IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS APPLICATION NO. 5 OF 2015

(Being Criminal Case No. 444 of 2015 at the Blantyre Magistrates Court)

In the Matter Between:

MAYESO GWANDA **APPLICANT**

And

THE STATE **RESPONDENT**

And

LEGAL AID BOARD **FIRST *AMICUS CURIAE***

CENTRE FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE CENTRE **SECOND *AMICUS CURIAE***

PARALEGAL ADVISORY SERVICE INSTITUTE **THIRD *AMICUS CURIAE***

SUBMISSIONS OF THE CENTRE FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE (CHREAA)

INTRODUCTION

1. CHREAA concurs with the submissions of the applicant in this matter that section 184(1)(c) of the Penal Code violates various constitutional rights. CHREAA's focus is on the broader enforcement and effect of the offence. CHREAA submits that section 184(1)(c)

falls short of the requirements set out in section 44 of the Constitution in cases of rights violations in that it does not meet the requirement of proportionality.

THE NATURE OF SECTION 184(1)(c) OF THE PENAL CODE

2. Section 184(1)(c) of the Penal Code provides that "every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that the person is there for an illegal or disorderly purpose, is deemed to be a rogue and vagabond."

3. CHREAA's own research on the enforcement of section 184(1)(c) confirms that the vagueness and overbreadth of the offence inevitably results in its arbitrary enforcement by the police and subordinate courts.

4. Some police officers interviewed as part of the research conducted by CHREAA in 2012 displayed a very broad understanding of the offence, with statements such as:

   4.1. "We conduct a sweeping exercise to arrest all those that have nothing to do but just wander in the towns."[1]

   4.2. "Standing along the road doing nothing."[2]

   4.3. "Most children arrested on charges of rogue and vagabond are street kids and are usually arrested walking around in town at night."[3]

   4.4. "When a person has been found at an odd hour at night."[4]

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[1] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 64, Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

[2] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 64, Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

[3] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 79, Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

[4] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 65, Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

4.5. "Moving without proper documentation at nights."[5]

4.6. "Mainly these are street kids who loiter around town with no place of abode."[6]

5. Some magistrates interviewed as part of the research conducted by CHREAA in 2012 also raised concerns that section 184 of the Penal Code was overly broad and had the potential to violate the rights of innocent persons:

5.1. "My concerns are that these offences, especially the categories are vague and complicated, as such it is difficult for the prosecution to make out cases from these charges, as well as in courts. It is very involving to deal with such cases because there is always a danger of coming up with a wrong decision." [7]

5.2. "My major concern regarding these offences is that it breaches the constitutional right of an accused person, the right to freedom of movement. The law seeks to attack only those persons who are underprivileged or poor. These cases seem to target those that are poor, for example rich people or those using cars at night cannot be caught by these cases in the Penal Code. Simply, the law is discriminatory."[8]

5.3. "Sometimes they arrest wrong people despite their justification, they are told that the court will have a final say. The State most of the time fails to prove the elements of the offence."[9]

5.4. "Most of the time police abuse sweeping exercises by arresting people, especially women from rest houses."[10]

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[5] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 65, Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

[6] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 79, Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

[7] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 70, Interview with Anonymous Magistrate 1 (9 October 2012).

[8] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 70, Interview with Anonymous Magistrate 2 (9 October 2012).

[9] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 70, Interview with Anonymous Magistrate 4 (10 October 2012).

[10] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 70, Interview with Anonymous Magistrate 4 (10 October 2012).

5.5. "I am of the view that concerns should be raised and recommended to the law commission to ensure that laws regarding offences of idle and disorderly persons and being rogue and vagabond should be looked into critically and then come up with an easier and straightforward provision in the Penal Code. This would help both prosecutors and courts to make reasonable and proper decisions, which will also be just according to the circumstances of each individual case that comes up at any point."[11]

5.6. "At times some of the people who are arrested are not offenders and in most cases they enter a plea of guilty so that they should be given a fine or released other than remaining in custody awaiting trial. And at times they discriminate against women, police arrest only women despite that during the arrest they were together with men. For example in rest houses and bottle [liquor] stores." "Much as the police sweeping exercises curb criminal activities, the police should not be taking advantage to abuse the law by arresting people anyhow just to punish them."[12]

6. CHREAA submits that the above comments from police and magistrates illustrates that the offence is overly broad and should be declared unlawful on that basis. As will be explained in the last section of these submissions, legal provisions should be narrowly worded and any overly broad offences do not meet the requirement of proportionality.

