African Human Rights and Access to Justice Programme
Legal Opinion for Case No. 262 – prolonged detention of a minor in Malawi

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Brief description of the case:
X, now aged 26, was charged, tried and convicted for murder in July 1997. Before his conviction he had for "more than four months" been held in prison custody at Chiriri, Malawi. Upon conviction, the judge ordered that X, who would have been about 16 years, be detained at the pleasure of the president of Malawi at a reform school for convicted juvenile offenders. However, X alleges that he was not taken to the school as per the court order. Instead, he was imprisoned in general prison population. X now claims in a "petition for immediate release" that at the time of his sentencing, the police informed him that he would not be taken to juvenile custody because he was not a juvenile. X has now filed a petition for release at the High Court of Malawi on the ground that X "has been in prison custody for a prolonged period of time".

Overview of legal opinion
The opinion argues that the right to a fair trial as guaranteed under the ICCPR, CRC, ACHPR and ACRWC was violated and specifies some provisions for which there is a continuing violation. The opinion also argues that at the time of prosecution and sentencing when X was a minor, the right to certification and trial as a minor, and the right to rehabilitation by way of punishment were violated. It specifies that there is a continuing violation of the right to be protected from arbitrary detention and that the violation started from the time of conviction. The opinion also argues that certain provisions of the Constitution of Malawi were violated. The opinion specifies some national and international remedies that could be pursued.

The opinion is written in parts as follows:
1. Applicability of relevant international human rights standards in Malawi in present case
2. Certification as a minor at the time of arrest and prosecution
3. Right to legal representation as a minor and specific entitlements related to the charge of murder
4. Right to rehabilitation in sentencing, sentencing to juvenile reform school and detention in general prison population at the "pleasure of the president" of Malawi
5. Right to fair trial and protection from arbitrary detention
6. Domestic remedies
7. International remedies

1. Applicability of relevant international human rights standards in Malawi in present case.
1.1 The **Convention on the Rights of the Child (CRC)** came into force in February 1990. Together with its Protocols, it is the comprehensive body of international human rights law addressing the child, and has been nearly universally ratified. Malawi ratified the CRC without reservations in February 1991 and submitted its Initial State Report to the CRC Committee in August 2000.

1.2 Malawi is a state party to the **African Charter on Human and Peoples' Rights, 1981 (ACHPR)** and the **African Charter on the Rights and Welfare of the Child, 1990 (ACRWC).** Under article 60 of the **ACHPR**, Malawi is obliged to respect, fulfill and protect human rights in the Charter and in other international treaties, such as the **CRC**. The African Commission has had occasion to find Malawi in violation of Charter rights, and two of these communications are referred to in the body of the opinion below.

1.3 Under Article 211 of the **Constitution of Malawi, 1995** (hereinafter Malawi's Constitution)1, international treaties once ratified, become part of the national law of the country. 2 The Convention is therefore a source of law in Malawi. In addition, Malawi accepts the right to individual petition for her citizens to approach international enforcement mechanisms for enforcement of international guarantees of human rights.

1.4 Malawi has also legislated additional statutory rights and procedures applicable to children. The **Children and Young Persons Act** (cap 26:03) is relevant after the period it was enacted, since it now stipulates the criminal procedures to be adopted in respect of children.

1.5 As a member of the Commonwealth, Malawi has committed herself to the enforcement of a human rights framework through judicial remedies, in terms of the Bangalore Principles, which are rooted in the shared common law traditions.3 In addition to a judicially enforceable Bill of Rights, Malawi also has judicial review procedures wherein superior courts review the processes of lower courts as well as administrative decisions and acts that infringe on natural rights.

1.6 Malawian national law relevant to the provisions of the **ACHPR, ACRWC, CRC** and the **ICCPR** cannot in terms of Article 211 of her Constitution be considered to be overruling the latter. Rather, their aim is to give effect to the same goals pursued by the international guarantees. In this opinion, I read them as *pari materiae*, in accordance with the legal doctrine that statutes having a common purpose are to be construed together.

2. Certification of as a minor at time of arrest and prosecution

2.1 Malawi's Constitution specifies the age of a child for "purposes of human rights as 16"4 18 is the age at which one may vote in Malawi, although one can marry at 15. Under the employment laws, the terminology "young person" refers to a person who is between 12 and 16 years of age.5 The **Children and Young Persons Act** provides that a child who is a person between the ages of 14 and 18 years should be tried as a person who knew what he or she was doing.6 Under the Marriage Act, a minor is a person who is under 21 years of age.

