**Joint Stakeholder Submission – Input to the Report of the Special Rapporteur on Torture**

25 November 2022

1. **Introduction**
	1. The Malawi Centre for Human Rights Education, Advice and Assistance (CHREAA), Irish Rule of Law International (IRLI) and Reprieve submit this input to the report of the Special Rapporteur on Torture. The content of this submission is based on information obtained by CHREAA, IRLI and Reprieve in the course of their work.
2. **Questionnaire**
	1. **Challenges, impediments and obstacles to effective national investigations and prosecution of acts of torture**
		1. **Permissive Use of Forced Confessions**
			1. Malawi is one of few countries in the world that still retains a permissive legal framework with regards to forced confessions. While the Constitution (Annex A) protects the right “not to be compelled to make a confession . . . which could be used in evidence against him or her,” the Criminal Procedure and Evidence Code (CP&EC) (Annex B) does not expressly prohibit the use of forced confessions.[[1]](#footnote-2) Section 176(1), as read with subsection (3), creates a conducive environment for law enforcement to resort to torture when conducting criminal interrogations.
			2. **Jurisprudence on Section 176**
				1. Various High Court judgements have interpreted the application of section 176 differently, and the case law on this provision is inconsistent and contradictory.[[2]](#footnote-3)
				2. Most High Court judgments, however, adhere to the dicta of the Supreme Court in the Judgement of *Thomson Fulaye Bokhobokho and Another v The Republic* (Criminal Appeal No. 10 of 2000) [2001] MWSC 5 (17 October 2001) (Annex C), where the Court ruled that a forced confession is admissible and can be given weight if there is corroborating evidence to find that the confession is “materially true”.
				3. Courts have admitted torture-tainted evidence, nearly all of which included forced confessions, in every recent capital case in which a death sentence was handed down. Often, no investigation is carried out into whether torture or ill-treatment actually occurred. Furthermore, courts rarely require corroborating evidence to prove that the confession is “materially true”.
		2. **Torture Is Not Criminalised**
			1. While the prohibition of torture is included in the Constitution, torture and other forms of cruel, inhuman or degrading treatment or punishment is not criminalised in the Penal Code (Annex D). See section b.i, “Constitutional and Legal Frameworks”.
		3. **Investigation Mechanisms are Underfunded**
			1. Various independent institutions have the power to investigate human rights violations and torture by police and prison officials. However, these institutions are severely underfunded and do not have the resources to conduct prompt and effective investigations. Furthermore, there are no constitutional or statutory requirements to conduct prompt investigations or to protect most victims of torture inflicted by police or prison officials. See section d on investigation mechanisms.
	2. **Regulatory frameworks**
		1. **Constitutional and Legal Frameworks**
			1. The prohibition of torture is included in the Constitution of Malawi. [[3]](#footnote-4) However, torture and other forms of cruel, inhuman or degrading treatment or punishment is not criminalised in the penal code.
			2. The Penal Code criminalises only acts that affect the bodily integrity of another person and does not criminalise psychological or mental torture.
			3. Furthermore, the penal offences, having been designed to criminalise conduct between private individuals, are less likely to capture the essential elements of the crime of torture, which among other things require that the infliction of pain must be for specific purposes delimited by article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
			4. A further point of concern with relying on the generic penal code is that utilising the current penal offences may lead to the conflation of torture on one hand and cruel, inhuman or degrading treatment or punishment on the other. Currently, it is unclear as to which offences under the Penal Code criminalise torture as opposed to cruel, inhuman or degrading treatment or punishment.
			5. Similarly, torture and other cruel, inhuman or degrading treatment or punishment in prisons is not criminalised. The Prisons Act (Annex E) prohibits prison officers from punishing a prisoner without a lawful order from the Commissioner of Prisons and further prohibits officers from using violence or a weapon without just cause.[[4]](#footnote-5) Violations of the aforementioned rules constitute an offence against discipline that may be investigated and tried by the Commissioner of Prisons or a magistrate.[[5]](#footnote-6) Victims do not have a statutory right to lodge a complaint or to be consulted during the disciplinary process.
