

Empowering Paralegals to Assist Pretrial Detainees

*Statement Submitted by the Open Society Justice Initiative and
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OPEN SOCIETY
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I. INTRODUCTION

1. The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. It fosters accountability for international crimes, combats racial discrimination and statelessness, supports criminal justice reform, addresses abuses related to national security and counterterrorism, expands freedom of information and expression, and stems corruption linked to the exploitation of natural resources. A major area of the Justice Initiative's work is the promotion of rights-based pretrial detention practices that comply with international standards and norms.
2. The Paralegal Advisory Service Institute (PASI), a non-governmental organization, provides access to justice at the front-line of Malawi's criminal justice system through paralegal aid clinics and appropriate basic legal advice and assistance.
3. Almost a quarter of incarcerated persons in Malawi are awaiting trial or the outcome of their trial. Many spend months, even years, in pretrial detention, often under difficult physical conditions. A root cause of the large number of pretrial detainees and their long periods of detention is a dearth of professionally trained lawyers. This problem can be significantly mitigated through the widespread use of paralegals to assist accused persons awaiting trial.

II. MALAWI'S INTERNATIONAL AND NATIONAL OBLIGATIONS

4. The Republic of Malawi is a party to several international and regional treaties that provide legal standards with respect to the rights of pretrial detainees. These rights include, *inter alia*, the right not to be subjected to arbitrary detention, the right to challenge the lawfulness of the detention, the right to trial within a reasonable time or to release from detention, the right to have legal assistance in any case where the interests of justice so require, the right to equality before the courts, and the right to be treated with humanity and with respect for the inherent dignity of the human person.
5. The Constitution of Malawi recognizes the right to challenge the lawfulness of one's detention and the right to be released from detention with or without bail. The Constitution sets out standards for the treatment of people in detention, including the right to be promptly informed of the reason for detention. The Constitution also guarantees any detained person the right to consult confidentially with a legal practitioner of his or her choice, and, where the interests of justice so require, to be provided with the services of a legal practitioner by the state.

III. MALAWI'S FAILURE TO MEET ITS PRETRIAL JUSTICE OBLIGATIONS

6. Inadequate access to quality legal assistance is a chronic and pervasive problem for criminal defendants in Malawi and a violation of international and constitutional norms.

Most Malawians cannot afford to hire private lawyers. The Legal Aid Department of the Ministry of Justice employs a mere 22 lawyers to fulfill its mandate. Moreover, with 220 licensed lawyers for a population of 14.5 million, professional legal services for accused persons are virtually nonexistent across large swathes of the country. It is estimated that fewer than 10 per cent of criminal defendants are represented by legal counsel.

7. Pretrial detainees comprised almost a quarter (22 percent) of the prison population in Malawi in March 2010. The overuse and frequent arbitrariness of pretrial detention in Malawi—a violation of Malawi’s international legal obligations under, *inter alia*, Article 9 of the International Covenant on Civil and Political Rights—affects many people who come into contact with the criminal justice system, and disproportionately and negatively impacts the poor.
8. The problems of the overuse of pretrial detention and inadequate legal aid for indigent criminal defendants are linked. It is not simply that pretrial detention makes it far more difficult for indigent criminal defendants to access quality legal aid in advance of their trials; the likelihood and severity of pretrial detention are magnified by the lack of access to quality legal assistance. Thus, while many pretrial detainees in Malawi are only charged with minor crimes, they are detained for lengthy periods of time. Such situations constitute violations of a number of internationally guaranteed rights, including the right to stand trial within a reasonable time or to be released from detention. While comprehensive data are unavailable, it is estimated that the average accused person charged with a capital offense is detained awaiting trial for two years.
9. In practice, conditions of detention in Malawi’s police cells and prisons violate international and constitutional norms. For example, people detained in police cells are generally not provided with any food by the state and have to make their own arrangements. The accommodation available in most police cells and prisons falls short of the requirements of the Constitution of Malawi and the United Nations Standard Minimum Rules for the Treatment of Prisoners which require the state to keep inmates in conditions that preserve their minimum comfort and dignity. Malawi’s prisons—where most pretrial detainees are kept—are significantly overcrowded. Countrywide, Malawi’s prisons hold more than twice the number of inmates than they were designed to house safely. The country’s largest prison, Zomba Central Prison, has an official capacity of 800 prisoners but was holding almost 2,300 inmates in April 2010.

IV. MALAWI’S RECOGNITION OF ITS OBLIGATIONS, AND POSSIBLE REMEDIES

10. Malawi is one of the many States to have recognized that, where a State has limited human and financial resources with which to address the rights of pretrial detainees, civil society organizations may play a key role in the protection of those rights. In 1996, for instance, government representatives from 40 African countries, including Malawi, attended the first Pan-African Seminar on Prison Conditions in Africa and produced the Kampala Declaration on Prison Conditions in Africa. The Plan of Action of the Kampala

Declaration emphasizes the important role NGOs should play in prisons, and that NGOs “should have easy access to places of detention.”

