



**STORY OF CHANGE:
VALUE OF PARTNERSHIPS
IN ABOLISHING DEATH
PENALTY IN MALAWI**



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Advocates for International Development (A4ID), founded in 2006, is a global charity that believes the law can and should be used more effectively to advance fair and sustainable development. A4ID aims to inspire and enable lawyers to join the global fight to eradicate poverty by advancing the UN Sustainable Development Goals (SDGs). Through A4ID, the world's top lawyers provide free legal support to organisations, working to advance human dignity, equality and justice. Its work has so far impacted in over 130 countries.

A4ID's Rule of Law Expertise (ROLE UK) Programme is funded by the Foreign, Commonwealth and Development Office. It supports partnerships to provide pro bono legal and judicial expertise with the aim to strengthen the rule of law in official development assistance (ODA)-eligible countries. The Programme's Knowledge Hub provides the pro bono legal sector with access to targeted and relevant information to inform and improve their technical assistance in development contexts.

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tell his story. Thanks also to Ines Maximiano and Joely Thomas for researching and drafting this story of change. Additional thanks to Neha Bhansali for design and layout.

COVER PAGE: *On the day Charles Khoviwa was released on bail.*

BACKGROUND

This story of change describes the progress made towards abolishing the death penalty in Malawi through a flexible and adaptive partnership between Reprieve, Legal Aid Bureau, and Akin Gump, supported by A4ID's ROLE UK Programme.

Stories of Change provide a descriptive and qualitative analysis of a particular ROLE UK Programme-supported partnership to add depth and detail to the quantitative data collected across all the partnership activities. These stories aim to test the hypothesis that the Programme's support for partnerships, or for short-term activities developed in partnership, has led to improved rule of law, and that this type of support can affect changes in policy, law and practice.

This Story of Change employs the **Most Significant Change technique**, a technique that involves collecting and analysing accounts of change and deciding which of these is the most significant.



UNDERSTANDING THE CONTEXT

WHERE THE DEATH PENALTY STANDS TODAY

In 2021, Malawi came closer than it ever has to permanently abolishing the death penalty. On 28 April, Malawi's Supreme Court of Appeal ruled that capital punishment was prohibited under Section 45(1) of the Constitution of Malawi's supreme law because it stood contrary to the right to life. Those on death row were to be granted a resentencing hearing within 21 days, with the longest possible sentence now set to be life imprisonment.

This achievement came as a result of decades of work by human rights defenders, lawyers and advocates, including a ROLE UK Programme-supported partnership. However, four months after this judgment, in an unprecedented move by the court, the death penalty was reinstated. This move is particularly worrying as it has the potential to set a precedent for other judicial U-turns, further affecting the rule of law in Malawi. Despite this disappointing move, nine death row prisoners were able to secure resentencing hearings. One prisoner was released on bail,

seven are serving life (commuted from death) and one prisoner is still on death row.

This story of change explores how a ROLE UK Programme supported partnership between Reprieve, Legal Aid Bureau (LAB) Malawi, and Akin Gump, who are some of the actors pivotal to progress towards abolishing the death penalty and the resentencing of the nine death row prisoners – has worked together to overcome numerous challenges that have presented themselves over the years. Key to their success, is their collaborative approach and their flexible and adaptive way of working.

THE HISTORY OF THE DEATH PENALTY IN MALAWI & THE FORMATION OF AN UNSTOPPABLE PARTNERSHIP

The death penalty in Malawi was instituted during colonisation by the British and carried over after independence in 1964. Despite this, Malawi has had a de facto moratorium on the death sentence since May 1994 and no executions have been carried out since 1992. This means that although the state has not executed people who have been

convicted of the death penalty, it has kept them in prison for life.¹ Since 2005, prisoners sentenced to death must serve their life sentences on death row, which is generally much worse compared to the conditions of the general population serving life in prison. In 2007, the Malawi High Court abolished the mandatory death penalty in the case of *Kafantayeni and Others v. Attorney General*.² Following the ruling, judges were allowed to consider mitigating factors³ when deciding on sentences for these crimes. As a consequence, 169 prisoners became entitled to a rehearing. However, by 2014, only one prisoner's case had been reviewed. This was partly as a result of lost or damaged records, as well as a severe lack of legal aid lawyers. Approximately 20 legal aid lawyers represented a population of 19 million in both civil and criminal matters, and many of these lawyers lack the skills and expertise required to take on capital cases and challenge death sentences.

