is defined as violence “directed towards a person based on their assigned sex at birth or gender identity and expression and grounded in unequal power relationships.”¹⁴ According to the UN, gender-based violence “results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty.”¹⁵ Intimate partner violence, as a term, applies where such abuse is perpetrated by one’s intimate partner or ex-partner.¹⁶ While accurate estimates are difficult to obtain, statistics from the 2015-16 Malawi Demographic and Health Survey [MDHS] showed that 42% of Malawian women who had ever been married faced violence by a current or former spouse.¹⁷ The same survey found that 26% of Malawian women who had ever been married were subject to physical violence, such as pushing, punching or burning; 19% were subject to sexual violence; and 30% were subject to emotional

¹³ Lana Clara Chikhungu et al., “Married Women’s Experience of Domestic Violence in Malawi: New Evidence from a Cluster and Multinomial Logistic Regression Analysis”, *Journal of Interpersonal Violence*, National Library of Medicine, 2021, pgs. 17-18. Available at <https://pubmed.ncbi.nlm.nih.gov/31156016/>.

¹⁴ Cornell Center on the Death Penalty Worldwide, “Defending Women and Transgender Persons Facing Extreme Sentences: A Practical Guide”, 2023, pg. 6. Available at <https://deathpenaltyworldwide.org/wp-content/uploads/2021/10/Defending-Women-and-Transgender-Persons-Facing-Extreme-Sentences-3.pdf>.

¹⁵ United Nations, Declaration on the Elimination of Violence Against Women, U.N. Doc. A/RES/48/104, December 20, 1993, Article 1; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35, U.N. Doc. CEDAW/C/GC/35, July 26, 2017, para. 14; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N. Doc. A/47/38, January 29, 1992, para. 23.

¹⁶ World Health Organization, “Violence against Women”. Available at https://www.who.int/health-topics/violence-against-women#tab=tab_1; USAID, “Informing Malawi’s National Response to Intimate Partner Violence”. Available at https://www.healthpolicyproject.com/pubs/743_Malawionepager.pdf. (The World Health Organization defines intimate partner violence as “behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours.” Therefore, figures on intimate partner violence are different from those on domestic violence since the latter includes violence against other members in a household such as children, the elderly, etc.).

¹⁷ National Statistical Office (NSO) Malawi and ICF, “Malawi Demographic and Health Survey 2015-16”, February 2017, pg. 284. Available at <https://dhsprogram.com/pubs/pdf/FR319/FR319.pdf>; Lana Clara Chikhungu et al., “Married Women’s Experience of Domestic Violence in Malawi: New Evidence From a Cluster and Multinomial Logistic Regression Analysis”, *Journal of Interpersonal Violence*, National Library of Medicine, 2021, pgs. 17-18. Available at <https://pubmed.ncbi.nlm.nih.gov/31156016/>.

violence, such as their partners limiting their contact with their families and friends, accusing them of infidelity, controlling their mobility, and publicly humiliating them.¹⁸

Certain trends emerge from surveys conducted specifically on intimate partner violence in Malawi: women with more than a secondary education are less likely to have experienced intimate partner violence; the likelihood of women experiencing such violence increases with the partner's alcohol consumption; and, women who have witnessed spousal violence as children are much more likely to themselves experience intimate partner violence.¹⁹ Comparing the rates of violence experienced by women from the 2010 MDHS and 2015-2016 MDHS, Malawi's National Statistical Office concluded that "spousal violence may be increasing."²⁰

Underreporting is a serious problem. Troublingly, based on findings from the 2015-2016 MDHS survey, Malawi's National Statistical Office found that 49% of all women who faced any type of physical or sexual violence "have never sought help nor told anyone about the violence that they experience."²¹ Likewise, according to another 2015 study, only 11.1% of assaults against women in cases where the offender was a household member were reported to Malawian police.²² 40.3% of study participants stated that they did not believe the crime was serious enough to report while 14.2% of study participants stated that the police were simply too far away.²³ The study also noted that "victims residing in households with access to a working phone...were significantly more likely to report assaults to the police than victims residing in a dwelling without a phone."²⁴

Even when cases are reported to the police, they are often withdrawn, particularly when they involve sexual violence, which "is still considered a private matter to be handled in families or communities and these attitudes are influenced by social perceptions."²⁵

¹⁸ National Statistical Office (NSO) Malawi and ICF, "Malawi Demographic and Health Survey 2015-16", February 2017, pgs. 283-284. Available at <https://dhsprogram.com/pubs/pdf/FR319/FR319.pdf>.

¹⁹ *Id.* pgs. 285-286.

²⁰ *Id.* pg. 285.

²¹ *Id.* pg. 288.

²² Aiden Sidebottom, "On the Correlates of Reporting Assault to the Police in Malawi", *British Journal of Criminology*, March 2015, pg. 391.

²³ *Id.*

²⁴ *Id.* pg. 393.

²⁵ UNICEF, "Access to Criminal Justice Services, The Case of Survivors of Violence in Malawi", August 2019, pg. 25. Available at

Further, according to National Police Spokesperson James Kadadzera, “many women withdraw cases involving their husbands because of fears of financial insecurity.”²⁶

To address widespread gender-based violence, Malawi has, among other things, passed a law entitled the Prevention of Domestic Violence Act. It criminalizes acts of “domestic violence,” including physical, economic, emotional, or psychological abuse, and provides for a penalty of up to 14 years for those convicted under the Act.²⁷ However, despite the Malawian government adopting “several policies and legal frameworks to address gender-based violence issues,” “sexual and gender based violence remains a serious problem in Malawi.”²⁸ Issues pertaining to implementation, for example, have limited the effectiveness of the Prevention of Domestic Violence Act; a 2021 report by the U.S. State Department found that police “did not normally intervene in domestic disputes” and cited other challenges, such as leniency in sentencing by courts and limited shelter available to abuse victims.²⁹ The aforementioned lack of reporting of domestic violence cases and withdrawal of such cases in light of community, financial, and family pressures have further diminished the support and protection victims are due under the Prevention of Domestic Violence Act.³⁰

<https://www.unicef.org/malawi/media/1931/file/The%20case%20of%20survivors%20of%20sexual%20violence%20in%20Malawi.pdf>.

²⁶ VOA News, “Gender-based Violence Spurs Protest in Malawi”, September 14, 2017. Available at <https://www.voanews.com/a/gender-based-violence-spurs-protest-malawi/4029408.html>.

²⁷ Malawi Prevention of Domestic Violence Act, December 29, 2006. (For the purposes of intimate partner violence, the Act covers spouses, as well as past and current unmarried partners where they share a household or depend on each other socially or financially and are or have been “in a visiting relationship for a period exceeding twelve months” or where they share a child).

²⁸ UN Resident Coordinator for Malawi, “Eliminating gender based violence is possible in Malawi”, November 25, 2019. Available at <https://malawi.un.org/en/41494-eliminating-gender-based-violence-possible-malawi>.

²⁹ United States Bureau of Democracy, Human Rights and Labor, “Malawi 2021 Human Rights Report”, 2022, pg. 19. Available at https://www.state.gov/wp-content/uploads/2022/02/313615_MALAWI-2021-HUMAN-RIGHTS-REPORT.pdf.

³⁰ VOA News, “Gender-based Violence Spurs Protest in Malawi”, September 14, 2017. Available at <https://www.voanews.com/a/gender-based-violence-spurs-protest-malawi/4029408.html>; United States Bureau of Democracy, Human Rights and Labor, “Malawi 2021 Human Rights Report”, 2021, pg. 19. Available at https://www.state.gov/wp-content/uploads/2022/02/313615_MALAWI-2021-HUMAN-RIGHTS-REPORT.pdf.

C. THE CRIMINAL JUSTICE SYSTEM IN MALAWI: ISSUES WITH ACCESS TO JUSTICE

Based on our research, it is clear that there are serious issues with access to justice in Malawi. Women in particular struggle to access the courts and legal aid, and, where they are criminally accused, face lengthy detention periods and fair trial rights violations.

Inadequate Access to Courts

Under Section 41(2) of the Malawi Constitution, every person “shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.”³¹ Despite the constitutional guarantee of access to the courts, Malawians face significant barriers in obtaining such access.³²

Geographical proximity to the courts is often an impediment.³³ Malawians in rural locations without access to a vehicle often have to walk, bike, or hitchhike to their local courts.³⁴ Personal finances also prevent Malawians from seeking recourse before the courts: the cost of traveling and/or living away from home for judicial proceedings can be too steep (access to legal aid will be discussed below).³⁵ Further, depending on their circumstances and education, Malawians may be unable to access their judicial system because they do not understand its rules and procedures.³⁶ For instance, the Danish Institute for Human Rights has reported that “the law [in Malawi] is drafted and administered in the official language, English, which many poor people are unable to

³¹ Constitution of Malawi, 1994, Section 41 (2).

³² Open Society Initiative for Southern Africa and AfriMAP, “Malawi Justice Sector and the Rule of Law”, 2006. Available at <https://www.opensocietyfoundations.org/publications/malawi-justice-sector-and-rule-law>; Irish Rule of Law International, “Improved Access to Justice for Unrepresented Accused Persons in the Criminal Justice System in Malawi”, September 21, 2017. Available at <https://www.humandignity.foundation/wp-content/uploads/2018/11/Evaluation-Report-Malawi-Access-to-Justice.pdf>.

³³ Open Society Initiative for Southern Africa and AfriMAP, “Malawi Justice Sector and the Rule of Law”, 2006, pg. 20. Available at <https://www.opensocietyfoundations.org/publications/malawi-justice-sector-and-rule-law>; Irish Rule of Law International, “Improved Access to Justice for Unrepresented Accused Persons in the Criminal Justice System in Malawi”, September 21, 2017, pg. 6. Available at <https://www.humandignity.foundation/wp-content/uploads/2018/11/Evaluation-Report-Malawi-Access-to-Justice.pdf>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

speak and/or read thereby excluding the majority of the population that speak only local languages.”³⁷ In light of impediments to judicial access, some Malawians rely on non-state structures of resolution, such as religious leaders and faith-based organizations.³⁸

Inadequate Access to Legal Aid

In addition to impediments to access to the courts, legal representation is difficult to obtain due to widespread poverty and institutional deficiencies. Under the Constitution of Malawi, every person who has been detained shall be informed of their right to have a legal practitioner,³⁹ and “where the interests of justice so require, ... be provided with the services of a legal practitioner by the State.”⁴⁰ The Malawi Legal Aid Act of 2010 further states that a person is eligible for legal aid in criminal matters if “it is in the interests of justice” and if the accused has “insufficient means” to obtain a private lawyer.⁴¹ According to Section 18(2) of the Act, there are multiple factors that should be taken into account by a competent authority in determining whether it is in the “interests of justice” that the State provide legal aid.⁴²

First, the nature of the case is key. Specifically, aid should be provided where the offence is such that if the defendant were convicted, they would likely be deprived of liberty, lose their livelihood, or have their reputation damaged.⁴³ Furthermore, in cases where a substantial question of law must be determined and representation would make a material difference in the defendant receiving a fair trial,⁴⁴ or where the nature of the case requires

³⁷ The Danish Institute for Human Rights, “Expanding Access to Justice for the Poor: Malawi’s Search for Solutions”, 2011. Available at https://menneskeret.dk/files/media/dokumenter/udgivelser/desmond_report_ok.pdf.

³⁸ Open Society Initiative for Southern Africa and AfriMAP, “Malawi Justice Sector and the Rule of Law”, 2006, pg. 21. Available at <https://www.opensocietyfoundations.org/publications/malawi-justice-sector-and-rule-law>.

³⁹ Constitution of Malawi, 1994, Section 42 (1)(c).

⁴⁰ Constitution of Malawi, 1994, Section 42 (1)(c).

⁴¹ The Malawi Legal Aid Act, 2010, Section 18 (1).

⁴² See also The Malawi Legal Aid Act, 2010, Sections 4 and 5 (The Competent Authority may be the Legal Aid Bureau); Section 23 (A Court may also recommend to the Director of the Bureau that a person before it be granted legal aid).

⁴³ The Malawi Legal Aid Act, 2010, Section 18 (2) (a).

⁴⁴ The Malawi Legal Aid Act, 2010, Section 18 (2) (b).

that witnesses be interviewed or cross-examined,⁴⁵ it is in the interests of justice to provide legal aid.

Second, the personal circumstances of the defendant are crucial considerations. For instance, if the defendant is unable to represent herself, has inadequate knowledge of English, or has mental or physical disabilities, legal aid must be provided under the Act.⁴⁶ If it is in the interests of someone else that the defendant should be represented or if the accused would, upon conviction, have insufficient means to pay the fine imposed within a month of its imposition, they should be provided legal aid.⁴⁷

Even where defendants do qualify for legal aid in criminal cases, however, many go unrepresented, largely due to lack of funding for such services. For instance, it was estimated in 2010 that “fewer than 10 percent of criminal defendants [were] represented by legal counsel.”⁴⁸ As of 2020, the Legal Aid Bureau, which was established through the Act to provide legal services to those who cannot afford them, estimated that there was a backlog of 700,000 cases, with the number of licensed legal practitioners amounting to only 627.⁴⁹ According to Steven Kayuni, Director of Public Prosecutions in Malawi, there were over 700 cases per defense lawyer in Malawi in 2022 — Mr. Kayuni stated that even though funding had increased for the provision of legal aid in recent years, “financial resources were still inadequate.”⁵⁰ And according to Chimwemwe Chithope-Mwale, Acting Director of the Legal Aid Bureau as of April 2025, “[t]he Legal Aid Bureau currently

⁴⁵ The Malawi Legal Aid Act, 2010, Section 18 (2) (d).

⁴⁶ The Malawi Legal Aid Act, 2010, Section 18 (2) (c).

⁴⁷ The Malawi Legal Aid Act, 2010, Section 18 (2) (e) (f).

⁴⁸ Open Society Justice Initiative and the Paralegal Advisory Service Institute, “Empowering Paralegals to Assist Pretrial Detainees”, Ninth Session United Nations Human Rights Council, Universal Periodic Review of the Republic of Malawi, November 2 – December 3, 2010, pg. 2. Available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/session9/MW/JS2_OSJI_Joint_submission2.pdf.

⁴⁹ Nyasa Times, “12 CSOs in support of amendment to Legal Aid Act”, September 22, 2021. Available at <https://www.nyasatimes.com/12-csos-in-support-of-amendment-to-legal-aid-act/>.

⁵⁰ UN Office of the High Commissioner, “In Dialogue with Malawi, Experts of the Committee against Torture Commend and Efforts to Combat Human Trafficking, Ask about Access to Lawyers and the Definition of Torture”, November 4, 2022. Available at <https://www.ohchr.org/en/press-releases/2022/11/dialogue-malawi-experts-committee-against-torture-commend-efforts-combat#:~:text=were%20still%20inadequate,-,The%20Legal%20Aid%20Bureau%20had%20increased%20the%20number%20of%20lawyers,cases%20per%20lawyer%20in%20Malawi>.

has 48 lawyers against a caseload of 28,169 files (averaging one lawyer handling over 580 cases).⁵¹

Delays and Pretrial Detention

According to the World Prison Brief, the total prison population in Malawi was 16,366 as of 2022, exceeding the institutional capacity of the prison system (designed to hold 7,000 prisoners).⁵² It was estimated in 2020 that 18% of the total prisoners were pre-trial detainees/on remand.⁵³

Despite a statutory limit of 90 days for pre-trial detention for serious offenses triable in the High Court, various civil society and international bodies have found that the “the actual length of pretrial detention frequently equal[s] or exceed[s] the maximum sentence for the alleged crime.”⁵⁴ Specifically, the U.S. State Department’s 2022 report on Malawi’s human rights situation cited reports that a “total of 1279 detainees charged with murder were awaiting trial, but authorities held most such detainees for two to three years before trial” and some “remained in prison awaiting trial for even longer periods.”⁵⁵ The report attributed these delays to the judicial system being “inefficient and handicapped by serious weaknesses including poor recordkeeping; a shortage of judges, attorneys, and other trained personnel; heavy caseloads; and corruption” as well as to “extensive procedural delays,” “prosecutorial delay tactics, recusals, and lawyers and witnesses not being present on trial dates.”⁵⁶ These challenges were likewise cited by the 2022 Freedom House Report on Malawi, which stated that “case backlogs contribute to lengthy pre-trial detention.”⁵⁷ As detailed by Freedom House, among other things, courts face

⁵¹ Email on file, Chimwemwe Chitope-Mwale, Acting Director of the Legal Aid Bureau, April 24, 2025.

⁵² World Prison Brief, “Malawi”. Available at <https://www.prisonstudies.org/country/malawi>.

⁵³ World Prison Brief and ICCPR, “World Pre-Trial/Remand Imprisonment List”, pg. 4. Available at https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf.

⁵⁴ See US Department of State, “2022 Country Reports on Human Rights Practice: Malawi”, 2023. Available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/malawi/>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Freedom House, “Freedom in The World 2022 Malawi”, 2023. Available at <https://freedomhouse.org/country/malawi/freedom-world/2022>.

“chronic and acute under funding,” which means that “at a functional level, judicial institutions run slowly and inefficiently.”⁵⁸

Heightened Challenges Faced by Malawian Women in Accessing Justice

Women face additional hurdles when attempting to navigate the criminal justice system. According to the Cornell Center on Death Penalty, “poverty, which affects women more often than men, further exacerbates women’s ability to receive a fair trial: women must secure one of the country’s handful of legal aid attorneys to prepare their defense” and “because many are illiterate, they are unable to understand or respond to legal filings without assistance.”⁵⁹ A Malawi Prison Audit of 2023 in Maula prison and Kachere women’s prison in Lilongwe, Malawi’s capital, found that “poverty is the critical determinant of whether a person is held in prison” and that 80% of the female prisoners interviewed cited lack of financial resources as the reason for not having legal representation, while “16 out of 18 women in pre-trial detention facing homicide charges claimed not to be represented.”⁶⁰

D. PROSECUTIONS OF SURVIVORS OF GENDER-BASED VIOLENCE

The lack of effective mechanisms to protect and support survivors of gender-based violence as well as the restrictions on access to justice discussed above mean that in some cases, women who suffer gender-based violence and seek to defend themselves are instead criminalized, charged, detained, and convicted. In Malawi, like other countries, women sentenced for violent offenses have often undergone prolonged periods of domestic abuse. As documented by The Advocates for Human Rights, World Coalition Against the Death Penalty, and Reprieve, “women imprisoned in Malawi for committing offences against life (i.e., murder, assault, or manslaughter) have overwhelmingly

⁵⁸ Freedom House, “Politics of Judicial Independence in Malawi”, 2013-2014, pg. 6. Available at https://freedomhouse.org/sites/default/files/inline_images/Politics%20of%20Judicial%20Independence%20in%20Malawi_1.pdf. See also World Justice Project, “Implementing the Legal Aid Act in Malawi.” Available at <https://worldjusticeproject.org/our-work/programs/implementing-legal-aid-act-malawi>.

⁵⁹ The Cornell Center on the Death Penalty Worldwide, “Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty”, September 2018, pg. 29. Available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>.

⁶⁰ NYU CIC, “Findings from Auditing Prisons in Malawi (Part 1): A data-driven approach to SDG16.3.2”, October 25, 2023. Available at <https://medium.com/sdg16plus/findings-from-auditing-prisons-in-malawi-part-1-a-data-driven-approach-to-sdg16-3-2-2b8346098bb3>.

experienced prolonged domestic violence at the hands of a partner, spouse or another family member. In many cases, the abuse has occurred repeatedly.”⁶¹

As further detailed by the three organizations, in cases where female accused are survivors of gender-based violence, “legal proceedings ignore the context of gender-based violence and the imbalance in power dynamics between an accused woman and her abusive intimate partner or family member.”⁶² Indeed, courts in Malawi “rarely consider gender-based abuse as a mitigating factor during sentencing.”⁶³

A 2018 Cornell study likewise found that all four women of a total of 15 prisoners on death row in Malawi were incarcerated because of the death of a family member and had experienced some form of domestic violence or emotional abuse.⁶⁴ In two of these cases, women had been sentenced to death for killing their abuser.⁶⁵ The facts of one of the cases are as follows:

A.N. was sentenced to death for killing her abusive husband. She was a survivor of brutal and systemic domestic violence. She had brought the matter to community leaders, who failed to assist her. One evening, her drunken husband came home and beat her relentlessly to the point where she feared death. To protect herself and her mother, who [was] also present, A.N. struck him on the head with an axe. A.N.’s husband later succumbed to the injuries and consequently, in November 2003, a court sentenced A.N. to death.⁶⁶

⁶¹ Reprieve, The Advocates for Human Rights, World Coalition Against the Death Penalty, “Malawi’s Compliance with the CEDAW Suggested List of Issues Relating to the Death Penalty”, 83rd Session of CEDAW, January 31, 2022, para. 16. Available at <https://worldcoalition.org/wp-content/uploads/2022/04/Malawi-CEDAW-Death-Penalty-FINAL.pdf>.

⁶² *Id.* para.18.

⁶³ *Id.* para. 19. In the case of gender-based violence survivor S.J., for example, who was sentenced to death for her “limited involvement” in a crime, “the court failed to take S.J.’s background of domestic abuse and her psycho-social and/or intellectual disabilities into account when sentencing her to death.” *Id.* para. 22.

⁶⁴ The Cornell Center on the Death Penalty Worldwide, “Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty”, September 2018, pg. 29. Available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>.

⁶⁵ *Id.* pg. 29.

⁶⁶ Reprieve, The Advocates for Human Rights, World Coalition Against the Death Penalty, “Malawi’s Compliance with the CEDAW Suggested List of Issues Relating to the Death Penalty”, 83rd Session of

Additionally, “her lawyer never visited her in prison,” “failed to argue that she had acted in self-defense,” “never presented evidence that her husband had savagely abused her for years preceding the attack,” and “she never had a chance to appeal her sentence, as the state failed to assign her an appellate lawyer.”⁶⁷ Having served 12 years in prison, A.N. was freed in 2015 when the High Court of Malawi “ordered [her] immediate release after lawyers assisted by the Cornell Center on the Death Penalty Worldwide presented evidence of her ill health and history of gender-based violence.”⁶⁸

CEDAW, January 31, 2022, para. 18. Available at <https://worldcoalition.org/wp-content/uploads/2022/04/Malawi-CEDAW-Death-Penalty-FINAL.pdf>.

⁶⁷ The Cornell Center on the Death Penalty Worldwide, “Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty”, September 2018, pg. 30. Available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>.

⁶⁸ *Id.*

METHODOLOGY



This report from TrialWatch, in collaboration with the Centre for Human Rights Education, Advice and Assistance (CHREAA) and the University of Southern California Gould School of Law International Human Rights Clinic (USC IHRC), was geared towards understanding 1) the offenses for which women are incarcerated; 2) the particular vulnerabilities female detainees face, including surviving gender-based and specifically intimate partner violence; and 3) whether these women's due process and fair trial rights are respected. It builds on the research conducted by the Cornell Center for the Death Penalty, The Advocates for Human Rights, World Coalition Against the Death Penalty, and Reprieve, as well as new data on women incarcerated in Malawi for violent crimes.

In 2022, CHREAA visited the 12 prisons with female populations in Malawi to obtain information through prison lists about the range of offenses for which women had been detained either pre-trial or post-conviction. The findings showed that at the time:

- 244 women total were imprisoned: 154 convicted and 90 in pretrial detention.
- The most common crimes identified were violent crimes (murder, assault, etc.), theft-related crimes, and crimes related to child trafficking and child desertion.
 - Violent crimes: 49 women were convicted of violent crimes and 73 women in pretrial detention for violent crimes;
 - Theft: 44 women were convicted of theft-related crimes and 10 women in pretrial detention for theft-related crimes; and
 - Child desertion and trafficking: there were 11 women convicted of crimes related to child desertion and trafficking.

Given that incarcerated women were overwhelmingly imprisoned for violent crimes and that proceedings regarding violent crimes carry the highest stakes in terms of prison sentences, TrialWatch, CHREAA, and USC IHRC spent 2023 interviewing women detained for violent crimes in Malawian prisons with the goal of understanding the particular vulnerabilities these women faced and the extent to which their fair trial and other rights were respected during the criminal proceedings against them.

By the time of interview, the women's prison population as well as the number of prisons with female populations had been reduced due to various mass releases.⁶⁹ In total, the

⁶⁹ See Radio Islam Malawi, "2298 Prisoners Pardoned in 2023 Independence Day Celebrations", July 5, 2023. Available at <https://www.radioislam.org.mw/2298-prisoners-pardoned-in-2023-independence-day-celebrations/>.

team interviewed 63 incarcerated women⁷⁰ across nine prisons in Malawi, asking questions about the circumstances underlying the offenses for which they had been charged or convicted and about their proceedings to date, including treatment during the police investigation and whether they had access to counsel. Of the 62 clearly identifiable charges, 46 women were charged with murder, three with manslaughter, ten with unlawful wounding, two with grievous bodily harm, one with murder and grievous bodily harm, and one with unlawful wounding and grievous bodily harm.⁷¹



Some women faced multiple charges; therefore, the percentages do not equal 100.