7. Whilst police officers and magistrates interviewed in CHREAA's research were generally under the impression that the purpose of the offence was crime prevention, the concerns raised around the enforcement of the offence and its risk of arbitrary enforcement are serious and should be factored into any limitation analysis under section 44 of the Constitution.

[11] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 70, Interview with Anonymous Magistrate 1 (9 October 2012).

[12] Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, page 70, Interview with Anonymous Magistrate 5 (3 October 2012).

THE RATIONALE OF CRIME PREVENTION DOES NOT JUSTIFY THE CONTINUED USE OF SECTION 184(1)(c) OF THE PENAL CODE

8. Crime prevention is a complex issue with no easy solutions. The United Nations Office on Drugs and Crime (UNODC) notes:

> "High levels of urban growth and inadequate services coupled with recent political transitions sometimes lead to rising crime rates and calls from various groups for more repressive policing. All too often beleaguered police fall back on repressive policing strategies to allay demands from political leaders or the population. Inevitably, however, repressive policing tends to have the effect of achieving, at best, short-term reductions in crime and of alienating much of the population from the police. Repressive efforts further corrode law enforcement, making it harder for police to enforce the law in the future."[13]

9. The Malawi Police Service has as one of its targets to develop joint problem solving partnerships with communities and other stakeholders to address underlying causes of crime and to train al police officers on values and principles of community policing activities.[14] This is a laudable objective. CHREAA submits that it is important for the police to re-consider the extent to which it uses outdated criminal offences in its efforts to reduce crime as the strategies used to enforce section 184 of the Penal Code are often counter-intuitive.

10. The purpose of section 184(1)(c) is said to be one of crime prevention in that arrests under section 184 potentially nets prospective criminals and serves as a deterrent for crime.

11. Whilst some criminals might fall within the net of section 184, the offence in essence allows for the conviction of persons who have not in fact been proved to commit any specific crime. This cannot be said to be an effective outcome. Surely it is better if suspected criminals are charged with the offences they are suspected of having committed and not with the lesser offence of being a rogue and vagabond.

12. CHREAA submits that international standards for crime prevention measures suggest that the continued use of section 184(1)(c) as a catch-all provision to arrest persons to prevent future crime is without basis and indeed counter-productive to the government's objective of fostering a working relationship with the community and the rule of law.

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[13] UNODC, *Introductory handbook on policing urban space*, 2011, at page 12.
[14] Malawi Police Service Strategic Development Plan July 2012 to June 2017, page 10-11.

13. The enforcement of section 184(1)(c) of the Penal Code is usually accompanied by arrest. This cannot be a reasonable response to crime prevention - Arrest practices applied broadly against offenders committing minor offences has not proved to lead to reductions in serious crime; and the rights violations occasioned by arrests requires strategies where arrest is only used as a last resort.[15]

The need for evidence to inform crime prevention strategies

14. The Guidelines for the Prevention of Crime emphasise the use of a knowledge base as one of the basic principles underlying effective crime prevention strategies:

> "Crime prevention strategies, policies, programmes and actions should be based on a broad, multidisciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices."[16]

15. The types of knowledge required includes knowledge about the incidence and prevalence of crime-related problems; knowledge about the causes of crime and victimisation; knowledge about existing policies and good practices; and knowledge about the process of implementing programmes and measuring their outcomes and impacts.[17]

16. In 2010, the United Nations' Salvador Declaration[18] again emphasised that crime prevention strategies should be based on the **best available evidence** and good practices.[19]

17. In 2015, the United Nations' Doha Declaration on Integrating Crime Prevention and Criminal Justice[20] recognised the importance of **effective, fair, humane and accountable crime prevention strategies** as a central component to rule of law, which should be implemented "along with broader programmes or measures for social and economic