2.2 Malawi therefore has plural and contrarian age provisions under her laws, with distinctions made for different goals and purposes. Malawi statutes adopt different ages to describe a person as a "child" as distinct from a "young person". In the case of conflicting

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1 All references are to text of the Constitution of Malawi downloaded from www.richmond.confinder.edu on May 8, 2007. The Articles cited here from the Constitution are attached at the end of the opinion.

2 International law 211.—
(1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.
(2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses.
(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.

3 Discussion of dichotomy between monism and dualism is deliberately omitted. The Bangalore Principles can be downloaded from the commonwealth website. They guide judges on the use of international treaty provisions in the domestic context.

4 See Para 53 of State Report submitted to CRC in August 2000 and available on www.unchr.ch database accessed on May 18, 2007

5 Section 4 of Employment of Women, Young Persons and Children Act

6 See Para 71 of Malawi State Report to CRC, August 2000 note 4 above.

provisions of age in the national law, the **CRC** and the **ACRWC** are relevant to guide the court as is familiar commonwealth judicial practice. The **ACRWC** expressly states that a child is a human being who is below the age of 18 years.7 The **CRC** states the same age with some allowance for modification by national law. In sub Saharan Africa, among the neighbours of Malawi, 18 is the median age of majority.

2.2 If X8 is 26 years of age today (May 2007) as stated in the case description, and was imprisoned in July 1997, after trial for murder, after being remanded in prison for "at least four months" while awaiting trial, it follows that he was at most 16 when the offence itself was committed. X merely insists he was involved in a bar brawl that led to the fatal stabbing of the deceased, but denies he stabbed the deceased. In this opinion, the question of X's guilt is not discussed, given the existing conviction that has not been overturned. It is not stated whether the intention in the intended proceeding is to seek overturning of sentence, subject to the law of limitations and other rules in the domestic law. This opinion however will not address the question of guilt.

2.3 If as stated, the offence for which X was prosecuted and subsequently convicted, was itself committed when X was below the age of 16, the **CRC** and the **ACRWC** compel some questions of legal principle as well as child rights that would have to be considered.

- Was X tried as a juvenile or as an adult?
- Given the charges, and noting that murder has a mandatory capital penalty in the country, in which court was X tried and convicted – juvenile court, subordinate court or High Court? Were his legal guardians present when he was arrested?
- Were his legal guardians informed that X had been arrested and would be charged with murder?
- Were his legal guardians present when X was interrogated during investigations before trial, after arrest? Did he have any legal representation during this time?
- Did he have any legal representation during trial for murder? Were any alternative charges considered?
- Did he have any co accused?
- Who cross examined prosecution witnesses?
- Did the presiding judicial officer inform X what his rights as a juvenile were under the Constitution, during trial?
- Did the presiding judicial officer consider the implications of trying X for murder for acts committed when he was at most not more than 16 years of age?

2.4 These questions are important in view of the age factor. Under the **CRC** and the **ACRWC**, there is an implicit requirement for a formal assessment of the age of juveniles brought within the criminal justice system, in order for their rights to become ascertained and available to them. If such an age assessment and certification is not taken, the risk that the rights of the child will be infringed upon are increased. The certification should be one of the procedures used to determine procedures to be used to prosecute a person who may be a minor, or for offences committed when that person was a minor. It is noteworthy that Malawi admits in its state report to not having a law prescribing the age at which a child, here defined as a person below 16 years, can benefit from legal counseling.9 Silence in Malawian law can be remedied by considering what the obligations are under the international provisions. Article 37 of the **CRC** applies and it states –

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7 Article 2 of African Charter on Rights and Welfare of the Child, available from the website of the African Commission on Human and Peoples' Rights at www.achpr.org; Article 2 of the Convention on Rights of the Child available on www.unhchr.ch

8 Name of the actual victim is actually unknown to the author and the description is from the supplied narrative in the case application to AHRAJ programme, no.262

9 Para 54 of State report, infra note no.4

> "States Parties shall ensure that:
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> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
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> (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;
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> (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. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
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> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

2.5 In order to facilitate the implementation of this article, the *CRC Committee* issued General Comment no.10 on children in criminal justice system on 9 February 2007.10 Even prior to this, the since reformed *UN High Commissioner for Human Rights* had issued the **Guidelines for Action on Children in the Criminal Justice System** in 1997.11 Clauses 14 – 23 thereof are quite detailed and state –