The team used a trauma-informed protocol when interviewing each individual.

Interviews were conducted in the language preferred by the participant, with the assistance of interpreters where needed. Before beginning, researchers explained the purpose and voluntary nature of the interview, assured participants of the absence of any consequences for refusal or withdrawal, and in each case, the team obtained each interviewee's oral consent for the interview and subsequent inclusion of information about their case in this report. Interviewees were also informed about how their information would be used and assured that their identities would remain confidential.

In the prison setting, interviews were conducted usually by a team of two—a lead interviewer and a note-taker—with interpreters present where necessary. Audio recordings were made only with explicit consent. Interviews took place in private or semi-private spaces arranged in consultation with prison officials to ensure a comfortable and

⁷⁰ The team initially interviewed 66 individuals but later confirmed that three of the interviewees were not incarcerated for offenses against the person and excluded them from this data set.

⁷¹ One interviewee stated that she was charged with “injuring someone,” though she is not aware of the official charge against her. This was likely either a grievous bodily harm or unlawful wounding charge.

safe environment for participants. Interviewees were told they could take breaks or stop the interview at any time and were encouraged to share only what they felt comfortable disclosing. All efforts were made to promote a sense of safety, autonomy, and respect throughout the process.

The report uses a mixed-methods approach, including both quantitative statistics and qualitative narratives (i.e., case studies) derived from the interviews conducted with incarcerated women, as supplemented by secondary research.

Limitations

This study is subject to certain limitations. First, the study is based on a limited sample of 63 women. Second, documentation—such as remand warrants, bail applications, charge sheets, and judgments—were available for 28 out of 63 cases.⁷² Since online court systems and police databases for case documents in Malawi are relatively new⁷³ and the vast majority of women did not have defense lawyers who could share documents, the team often relied primarily on information obtained from the interviews. Third, there were limitations in the ability to assess the duration of pre-trial detention for all accused persons since court records that could show when sureties were paid were not available for all women.

Despite these limitations, we believe the findings form a valuable and reliable account of the situation of women incarcerated in Malawi for violent offenses. Validation meetings with various stakeholders in Malawi were held in October 2024 and again in April 2025 to confirm if the findings of the sample were consistent with broader on-the-ground realities. They are also consistent with secondary research conducted as noted in the previous sections. Second, the data collected from the interviews is largely consistent with documentation obtained, the accounts of unrelated interviewees are consistent with one another as well as with our literature review and our analysis and conclusions are based on recurring themes and patterns from interviews, not reports from a single interviewee.

Third, where we were unable to determine the exact duration of their pre-trial detention, we used the next-best available data, such as the date of the defendant's last known court hearing for bail. For those confirmed to still be in detention but lacking a confirmed bail date, we used the date on which such information was received by CHREAA as a proxy.

⁷² Of the 27 women who experienced gender-based violence, documentation was available for 15 cases involving direct self-defense or where the women's actions were related to either gender-based violence or self-defense.

⁷³ See United Nations Development Programme, "Malawi Launches Groundbreaking e-Court Initiative to Revolutionize Access to Justice," April 29, 2024. Available at <https://www.undp.org/malawi/press-releases/malawi-launches-groundbreaking-e-court-initiative-revolutionize-access-justice>.

In cases where women had been released but no specific release date was available—or where there was insufficient documentation to make a precise calculation—we used the date of their interview with CHREAA and USC IHRC as a reference point, but only in instances where the woman was still in pre-trial detention at the time of the interview. As a result, our calculations are conservative. In many cases, the actual time these women spent in pre-trial detention is likely longer than what is reflected in our data. However, given the limitations of the study, we chose to err on the side of caution to ensure the reliability of the figures reported.

DATA FINDINGS



A. FEMALE INCARCERATION AND GENDER-BASED VIOLENCE

Of the 63 interviewees, 27 affirmatively indicated that their arrests and/or charges originated in the context of gender-based violence. Here, and as discussed above, gender-based violence “results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty”⁷⁴ and intimate partner violence is specifically when such abuse is perpetrated by one’s intimate partner or ex-partner. This definition reflects interviewees’ stories, which detailed harm including sexual and physical violence, psychological abuse, and financial manipulation and control.⁷⁵

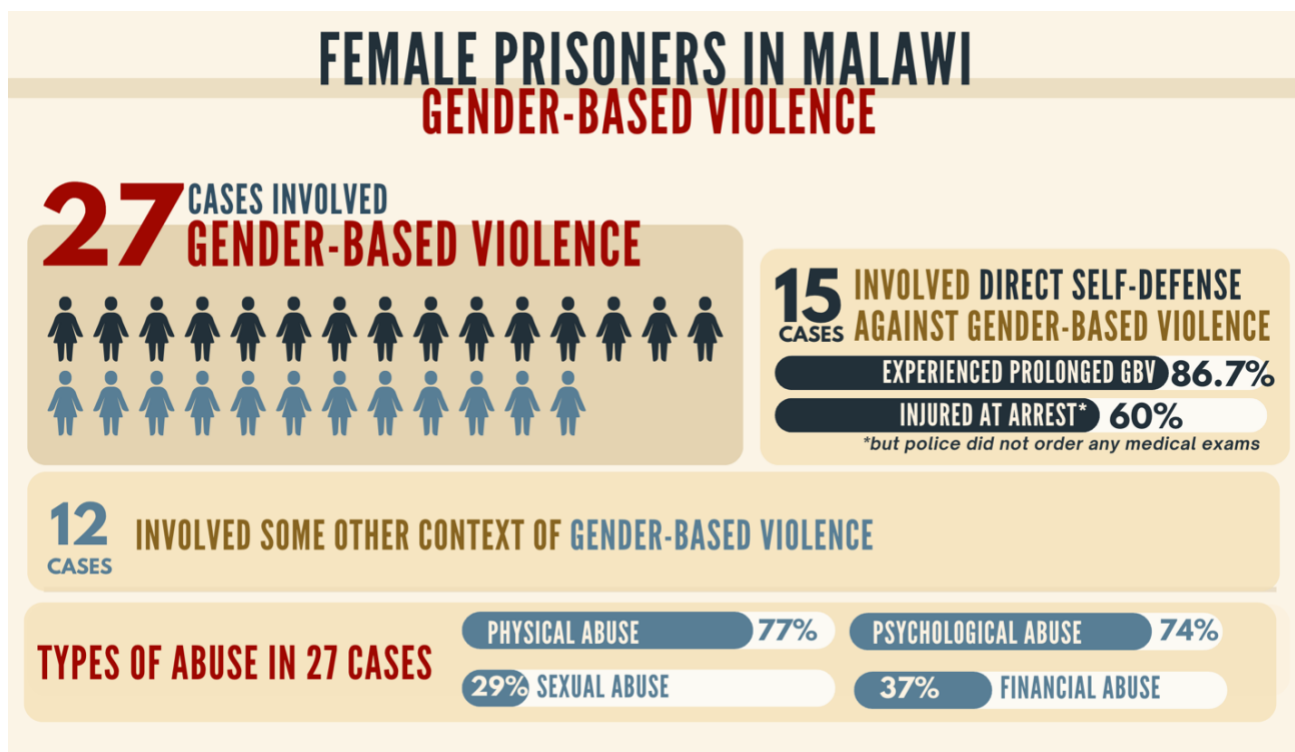
Of the 27 women who indicated that their incarceration was connected to gender-based violence, 15 specifically stated that their charges and imprisonment were based *on an act of self-defense to gender-based violence*. The remaining 12 women experienced violence with intimate partners that had some bearing on the circumstances leading to their arrests, but their arrest did not directly result from self-defense against gender-based violence. The most common type of abuse faced was physical abuse (77% of women), followed by psychological abuse (74% of women), financial abuse (37% of women), and sexual abuse (29% of women). The majority of these 27 women experienced two or more forms of abuse (i.e., sexual and psychological, physical and psychological, etc.). Of the 15 women who acted in self-defense, 86.7% had been subjected to a **prolonged history of gender-based violence**, meaning that they were abused more than three times or for more than one year by an intimate partner.

The above reported incidence of abuse may be lower than the actual occurrence due to barriers to disclosure, such as cultural stigma, shame, and trauma. To help mitigate underreporting, the interview protocol included trauma-informed practices. Interviewers were trained to create a respectful and non-pressuring environment, acknowledge potential discomfort without making assumptions, and remind participants that they could

⁷⁴ United Nations, Declaration on the Elimination of Violence Against Women, U.N. Doc. A/RES/48/104, December 20, 1993, Article 1; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35, U.N. Doc. CEDAW/C/GC/35, July 26, 2017, para. 14; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N. Doc. A/47/38, January 29, 1992, para. 23.

⁷⁵ Psychological abuse refers to verbal and emotional abuse; physical abuse refers to beatings, hitting, etc.; financial abuse refers to manipulation through money; and sexual abuse refers to rape, unwanted touching, etc.

stop or decline to answer at any time. These measures aimed to foster a safe space for disclosure while fully respecting participants' autonomy.



B. FAIR TRIAL RIGHTS AND DUE PROCESS VIOLATIONS

Accounts from the **63** interviewees highlighted a plethora of fair trial rights issues, including restrictions on access to counsel, and lengthy pre-trial detention periods.

None of the 63 women interviewed affirmatively indicated having **access to counsel** during the investigation stage following their arrest and only **14.3%** of the women interviewed indicated that they had access to counsel during pre-trial proceedings. Of the 20 women who were convicted, only 25% indicated that they had access to counsel during trial or plea hearings.⁷⁶ It is a welcome finding that women charged with murder or manslaughter did have counsel *during trial and plea hearings*. However, out of the 63 total women, only **nine (or 14%)** indicated that they had access to a public defender during at least one *stage of the proceedings*.

This may have impacted whether an interviewee felt she was able to tell her story during trial proceedings (e.g., give testimony, present witnesses, etc.) and whether each

⁷⁶ The five women who stated that they did have counsel during trial and plea hearings were charged for manslaughter and homicide. All the women who indicated that they did not have counsel during trial and plea hearings were charged with unlawful wounding and grievous bodily harm.

interviewee understood the plea deal offered. In fact, only seven women positively indicated that they were able to tell their story during trial or plea hearings. Moreover, of the 12 women who accepted a plea deal, only four had access to legal counsel. Notably, among the five women who reported lacking legal representation, three stated that they did not understand the terms of their plea deal. These trends continued into the appeals stage. Of the **20 convicted women, only half** affirmatively indicated that they knew of their **right to appeal their conviction**, and not a single woman **appealed**.

Given the above figures, the average pre-trial detention period of 13.7 months, which far exceeds Malawi's 90-day pretrial detention limit,⁷⁷ and the average sentence length of 12.5 years,⁷⁸ raise significant concerns about fair trial rights and rule of law for incarcerated women in Malawi.

Data regarding the subset of 27 women whose incarceration was connected to gender-based violence is broadly consistent with the overall dataset. The average pre-trial detention length was 11.9 months. This far exceeds Malawi's 90-day pre-trial detention limit for serious crimes, including murder. None of the 27 women reported access to counsel during the investigation stage, only 14.8% reported access to counsel during the pretrial stage, and 11% reported access to counsel during the trial or plea stage. Nine cases were concluded, resulting in convictions. Out of these nine cases, two cases went to trial and seven women took guilty pleas — only three women indicated that they had access to counsel during the proceedings.

Finally, of the nine cases that ended in convictions, **no** women indicated that they **appealed** their sentence. In fact, only **four** women even indicated **knowledge of their right to appeal**. Given these facts, the average

⁷⁷ See Malawi Criminal Procedure and Evidence Code, 1967, Section 161G ("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 offense shall be ninety days"). Note that the pre-trial detention limit numbers included were calculated using data from the interviews, as well as bail documents received from April of 2024.

⁷⁸ In calculating this figure, one woman's conviction resulted in a life sentence rather than a fixed number of years. To estimate her sentence length, we used Malawi's current average life expectancy of 63.7 years. See Data Commons, "Malawi Life Expectancy", 2020. Available at https://datacommons.org/tools/timeline#&place=country/MWI&statsVar=LifeExpectancy_Person; See also Esther Gumbo, "A Critical Analysis of Life Imprisonment in Malawi", Journal of African Law, School of Oriental and African Studies, 2017. Available at <https://www.jstor.org/stable/26857172> (Inferring from judicial comment that life sentences in Malawi are usually determined by "whole life sentences," meaning a set number of years without a prospect of release).

sentence length of about **8.3 years** in prison for these nine women is staggering.

C. TREATMENT IN POLICE CUSTODY

Of the 63 women interviewed, 13 indicated that they reported medical issues at the time of arrest or investigation. However, only one woman reported receiving medical care—in this instance, the woman was provided care pre-arrest when the police presumably did not consider her a suspect. Also concerning, ten women stated that police officers **physically assaulted** them during the investigation period. In one instance, an interviewee said she was beaten to produce a confession.

Notably, in about 60% of direct self-defense cases, interviewees reported injuries at the time of arrest. However, none of the women whose arrests or charges originated from an act of self-defense reported that the police **ordered a medical exam** at the time of their arrest. Furthermore, three of the 27 women whose cases were connected with gender-based violence said that they were **beaten by police** either during their arrest or time in custody.

CASE STUDIES



The case summaries below were selected with aim of providing a comprehensive picture of the types of defendants, charges, rights violations, and outcomes in the dataset. They rely on information obtained from interviews conducted in March, June, and August 2023 and relevant case file documents. When information is used from case file documents, it is indicated by a footnote. Each person's identity has been kept confidential through the use of pseudonyms. The case summaries are organized according to the stage of the proceedings, to the knowledge of the research team as of April 2024.

A. THE STORY OF CHISOMO [PRE-TRIAL]

Chisomo, a 21-year-old woman at the time of her interview, was arrested and charged with the murder of her ex-partner, Joseph, after she stabbed him in self-defense.

Chisomo recounted that during her eight-month long relationship with Joseph, he stalked, sexually assaulted, and threatened to kill her if she left him. On more than four occasions, Joseph strangled her, holding her mouth and neck “so that [she] couldn’t scream.” On another occasion, Chisomo described Joseph as becoming “so furious that he beat me severe[ly]” when she confronted him about his infidelity. In one instance, Joseph even threatened her with a panga knife.⁷⁹ Chisomo was in “constant fear of her safety.”⁸⁰ When Chisomo alerted Joseph’s parents to the abuse, they brushed her off. Chisomo and Joseph’s relationship ended when Joseph attempted to stab Chisomo after accusing her of infidelity, forcing Chisomo’s brother to intervene and Joseph to leave the house.

In early April 2023, about 1.5 months after Joseph left the house, Joseph suddenly attacked Chisomo at a local trading center where she was spending time with her friends.⁸¹ Joseph stabbed Chisomo two times in her upper arm and chest areas.⁸² Chisomo “instinctively extracted the knife from her chest” and stabbed Joseph back in response.⁸³ She fainted thereafter and was transported to a hospital, where she spent

⁷⁹ Affidavit in Support of the Bail Application, February 21, 2024. A panga knife is a large knife, akin to a machete. Merriam-Webster Dictionary, “panga”. Available at <https://www.merriam-webster.com/dictionary/panga>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

about a month recovering. During her time in the hospital, Chisomo learned that Joseph died as a result of his injuries.⁸⁴

In April 2023, Chisomo was arrested for the murder of Joseph.⁸⁵ She was not informed of her right to a lawyer and was not provided with access to counsel during questioning. Police officials told Chisomo that she was being arrested as a form of protection since Joseph's parents were seeking revenge against her for the death of their son.

After spending five days in police custody,⁸⁶ Chisomo was taken to court, where she pled not guilty. At the time of her interview in August 2023, Chisomo was still in pretrial detention and did not have access to legal services or counsel. As of February 2024, Chisomo did not know her trial date.⁸⁷ On February 21, 2024, Women Lawyers Association, a legal aid organization, filed a bail application on behalf of Chisomo.⁸⁸ A judge reviewed her bail application on April 2, 2024,⁸⁹ by which time Chisomo had remained in pretrial detention for over 11 months—far exceeding Malawi's 90-day legal limit for pretrial detention.

B. THE STORY OF GRACE [PRE-TRIAL]

Grace, a then 22-year-old mother, was arrested for the murder of her child, who was injured during a violent altercation between Grace and her husband, Emmanuel.

Grace reported that during their relationship of a year and two months, she and Emmanuel would fight at least four times a month, resulting in physical and verbal abuse. Emmanuel had a history of alcoholism and, when intoxicated, became aggressive and assaulted Grace. Grace would often sustain bruises as a result of Emmanuel's physical abuse, usually treating any resulting injuries on her own. Throughout the marriage, Grace avoided seeking help from the police.

The incident leading to Grace's arrest arose when Emmanuel gave her some money to buy groceries. When Grace returned home without change, Emmanuel became angry and attacked her. During this altercation, Grace was carrying their child on her back and

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Chisomo's case was committed to the High Court of Malawi on April 18, 2023. *Id.*

⁸⁷ Affidavit in Support of the Bail Application, February 21, 2024.

⁸⁸ *Id.*

⁸⁹ Summons for Bail Application, March 11, 2024.

as a result of the violence, the child was inadvertently injured. Grace managed to escape and sought help from her in-laws, who advised her to return home to Emmanuel. Grace followed her relatives' advice and went home, but three days later, her child died from the injuries resulting from the altercation. The day after the child's death, Grace was arrested for the murder of her child.

Grace reported that she was generally treated well by police but did not have access to counsel during police questioning. At the time of her arrest, Grace was experiencing memory loss because of the abuse to which she had been subjected and struggled to recall details about the incident. Moreover, Grace indicated that she did not have a lawyer throughout the pretrial stage thus far because she could not afford one. In October 2023, Grace submitted a bail application which was subsequently granted.⁹⁰ Grace thereby spent 1.2 years in pre-trial detention, which exceeded the maximum allowable time a person can remain in pretrial detention in Malawi before trial.

C. THE STORY OF MERCY [PRE-TRIAL]

On the morning of January 1, 2023, Mercy, then a 22-year-old woman, was arrested for murder after she stabbed her partner, Patrick, during a fight. Patrick later died.⁹¹ According to Mercy's 2023 interview, Mercy met Patrick at a "drinking joint," and they maintained an on-and-off relationship for approximately a year. Patrick abused Mercy throughout the relationship—Patrick would stalk, intimidate, beat, rape, and verbally abuse her, often accusing her of infidelity and calling her "wa Edzi iwe" or "you HIV+ person." Mercy explained that she never reported the abuse to the police because she feared that they would arrest both Patrick and her.

According to Mercy's 2023 interview, on December 31, 2022, Mercy and Patrick went to a bar, where Mercy conversed with both women and men. Patrick "started shouting that she was cheating on him," which led to "a fight" between Patrick and Mercy. During the fight, Mercy broke a bottle and charged at Patrick "to scare him." However, Patrick tripped and fell on Mercy, and a piece of glass slit his throat. The next morning, a group of men came searching for Mercy, accusing her of "killing [Patrick]." Mercy said she did not realize that Patrick had died until that day, when she heard that the men were searching for her. The men almost beat her up, but the police intervened and arrested her.

The police explained the reasons for her arrest but did not advise Mercy of her right to a lawyer, nor was she given access to a lawyer during questioning. She further stated that she could not afford counsel in any event.

⁹⁰ Bail Bond Documents.

⁹¹ Bail Application, June 16, 2023; Certificate for Summary Procedure Trial, January 27, 2023.

On January 9, 2023, Mercy was remanded to prison by a magistrate judge.⁹² On January 27, 2023, the State charged Mercy with murder.⁹³ On June 16, 2023, the Legal Aid Bureau filed a bail application on behalf of Mercy, requesting her release since her pretrial custody limit period of 90 days⁹⁴ had expired.⁹⁵ The application also cited her need for and right to receive antiretroviral drugs (“ARVs”) for her HIV treatment, her strong family ties that would ensure her return to court, and the fact that she was a minimal flight risk.⁹⁶ As of April 2024, Mercy was released on bail.⁹⁷

D. THE STORY OF AGNESS [PRE-TRIAL]

Agness, a 38-year-old mother of two at the time of her interview, was arrested and charged with the murder of her husband after he was killed by two men on August 19, 2022.⁹⁸

Agness and her partner, Samuel, were unofficially married.⁹⁹ Throughout their one-year relationship, Agness was subject to extensive verbal, physical, sexual, emotional, and financial abuse. For example, Samuel would often get drunk, physically beat Agness, set fire to her property, and steal her money. Samuel also threatened to kill Agness on multiple occasions. Agness reported that Samuel sexually abused her, causing her to run away and hide. She stated that “[i]t was violence upon violence,” and that Samuel “sexually abused me.”

⁹² Commitment of Adjudgment on Remand, January 9, 2023.

⁹³ Certificate for Summary Procedure Trial, January 27, 2023.

⁹⁴ Bail Application, June 16, 2023 (Explaining Section 161G of the Malawi Criminal Procedure and Evidence Code, 1967, which specifies that “the maximum period that a person accused of ... murder... may be held in lawful custody pending commencement of his trial in relation to that offense shall be ninety days.”).

⁹⁵ Bail Application, June 16, 2023.

⁹⁶ *Id.*

⁹⁷ Director of Public Prosecutions Reply to Bail Application, June 21, 2023.

⁹⁸ See Certificate of Summary Procedure Trial (Agness was specifically charged with murder “with malice aforethought”: “[Agness] . . . with malice aforethought caused the death of [Samuel]”).

⁹⁹ An official marriage under Malawian law requires a marriage certificate and registration with the State of Malawi. Here, the interviewee stated that her marriage was not formalized. See Marriage, Divorce and Family Relations Act, 2015, Section 10. Available at <https://malawilii.org/akn/mw/act/2015/4/eng@2017-12-31>.

Agness reported Samuel's abuse to the police on at least four occasions. The police provided Agness with a summons¹⁰⁰ for Samuel, but he never responded. Instead, Samuel told the police that he would stop abusing Agness and that the police did not have a role in their relationship. The police told Agness to go to court and obtain a protection order; however, the court told Agness that it could not intervene in unofficial marriages (as was the case here). Agness also sought help from relatives and the Chief of her village, but to no avail. In fact, her relatives said that "they were scared of how [Samuel] behaves when he starts a fight."

On the day of the incident, Agness returned home to find Samuel demolishing her property.¹⁰¹ Agness was on her way to the village Chief's house to obtain help when she saw a group of men on the road. She explained her situation and they offered to help.¹⁰² When Agness and the men returned, she saw Samuel breaking windows. Agness started to explain why the men were there, but Samuel began beating her and injured her elbows. The men then beat Samuel with a stick, and he fainted. Agness went to the police to report Samuel's violent behavior and explain what had happened.¹⁰³ When Samuel was pronounced dead later that day, Agness was arrested and charged with murder.¹⁰⁴

The police did not explain the reason for her arrest beyond the fact that her husband had died. Agness did not have access to counsel during police questioning, and the police did not order a medical examination even though Agness presented with injured elbows, feet, and a scar on her eyebrow. The police told Agness that she should have sought their help rather than "go to the men who ended up killing her husband."

¹⁰⁰ Here, the word "summons" is used to describe a letter or phone call made by the police to the alleged perpetrator of gender-based violence. Although the letter and/or phone call may entail a request that the perpetrator appear before police officers or cease illegal activity, the letter and/or phone call is/are not legally binding.

¹⁰¹ See Certificate of Summary Procedure Trial; Affidavit in Support of Summons for Release from Unlawful Detention, August 26, 2022 (Explaining that Agness had "disagreements" with Samuel prior to the incident and that on the day of the incident "the deceased arrived home drunk, he took a h[a]mmer and smashed all windows of their house without a proper reason").

¹⁰² Affidavit for the State (The specific details concerning how the group of men arrived at Agness's home remain unclear. In contrast to Agness's interview, the Affidavit for the State claims that Agness hired "two suspects who are still at large" to kill Samuel. The Legal Aid Bureau's Affidavit in Support of Summons for Release from Unlawful Detention claims that "two boys from the neighborhood showed up to stop the deceased" after the applicant shouted for help).

¹⁰³ Affidavit in Support of Summons for Release from Unlawful Detention, August 26, 2022.

¹⁰⁴ *Id.*

Agness was kept in police custody for about a week,¹⁰⁵ without adequate access to food. Agness reported that at one point she “started crying for help and insisted that they take [her] to court.” Agness appeared in court for a pretrial hearing without a lawyer on August 26, 2022.¹⁰⁶ After the hearing, she was placed in pretrial detention.¹⁰⁷ On May 24, 2023, after over 10 months in pre-trial detention, in violation of the maximum 90-day pretrial detention period permitted by Malawi law, Agness obtained bail with the assistance of a legal aid attorney.¹⁰⁸

E. THE STORY OF CHARITY [PRE-TRIAL]

In early 2022, Charity, a 29-year-old mother of two children at the time of her interview, was arrested for the murder of her husband, Isaac. In her March 2023 interview, Charity explained that during the incident, her husband had been beating her and trying to stab her pregnant stomach, so she killed him in an act of self-defense.

