

Submission to the Committee on the Rights of the Child regarding the Government of Malawi's Combined Third, Fourth and Fifth Periodic Report

Submitted by

The Southern Africa Litigation Centre (SALC)

**SOUTHERN ■ AFRICA
LITIGATION ■ CENTRE**

And

The Center for Human Rights Education Advice and Assistance
(CHREAA)



CHREAA

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Submission to the Committee on the Rights of the Child Regarding the Government of Malawi's Combined Third, Fourth and Fifth Periodic Report

Introduction

In advance of the preparation of the list of issues for the Republic of Malawi's periodic report to the Committee on the Rights of the Child (the Committee), the Southern Africa Litigation Centre (SALC) and the Center for Human Rights Education Advice and Assistance (CHREAA) would like to bring to the attention of the Committee concerns regarding the detention of primary caregivers and the best interest of the child; the incarceration of unaccompanied, migrant children, the imprisonment of children and child marriages. The organisations request the Committee to include these concerns in the list of issues for Malawi's review under the Convention on the Rights of the Child (the Convention).

SALC is a non-governmental organisation based in Johannesburg, South Africa. It aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers and local civil society organisations in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers and civil society organisations in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC has been working on human rights concerns in Malawi since 2005.

CHREAA is a non-governmental organisation which was established in the year 2000 and is working country wide in Malawi. CHREAA envisions a Malawian society that upholds human rights, justice and rule of law. Its mission is to promote and protect human rights by assisting vulnerable and marginalised persons in Malawi to access justice through civic education, advocacy and legal assistance. CHREAA's activities include provision of Paralegal Services in prisons, working with communities to empower them to participate in the delivery of justice in Malawi, protecting sex workers from police abuse, campaign against laws that discriminate against the poor and conducting voter and civic education in all prisons in Malawi and other selected constituencies.

Incarceration of Caregivers and the Best Interest of the Child (Articles 3 and 9)

SALC and CHREAA are concerned that the authorities have not put into place adequate measures to ensure the best interest of the child when sentencing caregivers to incarceration or holding them in places of detention prior to conviction. Under Malawian law, any breastfeeding infant child of a female prisoner may be received into prison with his or her mother. After the child has been weaned, he or she is to be separated from their mother and placed in the care of relatives or friends or a welfare authority.¹ Children are often kept in places of detention with their mothers up to the age of 3 years. The organisations recognize the need to ensure that a child is not separated from their parent, except when in the best interest of the child and when certain conditions are met.²

¹ Section 60 of the Prisons Act

² Article 9 of the Convention states, "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child..."

However, placing a child in detention with their mother can negatively impact on early childhood development and permanently damage the psychological and mental well-being of the child. In addition, due to lack of adequate funding prison services in Malawi are rarely able to provide the basic needs of a child held in detention with their mother, such as an adequately nutritious and balanced diet including for breastfeeding mothers, adequate pediatric health care and clothing. Most places of detention in Malawi lack recreational facilities and few children held with their mothers are able to attend nursery.

On the other hand the separation of mothers or other caregivers from their children has serious negative repercussions for the children. Children, often traumatized and unable to comprehend the reasons for separation, are likely to suffer from acute emotional and developmental problems. In addition, incarceration of a child's primary caregiver – who are often, but not always mothers - may result in the child receiving inadequate care.

Furthermore, in most cases women who take their children with them to prison, do so because there is no relative or friend to take care of them. So where the Officer in charge of the Prison exercises his power under section 60 to remove the child from prison, often the only option available would be to hand over the child to a welfare authority. However, there are very few welfare authorities in the country. Malawi's Child Care, Protection and Justice Act (CCPJ),³ under sections 46 and 47, provides for public and private foster homes but currently Malawi does not have one single public foster home to take in children in need of care and protection as envisaged by the Act. There has not been any commitment from government to rectify the present situation, almost six years after the Act came into force.

