Non-Governmental Organisations’ Report for the International Covenant on Civil and Political Rights (ICCPR) in Malawi
Task Force on Adoption of the List of Issues

Submission to the 108th Session of the Human Rights Committee
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<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 2 &amp; 26</td>
<td>Right to Equal Protection &amp; Non-Discrimination</td>
<td>2</td>
</tr>
<tr>
<td>Article 6</td>
<td>Right to Life</td>
<td>4</td>
</tr>
<tr>
<td>Article 14</td>
<td>Freedom of Administration of Justice</td>
<td>6</td>
</tr>
<tr>
<td>Article 18</td>
<td>Freedom of Religion &amp; Conscience</td>
<td>7</td>
</tr>
<tr>
<td>Article 19</td>
<td>Freedom of Expression/Opinion</td>
<td>8</td>
</tr>
<tr>
<td>Article 3, 6 &amp; 7</td>
<td>Right to Equal Treatment, Life &amp; Prohibition of Torture</td>
<td>10</td>
</tr>
</tbody>
</table>
Introduction

The International Covenant on Civil and Political Rights (ICCPR) recognizes the right to be protected from violence and discrimination for all people. Malawi is a country where violence and fear increasing pervades all areas of society and deprives many of its citizens from accessing their rights under the Covenant. This report is intended to underscore some of the most grievous violations and we urge the State to address them.

The authors would like to point out the need to address egregious human rights violations committed against women which needs more attention than this submission can submit. The lack of information available regarding the violations of human rights of women in Malawi is a symptom how they are systematically repressed and disenfranchised. We would urge the members of the HRC to specifically question the state of Malawi about women's access to education, employment, healthcare and overall standards of well being.

Article 2 & 26: Right to Equal Protection & Non-Discrimination

Articles 2(1), 3 and 26 of the Covenant provide for the respect, equality and non-discrimination of all individuals on the grounds of, inter alia, race, color and sex. For nearly two decades the Committee has recognized not only that the reference to “sex” in Articles 2(1) and 26 must be understood to include sexual orientation, but also that laws which criminalize consensual homosexual acts expressly violate the privacy protections of Article 17.1

The Committee has been equally strong in expressing its concern for the unequal treatment of women.² In its General Comments on Article 3, the Committee stated that countries have a duty to adopt measures of protection for women as well as take positive steps in all areas “to achieve the effective and equal empowerment of women.”³

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3 General Comment No. 28: Equality of rights between men and women (article 3) : . 03/29/2000. CCPR/C/21/Rev.1/Add.10 at para 3.
The Constitution of Malawi does not include sexual orientation among the named suspect classes in Section 20(1) to be guaranteed equal and effective protection from discrimination. Not only does the Constitution not guarantee equal protection and non-discrimination on the basis of sexual orientation, but sections of the Penal Code in Malawi actually criminalise homosexual activity. Sections 137A, 153 and 156 of the Penal Code of Malawi criminalise consensual sexual activity between individuals of the same sex with penalties ranging up to fourteen years’ imprisonment and the potential for corporal punishment. Criminalisation of homosexual practices has the affect of driving gay persons underground, making it difficult for many to access healthcare services. In fact, in its report to the Human Rights Committee, the government of Malawi recognises the affect this forced secrecy has on lesbian, gay, and bisexual people, acknowledging “[homosexuality] is not practiced in the open… it is therefore very unlikely that cases of discrimination and violence based on sexual orientation would be reported.”

It is worth noting that the President of the Republic of Malawi, Honorable Dr. Mrs. Joyce Banda, in her maiden State of the Nation Address, promised Malawians that her Administration would repeal laws that criminalise homosexuality practices. However, as of the current time, nothing tangible has been done to fulfill that promise.

Malawi law also sanctions overt discrimination on the basis of gender. Section 9 of the Citizenship Act clearly discriminates against women on the basis of their marital status as it provides that when a female citizen of Malawi acquires citizenship of a country other than Malawi through marriage, she will cease to be a citizen of Malawi within one year of the anniversary of this marriage. The provision does not apply to male citizens of Malawi who acquire the citizenship of a country other

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4 Section 137A of the Penal Code of Malawi: “Any female person who, whether in public or private, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, shall be guilty of an offence and shall be liable to imprisonment for five years. Section 153: “Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.” Section 156: “Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.”

5 CCPR/C/MWI/1 ¶105.


than Malawi through marriage. This differentiation does not pass the limitation test under section 44(1) of the Constitution.\(^8\)

The State Party should be commended for passing the recent the Gender Equality Legislation, which seeks to impose equality between men and women at all levels. However, in order for this law to be effective, it is important for the State Party to promote awareness of its passage and enforcement to send a clear message that the government may not discriminate against women on the basis of gender.