To address this, a coalition of local and global organisations created the Malawi Resentencing Project⁴ in 2014. This project aimed to investigate and present mitigating evidence in these death penalty cases and to ensure the sentencing hearings met international fair trial standards. This was the point at which Reprieve and LAB Malawi began working together. A number of lawyers from Akin Gump also got involved in the project from 2017 onwards, supporting on subsequent

casework and providing direct representation to individuals in Malawi still facing death sentences. As part of the project, the Malawi High Court issued a series of judgements to address missing case files, burden of proof and the nature of mitigating evidence as part of this project, creating the most comprehensive jurisprudence on the factors relevant to capital sentencing. Of the 169 prisoners who were ultimately eligible for a rehearing, 156 received reduced sentences and none were resentenced to death. As of May 2019, a total of 142 former death row prisoners had been released and, by October 2021, only 25 prisoners remained on death row.

To build momentum, Reprieve, Akin Gump, and LAB Malawi formed a partnership, whose aim it was to train legal aid lawyers on using mitigating factors involving mental health in trials, and to build consensus among key parliamentarians and stakeholders to create a movement to ultimately achieve abolition of the death penalty. Reprieve would bring their long experience working on the death penalty in East Africa with local partners and UK legal expertise; Akin Gump would offer their legal expertise on death-penalty work, including extensive experience in Malawi; while LAB Malawi would bring motivated young legal aid lawyers, local connections and country-specific knowledge. The partnership approached the ROLE UK Programme to support the training activities in May 2019.

STRONGER TOGETHER: TAKING A COLLABORATIVE APPROACH TO DEATH PENALTY WORK

When this partnership was formed, the political situation in Malawi was still conducive to abolition. But as it prepared for its first training activity, the first death sentence in over three years was handed down in a tragic case involving a victim with albinism.⁵ Initially, it was unclear whether this would become a long-term trend. However, 12 other death penalties were later issued for similar cases over 18 months between 2019 and 2020.⁶ All these new death sentences resulted from trials that were fundamentally flawed from the time of arrest to the conclusion of the sentencing proceedings due to the lack of experience of new legal aid lawyers in putting forward a strong defense.

It became evident that these contextual changes would require the partnership to rethink its approach. They agreed to put further trainings on hold and conduct a strategy session in November 2020. The aim of this two-and-a-half day session was to redefine the partnership objectives and create a feasible roadmap on how to best tackle the staggering increase in death penalties. With

the support of the ROLE UK Programme, the Director, Deputy Director, and Heads of Office of Legal Aid Bureau met in person with Reprieve's in-country Fellows, and were joined remotely by Reprieve and Akin Gump specialists.

While both Reprieve and Akin Gump had a long history of working in Malawi, and Reprieve had two local consultants (in-country Fellows), LAB Malawi were embedded as a local actor in the community. They were sensitive to the public mood and understood deeply the acute changes to the socio-political context. In a political move, to respond to the public outcry over the attacks, the government adopted an increasingly hard-line approach to deter these crimes. Thus, understanding the public mood was vital and LAB Malawi led a session with local partners, jointly setting the agenda.

The session included a roundtable on strategic direction, a presentation on local advocacy by an in-country Reprieve fellow in Malawi, a discussion on the high workload of LAB Malawi per region,

and how to best manage this and prioritise cases. Akin Gump also researched new areas of knowledge that they presented to LAB Malawi and these were discussed in detail. The strategy session finished with partners coming together to draft a list of recommendations to move forward.