> "14 – Particular attention should be given to the following points:
> (a) There should be a comprehensive child-centred juvenile justice process;
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> (b) Independent expert or other types of panels should review existing and proposed juvenile justice laws and their impact on children;
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> (c) No child who is under the legal age of criminal responsibility should be subject to criminal charges;
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> (d) States should establish juvenile courts with primary jurisdiction over juveniles who commit criminal acts and special procedures should be designed to take into account the specific needs of children. As an alternative, regular courts should incorporate such procedures, as appropriate. Wherever necessary, national legislative and other measures should be considered to accord all the rights of and protection for the child, where the child is brought before a court other than a juvenile court, in accordance with articles 3, 37 and 40 of the Convention.
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> 15. A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence. Appropriate steps should be taken to make available

10 The GC 10 is attached in a pdf file as an annex. See clauses 23 – 25 thereof.
11 The Guidelines are also attached as a pdf file as an annex.

> throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the informal resolution of disputes in cases involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims. In the various measures to be adopted, the family should be involved, to the extent that it operates in favour of the good of the child offender. States should ensure that alternative measures comply with the Convention, the United Nations standards and norms in juvenile justice, as well as other existing standards and norms in crime prevention and criminal justice, such as the **United Nations Standard Minimum Rules for Non-custodial Measures** (The Tokyo Rules), with special regard to ensuring respect for due process rules in applying such measures and for the principle of minimum intervention.

2.6 Malawi's Constitution protects the rights of children, defined as persons below the age of 16. This definition would apply to X at the time when at least the offence itself was committed by virtue of Article 23(5). Without an assessment of the age, and its certification in the prosecution, it can be argued that the state did not exercise its duty of care to a person who would be within the meaning of article 23, notwithstanding that X was tried and convicted as a juvenile, since the court itself was not a juvenile court. The certification should have been taken at the time when the authorities made a decision to prosecute X for the offence of murder. Even assuming X had subsequently attained the age of 16 years when his trial commenced, it is clear he was considered to be a minor for purposes of trial, conviction and sentencing. The question is whether the status was reflected at the time of committal of offence, arrest and committal to prosecution. Article 23 would be relevant for all pre-trial procedures. As regards the jurisdiction of the court, it is important to consider whether it was a court whose proceedings honoured article 42(g)(vi). Article 42 (g) provides:

Art 42 –

> "(g) in addition, if that person is a child, to treatment consistent with the special needs of children, which shall include the right--
> (i) not to be sentenced to life imprisonment without possibility of release;
> (ii) to be imprisoned only as a last resort and for the shortest period of time;
> (iii) to be separated from adults when imprisoned, unless it is considered to be in his or her best interest not to do so, and to maintain contact with his or her family through correspondence and visits;
> (iv) to be treated in a manner consistent with the promotion of his or her sense of dignity and worth, which reinforces respect for the rights and freedoms of others;
> (v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role; and
> (vi) to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards."

2.7 In my view, articles 23 and 42 of Malawi's Constitution can be read *pari materiae* with article 37 of the **CRC** and the soft norms contained in the Guidelines above. They are not a national law that overrules articles 37, and in many respects, the wording of the **CRC** has seeped into the provisions of Malawi's law. This makes a case for the relevance of using the provisions of the **CRC**, and subsequent general comments and guidelines, to interpret the procedures adopted in Malawi after 1991. If the proceedings failed to honour articles 23 and 42 of Malawi's Constitution, clearly, they cannot have satisfied the provisions of the **CRC** and the **ACRWR**. Malawi therefore failed to meet its international obligations in relation to article 37 of the **CRC,** in relation to X when he was a child under both **CRC** and Malawi's Constitution. Malawi failed to meet its obligations under article 17(1) of the **ACRWC**, for X whilst he was below the age of 18, which imposes an obligation to respect the right of every child accused of penal offence to special treatment.

2.8 For comparative law, the national lawyer may note the rules and procedures in Australia, Scotland and South Africa which share the common law and commonwealth traditions with Malawi. In Scotland, a person considered a minor in the criminal justice system below 16, while in Australia the age is 17. The Criminal Procedure Act of Scotland 1995, requires that no child under the age of 16 years is prosecuted except under the instructions of the Lord Advocate (Attorney General) section 42 (1). The SA law, as we see later below, also requires an independent investigation on the basis of the person being a minor, which should be submitted to the court before sentencing.

