MALAWI

Civil Society Report on the Implementation of the ICCPR
(Replies to the List of Issues CCPR/C/MWI/Q/1/Add.1)

• CENTRE FOR HUMAN RIGHTS AND REHABILITATION

In partnership with:

• Malawi Human Rights Resource Centre (MHRRC)
• Centre for Development of People (CEDEP)
• Paralegal Advisory Services Institute (PASI)
• Youth Consultative Forum (YCF)
• Media Institute of Southern Africa-Malawi Chapter (MISA)
• Church and Society Nkhoma Synod of the Church of Central Africa Presbyterian
• Malawi Law Society (MLS)

Malawi, 13 June 2014

With the support of the Centre for Civil and Political Rights
COMMENTS FROM
CIVIL SOCIETY ORGANISATIONS IN MALAWI
ON THE LIST OF ISSUES

IN VIEW OF THE REVIEW OF THE INITIAL REPORT OF MALAWI
(CCPR/C/MWI/1)
111th session of the Human Rights Committee
Geneva – July 2014
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I. Introduction

This report has been prepared by civil society organisations in reply to the List of Issues on Malawi adopted by the UN Human Rights Committee (CCPR/C/MWI/Q/1/Add.1) in view of the review of the Initial State Report (CCPR/C/MWI/1) scheduled at the 111º session of the Human Rights Committee in July 2014.

1. Authors of the report

The Centre for Human Rights and Rehabilitation (CHRR) is one of Malawi’s leading human rights non-governmental organisations. It was founded in February 1995 as a non-profit making organization registered under the Trustees Incorporation Act of 1962. The CHRR’s vision is of a Malawi with a vibrant culture, which embraces the values of democracy, human rights and rule of law. The organization’s mission statement is to contribute towards the protection, promotion and consolidation of good governance by empowering rural and urban communities in Malawi to become aware of and exercise their rights through research, advocacy and networking in order to realize human development. In seeking to realize its vision, the CHRR implements programmes revolving around five core areas, namely: Public Awareness and Community Empowerment; Civic and Human Rights Education; Training and Research; Advocacy and Networking, and Capacity Building.

In partnership with:

Malawi Human Rights Resource Centre (MHRRC)
Centre for Development of People (CEDEP)
Paralegal Advisory Services Institute (PASI)
Youth Consultative Forum (YCF)
Media Institute of Southern Africa-Malawi Chapter (MISA)
Church and Society Nkhoma Synod of the Church of Central Africa Presbyterian
Malawi Law Society (MLS)

2. Methodology

The Centre for Human Rights and Rehabilitation, with the support of the Centre for Civil and Political Rights (CCPR-Centre), convened a workshop of several stakeholders that included the Malawi Law Society, Ministry of Justice, Malawi Human Rights Commission, Media Institute for Southern Africa Malawi Chapter (MISA), Malawi Human Rights Resource Centre (MHRRC), Youth Consultative Forum (YCF) and Paralegal Advisory Services Institute (PASI) among others. These stakeholders were asked to provide their input to the list of issues in accordance with their expertise. Apart from the workshop, a consultant also conducted desk research and interviewed other stakeholders to confirm some of the issues that were discussed at the workshop and also to acquire additional information.
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II. **Constitutional and legal framework within which the Covenant is implemented (art. 2)**

<table>
<thead>
<tr>
<th><strong>Issue 1:</strong> Please explain which steps have been taken to fully incorporate the provisions of the Covenant in the legislation of Malawi so that the Covenant can be directly invoked and given effect by courts. Please also clarify which provisions of the Constitution, if any, are inconsistent with the Covenant and in which ways these inconsistencies will be addressed. Please also provide information on what procedures are in place for the implementation of the Committee’s Views under the Optional Protocol. Finally, provide information on which measures have been taken to raise awareness of the Covenant and the Optional Protocol among judges, lawyers and prosecutors.</th>
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1. **Steps taken to fully incorporate the provisions of the Covenant in the legislation of Malawi**

The piece of legislation in Malawi that has incorporated the provisions of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR or the Covenant) is the Constitution, in its Bill of Rights. Moreover, apart from the Constitution there are other pieces of legislation that have incorporated parts of the Covenant, such as the Gender Equality Act; Disability Act; Child Care, Protection and Justice Act; Deceased estates (Wills, Inheritance and Protection Act); Prevention of Domestic Violence Act; the Penal Code, and the Legal Aid Act.