[15] Weisburn D and Eck J (2004) "What can police do to reduce crime, disorder and fear?" *The annals of the American Academy* 593, 50.
[16] ECOSOC Resolution 2002/13, at para 11.
[17] UNODC *Handbook on the crime prevention guidelines – making them work*, 2010, at pages 50-54.
[18] Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and their Development in a Changing World, adopted at the Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, April 2010, A/CONF.213/L.6/Rev.2.
[19] Section 33, 34.
[20] Thirteenth United Nations Congress of Crime Prevention and Criminal Justice, in April 2015, adopted the Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International levels, and Public Participation A.CONF.222/L.6

development, poverty eradication, respect for cultural diversity, social peace and social inclusion."[21] To achieve this, the Doha Declaration emphasised the need to:

> "Adopt comprehensive and inclusive national crime prevention and criminal justice policies and programmes that fully take into account **evidence** and other relevant factors, including the **root causes of crime**, as well as the conditions conducive to its occurrence, and in accordance with our obligations under international law and taking into consideration relevant United Nations standards and norms in crime prevention and criminal justice, to ensure appropriate training of officials entrusted with upholding the rule of law and the protection of human rights and fundamental freedoms."[22]

18. Evidence suggests that a number of crime prevention strategies have not been successful and are not illustrative of good practice:

18.1. The UNODC questions deterrence as a crime prevention strategy:

> "deterrence is the classical crime prevention practice of the justice system. It is assumed that if penalties are harsh then offenders will be deterred from offending again, and others will be deterred from starting a career of crime. Unfortunately, there is no evidence to show that harsh penalties have a unique ability to prevent crime."[23]

18.2. The UNODC emphasises that crime will not be reduced by a corrupt, inefficient or ineffective police force; by lengthy periods in detention; by dependence on prison as a primary means of punishment; or by overcrowded and unsanitary prisons with no capacity for rehabilitation programmes. [24]

19. Crime prevention has been shown to work in a number of instances, including where police corruption is reduced; direct patrol in crime hot spots; problem-oriented policing; community policing with a clear focus; and improving police legitimacy with the community.[25] The UNODC emphasises that the bedrock of crime reduction and prevention includes respect for human rights; political will; an assumption that all accused persons are

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[21] Article 3.
[22] Section 5(a).
[23] UNODC, *Handbook on planning and action for crime prevention in Southern Africa and the Caribbean regions*, 2008, at page 20.
[24] UNODC, *Handbook on planning and action for crime prevention in Southern Africa and the Caribbean regions*, 2008, at page 23.
[25] UNODC, *Handbook on planning and action for crime prevention in Southern Africa and the Caribbean regions*, 2008, at page 20-21.

innocent until proven guilty; an evidence base for decisions; and police forces which realise they have to work with the community to prevent crime. [26]

20. There is no formal evidence to support the argument that arrests under section 184 in fact reduces crime. Thus the underlying rationale of section 184, of crime prevention and deterrence, seems to be more perceived than real. In contrast, there is ample evidence of the impact of the arrests under section 184 on the rights of an accused person and its effect on the trust communities have in the police force. In this context, it cannot be said that the crime prevention purpose of section 184 justifies its continued existence.

THE NEGATIVE CONSEQUENCES OF ENFORCEMENT OF SECTION 184(1)(c) OF THE PENAL CODE ON PRISONS

21. Two decades ago, the Plan of Action for the Kampala Declaration called on governments to review penal policies and reconsider the use of prisons to prevent crime:

> "In many developing countries, there is concern about an increased rate of crime. An understandable response is to send more people to prison, resulting in increased prison populations. **This response has little effect on rates of crime.** The majority of detainees are in pre-trial detention for petty crimes or serving short terms of imprisonment…"[27]

22. The UNODC has also raised concerns about the potential negative consequences of commonly used penal policies favouring arrest and imprisonment:

> "When poverty and lack of social support to the disadvantaged are combined with a 'tough on crime' rhetoric and policies which call for stricter law enforcement and sentencing, the result is invariably a significant increase in the prison population. Sometimes described as warehousing, the increased population typically comprises an overrepresentation of the poor and marginalised, charged with petty and non-violence offences. Although unrelated to crime rates, this situation is fuelled by media stories which promote tough action to combat crime despite the absence of evidence to demonstrate the link between rates of imprisonment and crime rates."[28]

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[26] UNODC, *Handbook on planning and action for crime prevention in Southern Africa and the Caribbean regions,* 2008, at page 24.
[27] Adopted at the Kampala Seminar on prison conditions in Africa, September 1996, at para 3.
[28] UNODC *Handbook on strategies to reduce overcrowding in prisons*, 2013, at page 25.