Recommendations:
(a) The State Party should amend its Constitution and other legislation to explicitly include, ‘sexual orientation’ as a prohibited ground to ensure protection of sexual minorities in Malawi.
(b) The State Party should ensure decriminalisation of homosexual activities or practices between consenting adults by removing Articles 137A, 153 and 156 from the Penal Code and all other legislation criminalising consensual adult sexual activity.
(c) The State Party should immediately amend or repeal section 9 of the Citizenship Act to ensure that it does not discriminate against women.
(d) The State Party should ensure popularisation of the Gender Equality legislation and ensure its enforcement accordingly.

**Article 6: Right to Life**

Article 6 of the Convention provides that every individual has the right to life and that no person should be arbitrarily deprived of life. The Committee has noted its grave concern at the practice of extrajudicial killings and recommended that where specific allegations are made, the State must take appropriate action to ensure a prompt and impartial investigation.\(^9\)

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\(^8\) Malawi Constitution, May 1994 art. 44(1) available at [http://www.africa.upenn.edu/Govern_Political/mlwi_const.html](http://www.africa.upenn.edu/Govern_Political/mlwi_const.html).

\(^9\) CCPR/C/COL/C/6, 4th August 2010 at para 12.
Extrajudicial Killings

There have been unprecedented numbers of extrajudicial killings by the police service in Malawi in recent years. Below are just two of many examples of extrajudicial killings that continue to occur in Malawi with impunity.

In September 2011, a student at Malawi Polytechnic, University of Malawi, Robert Chasowa was found dead. Chasowa was known to be a critic of former Malawi president, Bingu wa Mutharika. While the police insisted that the student committed suicide, renowned Malawian pathologist, Dr. Charles Dzamalala, confirmed through his autopsy that the student was killed. The police confirmed that the dead student was wanted by the police to answer charges of insulting the head of state, leading many to conclude that the police themselves were responsible for his death. His murder has not been investigated by police nor has anyone been held accountable.

On July 20th and 21st 2011 police officers killed at least eighteen unarmed political protestors. This egregious violation of Article 6 of the Covenant underscores the little regard the Malawi authorities currently have for their obligations under the Covenant. While the dead were characterized as thieves by the government, the police responsible for their murder were later awarded financial bonuses. There has been little or no attempt by the Malawian authorities to prosecute, prevent or address these and many other extrajudicial killings by police.

Recommendations:

a) The State of Malawi should investigate the September 2011 murder of Robert Chasowa as well as the July 2011 murders of eighteen unarmed political protestors and prosecute those responsible.

b) Essential to the prohibition of extra-judicial killings, torture and cruel, inhuman or degrading treatment is the operation of an Independent Police Complaints Commission. Malawi


should ensure that such a Commission exists within the State and that it can work impartially and free from pressure by the legislative and executive branches of Government.

**Article 14: Freedom of Administration of Justice**

Article 14 guarantees that “all persons shall be equal before the courts and tribunals.” By its General Comments, the Committee has noted that Article 14 enshrines the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law.”

Malawi courts regularly require undue and unreasonable delays in delivering judgments. Courts may take up to eight years or more without delivering their judgments. These excessive delays are an infringement of the right provided by Article 14(3)(c) of the Covenant guaranteeing the right to be tried without undue delay.

Furthermore, Article 14(1) of the Covenant mandates that all people be treated equally before the court, however, in Malawi there are discrepancies in treatment of magistrates and judges when members of one or the other group are suspected to have committed crimes or misconduct. A Judge of the High Court answering a criminal charge whose case is pending before the Judicial Service Commission in Malawi is still sitting on the Bench. Unlike this Judge, the State Party immediately interdicted magistrates who were charged with criminal offences and some were successfully prosecuted. These junior judicial officers were not sitting and hearing cases. It is important that judges and magistrates receive the same treatment under the law, because when judicial officers are suspected of being treated differently under similarly situated circumstances, it undermines people’s confidence in the court’s ability to adequately deliver justice.

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12 General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) : 04/13/1984, para 1.

13 “Malawi suspends anti-gay laws as MPs debate repeal” THE GUARDIAN (5 Nov 2012).

http://www.guardian.co.uk/world/2012/nov/05/malawi-gay-laws-debate-repeal
Article 18: Freedom of Religion & Conscience

Under the Covenant, every individual has the right to freedom of thought, conscience and religion. Limitations on religious practices are narrow and only permitted when prescribed by law to be necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. General Comment 22 indicates that freedom of religion is “far-reaching and profound” and the Committee “views with concern… any tendency to discriminate against any religion or belief for any reason, including the fact that they …represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”

Though Christianity is the predominant religion in Malawi, it is a country of diverse religions, traditions and beliefs. There are secular individuals and organisations that operate within Malawi as well as a number of minority faiths such as Bahai, Hindu, African Traditional Religions, and others.