2.9 It is noted that Malawi's state report to the **CRC** accepts the need for a prosecution monitoring system, but claims it cannot implement one fully due to resource insufficiency. This is not satisfactory, and the matter could be taken up when devising legislative and administrative remedy strategies.

3. Right to legal representation as a minor

3.1 There are two aspects of the right to legal representation in this case, in terms of international guarantees, where the entitlement is one of legal aid. In both cases, the right is concerned with both procedural and substantive fairness. First, every minor who is prosecuted for a penal offence is entitled to legal representation at state expense. Article 17 of the **ACRWC** provides for a legal representative to be assigned to such a minor beginning from the time of arrest. The **Guidelines for Action on Children in the Criminal Justice System** require priority be given to setting up agencies and programmes to provide legal and other assistance to children, if needed free of charge, such as interpretation services, and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected in practice.12

3.2 Second, there is a right to legal representation at state expense in respect of an indigent accused person who is charged with an offence that carries a severe sentence. This is provided for in article 14 of the **ICCPR** and in article 7 of the **ACHPR**. The *United Nations Human Rights Committee* has already held that denial of access to a lawyer in all capital offences cases constitutes a violation of article 14.13 Under the penal law of Malawi, murder is an offence for which the penalty is a mandatory death sentence.

3.3 Even if the sentence upon conviction was not mandatory death sentence, but a death sentence imposed by the court of its volition, strict observance of article 14 of the **ICCPR**, read *pari materiae* with article 7 of the **ACHPR**, would impose an obligation to allow the accused person access to legal representation at state expense. The Malawi High Court has recently found the mandatory nature of the death sentence for murder convictions to be unconstitutional. However, the Court has upheld the sentence itself, only disposing with the mandatory aspects of it.

3.4 One of the well known decisions of the *African Commission for Human and Peoples' Rights*, deals with the rights to liberty and to legal representation in Malawi. In Krischna Achutan (On behalf of Aleke Banda), and in Amnesty International on behalf of Orton and Vera Chirwa, as well as Amnesty International on behalf of Orton and Vera Chirwa v. Malawi14, the Commission made a joint finding. Krishna Achuthan had appealed to the Commission on behalf of his father-in-law, Aleke Banda, who at the time of the

12 See para 16 of the Guidelines attached as an annex.
13 Communication No. 459/1991, Osbourne Wright and Eric Harvey v. Jamaica, adopted on 27 October 1995
14 Communications nos. 64/92, 68/92 and 78/92 based on related facts and decided jointly by the ACmHPR in 1995. Available on Compilation of Decisions of the African Commission for Human and Peoples' Rights, Institute for Human Rights and Development, 2000

communication was being held at the pleasure of the president since 12 years, without legal charge or trial. Amnesty International petitioned the Commission on behalf of Orton and Vera Chirwa, both sentenced to death following a treason trial in which they were denied legal representation. The Commission held Malawi accountable for violations of Articles 1, 6 and 7 of the **ACHPR**.

3.5 International treaty guarantees, soft norms, case law and the provisions of the law in Malawi would require legal assistance to have been provided to X from the time authorities reached a decision to arrest him for prosecution for murder. Parental guidance while necessary, would not be sufficient for trial purposes on these charges, unless the parents as legal guardians undertook to legally represent X in trial. In juvenile proceedings additional duty of care would have been manifested in the procedures, hence the nature of the proceedings is also relevant.

4. Right to rehabilitation in sentencing

4.1 The CRC, the ACRWC and the Malawian Constitution address the aims of juvenile sentencing. First, the aim is rehabilitation consistent with the child' dignity and best interests. Secondly, the aim is a special judicial exercise of discretion and proportionality. The court should consider several possible alternatives, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care. The **Guidelines for Action** stipulate that the placement of children in closed institutions should be reduced. Such placement of children should only take place in accordance with the provisions of article 37(b) of the Convention and as a matter of last resort and for the shortest period of time. Corporal punishment in the child justice and welfare systems should be prohibited.15 The **United Nations Rules for the Protection of Juveniles Deprived of their Liberty** and article 37(d) of the **CRC** also apply to any public or private setting from which the child cannot leave at will, by order of any judicial, administrative or other public authority.16

4.2 As X was committed to detention in juvenile custody at the pleasure of the president, the result is that he was committed to a custodial sentence. In the ensuing period, this became a lengthy custody in jail where X was denied the status of being a juvenile. Under the Malawian Children and Young Persons Act, once he had attained the age of 16, authorities were at liberty to treat him as a person who was not a juvenile. This is the only interpretation one can make of the subsequent decision to de facto overrule the court order for committal to juvenile custody. At the same time, the decision had the effect that X could not benefit from the rehabilitation that as a juvenile, he could have obtained from the reform school. In addition, his right not to be subjected to custody unless strictly necessary, and even then for the shortest time possible, was negated.