a. **The Constitution**

The Constitution of the Republic of Malawi contains a Bill of Rights in Chapter IV. This Bill of Rights is modelled on the ICCPR. It provides for the following: the right to life; prohibition against genocide; guarantees personal liberty; prohibition against torture, cruel, inhuman or degrading treatment or punishment; prohibition of discrimination of persons in any form on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.; right to personal privacy; right to marry and found a family; equal treatment of
children regardless of the circumstances of their birth; women’s right to full and equal protection by the law, and the right not to be discriminated against on the basis of their gender or marital status; right to culture and language; prohibition against slavery and servitude; right to acquire property; the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi; labour rights; freedom of association; freedom of conscience, religion, belief and thought, and academic freedom; freedom of opinion; freedom of expression; freedom of the press; the right of access to all information held by the State or any of its organs at any level of Government; freedom of assembly; freedom of movement and residence; political rights; access to justice and legal remedies; rights on arrest, detention and fair trial; right to administrative justice; prohibition of restrictions, limitations or derogations of rights except in certain circumstances.

b. Other legislation
As alluded to above there are other pieces of legislation that incorporate the Covenant and these are:

• *The Gender Equality Act*
This Act seeks to promote gender equality for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment and to provide for public awareness on promotion of gender equality.

• *Disability Act*
This Act seeks to provide for the equalization of opportunities for persons with disabilities through the promotion and protection of their rights.

• *Child Care Protection and Justice Act*
This Act seeks to consolidate the law relating to children by making provision for child care and protection and for child justice; and for matters of social development of the child. It basically seeks to protect the rights of children in areas such as custody, maintenance and criminal justice.

• *Deceased estates (Wills, Inheritance and Protection Act)*
This Act seeks to provide for the making of wills and the devolution of property under a will and the inheritance to the estates of persons dying without valid wills. This Act protects the right to property, especially for women and children in that it protects widows and children from the practice of property grabbing.

• *Prevention of Domestic Violence Act*
This Act makes provision for the prevention of domestic violence and for the protection of persons affected by domestic violence.

2. Direct application of the Covenant
According to Section 211 of the Constitution, the Covenant can be directly invoked in the Courts of Malawi. Section 211 provides that 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, and that international agreements entered into before
the commencement of the 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.\(^1\)

Malawi ratified the ICCPR on 22 December 1993, some five months prior to the entering into provisional force of the Constitution. Under section 211(2) of the Constitution, the ICCPR is automatically self-executing in Malawi and all domestic laws must comply with the guarantees it provides. Indeed, there is no Act of Parliament that alters this position.

However, in practice the applicability of international law is yet to be settled definitively by the courts in Malawi. In Malawi Telecommunications Ltd v Makande & Omar, MSCA Civil Appeal Number 2 of 2006, the Supreme Court held that an international treaty ratified by Malawi before 1995 was part of the domestic law. In the Matter of the Adoption of Children Act (Cap. 26:01) and In the Matter of CJ (a Female Infant), MSCA Adoption Appeal Number 28 of 2009, the Supreme Court seemingly adopted a dualist approach even regarding an international treaty ratified before 1995. The Court held that “all international agreements entered into prior to the Constitution or after the Constitution are only binding if they are not in conflict with the clear provisions of our statutes. Put differently, whether an international agreement forms part of our law, regardless of when it was entered into force, will depend on whether there is no Act of Parliament that provides to the contrary (...) We do not therefore agree with counsel’s submission that the intention of section 211(1) is to make any international convention which Malawi signs automatically part of the law of the country.”

3. **Inconsistencies of the Constitution and other legislation with the Covenant**

Even though the Constitution incorporates most of the rights of the ICCPR, there are still some inconsistencies with the Covenant, in particular with regard to sexual minority rights and the rights of women.

a. **Sexual minorities**

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.\(^2\)

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\(^1\) See sections 212(1) (2) and 215 of the Constitution.

\(^2\) 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
Even though sections 153(a) and (c) and 154 of the Penal Code are capable of application to opposite-sex as well as same-sex sexual partners due to their gender-neutral wording, the courts do not apply them as such, and the provisions in Malawi, as elsewhere, are widely associated with homosexual men and women as a class. Moreover, even where the law criminalizes certain sexual act for all people (like sections 153(a) and (c) and 154 of the Penal Code) rather than with reference to the sex of the partners (like sections 137A and 156 of the Penal Code), such laws have been widely recognized as having a disproportionate impact on homosexual men and women.