23. Studies suggest that high rates of imprisonment are also linked to the use of the criminal justice system as a response to various social problems, including the increased movement of people due to socio-economic conditions, and the lack of health and welfare provision for persons with mental illness etc.[29] CHREAA submits that the continued assumption that the police, through overly broad offences such as section 184(1)(c) of the Penal Code, can arrest persons and thus somehow address social behaviour within society is misplaced and fails to acknowledge the root causes underlying such behaviour. The rights violations occasioned by such a response is no longer acceptable in an open and democratic society.

24. CHREAA submits further that whilst not being the only cause for prison overcrowding, the over-use of imprisonment and detention, including for minor offences such as section 184(1)(c), exacerbates overcrowding in prisons, thus contributing to the violation of human rights not only of persons detained under section 184(1)(c) but all prisoners who are then affected by the increase in prison population and the resultant negative impact on prison conditions.

International standards for imprisonment

25. The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)[30] provides for the standards to be maintained in detention, including:

> "All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation..."[31]
> "The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner..."[32]
> "Adequate bathing and shower installations shall be provided that every prisoner can, and may be required to, have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate…"[33]

[29] Coyle A (2012) A worldwide problem – the roots of mass incarceration, Sentencing Project, *25th Anniversary Essays*, at page 36.
[30] United Nations General Assembly Resolution A/RES/70/175 of December 2015.
[31] Rule 13.
[32] Rule 15.
[33] Rule 16.

> "All parts of a prison regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times…"[34]
> "Every prisoner shall, in accordance with local or national standards, be provided with a separate bed and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness..."[35]
> "Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served."[36]

26. In addition to international standards for detention, courts have often emphasised that the contravention of these standards amount to a violation of human rights, including the right to dignity and to freedom from inhumane and degrading treatment.

27. In 2011, the Supreme Court of the United States took up the issue of overcrowding in prison in *Brown v Plata*.[37] Prisoners with mental health issues were not receiving adequate medical care, and the Court found that the underlying problem was prison overcrowding. The Court stated it was obliged to act:

> "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society. If government fails to fulfil this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation."[38]

28. The Court recognised the need to be "sensitive to the State's interest in punishment, deterrence and rehabilitation", as well as to the expertise of prison administrators, but it reaffirmed its responsibility "to enforce the constitutional rights of all 'persons,' including prisoners."[39]

29. The European Human Rights Court has also taken up the issue of overcrowding in *Varga v Hungary*. The Court found that several aspects of the applicants' detention, such as poor hygiene and lack of privacy, combined with the lack of personal space due to overcrowding,

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[34] Rule 17.
[35] Rule 21.
[36] Rule 22.
[37] *Brown v Plata*, 563 U.S. 493 (2011).
[38] *Id*. at 511. The Eighth Amendment of the United States' Constitution states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
[39] *Brown v Plata*, 563 U.S. at 511 (2011).

showed that the conditions of detention constituted a violation of Article 3 of the European Convention on Human Rights.[40]

30. As the Malawian High Court stated in *Republic v Mphembedzu*, "the authorities have a legal and moral obligation to protect the right to health of prison inmates."[41]

The current situation in Malawi's prisons

31. It is widely acknowledged that Malawi's prisons are congested and that prisoners receive inadequate nutrition and health care. These conditions have existed for many years.[42]

32. The 2014 Prisons Inspectorate Report noted that "prisoners observed that prisons are congested because courts are jailing people who commit minor offences that could be expended through community service."[43]

33. Prison conditions in Malawi have been held to violate prisoners' human dignity and freedom from inhuman and degrading treatment in the case of *Masangano v Attorney General and Others:*[44]

> "[O]vercrowding . . . contributed to the death of 259 inmates in a space of about 18 months. In a room meant for a certain number of inmates one would find almost double the number. That overcrowding has been noted as one factors creating the spread of diseases in prison such as tuberculosis which has been said to be a major cause of sickness and death in prison, along with HIV".[45]