4.3 Having seen article 42 of Malawi's Constitution, which is read *pari materiae* with article 37 of the CRC and article 17(1) of the ACRWC, it is clear that when the Malawian court is asked to sentence a child, it has discretion between imprisonment and detention, and other types of punishment with the interest of rehabilitating the child in mind. Vocation training and other types of care, including counseling are also important aspects of the rehabilitation in juvenile detention.

4.4 The legal argument is that custodial sentences when dealing with minors should be avoided, restricted and imposed for the shortest term. This is precisely what did not happen in the case of X. Under the national law, custodial sentence was a given, and the practice of detaining minors at the pleasure of the president seem to be a mandatory sentencing procedure.

15 Para 18, see annex
16 Para 19, see annex

4.5 If mandatory, the principal question to ask here is whether by virtue of being mandatory, they curtail the judgment of the judicial officer. Until recently, the death sentence has been a mandatory minimum sentence imposed on all convicted persons by virtue of provisions in the penal law. That has been overturned by the High Court on the ground that a mandatory minimum sentence when imposed as such, converts the trial judge into a policy arm of the administration of legislature, and the court cannot be seen to be exercising its own judgment. If in X's case, the trial judicial officer was not at liberty to consider alternatives for punishment proportionate with the crime and severity of sentence, taking account of aggravating as well as ameliorating factors in deciding the penalty, and the best interests of the juvenile offender into account, one has room to argue that this is a mandatory sentencing practice that is a violation of the international norms and the constitutional guarantees in Malawi.

4.6 The statute dealing with the custodial detention of juveniles in Malawi is the Children and Young Persons Act. It provides for periodic review of children placed in institutions and for special court procedures, sittings and sentencing pertaining to a child, as well as approved homes or institutions. However, the Act, by its own provision, and in practice, does not apply to those who have attained and are over the age of 16, and it does not apply to those such as X who are not placed in juvenile custody but are in general prison population.

4.7 For comparative law purposes, the national lawyer's attention is drawn to 3 key cases from South Africa.
(i) The first is In *S v Kwalase17* wherein the implication of state obligations on sentencing children was considered. The court acted on the basis of the ratification by South Africa of the United Nations Convention on the Rights of the Child, and provisions in South Africa Constitution on consideration of international law by the courts. It also restated the importance of soft norms contained in the **Beijing Rules for the Administration of Juvenile Justice** (1985), the **United Nations Rules for the Protection of Juveniles Deprived of their Liberty** (1990) and the **Riyadh Guidelines on the Prevention of Juvenile Delinquency** (1990). The Court held that –

> "[p]roportionality in sentencing juvenile offenders (indeed, all offenders), as also the limited use of deprivation of liberty particularly as regards juvenile offenders, are clearly required by the South African Constitution. [and with] due regard to the provisions of international instruments relating to juvenile justice. *The judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an individualised response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the judicial officer must structure the punishment in such as way as to promote the reintegration of the juvenile concerned into his or her family and community*"

(ii) The second case is *S v Z18* where the court considered cases involving the imposition of suspended prison sentences. After on site inspections of the conditions in which persons under 18 years are held after sentencing, the court discovered that children were actually serving sentences of imprisonment. Some were not even separated from adults and not all were attending school. 18 children were discovered in prison awaiting transfers to reform school, and some of them had been in prison for more than a year. Following these discoveries, the court re emphasised the principle that imprisonment for children should be restricted, avoided and imposed for only the shortest periods if necessary. Thereafter, the court formulated three rules to be used in such cases –

17 Reported in 2000 (2) SACR 135 (C) see 130 – 139b
18 Reported in 1999 (1) SACR 427 (ECD) see 431 - 441

a) First, the younger the child, the more inappropriate the use of imprisonment.
b) Second, imprisonment is especially inappropriate where the child is a first offender, and,
c) Third, short-term imprisonment is seldom appropriate in cases involving children.