Criminalisation of homosexual practices has the effect 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.”

Even though the former 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 homosexual practices, nothing tangible has been done to fulfill that promise. The newly elected President Professor Peter Mutharika joined the political bandwagon of other presidential hopefuls during the presidential campaigns who pledged to subject the issue of sexual minority to a referendum.

b. The rights of women
As alluded above, the Constitution of the Republic of Malawi entrench non discrimination of women on the basis of their gender and the State has passed legislation to help women
enjoy their rights like the Gender Equality Act, Prevention of Domestic Violence Act and Deceased Estate (Wills, Inheritance and Protection Act).

However there are some laws that sanction 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 than Malawi through marriage. This differentiation does not pass the limitation test under section 44(1) of the Constitution.

There are also Sections 149 to 151 of the Penal Code which prohibits procurement of an abortion. Procurement of an abortion attracts up to fourteen years imprisonment. As a result of the restrictive laws on abortion women in Malawi undergo unsafe abortions performed by unqualified people often leading to irreparable damage and death for the women. The women will either try to induce an abortion on their own by ingesting traditional herbs or caustic substances. It is estimated that at least 70,000 women undergo unsafe abortions every year in Malawi. As a result the government of Malawi spends millions of Kwachas in post abortion care.

Hopes were raised with the passing of the Gender equality Act as it was felt that its provisions on sexual and reproductive rights could also encompass the decriminalisation of procurement of abortion. However, in the report of the Law Commission on the development of the Gender equality Act, the Commission made it clear that even though they did contemplate providing for the issue of abortion in the Act, they concluded that the review on the law of abortion should be handled by a special law commission set up specifically for that purpose and recommended to Government to set up such a commission.

The State took heed of the above report and should be commended for empanelling a special law commission on abortion law, which has been tasked with coming up with

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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).


10 Section 19 (1) of the Gender Equality Act provides everyone with the right to adequate sexual and reproductive health which includes the right to access sexual and reproductive health services. It is from this right that people wanted to imply the right to abortion. However section 19 (1) does not stand alone it must be read together with section 19(2) which is to the effect that the right to choose whether or not to have a child is subject to any other written law.
recommendations on the same. The commission is currently in the middle of the assignment.

4. Procedures for the implementation of the Committee’s Views under the Optional Protocol and measures to raise awareness of the Covenant and the Optional Protocol among Judges, Lawyers and Prosecutors

According to the Ministry of Justice and Constitutional Affairs they have got a dedicated human rights unit that looks at the issue of the implementation of the Committee’s Views and recommendations. The Ministry instates a task force towards coming up with a State Party report and recommendations of the Committee are brought to the attention of the task force and discussed. Up to date, Malawi has not received any Views from the Committee under the Optional Protocol to the ICCPR.

On the other hand, there has not been any deliberate effort by the State to raise awareness on the Covenant among judges, lawyers and prosecutors.

Recommendations:
The State Party should:

1) Amend its Constitution and other legislation to explicitly include, ‘sexual orientation’ as a prohibited ground to ensure protection of sexual minorities in Malawi.

2) 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.

3) Immediately amend or repeal section 9 of the Citizenship Act to ensure that it does not discriminate against women.

4) Repeal the restrictive law on abortion as found in the Penal Code and fast track the amendment of abortion law according to international human right standards.

5) Undertake deliberate programs to ensure popularisation of the ICCPR and all other legislation that incorporate the ICCPR like the Gender Equality Act, the Disability Act and the Deceased estates (Wills, Inheritance and Protection Act).

Issue 2: Please explain whether the Malawi Human Rights Commission has the competencies, means and mandate to function in line with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). Please also provide information on steps taken to ensure the independence of the Commission, and to increase its resources in order to enable the Commission to fulfill its mandate. Please clarify which mechanisms are in place for the effective consideration and implementation of the recommendations issued by the Commission.
The Malawi Human Rights Commission (MHRC) is vested with competence to promote and protect human rights both by the Constitution and the Human Rights Commission Act.\textsuperscript{11} MHRC has got 5 directorates which focus on specific thematic areas of human rights and these are: Directorate of Civil and Political Rights, Directorate of Economic, Social and Cultural Rights, Directorate of Child Rights, Directorate of Gender and Women Rights and Directorate of Disability and Elderly Rights. Further, in terms of human resource capacity, MHRC has got 4 lawyers, investigators and research officers, just to mention a few, who have competency to handle human rights issues.