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[40] *Varga v Hungary* [2015] ECHR 422. Article 3 of the European Convention on Human Rights reads: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[41] *Republic v Mphembedzu* (Bail Case No. 70 of 2011) [2011] MWHC 12 (21 November 2011).
[42] For example: The African Commission on Human and Peoples' Rights Special Rapporteur on Prisons and Conditions of Detention in Africa, in 2001 issued a report on Prisons in Malawi, which raised concerns about overcrowding and proposed increased use of alternative sentencing measures, mediation and community policing to reduce congestion in prisons. The report made various recommendations on food and health services. In January 2014, a Report to the Human Rights Council by the United Nations Special Rapporteur on the Right to Food on her Mission to Malawi, recommended that the Government "take immediate measures to ensure access to adequate food in prisons, including by raising current minimum standards in the new Prison Act being drawn up".
[43] Malawi Inspectorate of Prisons (2016) *Report to Parliament on Prisoners' Health and Staff Welfare*, at page 2.
[44] [2009] MWHC 31.
[45] *Masangano v Attorney General and Others* [2009] MWHC 31.

34. Since the 2009 ruling in that case, there has been little improvement. Many of the violations found in the 2004 Prison Inspectorate Report cited by the Court as evidence of inhuman and degrading treatment have continued or worsened as evidenced in the 2014 Prison Inspectorate Report.

35. The 2014 Prisons Inspectorate Report raises a number of concerns about current conditions in Malawi's prisons, noting that there was evidence of worsening conditions:

    35.1. "Almost all prisons in the country have prisoners above the recommended capacity which has resulted in congestion."[46]

    35.2. The overcrowding continues to be so bad that some prisoners do not have space to lie down to sleep and must sleep sitting up in the "shamba" position.[47]

    35.3. Lack of blankets and clothing continues to be an issue. Twelve of the facilities visited lacked the minimum levels of blankets or supplies.[48]

    35.4. The report cited that prisoners were given less than the minimum mandated amount of soap; only one tablet a month, instead of two.[49]

    35.5. The report cited critical food shortages at five facilities.[50]

36. There have also been months of media reports indicating that prisoners have been suffering from food shortages.[51] These reports indicate that food levels are falling below the

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[46] Malawi Inspectorate of Prisons (2016) *Report to Parliament on Prisoners' Health and Staff Welfare*, page 2.
[47] *Id.*
[48] Mzuzu Prison, Chichiri Prison, Zomba Prison, Mikuyu1 Prison, Mwanza Prison, Thyolo Prison, Mulanje Prison, Kasungu Prison, Kachere Juvenile, Byanzi Jevenile, Mzimba Prison and Nkhata Bay Prison. Malawi Inspectorate of Prisons (2016) *Report to Parliament on Prisoners' Health and Staff Welfare*.
[49] Malawi Inspectorate of Prisons (2016) *Report to Parliament on Prisoners' Health and Staff Welfare*, page 3.
[50] Mzuzu Prison reported "below requirements as set under the Prison Act due to lack of funds." Massive debt to suppliers by Chichiri Prison has led to food insecurity. Mulanje Prison reports that prisoners have received half rations since March 2013. Kachere Juveline reports that difficulty in obtaining firewood leads to entire days without food. Funding shortages at Nkhotakota prison were so bad that the prison had K8 Million of debt to suppliers, and at times the prisoners were only fed once a week. Malawi Inspectorate of Prisons (2016) *Report to Parliament on Prisoners' Health and Staff Welfare*.
[51] See, for example, Lackson Kanyoza "Food shortages hits prison" *Malawi Star* (9 March 2016) available at https://www.malawistar.com/2016/03/09/food-shortage-hits-prison/; Christopher Jimu "Hunger threatened Malawi prisons" *Malawi Nation* (11 November 2015) available at http://mwnation.com/hunger-threatens-malawi-prisons/; Thula Chisamba "Hunger hits Mzimba prison" *Malawi 24* (31 December 2015) available at http://mwnation.com/hunger-threatens-malawi-prisons/; Medecins sans Frontiers / Doctors without Borders *Malawi: Detained for a dream* (4 August 2015) available at http://mwnation.com/hunger-threatens-malawi-prisons/.

minimum standards set out by the Prison Act, and thus constitute proof of prisoners in Malawi suffering from inhuman and degrading treatment.[52]

37. The UN Special Rapporteur on the right to food, in his report on his mission to Malawi noted that budget constraints cannot justify violations of the right to adequate food and non-compliance with the Standard Minimum Rules for the Treatment of Prisoners.[53]

The effect of prison conditions on prisoners and their families

38. The Kampala Declaration on Prison Conditions in Africa[54] recommended that "police, the prosecuting authorities and the judiciary should be aware of the problems caused by prison overcrowding and should join the prison administration in seeking solutions to reduce this."