There was a concern around how the partnership can continue supporting the abolition of the death penalty, without being perceived to be supporting attacks on people with albinism. Consultations were conducted with local NGOs working on issues affecting people with albinism, such as the Association of Persons with Albinism in Malawi. It was understood that most groups agreed that the death penalty was not a useful deterrent in these cases and there was noted to be a general understanding that everyone has the right to legal representation, regardless of the crime they are accused of. However, public sentiment was different, with LAB Malawi noting that one cause for the rise in death penalty cases in 2019 was the public narrative around the death penalty, stirred by anger at attacks on people with albinism. Against this context, the government had been seen to use the death penalty to gain support in upcoming elections. LAB Malawi and the in-country Fellows thus believed the most suitable approach in this case would be community advocacy to improve public perception on the issue.

"We had interviews with groups and they informed much of what we do now. It was made clear to us that what is needed is much more than just the death penalty. The work that is needed is education to address root causes of this issue which are not addressed by the death penalty."

(REPRIEVE IN-COUNTRY FELLOW)

**"Through the
ROLE UK
Programme, they
have become our
colleagues – we
can call each other
any time if there
are any issues. It's
through this that
the work actually
works and we are
quick and
efficient."**

**(REPRIEVE IN-COUNTRY
FELLOW)**

Another issue raised, which had been observed by LAB Malawi and other local organisations, was that legal aid lawyers often struggled to implement learnings from trainings. One of Reprieve's in-country Fellows was subsequently able to join the lawyers in-person

to conduct investigations and help put learnings into practice. Reprieve added: "[Reprieve's in-country fellow] has already started to meet with people and conduct initial investigations and put learnings into practice. The strategy session helped us to identify how to best do this."

Though the partner organisations had worked together prior to the formation of this partnership, they noted how the strategy session helped foster a much stronger and more trust-based relationship between them. Prior to the session, interactions had been ad hoc but, afterwards, interactions became a lot more regular and structured, in part due to their relationships becoming less formal. For example, the ability to text the director of LAB Malawi was noted as being of huge importance in cementing relationships, breaking down bureaucratic processes, and improving efficiency.

It was also noted how the joint approach ensured partners' buy-in, support for the agreed strategy, as well as investment in the resulting recommendations. As Reprieve put it: "The strategy session allowed us to have a thoughtful approach that highlighted and prioritised LAB Malawi's input. The idea was to not move ahead and impose a training but

rather to debate together how to tackle this issue.” Akin Gump praised Reprive’s model of working with in-country partners, noting that they were used to a more traditional model of

teaching but that, going forwards, they would be keen to adopt this more collaborative approach. They described Reprive as a “beacon on how to engage locally”.



Reprive and LAB Malawi paralegals and legal aid lawyers in the February 2022 training in Salima Malawi

Significantly, LAB Malawi have found that having Akin Gump and Reprieve as partners in death penalty work has been in recruiting young legal graduates. Given the political narrative around the death penalty, LAB Malawi has in the past struggled with how it is perceived. But having internationally renowned partners has helped it to improve its reputation, which, in turn, helps to recruit graduates. They hope this will lead to the number of legal aid

lawyers increasing in the country. LAB Malawi stated that it needed to emphasise how much this partnership is needed not only to tackle the death penalty in Malawi, but to expand its work to other human rights issues – particularly that of torture, which is becoming increasingly prevalent. For LAB Malawi, the partnership's international profile is crucial in successfully highlighting and tackling such issues.

"Because of the ROLE UK Programme, Akin Gump came to Malawi and from the beginning it meant they were completely bought in. This has completely changed the reach and efficacy of our work. This relationship has developed with and because of the ROLE UK Programme."

(REPRIEVE PROJECT LEAD)

ADAPTING TO CHANGE: STAYING ONE STEP AHEAD

In order to be able to utilise the local knowledge gained from LAB Malawi and Reprieve's in-country Fellows, it was important that the partnership be flexible in its approach. As noted, they were willing to halt activities to reflect on their strategy and they subsequently adapted their approach based on the information they had received. Moving from an approach that focused on achieving abolition, they now decided to work towards mitigating the effects of the resurgence in support for the death penalty in cases involving victims with albinism.

This included adopting a more effective case assessment strategy; increased engagement in proactive advocacy with both political parties and officials, judges, and community leaders; increasing supervision of junior counsel in the handling of trials; and organising a training for advocates on litigation, and the management and handling of cases and files.