	3. **Elements of human rights-compliant investigations and prosecutions**
		1. The Malawi Human Rights Commission (MHRC) is an independent national institution that has the power to investigate violations of human rights.[[6]](#footnote-7) It has the duty to be competent in protecting and promoting human rights.[[7]](#footnote-8)
		2. The Independent Police Complaints Commission (IPCC) has the power to investigate complaints against police officers.[[8]](#footnote-9) The IPCC was created as an investigative body that is independent from the Malawi Police Service (MPS).[[9]](#footnote-10)
		3. The Inspectorate of Prisons is charged with monitoring conditions of detention.[[10]](#footnote-11) Although the Constitution states that the body shall exercise its powers, functions, and duties independently, members of the Inspectorate include authorities from the Malawi Prisons Service.[[11]](#footnote-12)
		4. There are no statutory or constitutional guarantees for investigations and prosecutions that are prompt, adequate and effective, accessible and safe, open to public scrutiny and transparent, and secure rights and remedies for victims and survivors.
	4. **Mechanisms/institutions/entities involved in complaints, investigations and prosecution**
		1. **MHRC**
			1. The MHRC, established by section 129 of the Constitution, is an independent body that is empowered to investigate human rights violations.[[12]](#footnote-13) Investigations may be commenced on its own or upon complaints received from individuals, groups, legal practitioners, legal representatives, and third-parties.[[13]](#footnote-14) The MHRC may make recommendations to government bodies, but it does not have judicial or legislative powers.[[14]](#footnote-15)
		2. **IPCC**
			1. The IPCC was created by the Police Act (Annex G) as an investigative body independent from the MPS.[[15]](#footnote-16) The IPCC’s mandate is to: (i) receive complaints by the public against the MPS, (ii) to investigate deaths or injury caused by police, and (iii) to investigate all deaths and injuries that occur in police custody.[[16]](#footnote-17)
			2. The IPCC is limited by resource constraints. The Commissioner stated in September 2021 that the Commission had received 99 complaints but were only handling 14 complaints, due to resource constraints. He stated that while the work of the Commission demands 30 people, he can only recruit 15 full-time staff due to budget constraints.[[17]](#footnote-18)
			3. Due to budgetary and human resource constraints, the office has a backlog of complaints and reported that it is actively investigating only cases of death by police.[[18]](#footnote-19)
		3. **Inspectorate of Prisons**
			1. Section 169 of the Constitution of Malawi establishes the Inspectorate of Prisons, which is charged with monitoring conditions of detention.[[19]](#footnote-20) There is no constitutional or statutory requirement to inspect prisons at regular intervals. The Inspectorate of Prisons reported that prison inspections occurred in 2021, 2020, 2018, 2014, and 2009.[[20]](#footnote-21)
			2. We are concerned with the lack of mechanisms available to people in prisons and other places of detention to seek redress for torture and other cruel and inhuman treatment. Malawian prisons have been severely overcrowded for years, and people are kept in facilities with poor ventilation and without adequate food and water. Conditions in Malawian prisons constitute cruel, inhuman and degrading treatment, and people in prisons do not have meaningful access to investigative bodies.
			3. In 2007, the Constitutional Court of Malawi found, in the case of *Gable Masangano v Attorney General* (Constitutional Case No. 15 of 2007), that prison overcrowding and poor ventilation in prison facilities violated the right to be free from torture and cruel, inhuman or degrading treatment. Between 2020-2021, the Malawi Prison Inspectorate visited all of the prisons of Malawi, which at that stage were at 278% capacity, and also found the situation to be tantamount to torture and cruel, inhuman and degrading treatment.[[21]](#footnote-22) The prisons of Malawi remain severely overcrowded with an overall population of about 16,700 prisoners in the system against a prison capacity of 7,322.[[22]](#footnote-23) We have witnessed detainees having to sleep in a kneeling position or side by side on the ground, due to the lack of space. People in prisons suffer from long-term knee problems and other ailments that are related to being placed in a confined space for prolonged periods.