39. The Plan of Action for the Kampala Declaration identified the problem of overcrowding in prisons and noted:

> "Prisons in Africa are over-crowded and inadequately resourced. The conditions for prisoners are inhuman; the conditions for staff are intolerable. **This over-use of imprisonment does not serve the interests of justice, nor does it protect the public, nor is it a good use of scarce public resources.** Imprisonment should only be imposed by the court when there is no other appropriate sentence. People should be sent to prison only when they have committed very serious offences or when the protection of the public requires it…"

40. Pretrial detention has been shown to have a significant impact on individuals and their families, affecting income and employment, education, prison-related expenses, and long-term and intergenerational effects and "those entering pretrial detention come from the poorest and most marginalised echelons of society, who are least equipped to deal with the criminal justice process and the experiences of detention."[55]

[52] The minimum food stuff required by the Third Schedule of the Prison Regulations is .68 Kg of maize flour/day with relish.
[53] Report from the Special Rapporteur on the Right to Food to the Human Rights Council on his Mission to Malawi, A/HRC/25/57/Add.1, January 2014, at page 18.
[54] Adopted at the Kampala Seminar on prison conditions in Africa, September 1996.
[55] OSJI, *The Socioeconomic Impact of Pretrial Detention*, 2011, at page 23.

41. It is widely acknowledged that overcrowding affects the physical and mental well-being of all prisoners, exacerbates existing mental and physical health problems, and increases the risk of transmission of communicable diseases.[56]

42. Imprisonment disproportionately affects people living in poverty and directly contributes to the impoverishment of the prisoner and his or her family.[57] Studies have also shown that children of parents who have been imprisoned are more likely to face food insecurity and come into conflict with the law.[58]

43. Women are particularly vulnerable to remaining in pretrial detention because they cannot afford fines for minor offences, bail or legal representation.[59]

44. The conditions in detention and its impact on the rights of the detainees and their families are so harsh that it is an absolute necessity to review the extent to which society is over-using criminal law to justify its inability to address the problems faced by society. In this context, there is increased acceptance of the principle that arrest and detention should be used as a last resort, and an increasing call for the review of outdated criminal laws and penal policies that allowed for the use of incarceration.

The increased recognition of the need to rationalise criminal offences

45. As part of the increased recognition of the need to reduce the use of imprisonment, the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)[60] called on States to "rationalise criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the

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[56] See for example UNODC (2013) *Handbook on strategies to reduce overcrowding in prisons*, page 11.
[57] The impact of police practices beyond the persons directly affected was highlighted in *South African Informal Traders Forum and Others v City of Johannesburg and Others* [2014] ZACC 8, at para 31: "It must be added that the eviction of traders involved constitutional issues of considerable significance. The ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced 'humiliation and degradation'. Most traders, we were told, have dependants. Many of these dependants are children, who also have suffered hardship as the City denied their breadwinners' lawful entitlement to conduct their businesses. The City has not disputed this. The City's conduct has a direct and on-going bearing on the rights of children, including their rights to basic nutrition, shelter and basic healthcare services. The harm the traders were facing was immediate and irreversible."
[58] UNODC *Handbook on strategies to reduce overcrowding in prisons*, 2013, at page 15. It has been shown that incarceration adversely affects children and families in terms of food insecurity. Cox R and Wallace S (2013) "The impact of incarceration on food insecurity among households with children" Research paper, Andrew Young School of Policy Studies, Georgia State University.
[59] Ackermann M (2014) *Women in pre-trial detention in Africa – a review of the literature*, CSPRI.
[60] United Nations General Assembly Resolution 45/110 of December 1990.

offender".[61] The Rules state that "the use of non-custodial measures should be part of the movement towards depenalisation and decriminalisation instead of interfering with or delaying efforts in that direction."[62] The Rules emphasise that "pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim."[63]

46. Following from this, the African Commission of Human and Peoples' Rights endorsed the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa in 2002. The Plan of Action recommended the "decriminalisation of some offences such as being rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents."