The court also required a monitoring system for sentencing be set up.

(iii) The third case is *S v Mtshali and Mokgopadi* 19. This was a case of judicial review wherein the sentences of two girls who had been referred to a reform school were overturned, when it appeared that there was no such facility for girls in the province of Gauteng, and that the girls had consequently been held in prison for almost two years awaiting the designation of an appropriate facility. Other provinces had refused them admission to provincially administered facilities, as the referral from another province would have cost implications for the receiving province. The Gauteng provincial authority, on the other hand, had declined to accept responsibility for the costs, and the girls remained incarcerated in prison as a consequence until the matter was brought to the attention of a judge by a social worker. Setting the sentence aside, the Judge argued that the proceedings were not in accordance with justice, as the magistrates concerned had, through no fault of their own, made orders founded upon a misapprehension as to the nature of the consequences that would follow.

5. Right to fair trial and protection from arbitrary detention

5.1 Perhaps there were reasons why X as a young offender of about 16 years could not be detained with other juveniles, say for their or his safety. But these can only be speculated since what was denied was that X was in fact a minor, rather than what particular effect his detention would have as such. To me, the de facto conversion of a rehabilitative custody order to one of general imprisonment points to the arbitrariness in the sentencing of X where the interests of the juvenile were dispensed with without any additional judicial step. It appears that X was merely handed over to an officer responsible for the prison to begin an indefinite term of imprisonment, notwithstanding the actual sentencing order. This abuse happened within a system or pattern of other infringements of the rights of juveniles and minors within the criminal justice system.

5.2 In the original custodial detention sentencing orders, it appears that X was committed to an approved school for the duration of the period remaining until he was no longer an eligible juvenile having attained the prescribed age, unless released earlier. In that period, and in any subsequent period failing release, the duration of the term of custodial sentence would be determined administratively. This practice is referred to as detention at “the pleasure of the president.” The power of the president to exercise mercy and release X is his constitutional prerogative. That power can be petitioned administratively and exercised on the basis of advice and recommendations of the relevant officials. The administrative process provides the institutional possibility of appeal and review, and it is the gateway to the presidential pardon. That part of the process is amenable to judicial review for several reasons including error or bias, but it is not clear whether this judicial remedy extends to the prerogative itself. Malawi High Court would have to interpret the Constitution in that regard.

5.3 A possibility is that in view of the lengthy detention, the court can be asked through a judicial review application to issue an order setting aside the sentence as happened in *S vs Mtshali and Mokgopadi* above.

5.4 Another possibility is to submit evidence of the impracticability or excessive difficulty bordering on impossibility of invoking the administrative channels to presidential pardon, which is purely discretionary if given at all. It is not clear whether X or his parents or family or anyone on his behalf have tried in the intervening period to have him transferred to a

19 Case A863 of 1999 WLD unreported

juvenile home or set free upon attaining the age of majority. It is relevant if there has been any kind of formal attempt that resulted in failure and continuing incarceration. It is relevant to show the impracticality as well as to evidence when delay can be taken into account. The effect would be to indicate an absolute detention without any remedies from the administration. Such a detention would not be compatible even with the Malawian Constitution which prohibits the derogation of the right to protection from arbitrary detention even when a state of emergency has been declared. It is incompatible with a state of constitutionalism and respect for human rights, and the rights of the child.

5.5 On the ground that detention is arbitrary when it violates the law, the detention of juveniles with the adult population has to be considered as excessive. This mixing is prohibited by the **CRC** as well as the **ACRWC** for what are self evidently natural reasons.

5.6 X has now been in prison detention for ten years presumably without any knowledge of when he will be released. In cases of arbitrary detention, the excessive length of detention is a key factor when determining whether a violation has occurred. The case law is that each specific case of prolonged detention must be considered on its merits, taking into consideration other factors such as the conduct of authorities and existence of possibility of independent review and appeal. Suffice to say that ten years is a long term even by Malawian penal standards. For instance, under the Malawian penal law, a person who defiles a boy below the age of 14 risks a maximum sentence of seven years. Life sentences are reserved for other serious felonies such as murder and rape, while death sentence still exists in the statute books for murder and treason, although it is no longer a mandatory sentence.