The composition of MHRC and the appointment of its members is in accordance with the procedure provided for under section 131 of the Constitution and Sections 3-10 of the Human Rights Commission Act. Further the Commission’s impartiality and independence is guaranteed by its enabling Act.\textsuperscript{12}

\begin{itemize}
  \item \textsuperscript{11} See Section 29 of the Constitution. Section 12 of the Human Rights Commission Act states as follows: “the Commission shall be competent in every respect to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body.”. Furthermore, by virtue of Section 14 of the Human Rights Commission Act, MHRC is given the responsibilities:
    \begin{itemize}
    \item (a) to submit to the President, Parliament or any other competent authority, on an advisory basis, either at the request of the President, Parliament or such other authority or on its own volition, its opinions, recommendations, proposals or reports on any matters concerning the protection and promotion of human rights;
    \item (b) to examine any legislation, judicial decisions or administrative provisions in force as well as Bills and administrative proposals and make recommendations as it considers appropriate in order to ensure that such legislation, judicial decisions, administrative provisions, Bills and administrative proposals conform to the fundamental principles of human rights;
    \item (c) where necessary, to recommend the adoption of new legislation or administrative provisions, or the repeal, replacement or amendment of legislation or administrative provisions in force and relating to human rights;
    \item (d) to comment publicly or as it sees fit on any general or specific situation of violation of human rights and to recommend initiatives or measures to put an end to such situation;
    \item (e) to promote ratification by Malawi of any international human rights instruments;
    \item (f) to promote the harmonization of national legislation and practices with international human rights instruments to which Malawi is a party and to promote and monitor their effective implementation;
    \item (g) to contribute to the reports which Malawi is required to submit pursuant to treaty obligations and, where necessary, express its opinions on the subject matter but always with due regard to its status as an independent national institution;
    \item (h) to cooperate with agencies of the United Nations, the Organization of African Unity, the Commonwealth and other multilateral or regional institutions and national institutions of other countries which are competent in the area of protection and promotion of human rights;
    \item (i) to assist in the formulation of programmes for the teaching of, and research in, human rights and, where appropriate, to take part in their execution in institutions and other bodies, including in schools, universities and professional circles; and
    \item (j) to publicize human rights with the aim of increasing public awareness.
    \end{itemize}
  \item \textsuperscript{12} Section 34(1) states that “every member of the Commission, of a committee of the Commission or of the staff of the Commission shall serve independently and impartially and exercise his powers or perform his duties and functions in good faith and without fear or favour.” Section 34(2) states that “No organ of the Government and no member or employee of an organ of the Government nor any other person or body of persons, shall interfere with, hinder or obstruct the Commission, any committee of the Commission, any member of the Commission or of such committee or of the staff of the Commission or any person duly authorized to act in the service of the Commission in the exercise of its or his or her powers or the
\end{itemize}
Looking at the above, it can be said that in theory MHRC has the competencies and mandate to function in line with the Paris principles. However, in reality its independence is perceived to be compromised by the role of Government representatives on the Commission, namely the Ombudsman and the Law Commissioner. These two representatives have power over the composition of MHRC. It is them that decide which organisations should submit names to be considered for appointment on the Commission and it is them again that jointly refer the name to the President for appointment. Further they have voting rights. This is in clear contravention of the Paris Principles, which require that Government representatives on governing or advisory bodies of NHRIs should only participate in an advisory capacity.

MHRC has taken steps to have the above rectified. It engaged relevant stakeholders including the Attorney General’s Office to work towards coming up with a bill to amend the Human Rights Commission Act. It is proposed, among other things, that the voting rights of the Law Commissioner and the Ombudsman in the proceedings of MHRC or a committee of MHRC be removed. No amendment has yet been effected.