47. The 2015 Doha Declaration also called on States to:

> "Intensify our efforts to address the challenge of prison overcrowding through appropriate criminal justice reforms, which should include, where appropriate a review of penal policies and practical measures to reduce pretrial detention, to enhance the use of non-custodial sanctions and to improve access too legal aid to the extent possible."[64]

48. The United Nations Office on Drugs and Crime (UNODC) notes that the first question to be asked is whether particular types of conduct need to fall within the scope of the criminal justice system at all:

> "Various societies have decriminalised vagrancy in whole or in part, significantly reducing rates of imprisonment… In such cases, decriminalising the behaviour and dealing with it outside the criminal law does not produce a negative impact on public safety."[65]

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[61] Rule 1.5.
[62] Rule 2.7.
[63] Rule 6.1.
[64] Thirteenth United Nations Congress of Crime Prevention and Criminal Justice, in April 2015, adopted the Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International levels, and Public Participation A.CONF.222/L.6, section 5(k).
[65] UNODC, *Handbook of basic principles and promising practices on alternatives to imprisonment*, 2005, at page 13.

49. They emphasise that "not all socially undesirable actions should be subject to the criminal law. The response to many undesirable actions may better fall within the scope of social or health-care policies rather than criminal justice." [66]

50. When assessing the continued value of section 184(1)(c) of the Penal Code, it is important to consider the reality of poverty which exists in Malawi. It is not rational to criminalise poverty in the context of drought, unemployment and the absence of social security measures aimed at providing support to persons who find themselves in poverty.

51. The US Court of Appeals for the Ninth Circuit, in dealing with the enforcement of an ordinance that criminalises sitting, lying or sleeping on public streets; held that it was incorrect for the police to arrest persons who were homeless and had no choice but to sleep on public streets – "the Eight Amendment (the prohibition against cruel and unusual punishment) prohibits the City from punishing involuntary sitting, lying or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without a shelter in the City of Los Angeles."[67]

52. CHREAA submits that the fact that arrests under section 184(1)(c) have led to detention and imprisonment, in the context of current prison conditions prevailing in Malawi, is disproportional to the behaviour the offence seeks to address. It is also counter-productive in that it results in an increased prison population and increased economic hardship of those arrested and their families.

THE REQUIREMENT OF PROPORTIONALITY

53. Section 44(2) of the Constitution provides that limitations on the exercise of any constitutional rights must be prescribed by law, be **reasonable**, be recognised by **international human rights standards** and be **necessary** in an open and democratic society.

54. The Malawi courts have emphasised that the burden to prove that a limitation of a constitutional right meets the requirements in section 44(2) does not lie on the one whose

[66] *UNODC Handbook on strategies to reduce overcrowding in prisons*, 2013, at page 46.
[67] *Jones v City of Los Angeles*, CV-03-01142-ER, at 4454.

right is being limited, but on those seeking to limit the right.[68] This is in line with comparative jurisprudence on the burden of proof in constitutional matters.

54.1. The Uganda Constitutional Court, in the case of *Lyomoki and Others v Attorney General*,[69] held that the onus is on the applicants to show a *prima facie* case of violation of their constitutional rights. Thereafter the burden shifts to the respondents to justify that the limitations to the rights in the statute is justified by the Constitution.

