



Africa Criminal Justice Reform  
Organisation pour la Réforme de la Justice Pénale en Afrique  
Organização para a Reforma da Justiça Criminal em África

## Arrest without a warrant in Malawi

May 2020

### Introduction

This fact sheet deals with the process of arrest without a warrant in Malawi and aims to provide guidance on how police officers should test and use their discretion when contemplating an arrest without a warrant. It is indeed the case that large numbers of people are arrested every year in Malawi. For example, a single police station in Blantyre typically processes over 1300 people each year, with each person spending a median of two days in custody.<sup>1</sup> The power to arrest without a warrant is described in Malawi law. The scope here concerns ordinary day-to-day law enforcement and thus excludes states of war, states of emergency or other highly unusual situations. Police officials are often the officials who perform the overwhelming majority of arrests although other state officials also may have the power to arrest without a warrant, e.g. prison officials. The focus here is on police officials.

Arrest is understood to mean the following, as per *Holgate-Mohammed v Duke*:

‘First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody (sc. by action or words restraining him from moving anywhere beyond the arrester’s control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate’s judicial act.’<sup>2</sup>

Police officials are entrusted with the power to arrest a person without having obtained a warrant of arrest from a judicial officer. It is necessary for the police to have this far-reaching power as the requirements of their work (e.g. to stop a person from committing a crime) necessitate that. However, the deprivation of liberty is a serious intervention in a

person's life and the authority to arrest without a warrant must therefore be used in a lawful manner and not to intimidate, scare or punish people.

In the below a brief overview is given of what guidance can be gained from international and regional law regarding arrest without a warrant. The following section deals with police discretion and this is followed by a review of the typical offences for which an arrest can be executed without a warrant. This will naturally differ from jurisdiction to jurisdiction, but will serve as a guide in this regard.

## International law

The Universal Declaration on Human Rights (UDHR) guarantees the right to be free from arbitrary arrest, detention or exile.<sup>3</sup> The International Covenant on Civil and Political Rights (ICCPR) in Article 9(1) reads:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

It is acknowledged that the deprivation of liberty may be necessary in certain circumstances, but that it must not be arbitrary and be done with respect for the rule of law.<sup>4</sup> It is noted in General Comment 35 that the two prohibitions in Article 9(1) overlap in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Moreover, arrest or detention that lacks any legal basis is also arbitrary.<sup>5</sup>

The UN Working Group regards deprivation of liberty as arbitrary in the following instances:

- When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
- When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (category II);
- When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

- When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
- When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).<sup>6</sup>

To summarise, arrest and detention are arbitrary if:

- the grounds for the arrest are illegal
- the victim was not informed of the reasons for the arrest
- the procedural rights of the victim were not respected
- the victim was not brought before a judge within a reasonable amount of time.<sup>7</sup>

## Regional law

The African Commission on Human and Peoples' Rights adopted the *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (Luanda Guidelines) in 2014 following extensive consultation. The Guidelines has a narrower definition of arrest than cited above, referring to it as “the act of apprehending a person”.<sup>8</sup> The Luanda Guidelines also encourages the diversion of cases away from the criminal justice system, the use of alternatives to arrest and the use of arrest as “an exceptional measure of last resort”.<sup>9</sup> Furthermore, the grounds for arrest must be established in law, as is the case with the ICCPR Art. 9(1).

Moreover, the Luanda Guidelines set this requirement so that “Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.”<sup>10</sup> It is furthermore noted that arrest must not be executed on the basis of discrimination of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status.<sup>11</sup> It should be noted that the Guidelines do not specifically name gender orientation as a basis for discrimination, but it can be read into “or any other status”.

The Luanda Guidelines limit the powers of arrest to police or by other competent officials or authorities authorised by the state for this purpose.<sup>12</sup> In some jurisdictions it is only a judicial officer (judge or magistrate) that can issue a warrant of arrest, but in other (e.g. Mozambique until recently) this power was extended to a wide range of officials, such as prosecutors and even administrative heads in rural areas.<sup>13</sup> Further, an arrest shall only be carried out if authorised by a warrant of arrest or when there are reasonable grounds to suspect that a person has committed an offence or is about to

commit an arrestable offence.<sup>14</sup> This fact sheet will focus on the power to arrest without a warrant, in other words where the arresting officer must have reasonable grounds to suspect that a person has committed an offence or is about to commit an offence.

## The power to arrest without a warrant

The power to arrest a person without a warrant is afforded to police officials by the Criminal Procedure and Evidence Code (CPEC).<sup>15</sup> The power to arrest is, however, subject to the rights of arrested persons listed in the Constitution,<sup>16</sup> and the police official may arrest and there is no requirement that a police official must arrest.<sup>17</sup>

Even when a person had been arrested, the CPEC provides that the Officer in Charge of a police station must release an arrested person unconditionally if there is insufficient evidence.<sup>18</sup> The situations in which a person may be arrested without a warrant include in relation to “arrestable” or cognisable offences. The police official must have a reasonable suspicion that the person committed an offence before arresting any suspect.<sup>19</sup>

However, there are a range of other circumstances in which the CPEC says arrest may occur, which may unjustifiably limit rights in the Malawi Constitution and international human rights law. However, they have not yet been challenged in court and are part of Malawi law. The CPEC provides that a person may also be arrested if they:

- Disturb the peace in the presence of a police officer
- Lie or loiter on a highway, yard or place at night so that are suspected on reasonable grounds of being involved in a crime
- Are about to commit an arrestable offence
- Are apparently hiding with a view to committing an offence
- Are a habitual offender
- Are accused of a non-arrestable offence, but refuse to give their name and address and lie about these.<sup>20</sup>

## How must an arrest be executed?

How an arrest, with or without a warrant, is to be executed is set out in the CPEC.<sup>21</sup>

- The police officer must inform the person that they are about to be arrested. If the person surrenders, this is enough.
- If the person resists arrest, reasonable force may be used. No force greater than reasonable or necessary is justified

- The person must be informed of their right to remain silent and of the consequences of making a statement, although the CPEC provides that failure to do so does not render the arrest unlawful; this may be unconstitutional and contrary to international law but has not yet been challenged in court.