Another major challenge to the independence and implementation of functions of the MHRC are its finances. This is so despite the fact that section 32(1) of the Act provides that “The Government shall adequately fund the Commission to enable it to exercise its powers and perform its duties and functions and so as to ensure its independence and impartiality”. Most of the activities of MHRC are implemented using donor funds. Currently MHRC receives funding from various donors including UNDP, EU and Irish Aid. MHRC consistently lobbies and engages donors for funding.\(^\text{13}\)

Moreover, it has been observed by some quarters that MHRC is sometimes selective in its handling of human rights violations or issues. This observation was necessitated by MHRC’s failure to deal with the issue of sexual minorities. Last year MHRC did not respond to the High Court’s invitation to be friends of the court in a court case that is examining the constitutionality of Section 153 (a) of the Penal Code, which criminalizes sex against the order of nature. Even though the invitation from the Court was a general invitation to all interested parties and did not specifically target MHRC, this was an opportunity for MHRC to exercise its mandate. MHRC since its inception has remained silent or refrained from performance of its or his duties and functions.” Section 34(3) states that “Any person who contravenes subsection (2) shall be guilty of an offence and liable to a fine of K20,000 and to imprisonment for five years.” Section 34(4) states that “All organs of the Government shall accord the Commission such assistance and cooperation as may be reasonably required for the exercise of its powers and performance of its duties and functions and for the protection of the independence, impartiality and the due dignity of the Commission.”

\(^{13}\) MHRC is allowed to receive donations to be applied towards the discharge of its mandate. Section 32(2) states that “the Commission may receive any donations of funds, materials and any other form of assistance for the purposes of its duties and functions provided that no such donation shall jeopardize or compromise the independence and impartiality of the Commission.”
declaring its position on sexual minority issues. This is contrary to its mandate where it is supposed to provide guidance in all human rights issues.

**Recommendations:**
**The State Party should:**
1) Provide more funding to the MHRC to enable it carry out its mandate.
2) Review the law as recommended by MHRC so that Government representatives on the Commission do not have the power to decide who becomes a Commissioner and that they should not have any voting powers but should merely work in an advisory capacity.
3) Establish proper mechanism for the consideration of the Commission’s recommendations

**III. Non-discrimination, equality between men and women (arts. 2, para. 1, 3 and 26)**

**Issue 3:** Please provide information on the findings of the Law Commission with regard to its review of the Penal Code, in particular sections 137(A), 153, and 156, in the context of the Human Rights Committee’s previous recommendation to decriminalize consensual same-sex sexual activity. Please clarify whether the State party will introduce monitoring of cases of violence based on sexual orientation. Please also specify whether the State party has set up awareness-raising campaigns to educate the population on the issue.

In line with its mandate, on 7 December 2011, the Law Commission received a submission from the Executive (through the Ministry of Justice and Constitutional Affairs) to review sections, 137A, and 153–156 of the Penal Code. However, the Law Commission has not yet undertaken the said review.

There are currently no awareness raising campaigns set up by the State to educate the population on the above issue. The only awareness campaigns that are there are those championed by CSOs like CHRR and CEDEP.

**Recommendations:**
**The State Party should:**
1) Undertake to promptly review the laws touching on consensual same sex activities and decriminalize them according to international human rights standards.
2) Undertake awareness campaigns to sensitive the citizenry on the issue of consensual same sex activities.
3) Monitor cases of violence based on sexual orientation and devise means to curb the same.
Issue 4: Please provide information on steps taken to ensure that persons who engage in illegal practices targeting widows, such as appropriating a widow’s estate, “sexual cleansing” rituals, and “widow inheritance”, are prosecuted and punished, if found guilty. Please also indicate which measures, including awareness raising campaigns, have been adopted to eliminate these traditional practices affecting the dignity and personal integrity of women. Please also clarify whether the Marriage and Divorce Family Relations Bill has been adopted by Parliament, and if so, provide information on its provisions. Please also provide information on measures adopted to raise awareness of the new Gender Equality Law among lawyers, prosecutors, judges and society at large.

Malawi has the Deceased Estates (Wills, Inheritance and Protection Act), which makes it an offence to dispossess widows or any beneficiary of a deceased estate. Unfortunately, widow cleansing and widow inheritance though harmful cultural practices are not specifically mentioned in any Act. However, the Gender Equality Act in section 5 prohibits the commission of any harmful practice. Any person who contravenes this section is liable to a fine of one million Kwacha (K 1,000,000) and to a term of imprisonment for five (5) years. The practices of widow cleansing and widow inheritance can therefore be caught under this section.

Unfortunately despite the above safe guards these harmful practices are still very prevalent in the Malawi Society and prosecution for the same is difficult as most are not reported because they are entrenched cultural practices so that even the victims themselves sometimes do not realise that these are harmful and a violation of their rights.