SALC and CHREAA are concerned that, in imposing sentences against caregivers, not enough is being done to take into account the best interest of the child and to ensure them the care and protection necessary for their well-being in accordance with the article 3 of the Convention.⁴ There have been a few cases where the courts have viewed child care responsibilities as a mitigating factor in sentencing,⁵ but this is not consistently applied in all courts. Malawi law allows a magistrate to order pre-sentencing reports which enable a court to inquire into the circumstances of the person being sentenced, including whether they are the primary caregiver of any children and the effect that their incarceration will have on their children.⁶ However, these pre-sentencing reports do not appear to be used often.

³ Act No. 22 of 2010

⁴ Article 3 states, "(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (2.) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (3.) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

⁵ In *Neziyasi Dickson and Another –Vs- Republic (2007)*: In considering the grant of bail to the applicant who had a child with her in prison, Justice Singini (as he then was) stated that "one compelling factor for the grant of bail is the plight of this baby who is in custody with the applicant as her mother and in my judgment, the best interest of the child requires that the mother be released on bail". In 2013, *Rep v Keke*: The High Court held that a sentencer must pay attention to gender. E.g. a prison sentence should be reduced where the woman is pregnant. In 2014, the High court in *Rep v Kaliati* held that a non-custodial form of punishment should have been imposed on a 65-year-old grandmother convicted for shoplifting. It further saw the fact that the woman looked after orphans as a mitigating factor.

⁶ Section 321J of the Criminal Procedure & Evidence Code states, "(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks

Detention of unaccompanied migrant children (Articles 2, 3, 8, 22, 20, 24, 37 and 39)

SALC is concerned about the high number of unaccompanied migrant children, mainly from Ethiopia, detained under poor conditions at Kachere Juvenile Prison - and possibly other places of detention. Many of these are reportedly victims of child trafficking or have been smuggled into the country with the intention of either seeking asylum in Malawi or transiting to South Africa. As of February 2016, there were 37 such children in Kachere Prison, all of whom were from Ethiopia.

In terms of the CCPJ, local authorities are required to appoint a secretary for children's affairs who is responsible for the welfare of children within its area.⁷ Local authorities are also required to provide accommodation for children within their jurisdiction in need of accommodation, including those seeking refuge.⁸ Despite these provisions, unaccompanied migrant children are held in prison whilst arrangements are made for their repatriation by the Malawi authorities in collaboration with their respective governments. The insufficient number of lawyers to assist with their review cases and judicial delays often leads to their prolonged detention, sometimes indefinitely. Of the 37 children in detention in February, only 16 had been taken before a court to have their case heard. They are often held in cells with pre-trial detainees, and sometimes with sentenced prisoners, under conditions which lack the basic minimum standards for detention and insufficient resources to afford them an adequate and balanced, nutritious diet. Many of the children are not accustomed to the local food served and some have reportedly opted to remain hungry rather than eat the food. While organisations such as MSF have provided some medical attention for the detained, unaccompanied migrant children, access to health care for them remains of great concern. An aggravating factor is that many of them have travelled long distances on very little food before arriving in Malawi and being detained.

SALC and CHREAA believe that the conditions of their detention amount to a violation of their rights to be protected against all forms of discrimination or punishment on the basis of the status of their parents;⁹ not to be subjected to cruel, inhuman and degrading treatment;¹⁰ as well as their rights to the enjoyment of the highest attainable standard of health.¹¹ It must also be noted that the Working Group on Arbitrary Detentions (WGAD) has stated that the prolonged administrative custody of migrants without the possibility of administrative or judicial review of remedy constitutes an arbitrary detention.¹² The WGAD has also set out principles for the

fit, in order to inform itself as proper to the proper sentence to be passed." According to subsection (2) of this section, "The information or evidence that the court may receive may... include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence." These reports may include information on whether the convicted person is a care giver.

⁷ Article 7(1) states, "A local government authority shall designate one of its officers to be the person responsible for the welfare of children and such officer shall be referred to as the Secretary for Children's Affairs."

⁸ Article 73, "A local government authority shall provide accommodation for children within its area of jurisdiction who appear to be in the need of accommodation as a result of their being lost or abandoned or seeking refuge."

⁹ Article 2(2), "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

¹⁰ Article 37, "States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment..."

¹¹ Article 24 (1), "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."