			4. Even when investigations are conducted, investigatory bodies are unable to secure sufficient redress for human rights violations. In October 2022, the MHRC investigated a hunger crisis in Malawian prisons, where there were reports of people in prisons going without food for at least four to five days, in violation of the right to adequate food.[[23]](#footnote-24) It further reported that, despite sharing its findings with prison authorities and the government, little efforts have been made to address the situation in the long term.[[24]](#footnote-25)
		4. **Legal Aid Bureau**
			1. Access to legal aid is crucial in monitoring instances and torture and excluding torture-tainted evidence. However, the lack of legal aid lawyers and the rates of poverty of accused persons means that 90% of people who are caught in the criminal justice system are unrepresented.[[25]](#footnote-26)
			2. The Legal Aid Bureau provides legal aid to persons in criminal matters if the person has insufficient means and if it is in the interests of justice.[[26]](#footnote-27)
			3. The Legal Aid Bureau is woefully underfunded. In the 2022-2023 budget, the office submitted a budget plan for K6.3 billion but was only allocated K699 million. In response, the Director said that the allocation was “as good as closing the office”.[[27]](#footnote-28) He reported that the office has 26,561 cases to handle among 41 lawyers (about 647 cases per lawyer).[[28]](#footnote-29)
		5. **Allegations of Extrajudicial Killings by Police Officers**
			1. Although the Police Act requires that the police report all deaths in custody for investigation,[[29]](#footnote-30) not a single inquest was conducted into the circumstances of the deaths of 34 people who have died under suspicious circumstances in custody or involving police officers from 2009 to 2018, who were identified by CHREAA.[[30]](#footnote-31)
			2. In 2018, CHREAA also conducted a study of 43 victims who were allegedly killed by police in “Operation Elimination”, an effort to execute previously convicted people in violation of international human rights law. An interviewed officer revealed that police would call people recently released from detention in handcuffs to a specific location where the police would shoot and kill them. The bodies were taken to nearby mortuaries with the explanation that the deceased was killed during an armed robbery.[[31]](#footnote-32) Official investigations into these killings have not commenced.
3. **Msundwe Case**
	* + 1. On 15 October 2019, a group of Malawian police officers sexually assaulted women and girls in the areas of M’bwatalika, Kadziyo and Mpingu, around the capital city of Lilongwe, during protests after a controversial presidential election. The MHRC investigated the incident and provided a comprehensive report, which found that 13 women and 4 girls were raped and sexually assaulted.[[32]](#footnote-33)
			2. The Malawi Women Lawyers Association successfully took a judicial review application to the High Court of Malawi in 2020 to address the failures of, and human rights abuses carried out by, the MPS in the Msundwe incident and to seek compensation for the survivors. The ruling, delivered on 13 August 2020, ordered, inter alia, that the police fully investigate the matter and submit an occurrence book to the court within 14 days, which would give detailed account of the officers accused of raping and assaulting the women and girls.[[33]](#footnote-34) The police have not done this, thereby breaching the court order, and no criminal prosecutions have been brought against any of the officers involved.
			3. In August 2021, MPS leaked a report alleging that the MHRC report was false because the rape victims were coerced by politicians to make false claims.[[34]](#footnote-35) The MHRC defended their investigation and report but agreed to a fresh investigation.[[35]](#footnote-36) The IPCC is now assigned to conduct an investigation into the Msundwe incident. However, the IPCC is limited in funding and human resources.[[36]](#footnote-37) In September 2021, the IPCC hoped that it would have a report by October 2021,[[37]](#footnote-38) yet a report has not been released to the public.
	1. **Victim participation and protection**
		1. The MHRC and IPCC have the ability to hear and obtain the cooperation of victims as part of their investigative powers.[[38]](#footnote-39) However, there is minimal legal protection afforded to most victims of torture by police or prison officials.
		2. **Participation in Court Proceedings**
			1. The CP&EC provides protection to victims of sexual offences when giving evidence in court proceedings.[[39]](#footnote-40) Protections may include clearing the courtroom during the witness’s testimony, partitioning the courtroom, allowing the witness to be escorted by a relative or friend for emotional support, and directing that the evidence be given remotely and transmitted through CCTV.[[40]](#footnote-41)
			2. The CP&EC also allows subordinate courts and the High Court to receive evidence from victims during post-conviction sentencing to enable the court to assess the gravity of the offence.[[41]](#footnote-42)
		3. **Education and Training for Medical Personnel**
			1. In Malawi, victims of torture and cruel or inhuman or degrading treatment tend to be accused persons, detained persons, or sentenced prisoners. Under the Constitution, this category of people has been identified as requiring special protection. Thus, under section 42(1)(b) of the Constitution of Malawi, detained persons, including sentenced prisoners, have a right to a fair trial which includes an unqualified right to access to medical treatment at the state’s expense.
			2. Victims of torture face challenges in accessing medical treatment. Until the Minister of Health issued a directive in 2022, medical personnel had been refusing to provide medical assistance to patients who alleged physical injuries inflicted by police without a police report.[[42]](#footnote-43) We remain concerned with the lack of education among health workers regarding the constitutional protection of accused, detained, and sentenced persons.
		4. **Criminal Proceedings**
			1. In the absence of express criminalisation of torture, compensation in criminal proceedings for torture victims or their families is rare if not non-existent in Malawi.