Un fortunately, members of religions minority groups are routinely discriminated against. In September 2012 at Makapwa Primary School in Thyolo, the Headmaster of the school sent away three Rastafarian children for having dreadlocks. The Rastafarian community commented on the issue stating that their children were being denied the right to education due to their religious belief. The State Party must protect the right to freedom of religion and conscience within school policies and guidelines in compliance with its duties under the ICCPR as well as in view of section 44(1) of the State Party’s Constitution.

Recommendation:

- The State must take action to ensure members of religious minorities are not discriminated against on the basis of their religious beliefs.

14 CCPR/C/21/Rev.1/Add.4 July 1993.
15 CPR/C/21/Rev.1/Add.4, General Comment No. 22
17 Id.
18 Article 44(1) of the State Party’s Constitution states, “There shall be no derogation, restrictions or limitation with regard to… the right to freedom of conscience, belief, thought and religion and to academic freedom.”
Article 19: Freedom of Expression/Opinion

Article 19 of the Covenant affirms the rights of free expression and opinion. In a General Comment, the Committee made clear that both of freedom of expression and opinion represent “the foundation stone for every free and democratic society.” All domestic laws should uphold freedom of expression, and media within the State must be able to operate without “censorship or restraint.” Freedom of opinion extends to all areas of society, including “political discourse,” “discussion of human rights,” and “journalism.”

Specifically, Article 19 asserts that, “everyone shall have the right to hold opinions without interference; and that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.” The freedoms to hold and express opinions have been enshrined repeatedly by the Human Rights Committee as central to the human rights system and the ICCPR. In General Comment No. 22, the Committee states that Article 19.1 includes the right of everyone to hold opinions without interference and that this right is unconditional. The Human Rights Committee stated in General Comment No. 25 that a commentary on public issues without censorship or restraint is vital to informed public opinion.

Access to Information

In Malawi, the right of access to information is guaranteed under section 37 of the Constitution. However, there are three challenges people in Malawi face regarding access to information. First, the wording of the constitutional provision is vague, offering an imprecise measure of when an individual has a right to access the information. The Constitutional provision provides as follows:

“Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of

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19 CCPR/C/GC/34, 21 July 2011.
Government in so far as such information is required for the exercise of his rights.”

By linking the right of access to all information to the ability to demonstrate the need or existence to exercise of a right, the right is rendered illusory to those that may require information from the State but are unable to demonstrate the right for what such information shall be exercised. Many states on the continent no longer have ‘the requirement for the exercise of his rights’. The wording of the provision also assumes that all rights, for which the information will be sought for, will necessarily have to be exercised. Some rights are just demanded without necessarily being exercised. For instance, the right to a clean environment cannot be exercised. It can only be demanded or safeguarded.

Second, there are many sections in the Penal Code that criminalise free expression of opinions. There is no enabling legislation to give full effect to section 37 of the Constitution. The Access to Information Bill (the Bill) was first introduced eight years ago but has still not become law. The importance of this Bill cannot be over-emphasised. If passed into law, it will allow journalists, lawyers, accountants, teachers, researchers and others to freely access public information.

**Right to freedom of association**

The right to freedom of association is being abused by politicians when it comes to crossing the floor as provided for in section 65 of the Constitution. This provision limits the movement of members of the National Assembly from one political party represented in the National Assembly, other than by that member alone, to another political party represented in the National Assembly or joining any other political party, association or organisation whose objectives or activities are political in nature.

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23 For instance, sections 50 and 51 still criminalise sedition, section 60 criminalises publication of false news likely to cause fear and alarm to the public, section 60A criminalises communication of false statements which may be published generally outside Malawi, the Censorship and Control of Entertainment Act, Cap.21.01 of the Laws of Malawi empowers the Censorship Board to ban any publication deemed to be undesirable, section 4 of the Protected Flag, Emblems and Names Act, Cap. 18:03 of the Laws of Malawi criminalises insulting, or ridiculing or showing disrespect to or with reference to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, among many others.
This provision has been interpreted by the Supreme Court of Appeal for Malawi to mean that a member of the National Assembly may also “cross the floor” when he or she joins any political party or organisation outside the National Assembly whose objectives or activities are political in nature. However, at this time over forty (40) members of the National Assembly moved from their political parties represented in the National Assembly and joined the party in power, but the Speaker of the National Assembly has not declared the seats of those members of the National Assembly vacant. In fact, the State Party has taken a position that it cannot implement Section 65 of the Constitution because it does not have money to conduct by-elections.