Unfortunately, there has not been much effort to disseminate the Gender Equality law as evidenced by the citizenry’s ignorance on the existence of the Act. There is still high prevalence of sexual cleansing, widow cleansing and widow inheritance cases in Malawi.

To some extent the Government, through the Ministry of Gender and in conjunction with CSOs like WILSA, undertake awareness raising campaigns to educate people on the dangers of the harmful practices like widow cleansing and widow inheritance but more effort is needed.

The Marriage, Divorce and Family Relations Bill has not yet been enacted into law.

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14 Any person found guilty is liable to a fine of K1,000,000 and to imprisonment for ten years and in addition to such sentence, the court can make an order directing that the property or the monetary value thereof be immediately restored to the person or persons lawfully entitled thereto or to the estate of the deceased person; and furthermore the above offender shall not qualify as an administrator or guardian in relation to an estate of a deceased person in Malawi.

15 Harmful practice is defined as “a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to—(a) undermine the dignity, health or liberty of any person; or (b) result in physical, sexual, emotional, or psychological harm to any person.
Recommendations:
The State Party should:

1) Adopt the Marriage, Divorce and Family Relations Bill.
2) Sensitise Judges, Lawyers, Prosecutors and the whole country on the Gender Equality Act.
3) Prosecute and sanction cases of appropriating a widow’s estate, sexual cleansing rituals, and widow inheritance.

IV. Right to life (art. 6)

Issue 5: Please indicate whether the State party intends to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights and amend the Criminal Code, with the aim of formally abolishing the death penalty. Please explain whether the death penalty continues to be imposed by some courts and tribunals and, if so, specify the number of persons condemned to death and of commutations of the death sentence in the last five years. Please also explain how this is in line with the moratorium on the application of the death penalty as well as the Constitutional Court decision in the case of Kafantayeni v. Attorney General.

At the moment the State has no immediate plans to abolish the death penalty, however the moratorium is still in place. Death penalty is still in the statute books. The indication so far is that there has not been any mandatory death sentence imposed by the Courts since the judgment above.

Unfortunately, the State has not done any resentencing of the prisoners that were condemned to death. There are about 23 people on death row that received the mandatory death penalty and approximately 170 more whose mandatory death sentences were commuted to life sentences. All of these individuals are entitled to resentencing.

Currently MHRC in conjunction with Malawi Law Society, University of Malawi, PASI and the Northwestern University with support of DFID Tilitonse Program have embarked on a resentencing project. It is important to recognise that the State, as one of the crucial stakeholder in this exercise, is fully cooperating.

Recommendations:
The State Party should:

1) Provide funds for the resentencing of prisoners who received the mandatory death penalty and not just rely of donor support;
2) Sensitize Lawyers and the judiciary especially Magistrates on the Kafantayeni Judgment and its implications on sentencing.
3) Open up the debate on abolition of the death penalty which will finally culminate into Ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights and amend the Criminal Code, with the aim of formally abolishing the death penalty.

**Issue 6:** With regard to reports of cases of extrajudicial killings, please report on the outcome of criminal proceedings related to (1) the death of Edson Msiska in January 2012 in police custody; (2) the death of Fanikizo Phiri by a police officer during a student demonstration; (3) the death of the student Robert Chasowa on campus.

- Edson Msiska: six police officers were arrested and prosecution commenced. Three of the officers were acquitted, while the other three were found with a case to answer. The State finished presenting its case and the matter is now at defense stage.
- Fanikizo Phiri: no one was prosecuted. Fanikizo Phiri’s family was compensated by government in a civil suit.
- Robert Chasowa: several arrests were made, but the prosecution has not yet commenced and the suspects are out on bail. Civil society has been calling for the expedition of the issue to ensure that justice prevails.

**Recommendations:**

**The State Party should:**

1) Complete the prosecutions of the accused persons in the cases of Edson Msiska and Robert Chasowa expeditiously and impose sanctions according to the laws. The same should be done in a transparent matter.

V. **Prohibition against torture and cruel, inhuman or degrading treatment or punishment, right to liberty and security of person, treatment of persons deprived of their liberty (arts. 7, 9, 10, 12 and 13)**

**Issue 7:** Please provide information on steps taken to effectively combat torture and excessive use of force by police officers. Please provide information on the work of the Independent Police Complaints Commission, in particular (1) the total number of complaints of alleged torture and cruel, inhuman or degrading treatment on the part of police officers or prison officials that have been filed since its establishment; (2) how many of those have been investigated; (3) the outcome of the investigations and the action taken against those found guilty; and (4) the measures taken for the rehabilitation and compensation offered to victims.
Even though the Police Act provides for an Independent Police Complaints Commission, it is yet to be operationalised. As of now, complaints are dealt with by Police Stations. According to the Police, there is no central system that records the total number of complaints for the whole country. Each Police Station deals with its own cases. It is therefore difficult to get readily available statistics.