¹² WGAD Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty

detention of migrants, which include the requirement for migrants placed in custody to be brought promptly before a judicial or other authority and for such detention to be for a limited time and never indefinite.¹³ The detention of these children, may therefore in some cases also constitute a violation of their right not to be arbitrarily deprived of their liberty.¹⁴

In addition, the organisations are concerned that the detention of the unaccompanied migrants fails to take into account the best interest of the child,¹⁵ the special protection and assistance to which they are entitled,¹⁶ their right to receive appropriate protection and humanitarian assistance in the case of asylum-seekers¹⁷ and their physical and psychological needs as required by the Convention.¹⁸ The places where they are held do not meet the requirements of safety – particularly for trafficked children - health, number and suitability of staff, as well as competent supervision for victims of child trafficking and potential or actual asylum-seekers.¹⁹ Furthermore, the language barrier and lack of adequate translators raises a concern for the ability of the authorities to ensure “the physical and psychological recovery and social reintegration” of the children.²⁰

Civil society organisations in Malawi have been intervening to assist the children and have suggested their removal to safer and more appropriate safe houses. However, SALC, CHREAA and these organisations are concerned that medical care in the proposed alternative places, which are in more remote areas, may be even harder to access, particularly as MSF may not be able to visit as frequently. The organisations are also concerned about the safety of the children in the safe houses, particularly those who have been trafficked.

under customary international law, Paragraph 38 (d)

<http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>

¹³ WGAD Deliberation No. 5 on situation regarding immigrants and asylum-seekers. Principle 3 and 7, <http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>

¹⁴ Article 37, “States Parties shall ensure that... (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

¹⁵ Article 3 (1)

¹⁶ Article 20 (1), “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”

¹⁷ Article 22 (1), “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

¹⁸ Article 37, “States Parties shall ensure that: ... (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age...”

¹⁹ See Article 3 (3) which states. “States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

²⁰ Article 39 of the Convention, “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Imprisonment of children (Article 3, 37 and 40)

In addition to the detention of unaccompanied migrant children for administrative purposes, SALC and CHREAA are concerned about the detention of children in criminal proceedings. According to the CCPJ, which applies to all children below the ages of 16 years,²¹ “No child shall be imprisoned for any offence.”²² An exception is made where a child has committed a serious offence, but in such a circumstance the child can only be held at a reformatory centre.²³ Despite this, children as young as 13 years have been detained even for petty offences. For example, in June 2015, CHREAA responded to a case of a 13-year-old girl convicted of rogue and vagabond offences and sentenced to payment of a fine of K4000.00 (about US\$5.30) or 30 days imprisonment in default of payment. As she was unable to pay the fine, she was sentenced to imprisonment and initially held at Chichiri Prison, before being transferred to Mpemba Reformatory Centre.

The detention of children is a violation of Malawi’s obligations in terms of Article 37 of the Convention which requires the imprisonment of a child to be in conformity with the law, in a manner which takes into account the needs of persons of his or her age and only as a measure of last resort. Furthermore, the detention of children, particularly for petty offences, is a violation of their right to dignity,²⁴ is not appropriate for their well-being or proportionate both to their circumstances and the offence,²⁵ and is not in the best interest of the child. It must also be noted that international human rights standards call for the decriminalisation of petty offences such as being a rogue and vagabond.²⁶

²¹ Section 2 of the CCPJ states, “... "child" means a person below the age of sixteen years; "child" used in relation to proceedings before age determination shall, if the age is unknown, include a person who appears to be below sixteen years of age...”

²² Section 140 of the CCPJ

²³ Section 141 CCPJ

²⁴ Article 40(1) of the Convention, “States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

²⁵ Article 40(3), “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. A variety of dispositions... and other alternatives to institutional care shall be available to *ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.*”

²⁶ See the UN Guiding Principles on Extreme Poverty and Human Rights call for the decriminalisation of laws which criminalise poverty, http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf, and the African Commission Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, <http://www.achpr.org/instruments/ouagadougou-planofaction/>

Child marriage (Article 3, 16 17, 19 and 24)