11. In 2004, Malawi hosted a conference on legal aid in criminal justice in Africa attended by delegates from twenty-six countries, which gave rise to the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa. The Lilongwe Declaration affirms that “Legal aid should be defined as broadly as possible to include legal advice, assistance... and to include a wide range of stakeholders, such as non-governmental organizations...”
12. The important contributions that paralegals can make to the criminal justice system, and to the protection of the rights of pretrial detainees in particular, have been recognized in a number of instruments. The Dakar Declaration of the African Commission on Human and Peoples’ Rights (1999), states that: “Bar Associations should in collaboration with appropriate government institutions and NGOs enable paralegals to provide legal assistance to indigent suspects at the pre-trial stage.” The ‘Plan of Action’ of the Ouagadougou Declaration on Accelerating Prison and Penal Reforms in Africa (2002), promotes the “greater use of paralegals in the criminal process to provide legal literacy, assistance and advice at a first aid level”.
13. Moreover, according to the Lilongwe Declaration, which Malawi itself tabled for adoption at the 2005 XIth UN Congress on Crime Prevention and Criminal Justice in Bangkok, “The only feasible way of delivering effective legal aid to the maximum number of persons [in African countries] is to rely on non-lawyers, including law students, paralegals, and legal assistants... An effective legal aid system should employ complementary legal and law-related services by paralegals and legal assistants.”

V. MALAWI’S EFFORTS TO ADDRESS THE ONGOING PROBLEM OF EXCESSIVE AND UNSAFE DETENTION

14. Where, as in Malawi, there are not enough lawyers to provide legal aid services to accused persons, the only feasible way of delivering effective legal assistance to the maximum number of persons is to rely on non-lawyers, including paralegals. Paralegals can provide access to the justice system for persons subjected to it, assist criminal defendants, and provide knowledge and training to those affected by the system that will enable rights to be effectively asserted.
15. In response to the lack of trained legal practitioners and high levels of pretrial detention, the Paralegal Advisory Service Institute (PASI) was established in 2000 to provide paralegal services to pretrial detainees and persons accused of criminal offences. PASI has helped reduce the number of awaiting trial detainees, cooperated with the police to extend its pretrial diversionary program, and assisted accused persons in preparation for their bail applications and trials.
16. As Henry Phoya, then Malawian Minister of Justice and Constitutional Affairs, has explained, “The use of paralegals through the Paralegal Advisory Service has led to the

reduction of a previously high prison remand population. This has been achieved through government recognition of the reality that in order to achieve the protection of human rights, civil society groups have to be taken on board.”¹

17. Although the work of paralegals is increasingly being recognized by the police, courts and legal profession, their legal position and status in Malawi remain precarious. Because their role in the criminal justice system is not defined or regulated by law, it is essentially an informal one. As a consequence, their ability to access places of detention and to provide a wide range of legal assistance services to pretrial detainees relies largely upon the goodwill and discretion of Malawian officials and may be subject to arbitrary limitations.

VI. RECOMMENDATIONS TO THE HUMAN RIGHTS COUNCIL

18. The Justice Initiative and PASI urge the UPR Working Group of the Human Rights Council and other States to address the informal and somewhat arbitrary manner in which paralegals employed by NGOs have to navigate Malawi’s criminal justice system. In particular, the UPR Working Group and other States should press Malawi to formalize and institutionalize the role of criminal paralegals in Malawi. Specifically, States should recommend that Malawi:
 - Promulgate the *Legal Education and Legal Practitioners Amendment Bill*, currently pending before Parliament. The Bill makes provision for paralegal services and seeks to formalize the role paralegals can play in providing legal education, support, and awareness to persons in conflict with the law.
 - Promulgate the *Legal Aid Bill* currently pending before Parliament. The Bill seeks to empower the Legal Aid Department to contract out some of its services to civil society based paralegals.
19. The Justice Initiative further urges the UPR Working Group to call on Malawi to take additional steps to address the inadequacy of legal aid services for indigent criminal defendants, including by increasing the numbers of lawyers on the staff of the Legal Aid Department and taking steps to ensure that legal aid services are available throughout the country.
20. Finally, the Justice Initiative appeals to the UPR Working Group to insist that Malawi take immediate steps to ensure that the conditions in police cells and other places of detention throughout the country meet all internationally recognized minimum standards.

¹ Henry Phoya, “The View from Government”, in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality*, Penal Reform International, 2007, p 31.