5.7 If the sentencing orders issued by the court are reviewed, the basis could be whether the nature of the proceedings respected the provisions of article 23 and 42 of the Constitution read *pari materiae* with articles 37 of the CRC and article 17 of the ACRWC. If the court was not an established juvenile court, yet as a court that tried X as though “he knew what he was doing” as per the national children’s law, possibly without legal representation, then by issuing sentencing orders applicable to a juvenile, then it would have contradicted its jurisdiction and acted under a fundamentally flawed process. The sentencing orders it could be argued, would then be subject to nullification and the sentence set aside.

5.8 If however the sentencing orders were merely used as a pretext to place X in a prison under a term of imprisonment that was not stipulated, then even if X was only so placed for temporary reasons, for instance, to ascertain his age, the duration itself, if not the practice has dubious legality and the imprisonment ought to be argued as arbitrary detention without legal basis and in violation of the rights of the child.

6. Domestic remedies

6.1 Without any independent review of this sentence at the pleasure of the president, X can effectively remain in prison for a further ten years. A sentence that has no fixed duration is arbitrary and therefore a violation of the law. The error was on the part of the court which –

- failed to consider alternative possibilities,
- failed to consider rehabilitation as a priority and detention as a last resort,
- failed to ensure detention for the shortest time possible, and
- failed to ensure separate detention away from adults in general prison population.

6.2 The court could have considered alternatives that include alternatives to custodial sentencing and that have the possibility of periodic and ongoing independent review and monitoring.

6.3 The court did not assist the national authorities through clear orders and without adequate supervision, the police and prison authorities behaved with disregard to the rights of X. As a

result, the superior court could be asked to set down judicial rules to guide the lower courts, based on an effective human rights approach. Those that courts can address could be consideration of a full range of penalties, including choosing to convert X for a lesser offence, for which there was no mandatory sentencing.

6.4 X is entitled to monetary compensation for –
- Excessively lengthy detention that is arbitrary because it is not proportional to the offence as a matter of fact, and because it violates the law as a matter of legal argument.
- denial of justice
- legal and moral harm done to him as a result of the arbitrary detention.

6.5 The period warrants exemplary damages. The de facto overruling of the juvenile sentencing and its conversion into an implicit and indefinite term of imprisonment demonstrates a degree of negligence and of impunity and in my view warrants punitive damages.

6.6 Today the court can release X on or without condition as a remedy for the violation of his rights as a juvenile and his rights to be protected from arbitrary detention which continue through his ongoing incarceration without limit.

6.7 Malawi also offers administrative remedies in her Bill of Rights. A number of non judicial constitutional bodies exist that can offer specific admin remedies in case of X since he is now serving a prison term without any judicial oversight.

6.8 Malawi needs a preventive remedy in the form of a monitoring system. Prevention does not costs as much as compensation and rehabilitation, and it need vigilance One part of it would be a certification system for purposes of prosecution especially for classes of serious offences, and severity of penalty. This would tie to issues of consent to prosecute a minor, legal representation at state cost, and trial in a juvenile court. The other part could be a monitoring system for sentencing monitoring based on the guidelines and principles of the CRC.

6.9 Article 1 of the CRC defines a child as a human being who is under the age of 18, but recognizes that the national law may stipulate a lower age. Article 2 of the ACRWC is more rigid on the age: “For the purposes of this Charter, a child means every human being below the age of 18 years.” Legislative action could be pursued to harmonise the different statutory provision of different qualifying ages and to align them with international provisions particularly in article 2 of the African Charter for the Rights and Welfare of the Child.

7. International remedies

7.1 The effectiveness of human rights depends on the effectiveness of remedies provided for their violation. Remedies for violations of rights entail recourse to an independent authority competent to ensure respect for those rights, even though not necessarily a judicial body. The right to a remedy for an arguable claim of a violation of a fundamental right or freedom is also a right expressly guaranteed by almost all international human rights instruments.

7.2 The *international* guarantee of a remedy implies that a State has the primary duty to protect human rights and freedoms first within its own legal system. Article 1 of the **African Charter for Human and Peoples’ Rights**, 1981 requires states to take legislative, administrative and other measures to respect, protect and fulfill the Charter rights. Article 1 of the **European Convention on Human Rights** requires the Contracting States to “secure” the rights and freedoms under the Convention. Both systems establish enforcement mechanisms, and in both cases the *African Commission* and the *European Court* exert their supervisory role subject to the principle of subsidiarity, i.e. only after domestic remedies have been exhausted or when domestic remedies are unavailable or ineffective.