54.2. The Canadian Supreme Court, in *R v Oakes*[70] held that "the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation".[71]

54.3. The Human Rights Committee has also found that the onus on the State extends to demonstrating the necessity and proportionality of the Act:

> "When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat"[72]

55. Various forms of the proportionality test have been adopted by courts, but they are all designed to ensure that a limitation does not unduly restrict a fundamental right. The test involves a balancing exercise between the rights of an individual and the rights of a community. The Zimbabwe Constitutional Court in *Chimakure* stated that "[t]he purpose of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression."[73]

56. The proportionality test to determine reasonableness was famously set out in the Canadian case of *R v Oakes*.[74] In order for a limitation to satisfy this test there must be a rational connection between the limitation and the objective sought to be achieved by the limitation;

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[68] *Jumbe and Mvula v Attorney General*.[2005] MWHC 15.
[69] *Lyomoki and Others v Attorney General* [2005] 2 EA 127 (UGCC).
[70] *R v Oakes* [1986] 1 SCR 103.
[71] *R v Oakes* [1986] 1 SCR 103-105D, 136J.
[72] UNHRC General Comment 34 at para 35.
[73] *Chimakure v Attorney General of Zimbabwe* [2014] JOL 32639 (ZH) page 21.
[74] *R v Oakes* [1986] 1 SCR 103.

the limitation must be the least intrusive way in which to achieve that objective; and there must be proportionality between its effects and its objectives.

57. The African Commission of Human and Peoples' Rights explained in *Constitutional Rights Project and others v Nigeria*[75] that "[t]he justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow"[76] and that a "limitation may not erode a right such that the right itself becomes illusory."[77]

58. In *Chimakure* the Zimbabwe Constitutional Court focused on the need for the limitation to be the least intrusive way of restricting the right when he said that "[t]he law should not in its design have the effect of overreaching and restricting expression which is not necessary for the achievement of the objective concerned."[78] The law must be "narrowly drawn and specifically tailored to achieve the objective pursued by the legislation."[79]

59. In its proportionality analysis, the Court should also take into consideration the constitutional principles set out in section 12 of the Constitution, including:

> "(b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their **lawful authority** and in accordance with their responsibilities to the people of Malawi;
> (c) the authority to exercise power of State is conditional upon the **sustained trust** of the people of Malawi and that trust can only be maintained through open, **accountable** and transparent Government and informed democratic choice;
> (d) the **inherent dignity** and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;
> (e) as all persons have **equal status before the law**, the **only** justifiable limitations to lawful rights are those **necessary to ensure peaceful human interaction** in an open and democratic society; and
> (f) all institutions and persons shall observe and uphold this Constitution and the rule of law and **no institution or person shall stand above the law**."

60. Criminal justice policies, including decisions on what type of behaviour to criminalise have to strike a proper balance between the rights of individuals and crime prevention. The

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[75] *Constitutional Rights Project and Others v Nigeria* (2000) AHLHR 227 (ACHPR 1999)
[76] *Constitutional Rights Project and Others v Nigeria* (2000) AHLHR 227 (ACHPR 1999), at para 42.
[77] *Constitutional Rights Project and Others v Nigeria* (2000) AHLHR 227 (ACHPR 1999), at para 42.
[78] *Chimakure v Attorney General of Zimbabwe* [2014] JOL 32639 (ZH) page 54.
[79] *Chimakure v Attorney General of Zimbabwe* [2014] JOL 32639 (ZH) page 58.

Tokyo Rules emphasise that States should "endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims and the concern of society for public safety and crime prevention."[80]

61. Considerations about the proportionality of an offence should look not only at the offence itself, but the broad range of alternatives the State has in its arsenal to address the same objective, and whether in that context the offence in its current form is a rational response to achieve its stated purpose.

62. Considerations about proportionality should further consider whether the proposed measure, the arrest of persons in public places "in circumstances as to lead to the conclusion that the person is there for an illegal or disorderly purpose", with the resultant rights violations occasioned by any arrest, is the best and least intrusive measure to achieve the stated objective. What is clear from the wording of the offence is that the person arrested has not been found actually committing an offence. What the offence does it to provide the police with the means to arrest a potential criminal without requiring them to taken any of the precursory steps in investigation that would be required for substantive crimes. The consequence of the arrest is subjecting persons to prison conditions which will certainly violate their rights to inhuman and degrading treatment and dignity.

63. CHREAA submits that the rights violations occasioned by arrests under section 184 do not serve a broader social purpose – there is no evidence of crimes being prevented by arresting persons under section 184. The effect of the arrests impacts not only on those arrested and their families, but on all prisoners subjected to worsening prison conditions as a result. In this context, section 184(1)(c) of the Penal Code simply does not meet the test of proportionality.

[80] United Nations General Assembly Resolution 45/110 of December 1990, Rule 1.4.

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