Charity and Isaac were in a relationship for approximately six months, during which he would regularly beat her, yell at her, and accuse her of infidelity. On one occasion Charity tried to report the abuse to the police, but the police told her to talk to the chairman of her township. Charity confided about the abuse to her husband’s boss, who advised her not to talk to the chairman and claimed that he would talk to the chairman instead. It is unclear whether he in fact spoke with the chairman.

In early 2022, Isaac began to accuse Charity of having an extramarital relationship again. One night, Isaac came home drunk and started beating Charity out of rage at the alleged affair.¹⁰⁹ Isaac subsequently refused to provide Charity with money or food for several days. Charity was pregnant at the time.

On the day of the incident leading to Charity’s arrest, Isaac accused Charity of receiving money from her alleged boyfriend to buy beef. Isaac began to beat Charity and threw the cooked beef, which almost burned one of their landlord’s children who was with Charity at the time. Charity continued cooking and was bent over the fire when Isaac grabbed a knife and attempted to stab Charity in her pregnant stomach, claiming the baby was not his. Charity attempted to run away, but Isaac began to chase her, so she tripped him, and

¹⁰⁵ See Commitment on Adjournment on Remand, August 26, 2022 (Agness was arrested on August 19, 2022, and remanded on August 26, 2022. Therefore, she was kept in police custody for about a week).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Bail Bond Granted, May 24, 2023.

¹⁰⁹ Affidavit in Support of Summons for Release from Unlawful Detention, August 23, 2023.

he dropped the knife. Charity picked up the knife and stabbed Isaac.¹¹⁰ During Charity's March 2023 interview, she summarized, "[i]t was either him or me."

Charity explained the incident to her landlord, who was nearby, and the landlord called the police. The police took Isaac to the hospital and arrested Charity. Charity had an injury to the side of her stomach at the time of arrest, which was not formally treated while she was in police custody. Moreover, the police did not order a medical exam. Instead, Charity treated the wound herself with soap and water.

Charity did not have access to counsel during initial questioning, the arrest, or the police's investigation. In fact, the first time Charity was advised of her right to a lawyer was when she went to her first pretrial hearing in May 2022. Over a year after her pretrial hearing, in May 2023, a bail hearing finally took place, after which it took more than 2 months for the judge to grant her bail application.¹¹¹ Charity was granted bail on October 27, 2023, having been held in pretrial detention for nearly 1.7 years, a time far exceeding the maximum allowable 90 days.¹¹²

Notably, Charity was pregnant while detained and gave birth to her second child in December 2022, while in prison. Charity stated that she was sent to a government hospital following the birth for a day and a half before being returned to prison.

When asked about her experience, Charity said, "I feel very sad to be here [in prison] with a child. Sleeping in a cell with my small child, who does not have a father now. These things affect me mentally." Reflecting on her relationship with Isaac, Charity said she had been "[h]urting a lot deep down emotionally," and that she "[felt] trapped." Charity was not provided access to psychosocial services while detained.

F. THE STORY OF MADALITSO [PRE-TRIAL]

Madalitso, who was 35 years old at the time of her interview and a mother of four children, was arrested for murder and grievous bodily harm after she stabbed her husband, Paul, in apparent self-defense and injured her husband's lover.

Madalitso and Paul were married for seven years, during which she experienced emotional and physical abuse that became more frequent during their last year together. Paul did not take care of his children, cheated on Madalitso throughout their marriage, and brought a lover, Annie, to their home. When Madalitso tried to confront Paul about

¹¹⁰ *Id.*

¹¹¹ Supplementary Affidavit in Support of Application of Summons for Release from Unlawful Detention.

¹¹² Bail Bond Granted, August 11, 2023.

his cheating, he threatened her and physically beat her. Madalitso was HIV negative when she got married, and then tested positive after the marriage, which she believes was “due to [Paul’s] cheating behavior.”

On December 8, 2022, Madalitso returned home from work, where she found Paul and Annie. Madalitso started arguing with Annie and Paul, at which point Paul began to beat Madalitso. Madalitso then grabbed a knife that was on the table and stabbed Paul in the stomach. Paul was rushed to the hospital where he later died, and Madalitso was arrested. While in custody, Madalitso was beaten by a police officer. She was then charged with the murder of Paul and causing grievous bodily harm to Annie.¹¹³

Madalitso was held in police custody for ten days, during which she did not have access to counsel, including during police questioning. Subsequently, she was remanded to pretrial detention. At the time of the June 2023 interview, Madalitso had a private lawyer and had applied for and was granted bail on the murder charge. Madalitso also applied for bail on the grievous bodily harm charge but was still awaiting the decision at the time of her interview. Madalitso’s interview and remand documents indicate that she was in pretrial detention from January 2023 until September 27, 2023, a period of nearly 10 months, exceeding the prescribed maximum of 90 days in pretrial detention.¹¹⁴

G. THE STORY OF CHIMWEMWE [CONVICTED]

On the night of October 18, 2015, Chimwemwe, a mother of five in her 30s, was arrested for unlawfully causing the death of her partner,¹¹⁵ George.¹¹⁶ According to Chimwemwe’s interview in June 2023, George was a gangster in the village and even though Chimwemwe did not want to marry him, he raped her in front of her children to force her to marry him. Chimwemwe said that George was known for his violence and therefore feared by other people in her village, and that during her three-year relationship with him,

¹¹³ Although Madalitso relayed in her interview that she was charged with both murder and grievous bodily harm, we only have documentation (the remand sheet) that confirms her grievous bodily harm charge.

¹¹⁴ Madalitso’s remand documents indicate that bail proceedings were adjourned on five separate occasions during her approximately nine-month pretrial detention period. Commitment on Adjournment on Remand; See Malawi Criminal Procedure and Evidence Code, 1967, Section 161G (“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 offense shall be ninety days”).

¹¹⁵ The term “partner” is used throughout this case summary as Chimwemwe interchangeably uses lover, husband, or boyfriend to refer to George.

¹¹⁶ Charge Sheet, June 8, 2021.

he constantly abused her physically, emotionally, and sexually.¹¹⁷ Chimwemwe noted that her family and other people in the village were aware of the abuse.

In a caution statement to the police elicited in the absence of counsel after her arrest, Chimwemwe recounted that on the night of the incident, George, who was “excessively drunk,” had threatened to kill Chimwemwe’s 1-year-old son with a hoe and axe and assaulted Chimwemwe’s leg with a hoe handle.¹¹⁸ Chimwemwe shouted for help but found none.¹¹⁹ After George fell asleep, Chimwemwe struck him in the neck with an axe.¹²⁰ She said: “I ... took an axe and axed my [partner] on the neck. I did that fearing that each and every day after being intoxicated, he usually assaults me and maybe I could be relieved from troubles.”¹²¹ After striking George in his sleep, Chimwemwe fled with her children to a house near Zambia overnight.¹²² The next morning, three men, including two of Chimwemwe’s brothers, found pools of blood around Chimwemwe’s house.¹²³ Worried about Chimwemwe, one of her brothers called a member of a community policing group, who found George lying on a bloodied mat in the bedroom.¹²⁴ George was transported to the hospital but pronounced dead a few hours later due to a severe loss of blood from the deep cut.¹²⁵ The same day, police arrested Chimwemwe for murder.¹²⁶

After Chimwemwe was arrested, the police interviewed six witnesses, including Chimwemwe’s then 12-year-old daughter who saw the incident, her two brothers, a young man who accompanied the brothers to the scene, a member of the community policing

¹¹⁷ Translation of Caution Statement by Chimwemwe.

¹¹⁸ Translation of Caution Statement by Chimwemwe; Summary of Known Facts, January 10, 2016.

¹¹⁹ Translation of Caution Statement by Chimwemwe.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Translation of Caution Statement by Chimwemwe; Precis of Witness Evidence, October 19-20, 2015 (During Chimwemwe’s June 2023 interview, she explained that she had run away from her village to Zambia on the night of the incident, but George had followed her and tried to kill her with a machete. In self-defense, Chimwemwe took the machete, struck him on the neck, and ran away. She eventually heard that George had died after the incident).

¹²³ Precis of Witness Evidence, October 19-20, 2015.

¹²⁴ *Id.*

¹²⁵ *Id.* Referral Note for Secondary Services, October 19, 2015.

¹²⁶ Translation of Caution Statement by Chimwemwe; Police Reports, October 1, 2016.

group who found George's body, and Chimwemwe's mother.¹²⁷ As noted above, the police questioned Chimwemwe without counsel when they obtained the account of events described above, which they characterized as Chimwemwe "voluntarily [admitting] [to] the charge."¹²⁸ At the time of arrest and interrogation, Chimwemwe stated that she did not receive a medical examination despite injuries stemming from George attacking her with a hoe handle.

Chimwemwe was taken before a second-grade magistrate court and remanded for further proceedings.¹²⁹ She was then released on bail after a judge "had [a] court camp visit" at the prison.¹³⁰ Chimwemwe stated that she did not know why she was released on bail and the accessible court documents do not provide clarification.¹³¹ She was released on bail for approximately five to six years.

On June 8, 2021, Chimwemwe was charged with manslaughter.¹³² Chimwemwe pled guilty to manslaughter and was sentenced to five years. She received legal representation for her guilty plea. Chimwemwe stated that she knew of her right to appeal but had not appealed her sentence at the time of her interview.

H. THE STORY OF MPHATSO [CONVICTED]

Mphatso, a 30-year-old mother of four at the time of her interview, was arrested after she struck and stabbed a male sex client, Peter, with a bottle in self-defense during a physical altercation. According to Mphatso, she and Peter first met when Peter came to Mphatso for sex services, a relationship that continued throughout that year. The two fought occasionally, often when Peter found Mphatso with other men.

On the day of the incident, in March 2022, Peter followed Mphatso to a nearby liquor store after learning that she was drinking there with a man. Peter then "dragged" Mphatso to her workplace, a different liquor store. While there, Peter used the restroom. While Peter was in the restroom, Mphatso was approached by the same man she was drinking with at the last store. When Peter came out of the restroom and saw Mphatso with this man,

¹²⁷ *Precis of Witness Evidence*, October 19-20, 2015.

¹²⁸ *Police Reports*, October 1, 2016; *Translation of Caution Statement by Chimwemwe*.

¹²⁹ *Police Reports*, October 1, 2016.

¹³⁰ *Id.* "Court camp visits" refer to a summarized procedure by which magistrates hear cases and issue rulings on various matters, including bail applications, directly from a particular prison.

¹³¹ *Police Reports*, October 1, 2016.

¹³² *Charge Sheet*, June 8, 2021.

he called her a “filthy prostitute,” dragged her behind the store, and beat her. Mphatso reported that Peter broke a bottle and stabbed her in the mouth and both shoulders. In response, Mphatso also grabbed a bottle and stabbed Peter in his side and both arms and bit his ear. Mphatso had a serious cut in her mouth and on both shoulders. In fact, Mphatso stated that she could reach through “the cut in [her] mouth skin and touch [her] teeth.”

Following the incident, Mphatso went to the police unit to obtain a police report that would allow her to receive medical care. Mphatso then received medical attention at a public hospital, where she stayed for one night. The following day, Mphatso returned to the police unit. When the police asked her if she wanted Peter arrested, she replied no and returned home. Later that same day, a police officer arrived at Mphatso’s home and ordered her to return to the police unit. Upon her voluntary return, police took Mphatso’s statement regarding her physical altercation with Peter, without counsel present. During the interrogation, police told her they were arresting her because she had injured Peter. She was then immediately detained. At the time of the interview, Mphatso was not aware of the official charge against her. Mphatso reported that she was never informed of her right to a lawyer and did not have a lawyer during pre-trial or trial proceedings.

Mphatso appeared in court several times. At the first hearing, the judge explained Mphatso’s offense and read her a statement about whether to plead guilty or not guilty. Mphatso stated that she did not understand the charges. At the conclusion of the hearing, she pled guilty. According to Mphatso’s account, Peter appeared in court several times thereafter for sentencing purposes.¹³³ During these hearings, the police officer who had gone to Mphatso’s house to request her presence at the police unit served as a witness against Mphatso. Mphatso indicated that she was in physical pain during the hearings. Specifically, she had stitches and was not eating very much.

Mphatso was convicted and sentenced to 3 years plus hard labor in 2022. She had not filed an appeal at the time of the June 2023 interview.

¹³³ Witness cross-examinations do not occur during plea hearings in Malawi. Therefore, Mphatso’s reported post-plea appearances before the court were likely related to sentencing procedures. See Malawi Criminal Procedure and Evidence Code, 1967, Section 321J (1) (“[W]here a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed.”); Malawi Criminal Procedure and Evidence Code, 1967, Section 321J (2) (“The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.” Evidence referred to in Section 321 includes oral evidence by witnesses and documentary evidence).

When asked about the incident about a year after her arrest, Mphatso says that she “[d]o[es] not understand what happened” because both she and Peter were injured, yet she is the only one in prison. She stated that she was only trying to “defend herself, and felt “injustice happened,” and that the authorities “infringed her rights.”

I. THE STORY OF CHIKONDI [CONVICTED]

Chikondi, a 36-year-old mother of four at the time of her interview, was arrested for murder in 2017, after defending herself against abuse from her husband, Charles.

Chikondi and Charles were sweet potato farmers who had been in a relationship for about 12 years at the time of the incident that led to Chikondi’s arrest. Chikondi described repeated, though infrequent, physical abuse by Charles throughout their relationship.

One day, Charles took sweet potatoes from their farm and sold them with the help of a woman who Chikondi believed to be his girlfriend. Chikondi found out about this from people in the community. When Chikondi confronted Charles, he started beating her. Chikondi then picked up a panga knife and stabbed Charles in the neck. In her August 2023 interview, Chikondi said that Charles died “on the spot.”

Chikondi was arrested directly after the incident and said in her August 2023 interview that the police explained the reasons for her arrest and advised her of her right to a lawyer. However, Chikondi did not have access to counsel during police questioning. Furthermore, Chikondi spent approximately one year in pretrial detention, far beyond Malawi’s maximum time limit of 90 days in pretrial detention. During this period, she was assigned a public defender but did not have any contact with the attorney during the pretrial stage, which may be why she did not apply for bail during this period. Subsequently, she appeared in court with a public defender and pled guilty to her charge. She was convicted and sentenced to 25 years in prison. Chikondi said in her 2023 interview that she thought she was treated fairly in court. Chikondi is aware of her right to appeal the verdict but has not yet appealed because she does not have access to a lawyer.

J. THE STORY OF RUTH [CONVICTED]

Ruth, a 48-year-old woman at the time of her interview, was convicted for the murder of her husband of 16 years, Andrew. Andrew had been physically abusing Ruth for a long time. In 2013, Andrew’s abusive behavior escalated after he paid off a car loan and began to cheat on Ruth. When Ruth confronted Andrew about his cheating, he would beat her severely, sometimes using a panga knife, a big stick, or other nearby objects.

One day in 2013, Ruth and Andrew had an argument during which Andrew beat Ruth, burned her clothes, and threatened to kill her if she returned to their home. Ruth escaped to a neighbor’s house and reported Andrew to the police the following day. Andrew was

arrested that day and released on bail the next day on the condition that he pay damages to Ruth. However, Andrew never paid Ruth. Police advised Ruth to take the matter to court, but Andrew filed for divorce before Ruth could do so and threatened Ruth so that she would leave their home. It was in this context that the incident leading to Ruth's arrest occurred.

There are three accounts of the incident leading to Ruth's arrest—the first provided by Ruth during her initial interrogation by the police, the second provided by Ruth in court as part of a guilty plea, and the third provided by Ruth during the 2023 interview.¹³⁴

According to the version of events in the caution statement, taken in the absence of counsel during police interrogation after Ruth's arrest, a local "medicine man" connected Ruth with three men who had agreed to murder Andrew for Ruth.¹³⁵ While Andrew was asleep, Ruth met the three men outside her home.¹³⁶ The men then pinned Andrew down, hit him on the head with a hammer, and used wires to strangle his neck.¹³⁷

The second version of Ruth's story was taken down by the court after Ruth pled guilty.¹³⁸ This version differed from the first. Ruth maintained that a group of men broke into the house but did not kill Andrew, instead entering his room, tying him with the wires, taking his car keys, and leaving Ruth alone with him.¹³⁹ Once they left, Andrew, who was drunk, lunged at Ruth, who then hit Andrew on the head with a shovel and held him in a chokehold until he died.¹⁴⁰

The final account of Ruth's story was recorded during her interview in August 2023. During this interview, Ruth indicated that she arranged to sell Andrew's car to obtain the money that Andrew owed her and refused to pay. Ruth asked three men interested in buying the car to come to her home while Andrew was not there. During this time, Andrew

¹³⁴ The three accounts Ruth has provided are (1) Ruth's interview before a police investigator (caution statement), after which Ruth pled not guilty on October 4, 2018; (2) Ruth's retelling of the incident in court during the hearing at which she pled guilty, on October 8, 2018, in which Ruth describes acting in self-defense; and (3) the 2023 interview.

¹³⁵ Judgment, February 13, 2019.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

returned home and instigated an argument with the men, who beat him. Ruth and some bystanders then took Andrew to the hospital, where he died the following day.

Ruth explained during her August 2023 interview that she pled guilty because she had been present when three men beat Andrew during the incident leading to his death and because those three men “put the blame on her at court,” so she “just decided to plead guilty.”

Ruth spent four years in pre-trial detention before finally standing trial with the help of a public defender.¹⁴¹ Ultimately, the court rejected Ruth’s plea hearing testimony that she had acted in self-defense, concluding instead based on her initial statement to the police that Andrew’s murder was premeditated, so her actions could not have been in self-defense.¹⁴² Although the court acknowledged its obligation to consider mitigating circumstances,¹⁴³ it did not consider the history of gender-based violence in her marriage or her status as a mother to be a mitigating circumstance.¹⁴⁴

Ruth was convicted and sentenced to 30 years’ imprisonment on February 13, 2019, and has been serving her sentence since.¹⁴⁵ At the time of the August 2023 interview, Ruth had not filed an appeal.

¹⁴¹ Section 42(2)(f)(i) of the Constitutions states that right to fair trial includes the right to be tried within a reasonable time. For the offences with more than 3 years’ sentence, Section 46 of the General Interpretations Act states that a prosecution should be brought before court without undue delay, but the time period is not specified.

¹⁴² Judgment, February 13, 2019.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*



A. APPLICABLE LAW

This report draws upon the following international instruments and related jurisprudence: the International Covenant on Civil and Political Rights (“ICCPR”)¹⁴⁶; jurisprudence from the United Nations Human Rights Committee, tasked with monitoring implementation of the ICCPR; jurisprudence of the UN Working Group on Arbitrary Detention (“UNWGAD”); the Convention Against Torture (“CAT”)¹⁴⁷; the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)¹⁴⁸; jurisprudence from the UN Committee on the Elimination of Discrimination against Women, tasked with monitoring implementation of CEDAW¹⁴⁹; the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹⁵⁰; and jurisprudence from the Committee on Economic, Social and Cultural Rights, which is tasked with monitoring implementation of ICESCR.¹⁵¹ Additionally, this report draws on the following regional treaties and guidelines and related jurisprudence: the African Charter on Human and Peoples’ Rights (the “Banjul

¹⁴⁶ International Covenant on Civil and Political Rights, opened for signature December 19, 1966, 999 U.N.T.S. 171 [hereinafter “ICCPR”].

¹⁴⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature December 10, 1984, 1465 U.N.T.S. 85 [hereinafter “CAT”].

¹⁴⁸ Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature March 1, 1980, 1249 U.N.T.S. 13 [hereinafter “CEDAW”].

¹⁴⁹ The Committee’s power comes from Article 21 of CEDAW. The Committee’s mandate “is very specific: it watches over the progress for women made in those countries that are the States parties” to CEDAW and “monitors the implementation of national measures” to ensure State parties are meeting their obligations under CEDAW. United Nations Women, “Committee on the Elimination of Discrimination against Women”. Available at <http://www.un.org/womenwatch/daw/cedaw/committee.htm>. The Committee’s general recommendations are considered authoritative statements on the legal obligations of State parties. See LSE Centre for Women, Peace and Security, “CEDAW General Recommendations.” Available at <https://blogs.lse.ac.uk/vaw/int/cedaw/general-recommendations/>.

¹⁵⁰ International Covenant on Economic, Social, and Cultural Rights, opened for signature December 19, 1966, 993 U.N.T.S. 3 [hereinafter “ICESCR”].

¹⁵¹ The Committee on Economic Social, and Cultural Rights consists of 18 independent experts whose task is to monitor implementation of the ICESCR. The Committee was established in May 1985 to carry out the monitoring function in Part IV of the ICESCR assigned to the United Nations Economic and Social Council. The Committee reviews the reports that are submitted by states every 5 years as part of states parties’ obligation under the ICESCR. The Committee releases their concerns and recommendations in response to the state reports as comments. Office of the United Nations High Commissioner for Human Rights, “Introduction to the Committee on Economic, Social and Cultural Rights.” Available at <https://www.ohchr.org/en/treaty-bodies/cescr/introduction-committee>.

Charter”)¹⁵²; jurisprudence from the African Commission on Human and Peoples’ Rights (the “ACHPR”)¹⁵³ and African Court on Human and Peoples’ Rights (the “AfCHPR”), which monitor implementation of the Banjul Charter; the African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the “African Fair Trial Guidelines”)¹⁵⁴; the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (“Lilongwe Declaration”)¹⁵⁵; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”)¹⁵⁶; and the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa (“Luanda Guidelines”).¹⁵⁷ While different legal systems will, of course, implement international and regional standards in different ways, they reflect an irreducible floor, below which proceedings will be deemed unfair.

Reports issued by various UN Special Procedures and widely accepted guidelines that establish best practices have also been consulted, including the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (“UN Guidelines on Legal Aid”)¹⁵⁸; the UN Basic Principles on the Role of Lawyers¹⁵⁹; the UN Standard

¹⁵² African Charter on Human and Peoples’ Rights (Banjul Charter), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter “Banjul Charter”].

¹⁵³ While resolutions and jurisprudence from the ACHPR are not binding on States Parties, it reminds States of their obligations as members of the African Union under the African Charter on Human and Peoples’ Rights.

¹⁵⁴ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples’ Rights’ Resolution, March 29, 2003 [hereinafter “African Fair Trial Guidelines”].

¹⁵⁵ Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa adopted by the African Commission on Human and Peoples’ Rights’ Resolution, November 15-19, 2006 [hereinafter “Lilongwe Declaration”].

¹⁵⁶ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, African Union, July 11, 2003 [hereinafter “Maputo Protocol”].

¹⁵⁷ The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted by the African Commission on Human and Peoples’ Rights, April 28-May 12, 2014 [hereinafter “Luanda Guidelines”].

¹⁵⁸ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly, U.N. Doc. A/RES/67/187, March 28, 2013 [hereinafter “UN Guidelines on Legal Aid”].

¹⁵⁹ Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, September 7, 1990 [hereinafter “Basic Principles on the Role of Lawyers”].

Minimum Rules for the Treatment of Prisoners (the “Nelson Mandela Rules”)¹⁶⁰; the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the “Bangkok Rules”)¹⁶¹; and the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care (“MI Principles”).¹⁶²

Malawi ratified the ICCPR in 1993, the CEDAW in 1987, the Banjul Charter in 1989, the CAT in 1996, the Maputo Protocol in 2005, and the ICESCR in 1993. The report additionally references relevant provisions in the Constitution of Malawi¹⁶³ and the Malawi Penal Code, Criminal Procedure and Evidence Code, Legal Aid Act, and Police Act. In particular, the report assesses the Malawi Penal Code provisions on self-defense and the Malawi Criminal Procedure and Evidence Code provisions on mitigating circumstances.

B. THE LEGAL DEFENSE OF SELF-DEFENSE AND MITIGATING FACTORS DURING SENTENCING: COMPARING MALAWI’S CRIMINAL LAW FRAMEWORK TO INTERNATIONAL BEST PRACTICES

As recounted in a report by Reprieve and other organizations, in cases where female accused have survived gender-based violence “legal proceedings ignore the context of gender-based violence and the imbalance in power dynamics between an accused woman and her abusive intimate partner or family member.”¹⁶⁴ The data obtained for this report affirms this finding.

¹⁶⁰ Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), adopted by the General Assembly, U.N. Doc. A/RES/70/175, December 17, 2015 [hereinafter “Nelson Mandela Rules”]. The Nelson Mandela Rules are not binding. However, they serve as globally accepted principles for prison conditions. UN bodies, including the Human Rights Committee, have referred to the Nelson Mandela Rules when interpreting key provisions of treaties such as the ICCPR.

¹⁶¹ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), U.N. Doc. A/RES/65/229, December 21, 2010 [hereinafter “Bangkok Rules”]. Although not legally binding, the Bangkok Rules are a set of globally accepted guidelines for treatment of women prisoners.

¹⁶² Protection of Persons with Mental Illness and Improvement of Mental Health Care, adopted by the General Assembly, U.N. Doc. A/RES/46/119, December 17, 1991 [hereinafter “MI Principles”].