The training provided to lawyers following the strategy session took on board the feedback received from local organisations regarding the difficulty lawyers faced in putting learnt skills

into practice. Training was provided to all legal aid lawyers working on homicide cases, and focused on case management, case strategy, interview techniques and how to undertake effective mitigation investigation. It was crucial in helping cement the idea that a lot of cases needed to be reinvestigated through a mitigation perspective, particularly those concerning mental health issues.

Legal aid lawyers' feedback on the session was very positive, highlighting how the partnership's ability to change its approach ensured it remained relevant. The interest following the session was overwhelming, with lawyers submitting numerous follow-up questions from participants for more information on certain techniques that were discussed, especially with regards to mental health.

As mentioned, Reprieve and Akin Gump also began working more closely with Malawi's legal aid lawyers to help them to put new skills into practice. This included working directly with a legal aid lawyer in Blantyre to conduct further mental health investigation into a case. They are

now following up on a number of cases identified in the training in Lilongwe and Zomba and compiling a list of cases that need further mental health investigation.

It seems a significant shift has taken place, with participants starting to put what they learn into practice. The director of LAB Malawi commented that “legal aid lawyers used to get cases and just dealt with them as given to them by the government. Attitude has changed – now it is a lot more about investigation. Lawyers are

putting skills from the training into practice.”

Flexibility is one thing that the ROLE UK Programme strives to embed in its model, recognising that success in rule of law work can be dependent on being able to react quickly at opportune moments. The partners attested to the importance of the ROLE UK Programme in this regard, such as in its flexibility in enabling them to switch to conducting a strategy session at short notice.

“Legal aid lawyers used to get cases and just dealt with them as given to them by the government. Attitude has changed – now it is a lot more about investigation. Lawyers are putting skills from the training into practice.”

(DIRECTOR OF LAB MALAWI)

PUTTING THE PARTNERSHIP MODEL TO THE TEST: THE CASE OF CHARLES KHOVIWA AND THE TEMPORARY ABOLITION OF THE DEATH PENALTY

Perhaps the biggest testament to the strength and flexibility of the partnership thus far has been the way it has dealt with rapidly changing political and judicial circumstances that brought about the abolition of the death penalty for a short time.

The ruling came as a result of the case of Charles Khoviwa - convicted of murder and sentenced to the mandatory death penalty in 2003 before the *Kafantayeni* ruling allowed for mitigating evidence. As part of the Malawi Resentencing Project, Reprieve and LAB Malawi had brought forward for resentencing the case of Charles and eight others in February 2018, after an initial refusal by the Supreme Court of Appeal. In a move that surprised many, the judgement on their case also brought with it the ruling that capital punishment was prohibited under Section 45(1) of the Constitution of Malawi's supreme law because it stood contrary to the right to life.

Despite the Khoviwa case having been submitted prior to ROLE UK Programme's support of the partnership, the partners spoke of how crucial the Programme's support has been in enabling them to keep working on this case, stating that its function should not be understated. According to Reprieve, collaboration contributed immensely to forming

"This ruling is the result of the work of many people and the ROLE UK Programme is a part of that."

(REPRIEVE PROJECT LEAD)



Charles Khoviwa and counsel the day he got bail.

key relationships and networks and ensured the partners were able to respond to things more quickly. Through strengthening the partnership, the Programme helped ensure that the relationship ran quickly, smoothly and without any bureaucracy, which added a lot efficiency to the work.

They also noted that the ROLE UK Programme has made a huge difference in the way that LAB Malawi had been able to approach this project by

bringing in Akin Gump's perspective, particularly on the prominence of mental health mitigation. This meant that when the ruling arrived, partners were ready to take on the resentencing work immediately and effectively.

Although the ruling was short lived, it was not without benefit. The overturning did not affect Charles Khoviwa and the eight others who will be entitled to resentencing.



"The relationships we built through this project is why we were able to mobilise so quickly after the ruling and start the resentencing hearing work."