Recommendations:

a) The State Party should amend section 65 of its Constitution so that “crossing the floor” is defined as being limited to movement within the National Assembly and not outside the National Assembly as there is no floor to be crossed outside the National Assembly.

b) The State Party should take steps to ensure full implementation of section 65 of its Constitution as failure to do so, amounts to suspending a constitutional provision against the rule of law.

**Article 3, 6 & 7: Right to Equal Treatment, Life & Prohibition of Torture**

Malawi has not expressly provided for the right to enjoy the best attainable state of physical and mental health, however, its Constitution only contains a statement in section 13(c) which falls under principles of national policy to the effect that the State Party shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving provision of adequate health care, commensurate with the health needs of Malawian society and international standards of health care. The challenge is that principles of national policy are only directory in nature and are not justiciable. Some scholars have argued that the right to health may be invoked as a derivative of the right to development under section 30 of the Constitution. However, that route is lengthy and depends on the goodwill of the judiciary to

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24 *In re Presidential Reference Concerning Section 65 of the Constitution* Presidential Reference Appeal No. 44 of 2006 (MSCA) (Unreported).

25 Section 14 of the Constitution.

26 DM Chirwa ‘A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi’ (2005) 49 (2) *Journal of African Law* 207.
agree with that proposition. The best approach is to have the right expressly provided for either in the Constitution or other legislation.

HIV/AIDS continue to affect so many people and the development of Malawi generally. We commend the State Party’s interventions like intensifying prevention of mother to child transmission (PMTCT) and providing free Anti Retroviral Therapy (ART) to over 365,000 people across the country. However, many people are now being deformed by these ARVs as they are alleged to be of the least expensive available and which other State parties reject. In addition, the State party is also currently implementing a programme whereby all pregnant mothers are forced to be tested for HIV with or without their consent. Although the National HIV and AIDS policy is couched in a manner that the testing is an opt-out, its implementation on the ground is that it is compulsory which, is a violation of a pregnant woman’s human dignity, bodily integrity and autonomy.

The next critical issue of concern is sexual and reproductive health rights of women. Malawi still has one of the highest maternal mortality rates (MMR) in the world. Currently, it stands at 675 per 100,000. However, practically, Malawian women continue to face a lot of challenges in many respects. For example, 30% of the MMR deaths are as a result of unsafe abortions. Procuring an abortion is proscribed in Malawi.

Incidentally, improvement of maternal health is one of the eight Millennium Development Goals (MDGs). The State Party took a policy decision and banned traditional birth attendants (TBAs) to reduce the risk of women dying during delivery. Apparently, this ban is also for the safety and protection of the TBAs themselves from contracting HIV. The ban is highly controversial in some circles considering that access to hospitals remains a challenge in Malawi. In some cases, pregnant women die in hospitals without being attended by the medical and health personnel. A classic

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27 National HIV and AIDS Policy-Sustaining the Response (2011). A decision was taken recently by the State Party to review this document as it was felt that it left out very important issues dealing with HIV.
28 Assessment of legal and policy environment for HIV and AIDS in Malawi (2012).
31 Sections 149-151 of the Penal Code, Cap. 7:01 of the Laws of Malawi.
example of this is a woman who died in March 2013 at Mangochi District Hospital while giving birth in the corridors of the hospital without being attended to by a doctor or midwife.

Stock-outs of drugs remain a challenge in Malawi as well. People continue to die from curable diseases because the State Party is unable to sustain the availability of medicines and supplies in its hospitals.\(^3^4\) The last time the State Party procured essential medicines was in 2009. At the time of compiling this report, the State Party was suffering a 95% stock-out of essential medicines and supplies.\(^3^5\) Furthermore, despite being a signatory of the Abuja Declaration, which requires all signatories to allocate at least 15% of its national budget to the improvement of the health sector, the State Party continues to allocate less than 15% of its national budget to health issues.\(^3^6\) The State Party also lacks important medical equipment in its public hospitals. For instance, the State Party has only one functioning dialysis machine in Blantyre.

Recommendations:

(a) The State Party should ensure express provision for the right to health either in its Constitution or other legislation.

(b) The State Party should allocate a minimum of 15% of its national budget towards health in line with the Abuja Declaration.

(c) The State Party should invest in medical equipment that will ensure realisation of the right to health.

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\(^3^4\) ‘JB to blame for drug shortage’ The Sunday Times 17 February, 2013, ‘Drug Tragedy’ Nation on Sunday 17 February 2013 1, 3, and 5.

\(^3^5\) Id.