¹⁶³ The Constitution of Malawi was signed and took effect in 1994 and was revised in 2017.

¹⁶⁴ Reprieve, The Advocates for Human Rights, World Coalition Against the Death Penalty, “Malawi’s Compliance with the CEDAW Suggested List of Issues Relating to the Death Penalty”, 83rd Session of CEDAW, January 31, 2022, para. 18. Available at <https://worldcoalition.org/wp-content/uploads/2022/04/Malawi-CEDAW-Death-Penalty-FINAL.pdf>.

Self Defense Standards

According to Section 17 of the Malawi Penal Code, self-defense “shall be determined according to principles of common law.”¹⁶⁵ Further, a successful claim of self-defense requires that there be “an imminent danger or harm,”¹⁶⁶ “reasonable belief that force is necessary to prevent harm,”¹⁶⁷ and “use of reasonable force.”¹⁶⁸ Malawian courts have held that in order to assess whether there was indeed imminent danger or harm, the question is whether the accused could have been “under reasonable belief that there was imminent danger to him”¹⁶⁹ and the person used force “as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another.”¹⁷⁰

¹⁶⁵ Malawi Penal Code, Section 17.

¹⁶⁶ High Court of Malawi, *Ndozo v R*, Criminal Appeal 106 of 1996, January 30, 1997. Available at <https://malawilii.org/akn/mw/judgment/mwhc/1997/1/eng@1997-01-30> (“If the attack is serious that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence.”); High Court of Malawi, *R v Kefa*, Criminal Appeal 68 of 2008, April 21, 2009. Available at <https://malawilii.org/akn/mw/judgment/mwhc/2009/48/eng@2009-04-21> (“The question is whether the accused could have been said to have been under reasonable belief that there was imminent danger to him”).

¹⁶⁷ High Court of Malawi, *Ndozo v R*, Criminal Appeal 106 of 1996, January 30, 1997. Available at <https://malawilii.org/akn/mw/judgment/mwhc/1997/1/eng@1997-01-30> (“If there has been an attack so that the defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary that would be the most potent evidence that only reasonable defensive action had been taken”).

¹⁶⁸ High Court of Malawi, *Ndozo v R*, Criminal Appeal 106 of 1996, January 30, 1997. Available at <https://malawilii.org/akn/mw/judgment/mwhc/1997/1/eng@1997-01-30> (“In considering the defence under discussion the Court has to consider whether the force used was reasonable. The test is not purely objective. One has to look at what the defendant thought.”); High Court of Malawi, *R v Kefa*, Criminal Appeal 68 of 2008, April 21, 2009. Available at <https://malawilii.org/akn/mw/judgment/mwhc/2009/48/eng@2009-04-21> (“Even if the accused were to be said to have acted in self-defense it will have to be conducted that in all the circumstance he used excessive force... The accused had no justification whatsoever to produce a knife and stab the deceased. After all he had an upper hand in the fight.”).

¹⁶⁹ High Court of Malawi, *R v Kefa*, Criminal Appeal 68 of 2008, April 21, 2009. Available at <https://malawilii.org/akn/mw/judgment/mwhc/2009/48/eng@2009-04-21>.

¹⁷⁰ High Court of Malawi, *The State v Edward Longwe*, Murder Case 116 of 2018, para. 9. Available at <https://malawilii.org/akn/mw/judgment/mwhc/2018/1207/eng@2018-05->

A court is duty-bound to consider self-defense in a murder case even if the accused does not raise the defense themselves.¹⁷¹ When the defense is raised “and there is some evidence, it is for the prosecution to show that the defendant was not acting in self-defense.”¹⁷²

International best practices provide guidance on interpreting theories of “imminent harm” and self-defense. With respect to imminent harm, for example, a requirement that “a systematically abused woman.... wait until the commencement of an attack to defend herself is tantamount to sentencing her to murder” and the interpretation of such an imminence requirement “should extend to encompass that which is inevitable.”¹⁷³ In fact, in one such case, an Iranian woman, Razia Ebrahimi, killed her husband in his sleep in response to prolonged physical and psychological abuse.¹⁷⁴ She was subsequently prosecuted for and convicted of murder.¹⁷⁵ Several UN Special Rapporteurs stated that it was unreasonable to expect women like Ebrahimi, who have been subjected to “persistent domestic violence,” to wait to suffer grievous bodily harm before defending themselves.¹⁷⁶ And the European Court of Human Rights has held that “where there is a lasting situation of domestic violence, there can hardly be any doubt about the immediacy of the danger posed to the victim.”¹⁷⁷

10/source.pdf#:~:text=As%20regards%20self%2Ddefence%20the,defence%20of%20himself%20or%20a nother.

¹⁷¹ High Court of Malawi, Republic v Smart John Phiri, Homicide Case 28 of 2020, February 17, 2021. Available at <https://malawilii.org/akn/mw/judgment/mwhccrim/2021/1/eng@2021-02-17/source.pdf>.

¹⁷² High Court of Malawi, Ndozo v R, Criminal Appeal 106 of 1996, January 30, 1997. Available at <https://malawilii.org/akn/mw/judgment/mwhc/1997/1/eng@1997-01-30>.

¹⁷³ See Samantha Goosen, “Battered Women and The Requirement of Imminence in Self-Defence”, Potchefstroom Electronic Law Journal, 2013, pg. 78. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263141.

¹⁷⁴ American Bar Association Center for Human Rights & TrialWatch Initiative, “Kyrgyzstan v. Gulzhan Pasanova TrialWatch Fairness Report”, April 2022, pgs. 29-30. Available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/kyrgyzstan_vs_gulzhan_pasanova.pdf. See also Jan Arno Hessbruegge, “Human Rights and Personal Self-defense in International Law”, 2017, pg. 251.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ European Court of Human Rights, Tkheidze v Georgia, Application No. 33056/17, July 8, 2021, para. 49.

With respect to the reasonable belief requirement, theories of “battered woman syndrome” hold that “domestic violence victims exist in a state of learned helplessness,” are stuck in a cycle of abuse, and “can be triggered to violence by acts that might not provoke others.”¹⁷⁸ UN bodies have thus noted that a reasonable person standard in these cases should account for the impact of abuse on a woman’s psyche and the cumulative effect of a pattern of abuse on perceptions of harm and necessary force.¹⁷⁹ Similarly, the High Court of South Africa has stated that in determining reasonableness of belief, “the reasonable woman must not be forgotten in the analysis and deserves to be as much part of the objective standard of a reasonable person as does a reasonable man,” and that accordingly, the focus should not only be “on the specific form which the abuse may have over time and in particular circumstances, but pertinently on the impact of the abuse upon the psyche, make-up and entire world view of an abused woman.”¹⁸⁰

Alternatively, criminal justice experts have noted that courts evaluating reasonableness of belief should pay heed to the concrete dangers and obstacles faced by survivors subjected to prolonged violence: a high number of domestic violence survivors, for example, are ultimately murdered by their partners. The threat of violence is not illusory.¹⁸¹ Consequently, survivors who stay with their partners and subsequently take violent action may be responding not on the basis of battered women syndrome but on the basis of their immediate circumstances.¹⁸² Several UN Special Rapporteurs took this

¹⁷⁸ American Bar Association Center for Human Rights & TrialWatch Initiative, “Kyrgyzstan v. Gulzhan Pasanova TrialWatch Fairness Report”, April 2022, pg. 25. Available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/kyrgyzstan_vs_gulzhan_pasanova.pdf.

¹⁷⁹ Jan Arno Hessbruegge, “Human Rights and Personal Self-defense in International Law”, 2017, pg. 251; Samantha Goosen, “Battered Women and The Requirement of Imminence in Self-Defence”, Potchefstroom Electronic Law Journal, 2013, Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263141.

¹⁸⁰ Samantha Goosen, “Battered Women and The Requirement of Imminence in Self-Defence”, Potchefstroom Electronic Law Journal, 2013. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263141.

¹⁸¹ American Bar Association Center for Human Rights & TrialWatch Initiative, “Kyrgyzstan v. Gulzhan Pasanova TrialWatch Fairness Report”, April 2022, pg. 26. Available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/kyrgyzstan_vs_gulzhan_pasanova.pdf. See also Cheryl A. Terrance et al, “Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome”, North Dakota Law Review, 2012, pgs. 947-950; Paula Finley Mangum, “Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering”, Boston College Third World Law Journal, 1999, pgs. 607-609.

¹⁸² American Bar Association Center for Human Rights & TrialWatch Initiative, “Kyrgyzstan v. Gulzhan Pasanova TrialWatch Fairness Report”, April 2022, pg. 26. Available at

position in the case of Razia Ebrahimi mentioned above, stating that “[i]n domestic violence, the threat of violence by a persistently violent male partner has a cumulative impact as part of a pattern of behaviour and a woman’s violent response should be interpreted as a defense response to the cumulative acts of violence.”¹⁸³

Sentencing

The Malawi Criminal Procedure and Evidence Code provides a list of mitigating factors: “youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, or the fact that the [offender] has not previously committed an offence, or to the nature of the offence, or to the extenuating circumstances in which the offence was committed.”¹⁸⁴ Courts have agreed that the list of mitigating factors is not exhaustive and that they are obliged to “balance the mitigating and aggravating factors” and “consider the facts and circumstances of each case individually.”¹⁸⁵

According to best practices, the list of mitigating factors should include prior abuse. The Special Rapporteur on Violence Against Women, for example, has stated that mitigating circumstances should include, “situations of extreme abuse and violence” faced by female defendants,¹⁸⁶ while the Bangkok Rules state that mitigating circumstances should include “women’s...typical backgrounds.”¹⁸⁷

And Reprieve and other organizations in its report have stated that apart from the law itself Malawian courts in practice “rarely consider gender-based abuse as a mitigating factor during sentencing.”¹⁸⁸ This finding is reflected in the dataset, discussed below.

https://www.americanbar.org/content/dam/aba/administrative/human_rights/kyrgyzstan_vs_gulzhan_pasanova.pdf.

¹⁸³ Jan Arno Hessbruegge, “Human Rights and Personal Self-defense in International Law”, 2017, pg. 251.

¹⁸⁴ Malawi Criminal Procedure and Evidence Code, 1967, Section 337.

¹⁸⁵ High Court of Malawi, R v Jumbe, May 2, 2016. Available at <https://malawilii.org/akn/mw/judgment/mwhc/2016/500/eng@2016-05-02>.

¹⁸⁶ Human Rights Council, Report of the Special Rapporteur on Violence Against Women, its causes and consequences Mission to Tajikistan, U.N. Doc. A/HRC/11/6/Add.2, April 29, 2009, para. 37.

¹⁸⁷ Bangkok Rules, Rule 61.

¹⁸⁸ Reprieve, The Advocates for Human Rights, World Coalition Against the Death Penalty, “Malawi’s Compliance with the CEDAW Suggested List of Issues Relating to the Death Penalty”, 83rd Session of CEDAW, January 31, 2022, para. 19. Available at <https://worldcoalition.org/wp-content/uploads/2022/04/Malawi-CEDAW-Death-Penalty-FINAL.pdf>.

Interview Data

The interviews conducted for this study suggest that courts are not consistently applying international best practices to trials involving female survivors of gender-based violence who are alleged to have harmed their abusers.

To contextualize, a startling 27 women of the 63 women interviewed—nearly half of the female prisoners interviewed who were accused of a violent crime—were charged with an offense that reportedly occurred in connection to some form of gender-based violence, whether physical, sexual, economic, verbal, or emotional harm. Eighteen of these women were in pretrial detention and nine had been convicted, with an average sentence of 8.3 years in prison.¹⁸⁹

Fifteen interviewees—nearly a quarter of the female prisoners in Malawi accused of a violent crime in our dataset—specifically reported that they acted in self-defense. Eighty-six percent of these 15 women had been subjected to a prolonged history of gender-based violence, meaning that they were abused more than three times or for more than one year by the intimate partner they were accused of harming. Out of these 15 women, eight were in pretrial detention and seven were convicted, with the average sentence being 5.8 years.

The above numbers, along with the individual case studies, indicate that courts are not consistently considering the imminence and reasonableness requirements from the perspective of a survivor of gender-based violence (or taking gender-based violence into account at all).

Chimwemwe, for example, was convicted of manslaughter for killing her partner, George, and sentenced to five years in prison. According to Chimwemwe, during her three-year relationship, she was constantly abused physically and emotionally; her family and people in the village knew about George's abuse. Immediately prior to the incident leading to her arrest, George threatened to kill Chimwemwe's 1-year-old son and assaulted Chimwemwe with a hoe handle. In her caution statement, Chimwemwe testified that she then attacked George with an axe while he was sleeping because she feared him and because "each and every day after being intoxicated, he usually assaults me."¹⁹⁰ The charge sheet filed by the prosecution acknowledges this version of events. Even though

¹⁸⁹ The average sentence for women convicted in self-defense or GBV-related cases (8.3 years) appears lower than that of the overall group of 20 convicted women (12.5 years). This is primarily because only 3 out of the 9 self-defense/GBV cases involved murder or manslaughter charges, which typically carry longer sentences. When comparing sentences for murder or manslaughter across self-defense/GBV and non-GBV cases, the lengths are generally similar, with the exception of one manslaughter case.

¹⁹⁰ Translation of Caution Statement, Chimwemwe.

this act would have qualified as self-defense under a gender-sensitive interpretation of imminence and reasonableness standards, there was no indication from Chimwemwe's interview that this defense was considered by the court before Chimwemwe was convicted and imprisoned.

It also appears that courts are not consistently taking a history of abuse into account at sentencing, in contravention of international best practices.

Ruth, for example, pled guilty to killing her husband, Andrew, by hitting him with a shovel. She had been married for 16 years to Andrew, who, according to Ruth, repeatedly subjected her to physical abuse, infidelity, and further physical abuse when she confronted him about his infidelity. In one incident, Andrew burned Ruth's clothes and threatened to kill her if she returned to their home. Ruth stated that when she reported the matter to the police, Andrew was arrested but released on bail the very next day on the condition that he pay damages to Ruth—which he never did. Ruth gave the authorities two different versions of what happened on the day of Andrew's death: when interrogated without counsel, she did not mention self-defense, but in court represented by counsel, she said that she hit Andrew with the shovel because he lunged at her while drunk and angry. The court demonstrated gender sensitivity by recognizing that she had experienced a tumultuous marriage and divorce which could have affected her psychologically.¹⁹¹ However, despite this, the court did not cite the history of abuse as a mitigating factor, instead stating that since she is not a young person, she could not receive any further mitigation.¹⁹² Ruth was sentenced to 30 years in prison and has not yet filed an appeal.

C. ACCESS TO COUNSEL

Right to Free Legal Aid

Malawi is obligated to offer free legal aid to defendants in criminal cases in accordance with international and regional human rights treaties,¹⁹³ soft law instruments,¹⁹⁴ and its own domestic law.¹⁹⁵

¹⁹¹ Judgment, February 13, 2019.

¹⁹² *Id.*

¹⁹³ See ICCPR, Article 14 (3)(b); Banjul Charter, Article 7 (1)(c).

¹⁹⁴ African Fair Trial Guidelines; Lilongwe Declaration; Maputo Protocol.

¹⁹⁵ Constitution of Malawi, 1994, Section 42 (1)(c); The Malawi Legal Aid Act, 2010.

According to the UN Special Rapporteur on the Independence of Judges and Lawyers, legal aid “is a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy.”¹⁹⁶ Specifically for criminal offenses, “early access to legal aid for persons who have been arrested or detained ... is crucial in protecting an individual’s rights to a fair trial and due process and the right not to be arbitrarily detained, to ensure against ill-treatment by authorities, and to assist in navigating the justice system.”¹⁹⁷

Under Article 14(3)(d) of the International Covenant on Civil and Political Rights (“*ICCPR*”), all persons facing criminal charges have the right to defend themselves “through legal assistance of their own choosing” or to have “legal assistance assigned” in cases where the “interests of justice so require” and where the defendant does not have “sufficient means.” In interpreting Article 14(3)(d) of the *ICCPR*, the United Nations Human Rights Committee (“*Committee*” or “*UN Human Rights Committee*”) has stated that key factors for the “interests of justice” determination include the “the gravity of the offense”¹⁹⁸ and penalty. For instance, the Committee did not find a violation of the right to legal aid where the penalty for trespassing was merely a small fine¹⁹⁹ instead of imprisonment. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (“*UN Guidelines on Legal Aid*”), which were adopted by the UN General Assembly and are based on international best practices and standards drawn from the *ICCPR* and Universal Declaration of Human Rights (“*UDHR*”), state that legal aid should be provided wherever the criminal offence “is punishable by a term of imprisonment or the death penalty” and “at all stages of the criminal justice system.”²⁰⁰

¹⁹⁶ Lawyers Rights Watch Canada, “The Right to Legal Aid: A Guide to International Law Rights to Legal Aid”, 2015, pg. 4. Available at <https://www.lrwc.org/ws/wp-content/uploads/2014/09/International-Rights-to-Legal-Aid-w-clean-covers.pdf>.

¹⁹⁷ *Id.* pg. 5.

¹⁹⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 38.

¹⁹⁹ Human Rights Committee, *Lindon v Australia*, U.N. Doc. CCPR/C/64/D/646/1995, November 25, 1998, para. 6.5. See also Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 38 (With regards to capital punishment cases “it is axiomatic that the accused must be effectively assisted by a lawyer” and provided with legal aid “at all stages of the proceedings”); ACHPR, *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, Communication No. 231/99, 2000 (The African Commission for instance found a violation of the African Charter where legal aid was denied in a capital punishment case, because “the interests of justice demand it.”).

²⁰⁰ *UN Guidelines on Legal Aid*, Principle 3, para. 20.

The Committee has also emphasized, in its Concluding Observations, that the right to free legal assistance, much like the right to counsel, arises “at the moment of arrest.”²⁰¹

Like the ICCPR, Article 7 of the African Charter on Human and Peoples’ Rights (the “*Banjul Charter*”) also guarantees “the right to be defended by counsel.” In interpreting Article 7 of the Banjul Charter, the African Court on Human and Peoples’ Rights (“*AfCHPR*”) held in a case involving murder and robbery that “given the serious nature of the offence,” there was a legal obligation “in the interests of justice” to provide the criminal defendants “legal aid or at least inform them of their right to legal aid,” which “whether requested by the accused or not,” they were entitled to “at all stages of the proceedings.”²⁰² The AfCHPR, as affirmed in the Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa (“*African Fair Trial Guidelines*”), has thus stated that whether free legal counsel is in “the interests of justice” can be “determined by the seriousness of the offence and severity of the sentence.”²⁰³ Meanwhile the African Commission on Human and Peoples’ Rights (“*ACHPR*”) has emphasized that free legal aid should be extended to individuals “charged with *any crime* who cannot afford to pay the cost of being represented by a lawyer.”²⁰⁴ The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (“*Lilongwe Declaration*”), which has been endorsed by the ACHPR, states that “a person subject to criminal proceedings...should always be granted the right” to “legal assistance at all stages of the criminal process, including investigation, arrest, pre-trial detention, bail hearings, trials, appeals, and other proceedings.”²⁰⁵ Notably, Article 8(a) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“*Maputo Protocol*”) requires that women and girls be provided “effective access ... to judicial and legal services, including legal aid.”

²⁰¹ Human Rights Committee, Concluding Observations on Tajikistan, U.N. Doc. CCPR/CO/84/TJK, July 18, 2005, para. 11.

²⁰² AfCHPR, *Onyango Nyungi v. The United Republic of Tanzania*, Application No. 006/2013, March 18, 2016, paras. 168, 178, 181 (relying on a European Court of Human Rights decision that a potential sentence of 3 months was severe enough that the interests of justice demanded that legal aid should be provided).

²⁰³ See AfCHPR, *Alex Thomas v. The United Republic of Tanzania*, Application No. 005/2013, November 20, 2015, paras. 114, 120, 121; *African Fair Trial Guidelines*, Section H(b)(1).

²⁰⁴ International Commission of Jurists, “Pre-Trial Rights in Africa: A Guide to International Human Rights Standards”, September 2016, pg. 38. Available at <https://www.icj.org/wp-content/uploads/2016/10/Africa-Pretrial-rights-Publications-Reports-Thematic-reports-2016-ENG.pdf>.

²⁰⁵ Lilongwe Declaration, Section 3.

According to Section 42 (1) (c) of the Constitution of Malawi, every person “who is detained” has, “where the interests of justice so require, [the right] to be provided with the services of a legal practitioner of the State.” Under the Malawi Legal Aid Act, free legal aid should be provided to criminal defendants (whether detained or not) as required by the “interests of justice.” factors taken into consideration include the nature of the case; whether conviction of the offense would lead to loss of liberty, livelihood, or reputation; the nature of the defense required; and the personal circumstances of the accused.²⁰⁶ The Malawi Legal Aid Act further states that legal aid in criminal matters should be “available for suspects arrested or detained on criminal charges as early as the investigation stage.”²⁰⁷

With respect to determining whether an accused has “sufficient means,” it is within the discretion of States to establish “the financial threshold for the means test.”²⁰⁸ The UN Guidelines on Legal Aid instruct that even where a person exceeds the means test but still “cannot afford, or do[es] not have access to” a lawyer, they should be granted legal aid and even while eligibility for legal aid is being determined, “persons urgently requiring legal aid at police stations, detention centres or courts should be given preliminary legal aid.”²⁰⁹ Principle 3 of the UN Guidelines on Legal Aid attributes the responsibility of ensuring that those who cannot afford a lawyer and/or are vulnerable have access to legal aid to police, prosecutors and judges,²¹⁰ further stating that “an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid” should be undertaken to “avoid secondary victimization” of female survivors of violence.²¹¹

As noted above, under the Malawi Legal Aid Act, a person “shall be eligible for legal aid in criminal matters” if “it is in the interests of justice” and if “he has insufficient means” to

²⁰⁶ The Malawi Legal Aid Act, 2010, Section 18(2).

²⁰⁷ See Masauko Edwin Chamkakala and Bridget Uledi, “Malawi National Report”, Global Justice to Access Project. Available at <https://globalaccesstojustice.com/global-overview-malawi/#:~:text=Legal%20aid%20in%20criminal%20matters,early%20as%20the%20investigation%20stage>.

²⁰⁸ Lawyers Rights Watch Canada, “The Right to Legal Aid: A Guide to International Law Rights to Legal Aid”, 2015, pg. 48. Available at <https://www.lrwc.org/ws/wp-content/uploads/2014/09/International-Rights-to-Legal-Aid-w-clean-covers.pdf>.

²⁰⁹ UN Guidelines on Legal Aid, Guideline 1, para. 41.

²¹⁰ UN Guidelines on Legal Aid, Principle 3, para. 23.

²¹¹ UN Guidelines on Legal Aid, Guideline 9, para. 52.

obtain a private lawyer.²¹² An assessment of the means of an applicant requires taking into account “evidence of income and disposable assets of the applicant” and their spouse, or parents or guardians if they are younger than 21 years of age.²¹³

The above means that where individuals in Malawi accused of offenses carrying potential prison sentences cannot afford counsel, they are entitled to be provided with free legal assistance (apart from on appeal, which is discussed separately). As discussed in the sections that follow, the majority of incarcerated women interviewed did not have access to a lawyer throughout the criminal proceedings against them—in many cases because of their lack of financial means. This was true despite all 63 interviewees facing charges and sentences that should have warranted legal aid in the “interests of justice” under international and regional law and Malawi’s domestic obligations: 46 women were charged with murder, three with manslaughter, 10 with unlawful wounding, two with grievous bodily harm, one with murder and grievous bodily harm, one with unlawful wounding and grievous bodily harm, and one with an unknown charge (an offense against a person, which carries a prison sentence).²¹⁴ Out of all the women interviewed, only one woman indicated that she had the ability to afford a private lawyer at *any point* of the criminal proceedings.

As such, when the report discusses the right to counsel below as it applies to the interviewees, the analysis is informed by the fact that the women all qualified for legal aid. However, despite this, out of the 63 total women, only nine (or 14 per cent) indicated that they had access to a public defender during at least one stage of the proceedings.

Right to be Informed of Right to Counsel

The right to be informed of the right to counsel is enshrined in Malawi’s international and regional treaty obligations as well as the Constitution of Malawi. Under Article 14 (3) (d) of the ICCPR, the right to counsel includes the right “to be informed, if [the accused] does not have legal assistance, of this right.” The UN Human Rights Committee has established that “it is up to the State...to demonstrate that [a defendant] who [is] being tried for serious crimes...[is] adequately informed of his right to have counsel.”²¹⁵ According to the UN Basic Principles on the Role of Lawyers, adopted by the UN Congress on the Prevention of Crime and Treatment of Offenders, all persons should be

²¹² The Malawi Legal Aid Act, 2010, Section 18 (1)(a)(b).

²¹³ The Malawi Legal Aid Act, 2010, Section 21(1).

²¹⁴ Interviewee stated that she was charged with “injuring someone,” though she is not aware of the official charge against her. This was likely either a grievous bodily harm or unlawful wounding charge.