In addition, the Constitution provides that arrested persons detained in custody who are not cautioned and released, released on police bail or released on insufficient evidence, must be brought to court within 48 hours of arrest, unless the 48 hours expires outside of court hours, in which case the arrested person must be brought to court on the first court day after the expiry of court hours, failing which the arrested person must be released.<sup>22</sup> Although traditionally homicide cases were treated differently in Malawi law, the Constitution does not distinguish between types of offences and thus all arrested persons must be brought to court within the stipulated time or released.

## Children

The Child Care, Protection and Justice Act (CCPJA) provides that older children may only be arrested as a measure of last resort<sup>23</sup>, and children under 10 may not be arrested at all.<sup>24</sup> Instead, they must be referred to a probation officer, or taken to a safety home. Older children who may be arrested as a measure of last resort are those between the ages of 10 and 16, in terms of CCPJA definitions. Handcuffs and violence may not be used on children and may not be detained with adults who are not their parents. A relative or responsible person must immediately be informed of the arrest and must accompany the child through the process.

## Conclusion

By way of summary, international and regional norms on arrest and detention in order to prevent arbitrary detention emphasising that an arrest will be arbitrary if:

- the grounds for the arrest are illegal
- the victim was not informed of the reasons for the arrest
- the procedural rights of the victim were not respected
- the victim was not brought before a judge within a reasonable amount of time.<sup>25</sup>

It was also emphasised that there is no obligation to arrest, but that a police official may arrest to ensure the suspect's attendance at court. It is this discretion to arrest that if misused, or incorrectly applied, that can result in claims of arbitrary and unlawful arrest.

Further, there must be a reasonable suspicion or grounds for arrest. Apart from guidance in the applicable act, a police officer must *really* believe or suspect that the person has committed or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn which any reasonable person in view of the same facts would draw.

In addition to the suspicion being reasonable, (a) the arrester must have an open mind with regard to factors pointing to both innocence and guilt, (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested, and (c) for the suspicion to be reasonable, it must extend to all elements of the offence.<sup>26</sup>

Ultimately, when arresting without a warrant the arresting officer would have to satisfy the court the above guidelines were complied with and that the arresting officer had truly considered the rights of the suspect.

***ACJR is a project of the Dullah Omar Institute at the University of the Western Cape. We engage in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. Our work supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. Our work is anchored in international, regional and domestic law. We promote policy, law and practice reform based on evidence. We have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty. For more information, please visit our website at [www.acjr.org.za](http://www.acjr.org.za)***



Through engaged research, teaching and advocacy, the Institute supports processes in South Africa and the region to build inclusive, resilient states that are accountable to citizens and responsive to human rights. It aims to be the leading think tank on multi-level governance and human rights in Africa.

---

<sup>1</sup> Kayira, P., Muntingh, L. and Redpath, J. (2011) *Pre-trial detention in Malawi: Understanding caseflow management and conditions of incarceration* Open Society Initiative for Southern Africa, p. 85.

<sup>2</sup> *Holgate-Mohammed v Duke* [1984] AC 437, [1984] 1 All ER 1054, [1984] 2 WLR 660. See also CCPR/C/GC/35 para 13.

<sup>3</sup> Art.9 Universal Declaration on Human Rights (UDHR).

<sup>4</sup> CCPR/C/GC/35 para 10.

<sup>5</sup> CCPR/C/GC/35 para 11. 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.

<sup>6</sup> Fact Sheet No. 26, The Working Group on Arbitrary Detention, <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> .

<sup>7</sup> Trial International <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>

<sup>8</sup> Guideline 1(a).

<sup>9</sup> Guideline 1(c).

<sup>10</sup> Guideline 2(a).

<sup>11</sup> Guideline 2(b).

<sup>12</sup> Guideline 3(a).

<sup>13</sup> Judgment No. 4/CC/2013 of 17 September 2013.

<sup>14</sup> Guideline 3(a).

<sup>15</sup> S 28, 29, 31 and 33 Criminal Procedure and Evidence Code.

<sup>16</sup> S 42 Constitution.

<sup>17</sup> S 28 Criminal Procedure and Evidence Code.

<sup>18</sup> S 35(3) Criminal Procedure and Evidence Code.

<sup>19</sup> S 28 Criminal Procedure and Evidence Code.

<sup>20</sup> S 28 Criminal Procedure and Evidence Code.

<sup>21</sup> S 20 and 20A Criminal Procedure and Evidence Code.

<sup>22</sup> S 42 Constitution of Malawi.

<sup>23</sup> S 89 and 90 Child Care, Protection and Justice Act.

<sup>24</sup> S 93 Child Care, Protection and Justice Act

<sup>25</sup> <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>

<sup>26</sup> Plasket, C. (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), p. 186.