(REPRIEVE PROJECT LEAD)

As a testament to their adaptiveness and dedication, the partners began planning the resentencing hearings of those still on death row immediately after the ruling was announced. The partners will work not only to commute these to life sentences but to have resentencing hearings where mitigation circumstances, which were not previously considered, could be presented. According to Reprieve's Project Lead, "the ROLE UK [Programme-supported] trainings on mitigation will be crucial in this phase".

Immediately after the ruling was overturned, partners also discussed how to continue

working towards abolition and tackling the broad problem of the judgement reversal. They quickly developed a three-way strategy that could utilise the momentum gained from the previous ruling to address these issues. Firstly, they planned advocacy aimed at both the judiciary and the public, the main goal being for partners to work with the Malawian Parliament to codify the abolition of the death penalty and reverse the overturning. Secondly, they would continue their death penalty appeals in court despite the U-turn. Thirdly, they would continue to build capacity for legal aid lawyers, particularly in relation to mental health investigations and general mitigation. Additionally, the partnership is also bringing international attention to the issues surrounding the reversal by having worked on an urgent appeal to the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to bring light to this issue.

Indeed, their continued work in mitigations has already yielded positive results. In October 2021, a new case emerged in which two people were found guilty of causing the death of a person with albinism. However, despite the U-turn, they were handed life sentences instead of death sentences. The partnership reported that this was a direct result of the work conducted by a LAB Malawi lawyer and a Reprieve in-country Fellow, who worked together on the mitigation investigation and submissions.

MOVING FORWARD: ROLE UK PROGRAMME'S CRUCIAL SUPPORT

The benefits of collaborative partnership work are clearly evidenced by the ways in which the partnership between Reprieve, LAB Malawi, and Akin Gump has continuously overcome challenges in relation to its work on the death penalty in Malawi. Their joint experience, strong relationships, and adaptive approach were crucial in making gains in the face of obstacles that may otherwise have been insurmountable.

Clearly, there is still much work to be done in order to cement a ruling on abolition and secure fair resentencing hearings for the prisoners that remain on death row. The partnership is confident that further achievements can be made in this regard, provided that they are able to continue working together.

The partners confirmed how crucial the Programme's support has been to-date and stressed the need for further ROLE UK Programme guidance and funding. In respect to the third strand of its new strategy, the partnership identified the need for further mitigation training for public aid lawyers, as this will be crucial in the resentencing hearings

"We cannot tackle this if we are not in a partnership and that partnership requires ROLE UK Programme support."

(REPRIEVE IN-COUNTRY FELLOW)

for the prisoners still on death row and those awaiting trial who face a potential death sentence. Continued support will be vital to ensure the partnership continues and is able to flexibly respond to further challenges. The Programme team is currently in conversation with the partnership to plan further support. There are also discussions about providing support for similar resentencing work in Kenya after it abolished the death penalty in 2017.

ANNEX

SOURCES

This Story of Change was developed following interviews with individuals selected for interview by ROLE UK. Documentation relating to the work was also reviewed and considered. The team triangulated this information with desk-based research on the political, socio-cultural and economic context of Malawi.

The following individuals were interviewed:

LEGAL AID BUREAU MALAWI

- **Masauko Chamkakala** - Director

REPRIEVE

- **Chipiliro Lulanga**: In-Country Fellow Malawi
- **Katie Campbell**: Project Lead-Death Penalty (Sub-Saharan Africa)

AKIN GUMP

- **Phil Davies**: Associate
- **Helen Marshall**: Partner

NOTES

¹ https://www.biicl.org/files/2299_country_report_malawi_kasambara.pdf

² *Kafantayeni and Others v. Attorney General of Malawi* | International Law Reports | Cambridge Core

³ Factors which could result in a lesser charge and sentence. These include: the person's prior criminal record, mental illness, drug or alcohol intoxication, age, trauma and "sincere belief in witchcraft."

⁴ Also referred to as the Kafantanyeni Resentencing Project.

⁵ In May 2019, the High Court imposed the death penalty in the case of *R v Mikaele* [(Sentence) (Homicide Case No 238 of 2018); [2019] MWHC 50 (3 May 2019)] on a 28-year-old man convicted of murdering a person with albinism.

⁶ No new sentences have been handed down since 2021.