²¹⁵ Human Rights Committee, *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, March 31, 2016, para. 9.7.

“immediately informed...of their right to be assisted by a lawyer...upon arrest or detention or when charged with a criminal offence”²¹⁶ and “not later than forty-eight hours from the time of arrest or detention.”²¹⁷

As noted above, Article 7 (1)(c) of the Banjul Charter guarantees “the right to be defended by counsel.” The AfCHPR has found a violation of this article where the defendant was not informed of his right to counsel at the time of arrest.²¹⁸ Similarly, Section M(2)(b) of the African Fair Trial Guidelines stipulates that “anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and...the facilities available to exercise this right.” The Constitution of Malawi too states that that “every person who is detained” has the right to be informed of the right to counsel “promptly.”²¹⁹

The rationale behind this right has been summarized by a High Court in Malawi. As stated by the Court, “without knowledge of the existence of the right to legal representation, an accused who is otherwise capable of retaining the services of a legal practitioner of his or her choice may not do so,”²²⁰ which is particularly crucial given that some defendants are “ignorant of their rights and of the implications of the allegations or evidence placed against them.”²²¹ Being informed of the right to counsel and legal aid can also facilitate legal assistance for indigent defendants in a range of criminal cases, since “the eligibility for legal aid...is wide enough to cover almost all the criminal offences.”²²²

Only 33.3% of all the women interviewed as part of this study reported that they were informed of the right to counsel when arrested. As described below, the failure of

²¹⁶ UN Basic Principles on the Role of Lawyers, Principle 5.

²¹⁷ UN Basic Principles on the Role of Lawyers, Principle 7.

²¹⁸ AfCHPR, Abubakari Mohamed v. The United Republic of Tanzania, Application No. 007/2013, June 3, 2016, paras. 121, 122.

²¹⁹ Constitution of Malawi, 1994, Section 42 (1)(c).

²²⁰ High Court of Malawi, William Daudi v. The Republic, Constitutional Case No. 1 of 2018, May 13, 2019, pgs. 18-19. Available at <https://media.malawilii.org/files/judgments/mwhc/2019/188/2019-mwhc-188.pdf>.

²²¹ Dr. Ranier Grote, “Protection of Individuals in the Pre-Trial Procedure”, Human Rights Library. Available at <http://hrlibrary.umn.edu/fairtrial/wrtf-rg.htm>; See The Malawi Legal Aid Act, 2010, Section 18 (1)(a).

²²² Masauko Edwin Chamkakala and Bridget Uledi, “Malawi National Report”, Global Justice to Access Project. Available at <https://globalaccesstojustice.com/global-overview-malawi/#:~:text=Legal%20aid%20in%20criminal%20matters,early%20as%20the%20investigation%20stage.>

authorities to inform interviewees of their right to legal counsel and the corresponding lack of legal assistance throughout critical stages of the first instance proceedings had a significant impact on their ability to mount an effective defense.

In light of the above, Malawi has repeatedly violated the right to inform accused persons of their right to counsel upon arrest, as enshrined in its international and regional treaty obligations as well as in Malawi's Constitution.

Right to Counsel During Interrogation, Investigation, and Pretrial Proceedings

Defendants must be granted “prompt access to counsel”²²³ at all stages of criminal proceedings, including during the initial detention and investigation period and through further pretrial proceedings.

The UN Human Rights Committee has stated that “all persons who are arrested must immediately have access to counsel.”²²⁴ The Committee has elaborated that the absence of counsel during an interrogation endangers the right to a defense under Article 14(3)(b) of the ICCPR.²²⁵ In *Kelly v. Jamaica*, for example, the Committee found a violation of Article 14(3)(b) where police officers ignored the complainant's request to speak to a lawyer for the first five days he was in custody, during which he was interrogated.²²⁶ The UN Working Group for Arbitrary Detention (“UNWGAD”) has found violations of the right to counsel where the defendant was subjected to “interrogation and pretrial detention” without a lawyer present, remarking that this led to the defendant self-incriminating.²²⁷ Notably, the Human Rights Committee has established that the right to counsel is

²²³ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2017, para. 34.

²²⁴ Human Rights Committee, Concluding Observations of the HRC on Georgia, U.N. Doc. CCPR/C/79/Add.74, April 9, 1997, para. 28.

²²⁵ See Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.5; Human Rights Committee, *Lyashkevich v. Uzbekistan*, U.N. Doc. CCPR/C/98/D/1552/2007, May 11, 2010, para. 9.4; European Court of Human Rights, *John Murray v. UK*, Application No. 18731/91, February 8, 1996, para. 66.

²²⁶ Human Rights Committee, *Kelly v. Jamaica*, U.N. Doc. CCPR/C/57/D/537/1993, July 17, 1996, para. 9.2.

²²⁷ Working Group on Arbitrary Detention, Opinion No. 51/2017, concerning Patomwongfangam (Thailand) (advance edited version), U.N. Doc. A/HRC/WGAD/2017/51, August 23, 2017, paras. 45–46. See also Working Group on Arbitrary Detention, Opinion No. 71/2019, concerning Al-Nukheifi (Saudi Arabia) (advance edited version), U.N. Doc. A/HRC/WGAD/2019/71, November 21, 2019, para. 88.

applicable to not only interrogations but also other pre-trial procedures, such as preliminary hearings, including bail hearings,²²⁸ and identification parades.²²⁹

Like the ICCPR, Article 7(1)(c) of the Banjul Charter provides for the right to defense, which encompasses access to counsel. The AfCHPR has specifically noted that “the person held in custody has the right to be assisted by a lawyer from the outset of such a measure and during interrogations.”²³⁰ According to the African Fair Trial Guidelines, the right to counsel “begins when the accused is first detained or charged.”²³¹ In one case, the AfCHPR recognized a “situation of extreme gravity and urgency, as well as a risk of irreparable harm” after the ACHPR raised concerns about a defendant who faced “an imminent trial ... following a period of arbitrary detention based on interrogations carried out in the absence of a lawyer.”²³² The AfCHPR held that “interrogation without appropriate due process safeguards,” including “refusing the detainee access to a lawyer,” violated the right to counsel under Article 7 of the Banjul Charter.²³³ The ACHPR has “clarified that the right to legal assistance applies upon arrest, before and during questioning, and during preliminary investigation” in the course of the pre-trial proceedings “as well as throughout the proceedings.”²³⁴

²²⁸ Human Rights Committee, *Clive Johnson v. Jamaica*, U.N. Doc. CCPR/C/64/D/592/1994, November 25, 1998, para.10.2. *See also* Human Rights Committee, *Wright v. Jamaica*, U.N. Doc. CCPR/C/55/D/459/1991, October 27, 1995, para.10.2; Human Rights Committee, *Levy v. Jamaica*, U.N. Doc. CCPR/C/64/D/719/1996, November 25, 1998, para.7.2.

²²⁹ Human Rights Committee, *Pustovalov v. Russia*, U.N. Doc. CCPR/C/98/D/1232/2003, March 23, 2010, paras. 2.3, 6.4–6.5, 8.4. *See* Catriona Havard and Amina Memon, “Facial Recognition From Identification Parades”, in *Craniofacial Identification*, Cambridge University Press, May 5, 2012 (An identification parade is one “of the most common means of identifying a perpetrator of a crime and can be powerful evidence in securing convictions in criminal cases. In an identification parade (also known as a line-up) a suspect is placed amongst a number of similar-looking people (foils) and the task for the witness is to either select the person they recognise as being the culprit, or state the culprit is not there.”).

²³⁰ AfCHPR, *African Commission on Human and Peoples’ Rights v. Libya*, Application No. 002/2013, June 3, 2016, para. 95.

²³¹ African Fair Trial Guidelines, Principle N(2).

²³² AfCHPR, *African Commission on Human and Peoples’ Rights v. Libya*, (provisional measures), March 15, 2013, para. 3.

²³³ AfCHPR, *African Commission on Human and Peoples’ Rights v. Libya*, Application No. 002/2013, June 3, 2016, paras. 84, 93.

²³⁴ International Commission of Jurists, “Pre-Trial Rights in Africa: A Guide to International Human Rights Standards”, September 2016, pg. 34. Available at <https://www.icj.org/wp-content/uploads/2016/10/Africa-Pretrial-rights-Publications-Reports-Thematic-reports-2016-ENG.pdf>.

The African Fair Trial Guidelines too state that any person “arrested or detained shall have prompt access to a lawyer” and is not obligated to “participate in any interrogation without his or her lawyer present”²³⁵ while the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa (“*Luanda Guidelines*”) state that people subjected to police questioning, irrespective of whether they are detained or not, are entitled to the assistance of counsel.²³⁶ As discussed above, given the severity of their crimes and the potential sentences, all of the interviewees had not just the right to counsel but the right to free legal aid under both the ICCPR and the African Charter.

As also noted above, Malawian law guarantees the right to counsel and requires that where accused are indigent and the “interests of justice” so require, they are entitled to free legal assistance.²³⁷ This right to free counsel extends to pre-trial proceedings such as “criminal investigations,” where individuals are “arrested and held in custody at a police station, prison or other place of detention,” and generally where “criminal proceedings have been instituted.”²³⁸

Access to counsel in the period after arrest is crucial since it can “act as a check on improper investigative methods used by the prosecution”²³⁹ and can be “a key safeguard” for “the prevention of torture and ill-treatment” for those in pre-trial detention.²⁴⁰ Furthermore, legal representation “at the very outset of the criminal process ... guard[s] against coerced confessions or uninformed waivers of rights”²⁴¹ and ensures that the “defendant can understand his rights, including the right to an interpreter and the right to remain silent.”²⁴² The African Fair Trial Guidelines emphasize that the right to counsel is vital in cases involving female accused, stating that an essential element of the right to a

²³⁵ African Fair Trial Guidelines, Principle M(2)(f).

²³⁶ Luanda Guidelines.

²³⁷ See The Malawi Legal Aid Act, 2010, Section 18 (1)(a)(b); Constitution of Malawi, 1994, Section 42 (1)(c) (Every person “who is detained” has “where the interests of justice so require, [the right] to be provided with the services of a legal practitioner of the State”).

²³⁸ See The Malawi Legal Aid Act, 2010, Sections 17 and 18.

²³⁹ Dr. Ranier Grote, “Protection of Individuals in the Pre-Trial Procedure”, Human Rights Library. Available at <http://hrlibrary.umn.edu/fairtrial/wrtf-rg.htm>.

²⁴⁰ Penal Reform International, “FactSheet Pre-trial Detention: Addressing Risk Factors to Prevent Torture and Ill-Treatment”, 2015, pg. 7. Available at <https://cdn.penalreform.org/wp-content/uploads/2016/01/factsheet-1-pre-trial-2nd-ed-v5.pdf>.

²⁴¹ Amal Clooney and Philippa Webb, “The Right to A Fair Trial In International Law”, 2022, pg. 328.

²⁴² *Id.* pg. 373.

fair trial is “respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as...accused.”²⁴³

During interviews with 63 incarcerated women across nine prisons in Malawi, however, **none** of the women interviewed affirmatively indicated that they had access to counsel during the investigative stage of proceedings. In many cases, this was due to a lack of awareness about their right to counsel, financial constraints preventing them from hiring a lawyer, and/or an insufficient number of public defenders available to provide legal representation. This greatly impacted their ability to mount a defense.

For instance, one of the interviewees, Chimwemwe, a then 39-year-old mother of five, was reportedly assaulted in October 2015 by her “excessively drunk” partner, who also threatened to kill her one-year-old son with a hoe and axe. She stated that she had been frequently beaten and raped by her partner, who was often intoxicated, and that her family and other people in her village knew about his abuse. The night of the October 2015 incident, during which Chimwemwe shouted for help but found none, Chimwemwe struck her partner with an axe, stating that she was fearful of the assaults she was subjected to “each and every day” while he was intoxicated.²⁴⁴ According to Chimwemwe after she was arrested the next day, the police questioned her without counsel. During the interrogation the police obtained a written confession from her which they characterized as her “voluntarily [admitting] [to] the charge.” Chimwemwe also stated that she did not receive medical examination despite her injuries, which a lawyer considering a self-defense argument would have pursued.

In the case of Ruth, whose husband had reportedly abused her for a significant part of their 16-year marriage, there were multiple accounts of the events leading to her husband’s death and Ruth’s ensuing arrest. The account that Ruth gave to police during her initial interrogation while she was unrepresented by counsel did not involve self-defense, differing from the account she later gave in court while represented by counsel, which did involve self-defense. Ruth was ultimately convicted and sentenced to 30 years’ imprisonment in February 2019 and has been serving her sentence since.²⁴⁵ The court heavily relied on the “police formal charge which shows that Ruth admitted to the murder” (the statement in the absence of counsel), finding that the “new version of the convict does not just add up.”²⁴⁶

²⁴³ African Fair Trial Guidelines, Section A(2)(d).

²⁴⁴ Translation of Caution Statement by Ruth.

²⁴⁵ Judgment, February 13, 2019.

²⁴⁶ *Id.*

In another case, Grace, a then 22-year-old mother, was arrested for the murder of her child. According to Grace, her husband Emmanuel who had a history of physically abusing Grace attacked her when she was carrying her child on her back, resulting in her child getting injured and passing away 3 days later. Grace was arrested a day after her child died and questioned by the police without counsel—she specified that she could not afford a lawyer. Grace recounted that at the time of her arrest, she was experiencing memory loss because of the abuse to which she had been subjected and struggled to recall details about the incident. As of the interview in August 2023, she had spent 14.2 months in detention without access to a lawyer. She was released on bail in late 2023.

As demonstrated by the above examples, the presence of counsel during interrogations can help ensure that women who have faced gender-based violence in connection with the incident leading to arrest are able to fully relay their stories to the police; can serve as a procedural safeguard that prevents potentially false or coerced confessions; can ensure that key evidence such as medical examinations are obtained in a timely manner; and can help mitigate the risk of unjust prison sentences or plea deals.

Beyond arrest, the women interviewed likewise did not have access to counsel during pretrial proceedings. Of the 27 women who reported being arrested for or charged with a violent crime in relation to an instance of gender-based violence, only 14.8% reported having access to counsel during pretrial proceedings. Of the larger dataset of 63 women accused of violent crimes, only 14.3% women reported having access to counsel in pretrial proceedings. Lack of financial resources was one of the main reasons for this; 42.9% of all the women interviewed reported being unable to afford counsel at some point during the criminal justice process and at the pretrial stage.

The accounts of female detainees interviewed for this report, specifically those incarcerated for violent offenses for defending themselves against gender-based violence, demonstrate the impact that the presence of counsel can have on pretrial proceedings and pretrial detention. Charity, for example, was 29 years old when her husband, who had a history of abusing her, attempted to stab her in her pregnant stomach. According to Charity, she killed him in self-defense and was not informed of her right to counsel during her arrest or questioning: indeed, she was only informed of her right to a lawyer at her first pre-trial hearing, and unrepresented by counsel, her bail hearing was set for more than a year later. Charity wound up spending nearly 1.7 years in pre-trial detention before being released, and only after she had finally been provided a legal aid lawyer to represent her in her bail hearing.

Another interviewee, Agness, likewise recounted that she did not have counsel at her initial remand hearing. Consequently, she was placed in pre-trial detention for over 10 months before being granted bail with the help of a legal aid attorney. Agness had been a caretaker for the children of her sister, who had died, as well as for her mother, who had epilepsy. At the time of her interview, she expressed concern for her future and family.

The interviews and data reveal that incarcerated women in Malawi have not been consistently provided with counsel, specifically during pre-trial proceedings, which has at times led to inculpatory statements during interrogation and lengthy periods of pre-trial detention. This contravenes their right to counsel under international and regional treaty obligations, as well as the Constitution of Malawi and under domestic law.

Right to Counsel During Trial

The right to defend oneself through counsel, as enshrined in Article 14 (3) (d) of the ICCPR and Article 7 (1) (c) of the Banjul Charter, “clearly applies at the trial stage in a criminal case.”²⁴⁷ The UN Human Rights Committee, for example, has stated that the right to counsel “often determines” whether an accused person can “participate” in criminal proceedings “in a meaningful way,”²⁴⁸ thus emphasizing that the right is inherent throughout “the proceedings that culminated in [the defendant’s] conviction and sentencing.”²⁴⁹ The African Fair Trial Guidelines likewise provide that “the essential elements of a fair hearing include ... an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings.”²⁵⁰ And as discussed above, where a defendant facing a prison sentence is unable to procure counsel due to lack of finances, Malawi’s international and regional treaty obligations and domestic law require the provision of free legal aid.

It is vital that accused persons have access to counsel during a trial, because only with access to counsel can an accused robustly exercise his or her other fair trial rights. These include, but are not limited to, the right to call and examine witnesses, the right to raise an effective defense, the right to have evidence elicited by torture or compulsion excluded by the court, the right to be present at trial, and overall, the right to equality before the law and courts.²⁵¹ Being represented by counsel at trial can “prevent miscarriages of justice,” particularly given that a state “typically [has] greater resources than [an accused] does,” and can also prevent an accused from being “convicted simply because they lack the

²⁴⁷ Amal Clooney and Philippa Webb, “The Right to A Fair Trial In International Law”, 2022, pg. 340.

²⁴⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 10.

²⁴⁹ See, e.g., Human Rights Committee, Rodríguez Orejuela v. Colombia, U.N. Doc. A/57/40, July 23, 2002, para. 7.3.

²⁵⁰ African Fair Trial Guidelines, Section A(2)(f).

²⁵¹ Amnesty International, “The Right to a Fair Trial”, 2002. Available at <https://www.amnesty.org/en/wp-content/uploads/2021/06/pol300012002en.pdf>.

tools to establish their innocence” or “understand complex legal procedures and precedents.”²⁵²

Of the 20 women interviewed from the larger dataset whose cases went to trial or plea hearings, only 25% had access to counsel during trial or the plea hearing.²⁵³ It is worth noting, however, that for the subset of women sentenced, all of those who were charged with murder and manslaughter reported having counsel *during trial*. On the other hand, with respect to interviewees who reported being arrested or charged in connection to an instance of gender-based violence, only three out of the nine women convicted indicated that they had access to counsel during the trial or plea stage. The lack of access to counsel appeared to severely impact their experiences of their respective trials and their ability to exercise their rights.

For instance, only 20% of the women who were convicted and reportedly did not have access to counsel at trial indicated that they were provided the opportunity to tell their story. Lack of access to counsel also led to confusion around plea deals. Twelve out of the 20 women convicted took a plea deal. 75% of women who did have lawyers said they understood the plea deal (3 out of 4 women who did have lawyers) while only 40% of women who did not have lawyers said they understood the plea deal (2 out of 5 women).²⁵⁴

The extent to which the absence of counsel at trial or in plea hearings can impact the process was reflected in interviewees’ accounts. For example, [Mphatso](#), a 30-year-old mother of four at the time of her interview, reported being arrested after she stabbed a male sex client, Peter, with a bottle in self-defense during a physical altercation. Mphatso recounted that she did not have a lawyer during the trial stage. At the first hearing, the judge asked her if she pled guilty or not guilty. [Mphatso](#) stated that she did not understand the charges but pled guilty nonetheless. She also reported being in physical pain at this hearing because of the stitches in her mouth. Ultimately, absent counsel who could help explain the charges against her, assess and request evidence regarding the circumstances of the incident, and raise the legal arguments of self-defense or mitigation at sentencing, Mphatso was convicted and sentenced to 3 years plus hard labor in prison.

During her interview, which took place about a year after her conviction, Mphatso stated that she “[d]o[es] not understand what happened” because both she and Peter were

²⁵² Amal Clooney and Philippa Webb, “The Right to A Fair Trial In International Law”, 2022, pg. 328.

²⁵³ The five women who stated that they did have counsel during trial and plea hearings were charged for manslaughter and homicide. All the women who indicated that they did not have counsel during trial and plea hearings were charged with unlawful wounding and grievous bodily harm.

²⁵⁴ It could not be determined whether three of the women had a lawyer during plea proceedings.

injured, yet she is the only one in prison. She asserted that she was only trying to “defend herself” and feels “injustice happened” and that the authorities “infringed her rights.”

In another case, Helen stated that she had stabbed her partner, Victor, after he accosted and grabbed her at her workplace, demanding to see his daughter. As detailed by Helen, Victor had previously abandoned her and her children, leaving them without money or food. According to Helen, she was immediately arrested for unlawful wounding and was not informed of her right to counsel during arrest, investigation or trial, where the only testimony she gave was that she had four children who needed her and a poor family who could not step in to help. Helen stated that no witnesses appeared at trial on her behalf. Unrepresented by counsel, who could have raised her prolonged history of abuse to argue for a lesser sentence or raised the injuries she reportedly had at the time of arrest to argue self-defense, Helen was sentenced to 2 years.

The interviews of incarcerated women in Malawi reveal that they overwhelmingly did not receive access to counsel during trial, often preventing them from mounting an effective defense. This violated Malawi’s obligations under international and regional human rights treaties as well as its domestic laws.

Right to Counsel During Appeal

Under Article 14(5) of the ICCPR, “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.” The UN Human Rights Committee has established that this “guarantee is not confined only to the most serious offences.”²⁵⁵ According to the Committee, the “right to counsel applies during appeals proceedings following a conviction, regardless of whether the appeal relates to questions of fact and evidence or simply questions of law.”²⁵⁶

Although the ICCPR clearly enshrines the right to counsel on appeal, it does not guarantee the right to free legal assistance on appeal excepting limited situations. The UN Human Rights Committee, for example, has specified that defendants appealing against the imposition of the death penalty must be provided with free legal assistance.²⁵⁷

²⁵⁵ Human Rights Committee, General Comment No. 13, U.N. Doc. HRI/GEN/1/Rev.1, April 13, 1984, para. 17.

²⁵⁶ Amal Clooney and Philippa Webb, “The Right to A Fair Trial in International Law”, 2022, pg. 341. See Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, paras. 38, 51; Human Rights Committee, *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, March 31, 2016, para. 9.6.

²⁵⁷ See Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 10; Human Rights Committee, *Currie v. Jamaica*, U.N. Doc. CCPR/C/50/D/377/1989, March 31, 1994, para. 13.4; Human Rights Committee, *Shaw v. Jamaica*, U.N. Doc. CCPR/C/62/D/704/1996,

Regionally, Article 7(1)(a) of the Banjul Charter stipulates that the right to have one's "cause heard" includes "the right to an appeal to competent national organs." The African Fair Trial Guidelines establish that the right to counsel "applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings."²⁵⁸ The ACHPR has also stated that the right to counsel applies "at every stage of a criminal procedure," including "investigation, periods of administrative detention and during judgment by a trial and appellate court."²⁵⁹ African bodies, however, have not guaranteed the right to legal assistance on appeal.

Domestically, the Constitution of Malawi provides that every "sentenced prisoner" has the right to counsel,²⁶⁰ along with the right to "have recourse by way of appeal or review to a higher court."²⁶¹ Under the Malawi Legal Aid Act, accused persons are entitled to free legal assistance on appeal where "in the interests of justice," with relevant factors including the nature of the case; whether conviction of the offense would lead to loss of liberty, livelihood, or reputation; the nature of the defense required; and the personal circumstances of the accused, such as their inability to understand the proceedings or state their own case.²⁶² Similarly, a person is eligible for legal aid if they have "insufficient means" to obtain a lawyer, an assessment of which is made by the Director of the Legal Aid Bureau.²⁶³ One High Court in Malawi has found that "it is the fundamental right of every accused person to have recourse to legal representation at every stage of a criminal allegation against him or her."²⁶⁴ Thus, Malawi's domestic laws appear to provide for the right to free legal assistance at the appellate stage where an accused has received a prison sentence and has insufficient means to get legal representation.

June 4, 1998, para. 7.6; Human Rights Committee, *Taylor v. Jamaica*, U.N. Doc. CCPR/C/60/D/707/1996, June 14, 1996, para. 8.2; Human Rights Committee, *Kennedy v. Trinidad and Tobago*, U.N. Doc. CCPR/C/74/845/1998, March 26, 2002, para. 7.10.

²⁵⁸ African Fair Trial Guidelines, Section N(2)(c).

²⁵⁹ AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, Application No. 002/2013, June 3, 2016, para. 93.

²⁶⁰ Constitution of Malawi, 1994, Section 42 (1)(c).

²⁶¹ Constitution of Malawi, 1994, Section 42 (2)(f)(viii).

²⁶² The Malawi Legal Aid Act, 2010, Section 18(2).

²⁶³ The Malawi Legal Aid Act, 2010, Section 18(1) (b); Section 21.

²⁶⁴ High Court of Malawi, *Republic v. Lemani*, Judgment, June 1, 2000. Available at <https://malawilii.org/akn/mw/judgment/mwhc/2000/38/eng@2000-06-01>.

Access to counsel at all stages of the proceedings, including on appeal, is “the best means of legal defense against infringements of human rights and fundamental freedoms”²⁶⁵ and, according to the UN Human Rights Committee, “often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.”²⁶⁶ Ancillary rights provided at the appellate stage would be meaningless in most cases without access to counsel. Among other things, the ACHPR has noted that the accused has the right to access and assess the evidence used to make the appellate decision²⁶⁷ while the UN Human Rights Committee has stated that the right to an appeal means that the defense must be given access to the first instance judgment so as to have adequate facilities to prepare a defense²⁶⁸—the presence of counsel is essential in ensuring that defendants can effectively exercise these rights as part of the right to appeal.