			2. The family of Mr. Buleya Lule, who died as a result of police torture in 2020, have waited years for justice. On 14 September 2022, the High Court of Malawi ruled that 10 of the 13 police officers have a case to answer on the charge of murder.[[43]](#footnote-44) Three police officers were acquitted of murder and causing grievous harm.
		5. **Civil Proceedings**
			1. In civil proceedings however, compensation has been ordered in cases involving police brutality against suspects.[[44]](#footnote-45)
			2. Despite agreeing to compensate Lule’s widow K331 million in damages in June 2021,[[45]](#footnote-46) the Government failed to compensate Charity Lule until November 2021 and ultimately reduced final compensation to K44 million.[[46]](#footnote-47)
			3. While there is an avenue for compensation in civil proceedings, it is a very costly avenue that the majority of torture victims cannot afford. In light of the difficulty that lies in pursuing a civil remedy against state agents for torture by indigent torture victims, most of them suffer injustice without any remedy by way of compensation.
1. Annex A, Constitution of Malawi, § 42(2)(c); Annex B, Criminal Procedure and Evidence Code, Act 36 of 1967, § 176. [↑](#footnote-ref-2)
2. For example, in *Republic v Chinthiti* (Criminal Case. No 17 of 1997) (unreported), one High Court judge suggested that section 176 is unconstitutional.In *Palitu and Others v Republic* (Criminal Appeal No. 30 of 2001) [2001] MWHC 43 (19 September 2001), the High Court ruled that a forced confession can be admitted as evidence but that no weight should be given to it. [↑](#footnote-ref-3)
3. Annex A, Constitution of Malawi, §§ 19(3), 45(2)(b). [↑](#footnote-ref-4)
4. Annex E, Prison Act, Ch. 9:02, §§ 18-19, 43(xii), (xiv), (xxxiii). [↑](#footnote-ref-5)
5. Ibid., §§ 46-47, 51. [↑](#footnote-ref-6)
6. Annex F, Human Rights Commission Act, Ch. 3:08, §§ 11, 12. [↑](#footnote-ref-7)
7. Ibid., § 11. [↑](#footnote-ref-8)
8. Annex G, Police Act, Ch. 13:01, § 129 (Annex G). [↑](#footnote-ref-9)
9. Ibid., § 131. [↑](#footnote-ref-10)
10. Annex A, Constitution of Malawi, § 169. [↑](#footnote-ref-11)
11. Ibid., §170(1). [↑](#footnote-ref-12)
12. Ibid., §§ 129-31. [↑](#footnote-ref-13)
13. Annex F, Human Rights Commission Act, Ch. 3:08, §§ 12, 16(2) (2017). [↑](#footnote-ref-14)
14. Annex A, Constitution of Malawi, § 130. [↑](#footnote-ref-15)
15. Annex G, Police Act, Ch. 13:01, §§ 128-148. [↑](#footnote-ref-16)
16. Ibid., § 129. [↑](#footnote-ref-17)
17. The Daily Times, “Msundwe Investigation October 1”, 17 September 2021. Available at https://www.africannewsagency.com/times-group-malawi/msundwe-investigation-october-1-704b63af-0a90-5358-b24a-73c28f7f0dd6/. [↑](#footnote-ref-18)
18. “Policing the Malawi Police”, MW Nation, 28 September 2021. Available at https://mwnation.com/policing-the-malawi-police/. [↑](#footnote-ref-19)
19. Annex A, Constitution of Malawi, §§ 169-70. [↑](#footnote-ref-20)
20. Annex H, Malawi, Inspectorate of Prisons, *The Report of the Inspection of Prisons and Police Cells Conducted by the Malawi Inspectorate of Prisons in February, May, August 2020 and February 2021* (February 2021), p. 9; Annex I, Malawi, Inspectorate of Prisons, *The Report of the Inspection of Prisons and Police Service Cells Conducted by the Malawi Inspectorate of Prisons in March 2018*, p. 2. [↑](#footnote-ref-21)
21. Annex H, Malawi, Inspectorate of Prisons, *The Report of the Inspection of Prisons and Police Cells Conducted by the Malawi Inspectorate of Prisons in February, May, August 2020 and February 2021* (February 2021), p. 6. [↑](#footnote-ref-22)
