



REPRIEVE



AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS

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ISSUES AND RECOMMENDATIONS TO RAISE WITH THE GOVERNMENT OF MALAWI

In anticipation of the 2nd/3rd periodic report of the Government of Malawi to be presented at the 68th Ordinary Session of the African Commission on Human and Peoples' Rights (the Commission).

Submitted on 6 April 2021

The Community of Sant'Egidio was founded in 1968 and has since become a network of more than 70 countries tied together by values of peace and providing assistance to the poor. The Community has consistently advocated against the death penalty, and in 2002, launched the first International Day Cities for Life - Cities against the Death Penalty on 30 November. Approximately 80 cities were involved for the first edition in 2002. Now more than 2150 cities have rallied around the initiative - including 80 capitals in five continents, taking part in the event by raising public awareness, promoting educational initiatives and organising events held in symbolic monuments and squares. The Community of Sant'Egidio in Malawi contributed to this report.

Reprieve is an international legal action charity that was founded in 1999 (UK charity registration no. 1114900). Reprieve provides support to some of the world's most vulnerable people, including people sentenced to death and those victimized by states' abusive counter-terrorism policies. Based in London, but with offices and partners throughout the world, Reprieve is currently working on behalf of 70 people facing the death penalty in 16 countries, including Malawi. Reprieve's vision is a world free of execution, torture and detention without due process.

The World Coalition Against the Death Penalty, an alliance of more than 160 NGOs, bar associations, local authorities and unions, was created in Rome on 13 May 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition. The World Coalition headquarters are based in Montreuil, France.

Overview

This document has been prepared by the Community of Sant'Egidio, Reprieve and the World Coalition Against the Death Penalty to assist the Commissioners ahead of the 2nd/3rd periodic report of the Government of Malawi that covers the reporting period of 2015-2019.

Summary

Malawi has a *de facto* moratorium on executions and has not executed anyone since the new Constitution was enacted in 1994. The last known execution was in 1992.

As a result of the landmark 2007 Supreme Court judgment in *Kafantayeni v Attorney General of Malawi*, individuals convicted of murder are no longer automatically sentenced to death and instead, evidence of an offender's age, good character, difficult upbringing, mental health, and other factors are considered in mitigation. After a further Supreme Court judgment in 2010, all individuals automatically sentenced to death before 2007 became entitled to a new sentencing hearing where the judge would consider mitigating circumstances.

In order to facilitate the new sentencing hearings, a group of stakeholders formed the Malawi Resentencing Project, through which the High Court provided new, constitutional sentences to approximately 154 people between February 2015 and September 2017. The project was immensely successful, garnering international accolades, media coverage, and awards, including the World Justice Prize for the stakeholders involved in coordinating and carrying out the project.

As a result of the project, 155 individuals were resentenced to terms of years, 146 of whom have been released after serving sentences ranging from 15 to 42 years. Of these, at least 16 people were identified as being children at the time of the offence for which they were sentenced to death. Only one person was resentenced to life in prison. None were re-sentenced to death. Most of those released returned to their home villages.

After the conclusion of the resentencing hearings, the Resentencing Project sought to take qualitative and quantitative survey evidence from the home villages of those individuals who had been released as a result of the Project. In particular, the survey sought to gather evidence on views of traditional leaders who oversee communities where people who were formerly sentenced to death have been released and reintegrated. This experience gives the leaders a unique view of the death penalty. One leader surveyed concluded that he no longer supported the death penalty because "prison is for reform, and there is no reform in death." In all, 94% of the traditional leaders surveyed said that they didn't want the death penalty to continue to be a punishment in Malawi. They said they prefer rehabilitation.

Very few death sentences have been handed down in recent years. No one was sentenced to death between March 2016 and May 2019 (the close of the reporting period), at which point there were only 15 people on death row in Malawi. However, between May 2019 and time of writing, the country has taken what will hopefully be a temporary step back, issuing 12 new death sentences. In the recent cases where the death sentences were imposed, there are concerns that Legal Aid did not have sufficient time, personnel and resources to conduct effective mitigation investigations and make comprehensive submissions. There have also been documented cases of torture against suspects in death-eligible cases, including at least one case where police killed the suspect, Buleya Lule, through torture by electrocution. Evidence extracted through torture and forced confessions have been admitted in court in most recent death penalty cases.

Importantly, there have not been automatic commutations for those with death sentences to life in prison since 2005. Prior to 2005, all those sentenced to death received regular, automatic commutations from the President as part of holiday celebrations. Since 2005, these commutations have ceased entirely, though they have been reported to be ongoing in public documents. This is likely

a result of misunderstanding and miscommunication, due to the lack of guidelines and processes around commutation. The clemency process, to the extent that it has been formalized, is opaque and inaccessible to prisoners.

Despite this, in general terms, Malawi seems to be on track towards abolition.

Malawi demonstrated its increasing openness to abolition of the death penalty by changing its vote from abstention to votes in favour of the past three UNGA Resolutions for a moratorium on the use of the death penalty (in 2016, 2018 and 2020).

Malawi's previous report to the African Commission on Human and People's Rights was examined in 2015. In its Concluding Observations, the African Commission recommended that the Government of Malawi adopt an official moratorium on the death penalty as the next step towards definitive abolition and ratify the Second Optional Protocol to the ICCPR.

Recommendations

1. That the Government of Malawi to take further steps toward abolition, including by issuing a formal moratorium on executions.
2. That the Government of Malawi to continue its laudable record of voting in favour of the UNGA resolution on a moratorium, as It did again in 2020.
3. That the Government of Malawi to take specific steps to ratify the Second Optional Protocol to the International Covenant on civil and Political Rights (ICCPR) on the abolition of death penalty, as recommended in the Concluding Observations of the ACHPR in 2015.
4. That the Government of Malawi to issue regular, automatic commutations to life for all those who are sentenced to death.
5. That the Government of Malawi to formalise and provide transparency on its clemency and pardon procedures.
6. That the Government of Malawi to uphold the ruling and jurisprudence from the Kafantayeni case and related resentencing project by ensuring consideration of all relevant mitigating factors in every capital case, including ensuring all actors in the proceedings have resources to conduct proper investigation and present mitigation.
7. That the Government of Malawi to ensure courts abide by minimum standards for fair trials.
8. That the Government of Malawi ensure that every person who is sentenced to death is able to access an appeal, as guaranteed by Malawi Criminal Procedure and Evidence Code, sec. 324 and Section 42(f) of the Constitution.
9. That the Government of Malawi uphold its commitment to the Convention Against Torture and Section 19 of the Constitution of Malawi by preventing torture against suspects and making it illegal to use torture-tainted evidence in court. The Government of Malawi should pass domestic legalisation revising Section 176 of the Criminal Procedure and Evidence code, which currently allows forced confessions to be admitted in evidence.
10. That the Government of Malawi to ensure that each accused person in a capital case receives effective independent legal representation.