However, of the 20 convicted women interviewed from the larger dataset, only half affirmatively indicated that they knew of their right to appeal their convictions. Furthermore, **not a single woman** appealed her sentence, even though the average sentence was 12.5 years. While interviewees were not specifically asked why they did not appeal, many indicated that they did not have access to a lawyer during the first instance criminal proceedings because of lack of finances, so presumably faced the same issue on appeal. Notably, under Malawian criminal law, defendants on appeal can raise the legal defense of self-defense or request leniency in sentencing by arguing that any marital or domestic abuse they faced qualifies as a mitigating circumstance.²⁶⁹

The interviews demonstrate how deprivation of the right to appeal due to lack of counsel can have a staggering impact. For instance, despite being aware of her right to appeal, **Chikondi** had not yet appealed at the time of her interview because she did not have access to counsel. An appeal could potentially lead to a reduction in her 25-year

²⁶⁵ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(2)(a).

²⁶⁶ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 10.

²⁶⁷ African Commission Principles, Principle N(3)(e)(vii).

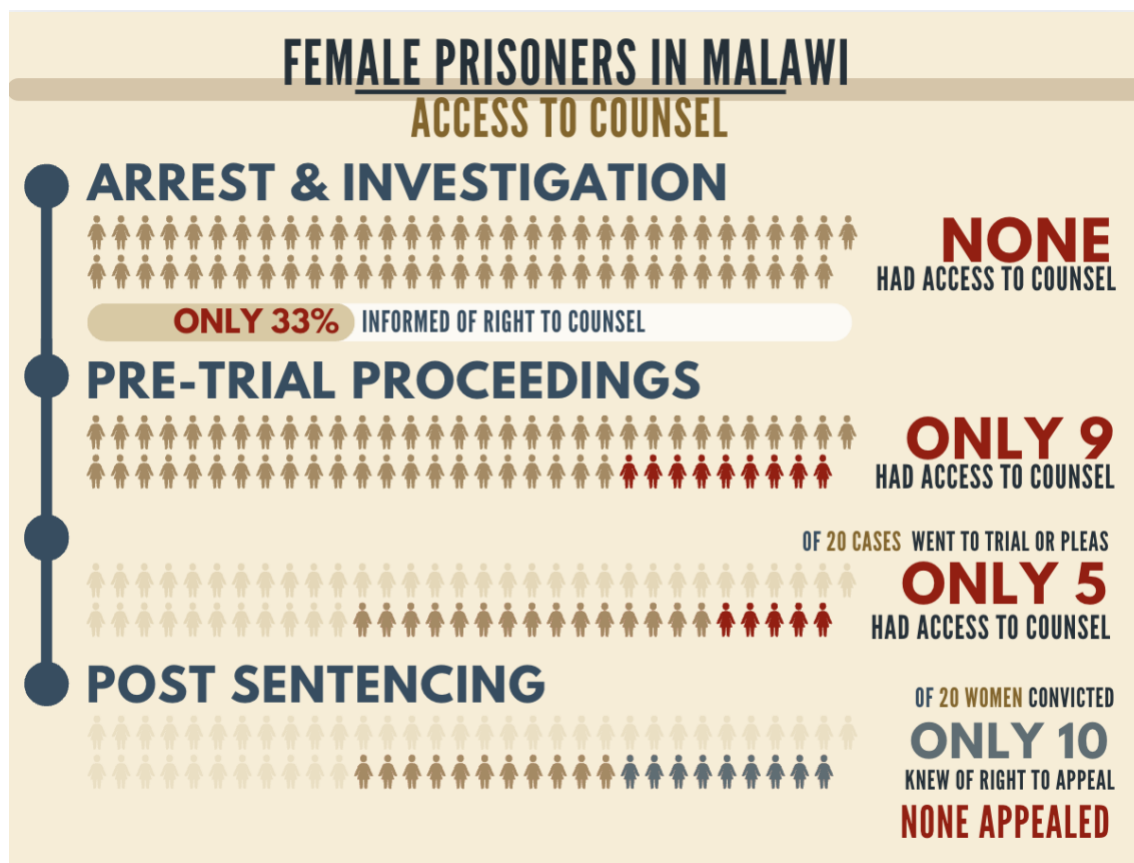
²⁶⁸ See ICCPR, Art. 14(3)(b); Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, paras. 33, 49. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en; Human Rights Committee, *Mennen v. the Netherlands*, U.N. Doc. CCPR/C/99/D/1797/2008, August 24, 2010, para. 8.2.

²⁶⁹ See Malawi Penal Code, 1930, Section 17; Malawi Criminal Procedure and Evidence Code, 1967, Section 337.

sentence, given the mitigating circumstances in her case, which include repeatedly being subjected to physical abuse during her marriage by her husband, and that she had stabbed him during an incident where he was beating her.

In another case, Rabecca, who was accused and convicted of unlawful wounding in late 2022, states that since her conviction, she had seen her children only a handful of times, that she was “very heartbroken” about the situation but did not have the financial means to appeal. Counsel during an appeal could help highlight any procedural flaws during her trial since absent counsel, as recounted by Rabecca, she “did not have [the] opportunity to explain her side of the story or present a defense” or “present any witnesses,” leading to a 7-year sentence that was later reduced to 3 years.

As noted above, the right to appeal is enshrined in the Constitution of Malawi, domestic laws, and international and regional human rights treaties, as is the right to counsel on appeal. Although the right to free legal assistance on appeal is not part of international and regional guarantees, it appears to be required under Malawian law. As such, the fact that not one of the 20 convicted female interviewees appealed is striking, revealing a breakdown in the criminal justice system that results in the most vulnerable criminal defendants having significantly reduced ability to protect their right to a fair trial.



D. PRETRIAL DETENTION: LEGAL STANDARDS AND PRACTICE

Failure to Comply with Domestic Procedural Rules

Article 9(1) of the ICCPR provides that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Interpreting this principle, the UN Human Rights Committee has stated that Article 9 “also requires compliance with domestic rules.”²⁷⁰ In *Indira Umarova v. Uzbekistan*, the Committee found that the detention of the author's husband in a temporary holding cell for fifteen days, in violation of criminal procedure provisions that required transfer from the temporary holding cell within 72 hours, violated his rights under Article 9(1).²⁷¹

Similarly, Article 6 of the Banjul Charter states that “no one may be arbitrarily arrested or detained” or “deprived of his freedom except for reasons and conditions previously laid down by law.” The ACHPR has stated that the “*lawfulness* and necessity of holding someone in custody must be determined by a court or other appropriate judicial authority” and should be in compliance with the African Fair Trial Guidelines.²⁷² The African Fair Trial Guidelines in turn state that “detention...shall only be carried out strictly in accordance with the provisions of the law.”²⁷³

The Constitution of Malawi states that every person “arrested for, or accused of, the alleged commission of an offense” has the right “to be released from detention, with or without bail unless the interests of justice require otherwise.”²⁷⁴ Malawi’s Criminal Procedure and Evidence Code provides for specific “lawful custody” time limits for all cases triable by subordinate courts or the High Court. For example, for all cases before

²⁷⁰ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 23, 36.

²⁷¹ Human Rights Committee, *Umarova v. Uzbekistan*, U.N. Doc. CCPR/C/100/D/1449/2006, October 19, 2010, para. 8.4 (the accused “was kept in a temporary holding cell for fifteen days in violation of the domestic Criminal Rules of Procedure, which require transfer from a temporary holding cell within a period of 72 hours. The State party has not refuted this allegation. Accordingly, the Committee concludes that the facts as presented reveal a violation of the author’s husband’s rights under article 9, paragraph 1, of the Covenant”).

²⁷² ACHPR, *Zegveld and Ephrem v. Eritrea*, Communication No. 250/2002, November 20, 2003; See also “Human Rights and Arrest, Pre-Trial Detention and Administrative Detention”, Human Rights Library. Available at <http://hrlibrary.umn.edu/monitoring/adminchap5.html>.

²⁷³ African Fair Trial Guidelines, Principle M(1)(b).

²⁷⁴ Constitution of Malawi, 1994, Section 42(2)(e).

the subordinate courts, including those involving alleged grievous bodily harm and unlawful wounding, an individual can only be held in pre-trial detention for 30 days.²⁷⁵ This time limit begins 48 hours after arrest and concludes once trial commences.²⁷⁶

For those more serious crimes triable by the High Court, including manslaughter and murder, cases must first be committed to the High Court. There is a separate time limit for how long a person can be held in detention while these committal proceedings are pending, which is 30 days. After the person has been committed, another custody time limit kicks in. The maximum time an accused person can be held in detention after their case has been committed to the High Court is 60 days until commencement of trial. Therefore, the total custody time limit for those accused of offenses triable in the High Court is 90 days.²⁷⁷ For both criminal cases before High Court and subordinate courts, the prosecution may ask for an extension of the custody time limit, which is only allowed “if there is good and sufficient cause.” Any extension period is limited to 30 days.²⁷⁸

Many of the female interviewees in Malawi’s prisons were subjected to pre-trial detention periods far exceeding the custody time limits prescribed in domestic law. Out of the total dataset, 47 female prisoners faced murder charges and three faced manslaughter charges, offences triable before the High Courts—but 83% of these female detainees were kept in pre-trial detention exceeding the 90-day custodial limit. Similarly, 13 detainees were charged with unlawful wounding or grievous bodily harm and 1 with an unclear charge (not involving death, so likely unlawful wounding or grievous bodily harm), offenses triable by subordinate courts—but 38% were kept in pre-trial detention exceeding the 30-day custodial limit. In fact, the average length of time spent by all interviewees in pre-trial detention is a staggering 13.7 months and the average pre-trial

²⁷⁵ Malawi Criminal Procedure and Evidence Code, 1967, Section 161D (“Custody time limit for offences triable in subordinate courts,” states that “the maximum period that a person accused of an offence triable in a subordinate court may be held in lawful custody pending commencement of his trial in relation to the offence shall be thirty days”).

²⁷⁶ The pretrial detention limit starts running 48 hours after arrest, even if the person has not been before a judge (i.e., arraignment). See Malawi Criminal Procedure and Evidence Code, 1967, Section 161C (“for the purposes of this Part, time shall run upon the expiry of forty-eight hours after the arrest of an accused person, or if the period of forty-eight hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry”).

²⁷⁷ Malawi Criminal Procedure and Evidence Code, 1967, Section 161 E (“maximum time period that a person accused of an offense triable in the High Court may be held in lawful custody pending his committal for trial...shall be thirty days”) read with Section 161 F (“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... shall be sixty days.) Therefore, the total custody time limit for those accused of offenses triable in the High Court is 90 days.

²⁷⁸ Malawi Criminal Procedure and Evidence Code, 1967, Section 161 H.

detention length for the 27 women who were incarcerated in relation to gender-based violence was 11.9 months. Notably, for the 27 women who were incarcerated in relation to gender-based violence, 73% were in pre-trial detention longer than the custodial time limit prescribed for their criminal offences at the time of the interviews, which is particularly concerning given that these women were survivors of gender-based violence.

One of the interviewees who had survived gender-based violence, Agness, was kept in police custody for about a week on murder charges before going before a court,²⁷⁹ following which she was transferred to pretrial detention. Malawi's laws, however, stipulate that police custody should end after 48 hours. Agness reported that at one point during police custody she "started crying for help and insisted that they take [her] to court." After she finally appeared in court, she spent over 10 months in pre-trial detention, long beyond the 90-day custodial limit prescribed in law for serious crimes (like murder) triable by the High Court.

Another interviewee, Christina, a 69-year-old woman accused of murder, states she was beaten by the police at the time of arrest, and held in pre-trial detention for 6 years before being sentenced. In another case, Chikondi, a mother of 4 children and a survivor of gender-based violence, was arrested for murder and kept in pretrial detention for approximately a year, far beyond Malawi's maximum time limit of 90 days in pretrial detention.

The above reflects Malawi's consistent violation of the right to be free from arbitrary detention, as guaranteed by both international and regional treaties as well as domestic law.

Disproportionate and Unnecessary Detention

Even if domestic law permits the detention of an accused person for a certain time period, the authorities must also show that detention is necessary and reasonable. With respect to pre-trial detention, Article 9(3) of the ICCPR states that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody."²⁸⁰ The UN Human Rights Committee has explained that "[d]etention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or

²⁷⁹ Agness was arrested on August 19, 2022, and remanded on August 26, 2022. Therefore, she was kept in police custody for about a week. See Commitment on Adjournment on Remand.

²⁸⁰ ICCPR, Article 9(3); Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/R.35/ Rev.3, December 16, 2014, para. 38 (Interpreting this provision in General Comment No. 35, the Committee has noted that this "applies to persons awaiting trial on criminal charges, that is, after the defendant has been charged, but a similar requirement covering the period before charging results from the prohibition of arbitrary detention in paragraph 1").

the recurrence of crime.”²⁸¹ Accordingly, “pretrial detention should not be mandatory for all persons accused of a particular crime without regard to individual circumstances.”²⁸² Courts must “examine whether alternatives to pre-trial detention...would render detention unnecessary in the particular case.”²⁸³ The UNWGAD has applied this principle to find detention arbitrary where the relevant authorities have failed to conduct an individualized assessment to determine whether it is “reasonable and necessary” to keep an individual in pre-trial detention.²⁸⁴ In addition, any justification for detention must be substantiated with evidence, and cannot be based on “mere assumption;”²⁸⁵ instead a “present, direct and imperative threat” justifying detention must be shown.²⁸⁶

As noted above, Article 6 of the Banjul Charter states that “no one may be arbitrarily arrested or detained” or “deprived of his freedom except for reasons and conditions previously laid down by law.” According to the ACHPR, detention must be a “last resort and should only be used where necessary and where no other alternatives are available,”²⁸⁷ with “standard operating procedures [promoting] the use of alternatives” to detention.²⁸⁸ Furthermore, the Luanda Guidelines require that there be “reasonable grounds to believe that the accused has been involved in the commission of a criminal offence that carries a custodial sentence,” and a showing that “there is a danger that he or she will abscond, commit further serious offences or if there is a danger that the release

²⁸¹ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/R.35/Rev.3, December 16, 2014, para. 38.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See, e.g., Working Group on Arbitrary Detention, Opinion No. 62/2017, concerning Akhmedov (Kazakhstan) (advance edited version), U.N. Doc. A/HRC/WGAD/2017/62, August 5, 2017, paras. 45-46; Working Group on Arbitrary Detention, Opinion No. 56/2017, concerning Suthijitseranee (Thailand) (advance edited version), U.N. Doc. A/HRC/WGAD/2017/56, August 24, 2017, paras. 67-68.

²⁸⁵ Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 2.5 (“The Committee considers that the State party has not given sufficient reasons, other than the mere assumption that he would try to abscond, to justify the initial pretrial detention of the author or its subsequent extension; nor has it explained why it could not take other measures to prevent his possible flight”).

²⁸⁶ Working Group on Arbitrary Detention, Opinion No. 44/2017, concerning Jaradat (Israel) (advance edited version), U.N. Doc. A/HRC/WGAD/2017/44, October 2, 2017, paras. 29-30.

²⁸⁷ Luanda Guidelines, para. 10(b).

²⁸⁸ Luanda Guidelines, para. 6(a).

of the accused will not be in the interests of justice.”²⁸⁹ Similarly, the African Fair Trial Guidelines stipulate that “States must ensure that [accused persons] are not kept in custody pending their trial” unless “there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others”²⁹⁰

Notably, Rule 57 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“*the Bangkok Rules*”) provides that “[g]ender-specific options for diversionary measures and pretrial and sentencing alternatives” should be developed “taking account of the history of victimization of many women offenders and their caretaking responsibilities.”²⁹¹ And according to the African Fair Trial Guidelines, “expectant mothers and mothers of infants shall not be kept in custody pending their trial.”²⁹²

With respect to domestic law, under Section 161 (I) of the Malawi Criminal Procedure and Evidence Code, “at the expiry of a custody time limit or of any extension thereof, the Court may of its own motion or on application by or behalf of the accused person or on information by the prosecution, grant bail to an accused person.” As established by the Supreme Court of Malawi, 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.”²⁹³ The Malawi Bail Act provides that arrested persons can be granted bail not only by courts but also by the police, excepting cases involving offences such as “treason, murder, rape, armed robbery, and burglary” or where the person has already been remanded in custody by a court.²⁹⁴ According to the Malawi Bail Act, courts deciding whether to grant bail should balance “the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody,” taking into account the “probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail,” whether the detention would

²⁸⁹ Luanda Guidelines, para. 11(a)(ii).

²⁹⁰ African Fair Trial Guidelines, Section M(1)(e).

²⁹¹ Bangkok Rules, Rule 57.

²⁹² African Fair Trial Guidelines, Section M(1)(f).

²⁹³ Open Society Foundations, “Pre-Trial Detention in Malawi: Understanding CaseFlow Management and Conditions of Incarceration”, 2001, pg. 37. Available at <https://dullahomarinstitute.org.za/acjr/resource-centre/Pre-trial%20detention%20in%20Malawi.pdf>.

²⁹⁴ Malawi Bail (Guidelines) Act, 2000, Schedule Section 3, Part I.

result in “any delay in obtaining legal representation,” “the state of health” of the accused and “any other factor which in the opinion of the court should be taken into account.”²⁹⁵

Ninety percent of the women ultimately convicted of crimes indicated that they had spent time in pretrial detention. More than half of these women were charged with unlawful wounding and grievous bodily harm as opposed to the more serious offense of murder. The above indicates that Malawi is not using pretrial detention as a last resort but instead automatically imposing it, without distinguishing between severe and less severe offenses. Furthermore, for the 26 women in pretrial detention who were, to our knowledge, granted bail by April 2024, in many cases bail was granted only after they received free legal aid to assist with the filing of the bail application—an indication that whether women received bail or not was not dependent on whether detention was reasonable or necessary but on whether they had legal assistance.

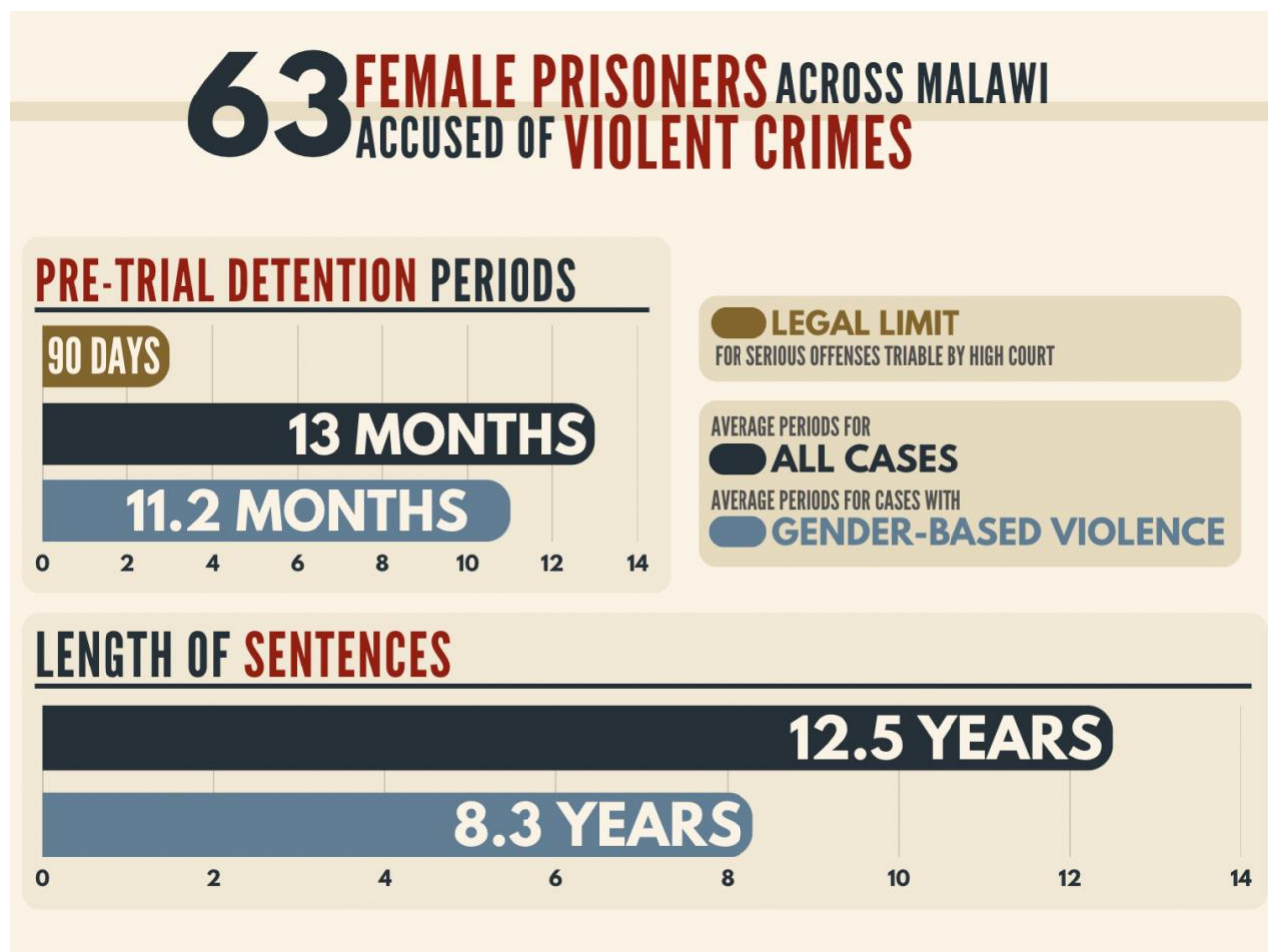
With respect to individual circumstances, seven women indicated they had children with them in prison, while four—three of whom were also among the seven—indicated that they were pregnant while incarcerated. Again, this indicates that the authorities did not conduct an individualized determination of whether detention was necessary and whether non-custodial alternatives would have been more appropriate.

Many women who were kept in pre-trial detention also had children at home and were caretakers. For example, Madalitso a mother of four, was in pretrial detention for nine months, only obtaining bail after obtaining legal aid. Agness spent over 10 months in detention, only obtaining bail after receiving legal aid, despite being a caretaker of her sister’s children (her sister had died) and her mother (who had epilepsy). Meanwhile, Mercy needed antiretroviral drugs for her HIV treatment but was in pretrial detention for roughly six months, obtaining bail only after she obtained legal aid. In yet another case, Charity was pregnant while detained—according to Charity her husband had tried to stab her in the stomach while she was pregnant, and she had killed him while defending herself. A bail hearing was not held for more than a year after her initial remand hearing and consequently Charity spent nearly 1.7 years in pretrial detention, giving birth while still in prison. Even after her bail hearing, it took the judge another two months to grant her bail.

In light of the above, it appears that the authorities consistently failed to conduct the requisite assessment of whether detention was reasonable and necessary. Instead, detention was seemingly largely based on whether the accused had access to counsel and if not, was automatically imposed and extended. This violates the right to freedom

²⁹⁵ Malawi Bail (Guidelines) Act, 2000, Schedule Section 3, Part II, S. 6.

from arbitrary detention under Malawi's international and regional treaty obligations as well as its domestic law.



E. RIGHT TO FREEDOM FROM DISCRIMINATION DURING INVESTIGATIONS AND LEGAL PROCEEDINGS

Article 2(1) of the ICCPR mandates that States Parties treat all individuals equally, regardless of distinctions, including sex, race, or colour.²⁹⁶ Article 3 requires States Parties to “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant,”²⁹⁷ while Article 26 provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”²⁹⁸ The Convention on the Elimination of All Forms of

²⁹⁶ See ICCPR, Article 2(1).

²⁹⁷ See ICCPR, Article 3.

²⁹⁸ See ICCPR, Article 26.

Discrimination Against Women (“CEDAW”) complements the right to equality set forth in the ICCPR. Article 2 obliges States to take “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”²⁹⁹ Article 5(a) requires States Parties to eliminate prejudices as well as practices based on stereotypes.³⁰⁰

The Inter-American Commission and Court have identified potential manifestations of gender discrimination and stereotypes within the context of criminal proceedings:

(i) improper assessment of evidence that is based on ideas that generalize social behavior and roles; (ii) the closure of potential lines of investigation into circumstances of the case and identification of the perpetrators; (iii) the lack of exhaustive analysis of the scene of a crime and failures in the collection, documentation, and preservation of evidence, as well as irregularities in forensic medical examinations; (iv) failure to take investigative steps as a result of judgments regarding the social behavior of men and women; (v) tacit assumptions that women are responsible for the facts because of the way they dress, their jobs, their sexual behavior, etc., or convictions based on negative stereotypes of certain groups that invite attribution of criminal responsibility.³⁰¹

The UN Committee on the Elimination of Discrimination against Women has characterized state actors’ use of gender stereotypes in legal proceedings as a breach of Article 2 and Article 5(a) of CEDAW.³⁰² In *Belousova v. Kazakhstan*, for example, the UN Human Rights Committee considered a case in which a woman alleged that her employer had sexually harassed her. There, the authorities failed to adequately investigate the claim. The Committee noted that the presiding court, which ultimately ruled in favor of the employer, “referred to the fact that [the woman] did not complain about the alleged sexual harassment while she was still employed, but only after her dismissal, as a circumstance

²⁹⁹ CEDAW, Article 2(c)(d)(e)(f).