22. Annex J, Wezzie Gausi, “Prisoners’ Nightmare”, Daily Times, 15 November 2022. [↑](#footnote-ref-23)
23. Annex K, MHRC, “Position of Malawi Human Rights Commission on the Current Social, Political and Economic Situation in Malawi”, 14 November 2022, at 7; figures on file with Reprieve. [↑](#footnote-ref-24)
24. Annex K, MHRC, “Position of Malawi Human Rights Commission on the Current Social, Political and Economic Situation in Malawi”, 14 November 2022, p. 7. [↑](#footnote-ref-25)
25. Charlotte Mackenzie, “Malawi Bail Project: accessing justice”, Counsel Magazine, 1 October 2021. Available at https://www.counselmagazine.co.uk/articles/malawi-bail-project-accessing-justice. [↑](#footnote-ref-26)
26. Legal Aid Act, § 18(1). [↑](#footnote-ref-27)
27. The Times Group, “How best to spend K8.1 billion”, 12 March 2022. Available at https://times.mw/how-best-to-spend-k8-1-billion/. [↑](#footnote-ref-28)
28. Ibid. [↑](#footnote-ref-29)
29. *See* Annex G, Police Act, § 145. [↑](#footnote-ref-30)
30. Centre for Human Rights Education (CHREAA), *A Preliminary Report into Police Extrajudicial Killings in Malawi* (2019), p. 17. [↑](#footnote-ref-31)
31. Ibid., p. 21. [↑](#footnote-ref-32)
32. Malawi, Human Rights Commission, *Investigation Report into the alleged rape, defilement and indecent*

*assault by police officers on some women and girls in Lilongwe West (M’bwatalika, Kadziyo and Mpingu*

*areas)* (2020). [↑](#footnote-ref-33)
33. Annex L, *The State v The Inspector General of Police & Others* (Judicial Review 7 of 2020) [2020] MWHC 24 (13 August 2020), at ¶¶ 53-56. [↑](#footnote-ref-34)
34. Paul Chamdimba Nkhoma, “Msundwe rape case saga was fabricated—Report”, Nyasa Times, 14 August 2021. Available at https://www.nyasatimes.com/msundwe-rape-case-saga-was-fabricated-report/. [↑](#footnote-ref-35)
35. Malawi, Human Rights Commission, “Statement on Recent Developments on the Msundwe Rape and Defilement Case”, 19 August 2021. Available at https://twitter.com/HumanRightsMW/status/1428374270573518855/photo/1. [↑](#footnote-ref-36)
36. Suzgo Chitete, “Complaints commission to probe Msundwe rape cases”, MW Nation, 23 September 2021. Available at https://mwnation.com/complaints-commission-to-probe-msundwe-rape-cases/. [↑](#footnote-ref-37)
37. “Policing the Malawi Police”, MW Nation, 28 September 2021. Available at https://mwnation.com/policing-the-malawi-police/. [↑](#footnote-ref-38)
38. *See* Annex G, Police Act, § 130(1)(f); Annex F, Human Rights Commission Act, § 15(b-c). [↑](#footnote-ref-39)
39. Annex B, Criminal Procedure and Evidence Code, § 71A. [↑](#footnote-ref-40)
40. Ibid., § 71A(1). [↑](#footnote-ref-41)
41. Ibid., §§ 260, 321J. [↑](#footnote-ref-42)
42. Ministry of Health, “Requirements for a Police Report Before Accessing Healthcare/Medical Assistance MoH/CD/55”, 28 June 2022. [↑](#footnote-ref-43)
43. “Buleya Lule murder: Chisale’s wife, nine others found with case to answer”, Malawi 24, 14 September 2022. Available at https://malawi24.com/2022/09/14/buleya-lule-murder-chisales-wife-nine-others-and-found-with-case-to-answer/. [↑](#footnote-ref-44)
44. *E.g.,* *Magombo v the Attorney General (Malawi Police Service)* (Assessment of Damages) (Personal Injury Cause 282 of 2018) [2021] MWHC 51 (05 August 2021). [↑](#footnote-ref-45)
45. “Pius Nyondo, Lule’s widow to get K331m from govt over husband’s death in police custody”, Nyasa Times, 14 June 2021. Available at https://www.nyasatimes.com/lules-widow-to-get-k331m-from-govt-over-husbands-death-in-police-custody/. [↑](#footnote-ref-46)
46. Gary Samati, “Lule’s widow finally compensated”, The Times Group, 14 November 2021. Available at https://times.mw/lules-widow-finally-compensated/. [↑](#footnote-ref-47)