Child marriages are prohibited by law in Malawi.²⁷ However, reports of child marriages in the country, including of children as young as 12 years of age, continue to be of concern. The situation is aggravated by the lack of clarity as to the minimum legal age for marriage in the country. In its report, the state mentions that, “The Marriage, Divorce and Family Relations Bill raises the minimum age for marriage to 18 years.”²⁸ This Bill has since been passed into law, but conflicts with the provisions of the Constitution. The state avers, “Under the Constitution, it still remains legal to enter into marriage at the attainment of the age between 15 and 18 years as long as consent of parents or guardians is obtained.”²⁹ However, the Committee has strongly recommended that “States parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.”³⁰ The Committee on the Elimination of all Forms of Discrimination against Women has further stated:

“In the context of the Convention on the Rights of the Child, "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Notwithstanding this definition, and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.”³¹

In addition, the African Charter on the Rights and Welfare of the Child,³² as well as the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,³³ both to which Malawi is a party, also set the minimum age of marriage at 18 years.

Bearing in mind that early marriage adversely affects the health of a child and their education, the marriage of a child under 18 years of age is rarely in the best interest of the child and may constitute a violation of their right to the enjoyment of the highest attainable standard of health. Furthermore, in many circumstances, such a marriage may constitute or result in “physical or mental violence,

²⁷ Article 80 and 81 of the Child Care Act state, “No person shall subject a child to a social or customary practice that is harmful to the health or general development of the child. 81) No person shall- a) force a child into marriage; or b) force a child to be betrothed.

²⁸ Republic of Malawi, Convention on the Rights of the Child, Combined Third, Fourth and Fifth Periodic Report, 2014, Paragraph 6

²⁹ Republic of Malawi, Convention on the Rights of the Child, Combined Third, Fourth and Fifth Periodic Report, 2014, Paragraph 5

³⁰ Committee on the Rights of the Child, General Comment 4, paragraph 16, <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC4.pdf>

³¹ Committee on the Elimination of Discrimination against Women, General Recommendation 21, Equality in marriage and family relations, 1994, paragraph 36

³² Article 21 (2) states, “Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years.”

³³ In terms of Article 6(b), “the minimum age of marriage for women shall be 18 years.”

injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”, which the state is obligated to take measures against.³⁴

Conclusion and Recommendations

While Malawi has made progress since submitting its initial report in 2007, areas of concern relating to the rights of children in law and practice remain. SALC therefore requests the Committee to include the concerns raised in this submission in the list of issues for consideration of Malawi’s combined third, fourth and fifth periodic report. SALC specifically requests the Committee to seek clarification from the government of Malawi regarding the following:

- i) Incarceration of Caregivers
 - The number of pregnant women and infants currently with their mothers in places of detention;
 - the steps being taken by the authorities to ensure courts take into account the best interest of a child when sentencing care givers, including through the use of pre-sentencing reports;
 - measures put in place to make alternative, non-custodial sentences the default sentences for primary care givers, or to hand down a custodial sentence for the shortest term that is conceivably commensurate with the offences in question if a custodial sentence is absolutely necessary;
 - Steps being taken to ensure the least traumatic impact on a child of holding a care giver in custody where a custodial sentence is necessary;
- ii) Detention of Unaccompanied, Migrant Children
 - The number of unaccompanied migrant minors currently in places of detention
 - The role of the Secretary for Children’s affairs in relation to unaccompanied migrant children;
 - The resources being allocated to ensure unaccompanied migrant children are kept in safe homes in conditions that meet the special protection and assistance to which they are entitled;
 - Measures being put in place to trace the parents of these children or other members of the family in order to obtain information necessary for their reunification as required by the Convention;
- iii) Imprisonment of Children
 - Steps being taken to ensure courts are aware of the provisions of the CCPJ and the Convention with regards to the detention of children and act in conformity with these provisions;
 - Steps being taken to ensure the decriminalisation of petty offences in accordance with international human rights standards;

³⁴ Article 19(1) of the Convention, “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

iv) Child Marriages

- Steps being taken to ensure Malawi brings the minimum legal age for marriage in line with international human rights laws and standards, as well as the envisaged time frame for this; and
- Measure put in place to ensure adolescent girls have access to information on the harm that early marriage and early pregnancy can cause, as required by the Committee³⁵

³⁵ General Comment 4, paragraph 27, <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC4.pdf>