7.3 In order to secure remedies from international guarantees, the right to an effective remedy is autonomous. The *African Commission* for instance has in practice accepted individual complaints based on articles 55 and 56, autonomously from rights to petition the organ within national law, which in most cases is silent. However, as with the *European Court*, under article 13, access to remedies is directly tied to those cases where the complaint or petition concerns specific right(s) in the Charter (or its Protocols). An applicant is required to point out one or more articles that form the basis of the rights claim.

7.4 Finally, in order to secure the international remedy, the existence of an actual breach of a substantive provision is not a prerequisite. The African Commission has admitted communications on the basis that they make a *prima facie* arguable case. The *European Court* has also stated that if a claim is arguable, there is a right to have the claim decided and subsequently to obtain a remedy. *Arguablity* infers a probability rather than a certainty of a favourable decision, a likelihood of success.

7.5 Monetary damages are so far the only damages one can claim for the violation of the right to be protected from unreasonable delay of trial

7.6 In the case of excessive incarceration, pecuniary damages can be awarded and in some countries have also awarded a public apology.

7.7. The international human rights laws considers remedies to be effective and available if they are reasonably predictably accessed by victims, for instance as demonstrated by case law, and secondly, when they are available at the time when the victim would have sought them from the national authority. Certain preventive remedies would be considered effective if in these terms and in the present case if for instance:

- administrative and judicial procedures allowed the possibility of fast tracking hearing of appeals against custodial sentences imposed on minors
- administrative or judicial procedures were immediately available for minors to lodge a request for release from custody upon attaining the age of majority
- the procedures permitted periodic and ongoing administrative and judicial review of all detention cases where there is no fixed limit
- a superior court had set clear guidelines regarding sentencing for the lower courts and prosecuting authorities, and where deviation needs written disclosures to the trial court
- such guidelines allowed the transfer of cases to an administrative tribunal that has the same authority to decide on the reasonableness of the change in rules such as the constitutional human rights commission, or independent prosecution body
- given the cost and even availability of persons with legal skills, the procedures allowed a state social worker or even NGO based community worker to have access to children held awaiting trial or transfers to juvenile reform schools
- reparations were granted on account of violations of procedural rules, when a malfunctioning or denial of justice ensues.

7.8 Lengthy detention in police custody of juveniles after arrest and before arraignment and charge should be considered with more gravity. The rules could discourage it by insisting when a violation is established that some remedies are immediately available. These could be –

- Warning to the prosecution that further delay will result in dismissal of the case
- Actual dismissal of the case if further delays (through adjournments) sought by prosecution
- Automatic dismissal of the prosecution, although drastic, when the period of unrest is unjustifiably prolonged, or goes beyond period stipulated by case law

- Sentence can be automatically mitigated and reduced in view of period of lengthy detention
- Exemption from punishment altogether, even if a conviction arises, based on proportionality of offence to sentence tests

Conclusion
I found the following paragraph from the submission by Malawi in her August 2000 State Report to the CRC honest but also rather nonchalant.

> "The provisions of the Children and Young Persons Act are rarely followed. In most cases arresting officers do not follow the required procedures. Some children are placed in prisons without charge. Many are not informed of their right to bail, trials are delayed, lay magistrates rarely constitute themselves into juvenile courts and children are tried as adults as presiding magistrates do not declare that they are presiding over a juvenile court. Mostly, juveniles are not aware of the type of the court they are being tried in."20

In light of this paragraph, one can wonder what Malawi considers to be the importance of ratifying international human rights instruments, and the role of the state in enforcing, respecting and fulfilling them. That said, I think the proper strategy to be considered is one that focuses more attention on remedies, rather than problems, and particularly attention on less costly preventive remedies.

For instance, the discontinuation of a prosecution in which a child has been in police custody for at least four months prior to being charged, can solve through avoidance part of the problems with the courts themselves. The decision to waive custodial sentence where a child has sat in prison for two years awaiting transfer to a reform school is another remedy that prevents the situation where the child continues to wait indefinitely, even after he or she is no longer a child. What should count is the motivation underlying the preventive remedy in light of specific forms of challenges that have to do with inadequacy of skills, of resources and of official care.

The national lawyer can be supported to come up with well motivated specific measures that are a form of redress and remedy for the victim, but which also develop the system in light of its current state of dysfunctionality and unintended malpractice.

End.

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