³⁰⁰ CEDAW, Article 5.

³⁰¹ IACHR, *Manuela and Family v. El Salvador*, Case No. 13.069, December 7, 2018, para. 152 (citing supporting caselaw from both the Commission and Court).

³⁰² See Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, U.N. Doc. CEDAW/C/49/D/20/2008, September 27, 2011, paras. 9.11-9.12; Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, U.N. Doc. CEDAW/C/72/D/65/2014, April 8, 2019, paras. 9.6-9.9, 9.11-9.12; Committee on the Elimination of Discrimination against Women, *R.K.B. v. Turkey*, U.N. Doc. CEDAW/C/51/D/28/2010, April 13, 2012, paras. 8.6-8.8. The Committee does not always clearly distinguish the acts that are violations of Article 2 provisions and those that are violations of Article 5(a).

rendering her allegation less credible.”³⁰³ This reasoning, based in trope, displayed a disregard for the woman’s “vulnerable position as a solo female wage earner subordinate to [the alleged perpetrator].”³⁰⁴ Taking these circumstances into account, the Committee found that national institutions’ failure to handle the case with the requisite sensitivity—a failure “influenced by stereotypes”—violated Article 2 and Article 5(a).³⁰⁵

The UN Declaration on the Elimination of Violence Against Women also counsels States against relying on stereotypes in legal proceedings. Article 4(f) stipulates that States should “ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.”³⁰⁶ Based on these principles, the UN High Commissioner for Human Rights has delineated best practices for law enforcement officials, such that “police shall exercise due diligence to prevent, investigate and make arrests for all acts of violence against women” and “shall ensure that revictimization does not occur as a result of the omissions of police, or gender-sensitive enforcement practices.”³⁰⁷ As the United Nations Office on Drugs and Crime (“UNODC”) has elaborated, a gender-sensitive investigation must pay heed to the fact that female accused, specifically those who have engaged in intimate partner violence, are often themselves survivors of sexual or gender-based violence.³⁰⁸

Regionally, Article 2 of the Banjul Charter states that everyone is “entitled to the enjoyment of the rights and freedoms...without distinction of any kind such as...sex,”³⁰⁹ while Article 3 states that “every individual shall be equal before the law” and entitled to

³⁰³ Committee on the Elimination of Discrimination against Women, *Belousova v. Kazakhstan*, U.N. Doc. CEDAW/C/61/D/45/2012, August 25, 2015, para. 10.10.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at paras. 10.8-10.10.

³⁰⁶ Declaration on the Elimination of Violence Against Women, adopted by General Assembly, Resolution No. 48/104, December 20, 1993. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women>.

³⁰⁷ UN High Commissioner for Human Rights, “International Human Rights Standards for Law Enforcement”, pg. 13. Available at <https://www.ohchr.org/sites/default/files/Documents/Publications/training5Add1en.pdf>.

³⁰⁸ UNODC, “Gender-based discrimination and women in conflict with the law”, July 2019. Available at <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-9/key-issues/1--gender-based-discrimination-and-women-in-conflict-with-the-law.html#:~:text=Women%20in%20conflict%20with%20the%20law%20not%20only%20encounter%20for%20mal,attitudes%20of%20criminal%20justice%20officers>.

³⁰⁹ Banjul Charter, Article 2.

“equal protection of the law.”³¹⁰ Article 18 of the Banjul Charter provides that States “shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman...as stipulated in international declarations and conventions.”³¹¹ In line with these articles, multiple African instruments, regionally binding on Malawi, require law enforcement to conduct themselves with gender sensitivity and eschew gender stereotypes. According to Article 8 of the Maputo Protocol, for example, State parties should ensure that “law enforcement...at all levels are equipped to effectively interpret and enforce gender equality rights” and “reform existing discriminating laws and practices in order to promote and protect the rights of women.”³¹² The African Fair Trial Guidelines elaborate that States must “ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.”³¹³

Malawi’s domestic laws echo these obligations. Under Section 20(1) of the Constitution of Malawi, “discrimination of persons in any form is prohibited” and all persons are “under the law, guaranteed equal and effective protection against discrimination on grounds of...sex.”³¹⁴ To that end, the Constitution also stipulates that legislation and policies to implement the “principles of non-discrimination” should be passed³¹⁵ in order to “eliminate customs and practices that discriminate against women,” particularly relating to “harassment and violence.”³¹⁶

³¹⁰ Banjul Charter, Article 3.

³¹¹ Banjul Charter, Article 18.

³¹² Maputo Protocol, Article VIII(d)(e).

³¹³ African Fair Trial Guidelines, Section K(b).

³¹⁴ Constitution of Malawi, 1994, Section 20(1).

³¹⁵ Constitution of Malawi, 1994, Section 13(a)(ii).

³¹⁶ Constitution of Malawi, 1994, Section 24(2)(a).

Several international bodies—including UNODC,³¹⁷ UN Women,³¹⁸ and the International Association of Chiefs of Police,³¹⁹—and countries like Uganda³²⁰ have also developed best practices for the arrest and investigation stages of cases likely involving self-defense, particularly those involving women who have experienced violence. These guidelines call for law enforcement to prioritize evidence collection and proper analysis before making an arrest, thoroughly evaluate the broader context, identify the predominant aggressor,³²¹ and assess whether the force used was reasonable and proportional. If the act of self-defense is justified, arrest should be avoided.

³¹⁷ UNODC, Handbook on Effective Prosecution Responses to Violence Against Women and Girls, 2014, pg. 85. Available at https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf; UNODC, “Effective Police Responses to Violence Against Women,” 2010. Available at https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_Effective_police_responses_to_violence_against_women_English.pdf.

³¹⁸ UN Women, “Handbook for Legislation on Violence Against Women,” 2012. Available at https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf; UN Women, “Essential Services Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines.” Available at <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2015/Essential-Services-Package-en.pdf>.

³¹⁹ International Association of Chiefs of Police, “Domestic Violence,” April 2019. Available at <https://www.theiacp.org/sites/default/files/2021-07/Domestic%20Violence%20FULL%20-%2006292020.pdf>.

³²⁰ Center for Domestic Violence Protection, “Responding to Violence Against Women: A Training Manual for Uganda Police,” November 21, 2009. Available at: https://www.law.berkeley.edu/wp-content/uploads/2015/10/Uganda_CEDOVIP_Responding-to-VAW_A-Training-Manual-for-Police_2009.pdf.

³²¹ The Predominant Aggressor Analysis is a method used by law enforcement, prosecutors, and other professionals to determine the primary or most culpable aggressor in a violent situation. The predominant aggressor is defined as “the party ... who, through known history and actions within the relationship, has caused the most physical harm, fear and/or intimidation against the other” and who “might not necessarily be the initial aggressor in a specific incident.” See Family Violence Reform Implementation Monitor, Predominant Aggressor Identification Is Clearly Described in Government Policies and Resources. Available at <https://www.fvrin.vic.gov.au/monitoring-victorias-family-violence-reforms-accurate-identification-predominant-aggressor/predominant-aggressor-identification-clearly-described-government-policies-resources>; See also International Association of Chiefs of Police, “Domestic Violence,” April 2019. Available at <https://www.theiacp.org/sites/default/files/2021-07/Domestic%20Violence%20FULL%20-%2006292020.pdf>; James G. White et al., Testifying About Self-Defense and Predominant Aggressors, Southwest Center for Law and Policy & Office on Violence Against Women, 2005. Available at <https://www.swclap.org/wp-content/uploads/PREDOMINANTAGGRESSORS.pdf>.

Interviews with incarcerated women in Malawi suggest that law enforcement officials often do not act with the requisite gender sensitivity, failing to pursue lines of inquiry related to gender-based violence. For example, 15 of the women interviewed indicated that they had acted in self-defense. Thirteen of these women experienced a history of gender-based violence before the incident leading to their arrest. And nine reported injuries at the time of arrest. However, **none** of these women indicated that the police ordered a medical exam, meaning that in each case, the police neglected substantial evidence supporting the possibility that the woman had acted in self-defense to gender-based violence.

The timelines of arrest as reported by interviewees *combined* with police treatment after arrest also suggests a tendency to disregard lines of enquiry about gender-based violence or exploring other potential lines of investigation into circumstances of the case.

For instance, alarmingly, police arrested 20 out of the 27 women who were charged with a crime in connection with gender-based violence directly after the incident or one day after the incident. In fact, 14 of the 15 women who reported acting in self-defense also stated that they were arrested immediately or a day after the incident.

Several case studies demonstrate the police failure to act with gender sensitivity during the investigation.

Charity, for example, faced repeated physical and verbal abuse by her partner Isaac; according to Charity, she had previously tried to report the abuse to the police, but the police told her to talk to the chairman of her township. Charity had also confided about the abuse to her husband's boss. Charity stated that on the day of the incident, Isaac began to beat Charity, and ultimately chased and tried to stab her, after which she stabbed him in self-defense. Despite the multiple individuals who reportedly knew about the abuse, and an injury to the side of her stomach, Charity reports that she was arrested immediately and that the police failed to order a medical exam.

Edith, another interviewee, faced physical violence and sexual, psychological, and financial abuse throughout her 15 years of marriage to her ex-husband, Thomas. According to Edith, on the day of the incident, Thomas started a fight with her at a drinking joint, hitting her with a bottle of beer. When Edith fled the premises, Thomas followed her to her home, at which point Edith hit Thomas on the head using a stick. Edith stated that she was incarcerated immediately after her arrest, even though she had injuries at the time. According to Edith, the police did not order a physical examination by a doctor after arresting her.

Another interviewee, Hope was arrested on the charge of murder right after she stabbed her husband in apparent self-defense after he grabbed a knife. Hope had visible injuries, including a missing tooth, at the time of her arrest resulting from the beating she endured at the hands of her husband. She notified the police that she required medical attention

and was told she would be provided with such care; however, she never received any treatment, nor did the police order examination by a doctor after arrest.

Mphatso, another interviewee, was attacked by a sex client, Peter. According to Mphatso, Peter frequently fought with her when she spent time with other men. As relayed by Mphatso, on the day of the incident Peter started beating her when he found her with someone else, punching her, dragging her, and stabbing her in the mouth and shoulders with a broken bottle. In self-defense, she also attacked him with a broken bottle. Mphatso stated that she was arrested one day after the incident and incarcerated immediately—she too had injuries at the time of arrest, but the police failed to order a medical exam.

In light of the above, it appears that the police consistently failed to pursue lines of inquiry regarding gender-based violence, reflecting adherence to gender stereotypes and a lack of gender sensitivity. This violates the right to freedom from discrimination under Malawi's international and regional treaty obligations as well as its Constitution.

F. RIGHT TO DIGNITY AND HUMANE TREATMENT

Right to Medical Care

Malawi is party to several international treaties that require parties to provide medical care to prisoners. In particular, Article 10(1) of the ICCPR provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”³²² The UN Human Rights Committee has specified that “adequate or appropriate and timely medical care must be provided to all detainees as part of state duties to ensure the enjoyment of all persons” of ICCPR rights.³²³ In 2012, the Committee called attention to “reported deaths of detainees due to the poor healthcare system” in Malawian prisons, urging the government to “investigate deaths reported in prisons and improve the health-care system.”³²⁴ The UN Standard Minimum Rules for the Treatment of Prisoners (the “*Nelson Mandela Rules*”), adopted unanimously by the UN General Assembly in 2015, also underscore the duty of member states to provide prisoners with

³²² ICCPR, Article 10 (1).

³²³ Lawyers' Rights Watch Canada, “Prisoners' Right to Medical Treatment International Law Provisions”, March 19, 2019. Available at https://www.lrwc.org/wp-content/uploads/2019/03/LWRC-Right-to-Medical-treatment.19.March_.2019.pdf. See also Human Rights Committee, *Pinto v. Trinidad and Tobago*, U.N. Doc. CCPR/C/39/D/232/1987, August 21, 1990, para. 12.7; Human Rights Committee, *Kelly v. Jamaica*, U.N. Doc. CCPR/C/41/D/253/1987, April 2, 1991, para 5.7; UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, U.N. Doc. A/RES/43/173 Annex, December 9, 1988, Principle 24.

³²⁴ See Human Rights Committee, *Concluding Observations: Malawi*, U.N. Doc. CCPR/C/MWI/CO/1, June 18, 2012, para. 13.

healthcare “free of charge and without discrimination on the grounds of their legal status.”³²⁵

Additionally, CEDAW requires Malawi to provide medical care to *women* prisoners. Article 12 (2) of CEDAW establishes the right to medical care for women in “pregnancy, confinement and the post-natal period.”³²⁶ Rules 6 through 18 of the Bangkok Rules set forth the rights of women prisoners to various types of healthcare, such as health-screening, gender-specific healthcare,³²⁷ mental healthcare, HIV prevention and treatment, substance abuse treatment programs, suicide and self-harm prevention, and preventive healthcare services.³²⁸

Malawi is also under regional treaty obligations to provide healthcare to prisoners. Specifically, Article 16 of the Banjul Charter requires that states “[take] the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick,” which entails a duty to provide healthcare to prisoners.³²⁹ In *International Pen and Others on Behalf of Aro Wiwa v. Nigeria*, the ACHPR held that Nigeria violated Article 16 of the Banjul Charter when it denied a detained activist’s requests for hospital treatment, “causing his health to suffer to the point where his life was endangered.”³³⁰ The ACHPR found that Nigeria had a “heightened” obligation to provide adequate medical care to individuals in custody since their “integrity and well-being [are] completely dependent on the actions of the authorities.”³³¹ Similarly, in *Malawi African Association and Others v. Mauritania*, the ACHPR reaffirmed this heightened duty to provide medical care to detainees, holding that the government of Mauritania violated Article 16 when several prisoners died due to food deprivation and lack of medical

³²⁵ UNODC, “Incorporating the Nelson Mandela Rules into National Prison Legislation”, 2002, Article 9 (1). Available at https://www.unodc.org/documents/justice-and-prison-reform/21-08355_Incorporating_the_Nelson_Mandela_Rules_into_National_Prison_Legislation.pdf.

³²⁶ See CEDAW, Article 12 (2).

³²⁷ Bangkok Rules, Rules 10, 11 (Gender-specific healthcare means provision of medical care and treatment by a woman physician or nurse, or in their presence).

³²⁸ Bangkok Rules, Rules 6-18.

³²⁹ Banjul Charter, Article 16.

³³⁰ ACHPR, *International Pen, Constitutional Rights Project, Inter-rights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, Communications No. 137/94, 139/94, 154/96 and 161/97, October 31, 1998, para. 112. Available at <https://www.refworld.org/jurisprudence/caselaw/achpr/1998/en/93792>.

³³¹ *Id.*

attention.³³² Article 14 of the Maputo Protocol requires Malawi to “ensure that the right to health of women, including sexual and reproductive health, is respected and promoted.”³³³

Malawi is further under domestic obligations to provide healthcare to prisoners. In particular, the Constitution of Malawi mandates access to healthcare for all prisoners. Section 19 recognizes the dignity of all persons and Article 42(1)(b) guarantees the rights of detainees and prisoners “to be held under conditions consistent with human dignity.”³³⁴ In *Gable Masangano v. Attorney General and Others*, a prisoner serving a twelve-year term sued Malawian government officials for failing to meet constitutional standards prescribing respect for human dignity, alleging poor detention conditions such as lack of food, clothing, cell equipment, cell space, and medical treatment.³³⁵ Specifically, the prisoner alleged that inmates were denied access to medical attention and the correct doses of medication, and were even asked about the offense they committed before receiving medical attention.³³⁶ In its decision, the High Court of Malawi stated that the Constitution of Malawi requires that each detained person be provided with “adequate nutrition and medical treatment” and that “it is the right of every prisoner to access medical treatment” without first being asked about the crime committed.³³⁷ Keeping in mind these concerns, the High Court ordered respondents to improve prison conditions in line with Malawi’s constitutional requirements.³³⁸

Interviewees’ accounts highlight the divergence between Malawi’s international, regional, and domestic obligations and its practices. For example, none of the interviewed women whose charges resulted from direct self-defense to gender-based violence were provided with medical care at the time of their arrest, despite the fact that approximately 60% of

³³² ACHPR, *Malawi African Association and Others v. Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, May 11, 2000. Available at <https://www.refworld.org/jurisprudence/caselaw/achpr/2000/en/96901>.

³³³ Maputo Protocol, Article 14 (1).

³³⁴ Constitution of Malawi, 1994, Sections 19, 42(1)(b).

³³⁵ Malawi Supreme Court of Appeal, *Masangano v. Attorney General & Ors*, Constitutional Case 15 of 2007, November 8, 2009. Available at <https://malawilii.org/akn/mw/judgment/mwsc/2009/31/eng@2009-11-08>.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

them recounted injuries related to self-defense at the time of arrest. The below case studies demonstrate this issue.

Agness said she had been beaten by her husband while he was destroying her property. Agness was arrested for her husband's death and recalled that, at the time of arrest, she had injuries on her elbows and feet, and a scar on her eyebrow. Despite these visible injuries, Agness recounted that the police did not provide her with a medical examination or treatment.

Nasileti was charged with unlawful wounding after stabbing her partner in an apparent act of self-defense. According to her interview, during Nasileti's relationship with this partner, she had been both physically abused and deprived of money and food. On the day of Nasileti's arrest, she described being "bloody and beaten." In her interview, she relayed that despite these injuries, the police who arrested her did not offer her access to a doctor and she did not receive any medical attention.

Charity, a 29-year-old mother of two at the time of her interview, was arrested for the murder of her husband when she stabbed him in an apparent act of self-defense. During her interview, she stated that just prior to the incident, her intoxicated husband had attempted to stab her pregnant stomach multiple times. Charity said that when the police arrested her, they did not provide any medical treatment, leaving her to treat the wound on the side of her pregnant stomach herself using soap and water. Charity stated that she received no medical attention for her injuries in the aftermath of her arrest beyond the provision of "a painkiller." Charity and two other women further recounted that they were pregnant and had given birth while incarcerated. Charity, for example, stated that she gave birth in prison and was sent to the government hospital for one and a half days.

As demonstrated by the interviews, Malawi's reported failure to provide medical care to women in police custody violates Malawi's international, regional, and domestic obligations related to access to medical care in detention.

G. RIGHT TO PSYCHOSOCIAL SERVICES

Under international, regional, and domestic standards, as well as best practices, Malawi is obligated to provide services to persons with mental health issues and has a special responsibility to provide mental health services to incarcerated women.

Prisoners' right to psychosocial services, an umbrella term that includes a range of mental health services, is inherently linked to the right to dignity and medical care in Article 10(1) of the ICCPR.³³⁹ With respect to incarcerated women, CEDAW's Article 12 requires

³³⁹ ICCPR, Article 10(1).

states parties, including Malawi, to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services.”³⁴⁰ In General Recommendation No. 35, the Committee on the Elimination of Discrimination against Women recommended that states parties take special measures to protect the mental health of women who are survivors of gender-based violence before, during, and after legal proceedings, in accordance with Article 2.³⁴¹ This includes “[e]nsur[ing] access to financial assistance, gratis or low-cost, high-quality legal aid, medical, psychosocial and counselling services . . . for women who are victims/survivors and their family members.”³⁴² The Committee has also recommended that reparations be made for survivors of gender-based violence in the form of mental health services.³⁴³

Further, Rule 16 of the Bangkok Rules establishes global standards to meet the specific needs of women prisoners,³⁴⁴ such as “mental healthcare and social welfare services” and “gender-specific and specialized support.”³⁴⁵ Rule 109(3) of the Nelson Mandela Rules requires psychiatric treatment to be part of healthcare for all prisoners in need of such treatment.³⁴⁶ The UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care (“MI Principles”) likewise state that all persons should have access to mental healthcare, which should be a fundamental part of the healthcare system.

The MI Principles also set out the highest attainable standards for mental health treatment, including “analysis and diagnosis of [a] person’s mental condition and treatment, care and rehabilitation for a mental illness or suspected mental illness.”³⁴⁷

³⁴⁰ CEDAW, Article 12(1).

³⁴¹ Article 2 of CEDAW provides that member states must institute policies that prevent discrimination against women, including guarantees of equal access to healthcare for women, which is also an obligation under Article 12. See CEDAW, Articles 2, 12; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35, U.N. Doc. CEDAW/C/GC/35, July 26, 2017.

³⁴² CEDAW, Articles 2, 12; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35, U.N. Doc. CEDAW/C/GC/35, July 26, 2017, para. 31(a)(3).

³⁴³ CEDAW, Articles 2, 12; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35, U.N. Doc. CEDAW/C/GC/35, July 26, 2017, para. 33(a).

³⁴⁴ Bangkok Rules, Preliminary Observations.

³⁴⁵ Bangkok Rules, Rule 16.

³⁴⁶ Nelson Mandela Rules, Rule 109(3).

³⁴⁷ MI Principles, Définitions.

Finally, Article 12 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), emphasizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³⁴⁸ Article 12 provides that member states must “creat[e] ... conditions which would assure to all medical service and medical attention in the event of sickness” to actualize the right to mental health.³⁴⁹ The Committee on Economic, Social, and Cultural Rights has interpreted the “conditions” in Article 12 of the ICESCR to include “appropriate mental health treatment and care.”³⁵⁰

At a regional level, Article 16 of the Banjul Charter guarantees that “[e]very individual shall have the right to enjoy the best attainable state of physical and *mental health*” (emphasis added).³⁵¹ In *Purohit and Moore v. The Gambia*, the ACHPR held that the right to mental health is critical under Article 16,³⁵² emphasizing that this right is central to human dignity and “should be zealously guarded and forcefully protected by all states party to the African Charter.”³⁵³ The ACHPR elaborated that mental health patients should be given special treatment in accordance with the MI Principles to “not only attain but also sustain their optimum level of independence and performance.”³⁵⁴

Domestically, Section 13 of the Constitution of Malawi mandates that the government “actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation” to obtain gender equality and provide adequate healthcare that reflects international and regional health standards.³⁵⁵

Interview interviews indicate that several women exhibited mental health concerns while in prison. Despite Malawi’s international, regional and domestic obligations to provide psychosocial services to individuals with mental health concerns, none of these women received adequate access to psychosocial services.

³⁴⁸ ICESCR, Article 12(1).

³⁴⁹ ICESCR, Article 12(2)(d).

³⁵⁰ UN Economic and Social Council, General Comment No. 14, U.N. Doc. E/C.12/2000/4, August 11, 2000, para. 17. Available at <https://www.refworld.org/legal/general/cescr/2000/en/36991>.

³⁵¹ Banjul Charter, Article 16.

³⁵² ACHPR, *Purohit and Moore v. The Gambia*, Communication No. 241/2001, 2003.

³⁵³ ACHPR, *Purohit and Moore v. The Gambia*, Communication No. 241/2001, 2003, para. 61.

³⁵⁴ ACHPR, *Purohit and Moore v. The Gambia*, Communication No. 241/2001, 2003, para. 81.

³⁵⁵ Constitution of Malawi, 1994, Section 13.

Grace, a 22-year-old mother, was placed in pretrial detention after being charged with the murder of her child, who was on her back when her husband physically assaulted her. Grace's child died as a result of this altercation. Grace indicated during her interview that the beating from her husband was so severe that she suffers memory loss and does not remember some of the events that transpired. As recounted during her interview, Grace had been in pretrial detention for almost a year at the time of her interview in August 2023 without any access to psychosocial services, despite her memory loss and other mental health concerns.

Charity, who indicated that she was not afforded any medical care, also reported that she was not provided access to psychosocial services despite exhibiting concerns about her mental condition, and despite the fact that she had given birth to a child in prison. Charity said of her situation, "I feel very sad to be here with a child. Sleeping in a cell with my small child, who does not have a father now. These things affect me mentally."

Faith was charged with murder. During Faith's 2023 interview, she stated that she experiences "some sort of mental illness" but had not been properly diagnosed. Although she occasionally takes "medication," she noted that "sometimes [her] head just doesn't feel fine." During her interview, Faith indicated that she had not received any treatment for her mental health concerns. Moreover, she spent over **2.2 years** in pre-trial detention before finally appearing in court for a bail hearing.

As these interviews demonstrate, Malawi has seemingly not provided incarcerated women with access to mental healthcare in a uniform manner. Malawi's practices contradict international, regional, and domestic obligations to provide mental health resources to incarcerated individuals, particularly those who are survivors of gender-based violence and now face the trauma of those experiences.

H. RIGHT TO BE FREE FROM TORTURE & TO HUMANE TREATMENT

The right to be free from torture, considered a *jus cogens* norm³⁵⁶ and outlined in Article 5 of the Universal Declaration of Human Rights,³⁵⁷ encompasses international, regional,

³⁵⁶ See UN Office of The High Commissioner, IACHR, Council of Europe, "26 June 2018 Joint Statement – UDHR70", pg. 2. Available at https://www.ohchr.org/sites/default/files/Documents/Issues/Torture/IntDay/2018/JointStatement_EN.pdf ("The prohibition of torture has since been elevated to *jus cogens*, thus recognizing that it is so fundamental that it supersedes all treaties and customary laws").

³⁵⁷ See Article 5 of the Universal Declaration of Human Rights ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

and domestic prescriptions against injuries to individuals inflicted by state authorities acting in their official capacity for certain specified purposes. Under Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), “the term ‘torture’ means any act by which severe pain or suffering...is intentionally inflicted on a person...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity [for certain specified purposes].”³⁵⁸ According to CAT Article 2, “each State Party shall take effective legislative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” These protections also include the prohibition of the use of torture to force prisoners to confess, which is outlined in Article 15 of the CAT.³⁵⁹

In addition to CAT, Article 7 of the ICCPR requires that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”³⁶⁰ Article 10 guarantees the inherent right of dignity for all persons deprived of their liberty, and Article 14 protects the right of prisoners against forced confessions.³⁶¹ Rule 1 of the Nelson Mandela Rules likewise offers a blanket assurance of the right to human dignity for persons in custody, including protection from “torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification.”³⁶² Lastly, Section 15 of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials³⁶³ indicates that law enforcement should not use force against individuals in custody or detention, “except

³⁵⁸ CAT, Article 1.

³⁵⁹ CAT, Article 15, (“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”).

³⁶⁰ ICCPR, Article 7.

³⁶¹ ICCPR, Article 10 (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”); Article 14 (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (g) not to be compelled to testify against himself or to confess guilt”).

³⁶² Nelson Mandela Rules, Rule 1.

³⁶³ The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, August 27 – September 7, 1990. These Principles constitute non-binding guidelines for states on how to regulate law enforcement practices domestically.

when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.”³⁶⁴

At the regional level, several obligations protect incarcerated women in Malawi from violence inflicted by law enforcement. First, Article 5 of the Banjul Charter protects the right to dignity for all individuals, including a prohibition on “torture, cruel, inhumane, or degrading punishment and treatment.”³⁶⁵ Article 3 of the Maputo Protocol binds Malawi to enact measures preventing “any exploitation or degradation of women” and protecting women from “all forms of violence, particularly sexual and verbal violence.”³⁶⁶ Additionally, the ACHPR has adopted the Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States, which directs State Parties to the Banjul Charter both to ensure that police behavior is consistent with the principles of legality, necessity, proportionality and accountability, and to absolutely preclude the use of torture, even under public necessity justifications.³⁶⁷ Finally, the Luanda Guidelines provide procedural guarantees for arrest, including a mandate in Section 2 that “the level of force must be proportionate and always at the most minimal level necessary.” Section 9 of the Luanda Guidelines guarantees not only the right to freedom from torture but provides that “no detained person while being questioned shall be subject to torture or other ill-treatment, such as violence.”³⁶⁸

Malawi’s domestic law provides for comparable protections against police violence for arrestees and incarcerated individuals, broadly set forth in Sections 19, 42, and 44 of the

³⁶⁴ *Id.*, Section 15.

³⁶⁵ Banjul Charter, Article 5.

³⁶⁶ Maputo Protocol, Article 3 (“States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence”).

³⁶⁷ See ACHPR, Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States, ACHPR/Res, 474, 2021.

³⁶⁸ See Luanda Guidelines, Section 9 (“The right of persons undergoing questioning to remain silent shall be respected at all times. It shall be prohibited to take undue advantage of the situation of a detained person for the purpose of compelling or inducing him or her to confess, to incriminate himself or herself, or to testify against another person”; “No detained person while being questioned shall be subject to torture or other ill-treatment, such as violence, threats, intimidation or methods of questioning which impair his or her capacity of decision or his or her judgment”).

Constitution of Malawi.³⁶⁹ Malawi's Police Act³⁷⁰ obligates police officers to refrain from "offer[ing] or us[ing] unwarrantable personal violence to any person in his custody" and "ill-us[ing] or ill-treat[ing] any person in his custody."³⁷¹ However, Malawi's domestic criminal law does not specifically define torture comprehensively per Article 4 of CAT, nor does any provision of Malawi's Police Act actually establish criminal penalties for violence by police against individuals, calling into question Malawi's compliance with Article 2 of CAT.³⁷² Furthermore, while Malawi's Criminal Procedure and Evidence Code protects against false confessions, Section 176 incongruously states that "evidence of a confession by the accused shall...be admitted by the court notwithstanding any objection...that such confession was...not freely and voluntarily made and without his having been unduly influenced thereto."³⁷³ Again, this provision of the Criminal Procedure and Evidence Code suggests potential misalignment with CAT's Article 15 prohibition on the use of torture during confessions.

The distinction between domestic practice and international and regional fair trial obligations was apparent during interviews. Ten women reported that police physically abused them during their time in custody following arrest. Of these, three cases were related to gender-based violence. The below case studies exemplify this issue.

Madalitso was arrested for stabbing her husband, Paul. As Madalitso recounted in her interview, she and Paul had a tumultuous relationship, wherein Paul frequently physically and emotionally abused her. For example, Paul physically beat Madalitso after she accused Paul of cheating on her. Paul also allegedly infected Madalitso with HIV. As relayed by Madalitso, on the day of the incident Paul had been beating Madalitso in

³⁶⁹ Constitution of Malawi, 1994, Section 19(3) ("No person shall be subject to torture of any kind or to cruel inhuman or degrading treatment or punishment"); *Id.*, Section 19(4) ("No person shall be subject to corporal punishment in connection with judicial proceedings or in any other proceedings before any organ of the State"); *Id.*, Section 42(2)(c) ("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 - [...] not to be compelled to make a confession or admission which can be used in evidence against him or her"); *Id.*, Section 44(1)(b) ("There shall be no derogation, restrictions or limitation with regard to [...] the prohibition of torture and cruel, inhuman or degrading treatment or punishment").

³⁷⁰ The Police Act took effect in 2014.

³⁷¹ See Malawi Police Act, 2010, Schedule 52 (5).

³⁷² In 2019, the Malawi government submitted a report to the Committee Against Torture under Article 19 of CAT to explain its level of compliance with the Convention. According to that report, the Penal Code of Malawi contains provisions that penalize acts that fall within the definition of torture in Article 1 of CAT, but does not specifically define torture in line with its obligations under Article 4 of CAT to criminalize "all acts of torture" outright.

³⁷³ See Malawi Criminal Procedure and Evidence Code, 1967, Section 176(1).

defense of another lover. During the altercation, Madalitso stabbed Paul. She was arrested right after the incident occurred, at which time she was reportedly beaten by one of the police officers on the scene, presumably for the purpose of “punishing h[er] for an act [s]he ... committed or is suspected of having committed.” According to Madalitso, another police officer then intervened.

Christina was accused of murdering her co-wife³⁷⁴ by asking a cattle hand to poison her. According to Christina’s interview, after the cattle hand blamed Christina for her co-wife’s death, Christina was taken to the police, who handcuffed, blindfolded, and beat her. Christina noted during her interview that she was beaten to force her confession.

Madalitso and Christina’s experiences, along with those of the other five women who reported being beaten by police, demonstrate Malawi’s lack of adherence to its international obligations to prevent the occurrence of torture and forced confessions, and ensure humane treatment, in violation of Articles 1, 2, and 15 of the CAT, Articles 7, 10, and 14 of the ICCPR, and Rule 1 of the Nelson Mandela Rules. At the regional level, these women’s experiences demonstrate Malawi’s non-compliance with prescriptions from the Article 5 of the Banjul Charter, Article 3 of the Maputo Protocol, Section 9 of the Luanda Guidelines, and the ACHPR Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States. Finally, based on the lack of a clear definition of “torture” in the criminal procedure code and the authorization of forced confessions as evidence, Malawi’s domestic law fails to adequately criminalize police violence against accused persons, including female prisoners.

³⁷⁴ One or two more women who are married to the same man in polygamy. Cambridge Dictionary, Cambridge University Press and Assessment, “co-wife.” Available at <https://dictionary.cambridge.org/us/dictionary/english/co-wife>.

RECOMMENDATIONS



Upon Arrest and Interrogation

There are two major issues that arise at the time of arrest and interrogation.

Responding to gender-based violence: First, as the data also reflects, the majority of incarcerated women in Malawi are in prison for violent offenses and many such offenses are connected with gender-based violence: specifically, defense from intimate partner violence. Among other things, it appears that police have discounted gender-sensitive lines of inquiry from the outset of investigations, including by failing to order medical exams in cases where interviewees reportedly had injuries from acting in self-defense and by immediately arresting interviewees even where self-defense was a live possibility and supported by evidence. As noted above, best practices for the arrest and investigation stages of cases likely involving self-defense, particularly those involving women who have experienced violence, call for law enforcement to prioritize evidence collection and proper analysis before making an arrest, while thoroughly evaluating the broader context.

Legal aid: Second, the vast majority of women interviewed did not have access to legal aid throughout the criminal proceedings against them, starting from arrest and interrogation. A clear majority of the interviewees reported that the police did not inform them of their right to legal aid upon arrest and interrogation. As also discussed above, the lack of counsel operated to the severe detriment of interviewees, leading to incriminating statements during interrogations, and subsequent prolonged pretrial detention due to an inability to obtain bail. Under the Legal Aid Act individuals facing charges for violent crimes and potential imprisonment should qualify for free legal assistance but due to lack of enough legal aid lawyers and funding available for the Legal Aid Bureau, there is a massive resource gap.

The following recommendations are geared towards specific actors at the time of arrest and investigation of female accused persons. Where applicable, the recommendations are informed by recent positive developments such as the Malawi Parliament passing the

Prison Bill 2025³⁷⁵ and Mental Health Bill 2025.³⁷⁶ At the time of writing this report, both Bills have not yet become law.

For the Malawi Police Service:

- Ensure that cases where the suspect is a woman accused of a violent offense against a person are sent, as much as feasible, to the unit dedicated to investigating gender-based violence offenses (Victim Support Unit). Currently, these cases are not directed to this unit.
 - Expand positions in the VSU to non-police officers who are trained in providing care and assistance to victims, including psychosocial care.
 - Create positions in the VSU that are more permanent and not subject to frequent transfers to ensure that those providing assistance have adequate training and experience.
- The Police Service should organize country wide trainings on 1) investigative best practices where gender-based violence survivors are themselves accused of crimes; 2) ensuring that accused who present with injuries are provided with medical care; 3) mandating that they inform detainees of their right to legal counsel at the time of arrest and interrogation, document these communications, and provide them with toll-free numbers of organizations that can provide legal aid such as the Legal Aid Bureau and Women Lawyers Association.
 - Integrate the above training materials into the police training school curriculum and standardize procedures to ensure these rights are consistently and systematically upheld.

For the Legislature:

- Amend the Penal Code to require police to notify detainees of their right to legal counsel and provide them with the toll-free number to contact the Legal Aid Bureau.
- To prevent police abuse of detainees, define torture comprehensively in Malawi's Penal Code in compliance with Articles 2 and 4 of CAT.

³⁷⁵ TrialWatch has the Prison Bill 2025 on file. "The New Prison Bill: What Has Changed?" Southern Africa Litigation Centre, March 31, 2025. Available at <https://www.southernafricalitigationcentre.org/the-new-prison-bill-what-has-changed/>.

³⁷⁶ TrialWatch has the Mental Health Bill 2025 on file. Taonga Sabola, "Parliament Passes Mental Health Bill", The Times Group, April 11, 2025. Available at <https://times.mw/parliament-passes-mental-health-bill/>.

For the Legal Aid Bureau:

- Lawyers assigned to cases of self-defence of gender-based violence should be trained to have specialized knowledge of the potential challenges, strategies, and procedures specific to such cases. Additionally, the Bureau should provide interpreters for individuals who do not speak Chichewa or English.
- Develop a legal research database with standardized templates on topics such as gender-based violence, self-defense, mitigating factors, and mistreatment to assist lawyers who often get assigned criminal cases very close to the hearing and are unable adequately to prepare for them.

Given that accused persons overwhelmingly did not have access to legal aid and representation, this impacted their ability to mount an effective defense throughout pretrial proceedings and, for those cases where verdicts were issued, during trials themselves, as well as causing confusion around plea deals. Some of challenges documented appear to stem from broader systemic issues with funding for legal aid and procedures for determining legal aid, with vulnerable women facing heightened challenges. In order to better facilitate the Legal Aid Bureau to increase its capacity to provide legal aid services in line with the Legal Aid Act, the following is recommended:

For the Legislature:

- Amend the Legal Aid Act to allow paralegals from not only the Legal Aid Bureau but also paralegals from civil society organizations to represent accused persons in court. This amendment was first proposed in 2021 but has not progressed since. According to Chimwemwe Chithope-Mwale, “paralegals working for the judiciary and prosecution [as lay police prosecutors] already have court rights/audience, so paralegals working for the defence can likewise be allowed to offer legal representation in befitting cases subject to regulation.”³⁷⁷

For the Ministry of Justice:

- In the coming fiscal year, ensure that funding for the Legal Aid Bureau and associated costs matches the needs of the populace and that the amount allocated for funding the Bureau is actually disbursed. As of April 2025, there are only 48 legal aid lawyers in the Legal Aid Bureau against a

³⁷⁷ Email on file, Chimwemwe Chitope-Mwale, Acting Director of the Legal Aid Bureau, April 24, 2025.

caseload of 28,169 files, averaging one lawyer handling over 580 cases.³⁷⁸ In past years, funds dedicated to the Bureau, already inadequate, have not been fully disbursed.³⁷⁹

- Issue a directive or policy to recognize Camp Courts (judicial sessions held within prison facilities to review cases of pre-trial detainees) as a standard judicial mechanism for reducing pre-trial detention.³⁸⁰ Require visiting justices and Camp Court teams to document outcomes, flag systemic delays, and report on recurring issues related to remand conditions or access to counsel. Encourage visiting magistrates to routinely conduct Camp Court sessions in prisons under their jurisdiction, using their authority to hear charges and review cases.

For the High Court Registrar:

- Ensure that the judicial system properly adheres to the new e-Justice filing program, that allows access to courts through videoconferencing from remote areas and digitization of court documents for faster resolution of cases, by issuing quarterly reports on the system's progress.³⁸¹

Upon Being Charged

From the above-observed cases, it appears that in cases involving women who had allegedly harmed their intimate partners, the prosecution appears not to consider alternatives to trial such as mediation and rehabilitation. This can be one possibility that is explored in specific cases, which can also reduce the existing burden on courts and legal aid lawyers.

³⁷⁸ Email on file, Chimwemwe Chitope-Mwale, Acting Director of the Legal Aid Bureau, April 24, 2025.

³⁷⁹ See Nyasa Times, "MPs Ask More Funds to Legal Aid Bureau", September 28, 2019. Available at <https://www.nyasatimes.com/mps-ask-more-funds-to-legal-aid-bureau-to-assist-malawians-who-cannot-afford-private-lawyer/>.

³⁸⁰ Section 136 of the Prisons Bill 2025 authorizes High Court judges to visit and inspect prisons and inquire into complaints by detainees. Section 137 establishes magistrates as visiting justices, allowing them to: visit prisons at any time, hear and determine charges under certain sections, inquire into prisoner complaints and access records, oversee prison conditions and compliance with regulations. These provisions empower judicial officers to engage directly in prison oversight and provide a legal basis for Camp Courts to function regularly within the prison system.

³⁸¹ UNDP "Malawi Launches Groundbreaking e-Court Initiative to Revolutionize Access to Justice", April 29, 2024. Available at <https://www.undp.org/malawi/press-releases/malawi-launches-groundbreaking-e-court-initiative-revolutionize-access-justice>.

For the Directorate of Public Prosecutions:

- Ensure that cases where an accused person is alleged to have harmed her intimate partner are directed to a unit dedicated to prosecuting gender-based violence offenses. Currently, these cases are not directed to this unit because of the prevalent viewpoint that when a victim of gender-based violence engages in an act of self-defense, they are no longer viewed as a victim but rather as a perpetrator.
- Establish prosecutorial guidelines whereby cases involving accused women who have allegedly harmed intimate partners are redirected in appropriate circumstances to alternatives to prosecution. This may include cases not involving murder or manslaughter where the accused women have suffered from prolonged domestic abuse, which can be referred for rehabilitation, mediation, or probation instead of direct prosecution.
- Further, given the prevalence of these types of cases, the Directorate should organize a training on prosecutorial best practices where gender-based violence victims are themselves accused of crimes.

Upon Being Subjected To Pretrial Detention

As discussed in the text, the vast majority of women interviewed underwent pretrial detention. Based on the interviews and case documents, it appeared that detention was often automatically imposed at the first remand hearing (when the accused is brought before the court from police custody after arrest), without regard to the severity or circumstances of the crime but instead dependent on whether the accused had access to lawyers to file bail applications on their behalf. Subsequently, women spent prolonged periods in pretrial detention before a bail hearing was scheduled and were only released if they were able to obtain counsel. Further, in almost all the cases, pretrial detention exceeded statutory limits, with women in detention for months and even years beyond what is permitted under Malawian law.

Under international standards, courts may only impose detention based on a consideration of the accused's individual circumstances and whether there is a concrete risk of flight, interference with the proceedings, or recurrence of crime. This requirement holds regardless of whether an accused has counsel or is able to apply for bail.

For the Malawi Police Service:

- Where the offense does not entail murder, rape, burglary, or robbery, Senior Police Officers at the police station where accused are detained also have the authority to release accused persons on bail. This means that many of the interviewees would have been eligible for release by the police.

- Conduct trainings ensuring that, in line with the Bail Act, police officers proactively conduct their own assessment of the accused’s circumstances and the likelihood of flight, recurrence of crime, or interference with the proceedings, and release the accused if detention is not necessary and reasonable. This will greatly assist with reducing the backlog in courts and overcrowding in prisons.
- In line with recommendations previously proposed by CHREAA and other legal aid organizations, “develop ... a new standard prison register with relevant columns for on-going calculation of time on remand; printing and distribution of these to all prisons; making provision for the on-going supply of the registers to prisons; training on the completion of these registers and the submission of lists of detainees to the Court User Committees and to magistrates.”³⁸²
- Leverage the Chief Commissioner’s authority to recommend early release or diversion of female victims of gender-based violence—particularly caregivers and pregnant women—through transfer to an open prison or half-way house, release on license or parole, or presidential pardon, reduction, stay of execution, or remission of sentence.³⁸³
- The Prison Service should conduct trainings for Prison Heads and other relevant officials on this new system to ensure that Prison Heads are regularly submitting lists of detainees whose detention has exceeded detention time limits to the appropriate Court officials as well as the Legal Aid Bureau.³⁸⁴

³⁸² Section 161 of the Prisons Bill 2025 requires the officer-in-charge to submit a list of all remandees to the High Court at the start of any criminal session held in the district where a prison is located. This list must include the date of each person’s admission and the legal basis for their detention.

³⁸³ See Prisons Bill, 2025, Section 73.

³⁸⁴ The Prisons Bill (Sections 138–140) expands the monitoring role of the Inspectorate of Prisons by authorizing it to receive and investigate complaints from remandees and establishing a Secretariat to manage its operations. The Inspectorate, working alongside prison authorities, can maintain a centralized remand register, collect and analyze pre-trial detention data, and alert authorities when legal time limits are exceeded. Sections 143–144 formalize the appointment of Independent Prison Visitors, who are required to conduct bi-monthly prison visits and monitor prisoner conditions. It is recommended that these visitors review detention registers, flag prolonged detentions, and report findings to the Inspectorate Secretariat, who can aggregate the data for analysis and tracking. Finally, a coordinated notification and response mechanism should be established among the Inspectorate, courts, prisons, and the Legal Aid Bureau to identify overdue remand cases, expedite bail hearings, and track case progress, ideally through a centralized, digitized system.

- At the point of admission into prison, every prisoner should be provided access to legal aid (the prison should provide the legal aid free toll numbers to inmates).³⁸⁵
- Enhance mental health support for women, particularly victims of gender-based violence, through entry screening, targeted counseling, and trauma-informed care, with coordinated oversight, reporting, and tracking.³⁸⁶

For the High Court Registrar:

- Conduct trainings of judges and magistrates to:
 - Make clear that courts at initial remand hearings must proactively undertake an individualized assessment regardless of whether an accused person has a lawyer or has applied for bail.
 - Ensure that where an accused has been in detention beyond statutory limits, courts must ensure their release absent exceptional circumstances, including by proactively scheduling bail hearings once notified that detention has exceeded statutory limits. This should also be accompanied by a positive duty for the prison authorities to notify the judiciary about prisoners who have exceeded the limit.
 - Guarantee that determinations on whether it is in the interests of justice to provide an accused person with free legal assistance are made at their first court appearance. Such a determination would be based on the criteria already outlined in the Legal Aid Act.
 - Ensure periodic trainings for magistrates so they are kept up to date on new case law and evolving jurisprudence.

For the Judiciary:

- In line with recommendations previously proposed by CHREAA and other legal aid organizations, there has been instituted “a new standard for court

³⁸⁵ Section 82 of the Prisons Bill introduces an important safeguard by requiring prison officers to inform detainees, upon remand, of their right to seek legal advice, including access to State-funded counsel, such as the Legal Aid Bureau, if they lack the financial means to afford their own lawyer and it is in the interests of justice.

³⁸⁶ Section 22 of the Mental Health Bill asserts the right of all persons to the “highest attainable standard of mental health care,” including those in custody (Section 47). It also establishes the right to be protected from sexual, physical, and psychological abuse, and any other form of discrimination. Section 47 specifically guarantees that all persons with a mental health condition, including those in detention, have the right to: “appropriate, affordable and accessible—(i) physical and mental medical health care; (ii) counselling services; (iii) rehabilitation; and(iv) after-care support.”

registers with relevant columns for custody time limits” among other relevant information useful to both prisons and courts that ideally is to be distributed to all courts. However, further training is required on how to complete and maintain them correctly.

Upon Trial, Sentencing and Post-Conviction

Once cases reached trial, it appears that courts did not always adhere to best practices applicable to women accused of harming their intimate partners, including with respect to ensuring that a history of abuse informs the determination of whether there was reasonable belief of imminent harm and ensuring that longstanding abuse is taken into account at sentencing. To that end:

For the Legislature:

- Amend Section 337 of the Penal Code to include a history of domestic abuse as a mitigating factor to be considered at sentencing.
- Introduce legislation on the maximum time that a court can take to complete criminal cases involving violence against a person.
- Introduce legislation, in line with Malawi’s Constitution, that mandates the standardization of mental health assessments at prison entry, prioritizing vulnerable groups—women, gender-based violence survivors, pregnant detainees, those with mental illness or children—with referral to counseling for those showing signs of distress or trauma.³⁸⁷

For the Judiciary:

- Consider developing a progressive stance on self-defense in gender-based violence cases in line with comparative jurisdictions such as South Africa. This can include recognizing patterns of domestic abuse as a valid basis for self-defense, expanding the imminence requirement in self-defense to consider cycles of abuse and introducing putative self-defense³⁸⁸ as a partial defense in some cases.

³⁸⁷ See Constitution of Malawi, 1994, Section 13; See also Mental Health Bill, 2025, Sections 22, 47.

³⁸⁸ Allowing for putative self-defense would take into account the context in which a woman committed a crime, including a history of gender-based violence with the other party. It would assess whether she mistakenly believed she was under threat and acted in self-defense. The key consideration is whether her belief was subjectively genuine. If her belief was genuine but objectively unreasonable, it would not completely absolve her of liability but could serve as a partial defense, potentially reducing charges (e.g., from murder to manslaughter). This approach acknowledges the subjective perception of threat experienced by survivors of abuse, even if, from an objective legal standpoint, their belief may be deemed unreasonable.

- Consider prolonged domestic abuse or gender-based violence as a mitigating circumstance while sentencing female offenders who commit violent offenses.

For the High Court Registrar:

- Organize a training on judicial best practices where gender-based violence victims are themselves accused of crimes, which should include the fact that courts have an independent obligation to consider self-defense as a mitigating factor, even if the defense does not raise it.

For the Malawi Prison Service:

- Provide awareness programs (Know Your Rights) in all female prisons to increase awareness among female detainees about their right to counsel, available legal aid options, and the time limits for filing an appeal.
- Standardize the use and presence of social workers and licensed therapists at all prisons and provide detainees with unfettered access to medical care, particularly women who are pregnant and women who are detained with young children.³⁸⁹

³⁸⁹ Section 61 of the Prisons Bill 2025 introduces a positive development by requiring that pregnant women be placed in prisons close to appropriate medical facilities. Additionally, Section 78 requires the prison service to provide special accommodations, including tailored diets and sanitary materials, for prisoners with specific needs related to age, health conditions, or pregnancy.