The notable case where the Police have investigated allegations of torture is the case of Edson Msiska who died in Police custody (see above). In its report, the State affirms that “The independent Police Commission is expected to investigate cases of deaths or any abuse of suspects in Police custody. While the Commission is yet to be established, internal mechanisms have been used to investigate suspicious cases of alleged abuse of rights by the police. In January 2012 a suspect named Edson Msiska died in police custody in Mzuzu after allegedly being assaulted and tortured by the Police. An internal inquiry has established that he was tortured and the perpetrators will be duly prosecuted.” Even though the State claims to have internal mechanisms that are used to investigate complaints of torture perpetrated by the Police, it is disconcerting to note that the State can only point at one case that of Edson Msiska whereby any action has been taken against Police Officers accused of torture.

**Recommendations:**  
**The State Party should:**

1) Undertake the necessary measures to operationalise the Independent Police Complaints Commission as a matter of urgency.

2) Have a central system that records all complaints of torture against the Police and this should be made readily available to the public.

**Issue 8:** Please provide information on steps taken to prevent and combat domestic violence, in particular measures taken to implement and promote the Prevention of Domestic Violence Act. Please provide information, on an annual basis and disaggregated by sex, on the number of cases of domestic violence that have been reported, how many of those have been investigated, how many alleged perpetrators were prosecuted and which sanctions were imposed. Please also provide information on which programs are in place to train judges and law enforcement personnel on combating domestic violence. Please also describe the measures taken to provide assistance specifically to women victims of domestic violence and the number of shelters available to them. Please clarify whether the State party will take steps to criminalize spousal rape.

The major step taken in combating domestic violence was the enactment of the Prevention of Domestic Violence Act. However, there have been challenges in implementing the Prevention of Domestic Violence Act such that the State intends to review the same. It has been reported that the law is very technical and not practical. There has been cultural
resistance and there is need to ensure that some violent acts that are hidden or "justified" under the cultural and traditional conduit be criminalized as offenses.

The number of cases of domestic violence reported, investigated and prosecuted are recorded at each individual Police Station manually. The figures without much detail are then sent to the Police headquarters. According to these records, as of 2013, approximately 15,601 cases of domestic violence were reported nationwide and out of these approximately 8,796 had been prosecuted. Unfortunately, the figures are not sent with the facts so it is difficult to know of the sanctions meted out in each particular case. From the figures above it is quite clear that domestic violence especially against women in Malawi appears widespread.

A 2005 study of intimate partner violence – the first nationally representative study – found that 49 percent of women, or nearly half, have experienced some form of abuse by their intimate partner. According to the 2010 Demographic Health Survey (DHS), of all women and girls aged 15 - 49 in Malawi, approximately 41 percent have experienced physical or sexual violence. Many have experienced controlling behaviors from a husband or intimate partner, such as insisting on knowing where they are at all times (51 percent), and being jealous or angry if they talk to other men (43 percent). A 2012 study looking at domestic violence against pregnant women at a district hospital in southern Malawi found that 59 percent had been psychologically, physically, or sexually abused during pregnancy.

There has been some effort by the State to prevent domestic violence and to provide assistance specifically to women victims of domestic violence. The Malawi Police Service, with support from various government ministries and UN agencies, especially UNICEF, has developed Victim Support Units (VSUs), Community Victim Support Units (CVSUs) and One Stop Centers to help women and child survivors of violence. According to UNICEF, there are 400 VSUs and 250 CVSUs in the country, and four hospitals in four major towns host One Stop Centers. However, the all these lack capacity to respond adequately, providing only limited counseling and, in some districts, temporary shelter to victims.

Recommendations:
The State Party should:
1) Expedite the review of the Prevention of Domestic Violence Act and increase the efforts to adequately implement it in practice.

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16 Information from records at the Police Headquarters in Lilongwe.
2) Provide more shelters for women faced with domestic violence and should also upgrade the existing ones to make sure that they offer effective protection for the victims of domestic violence.

3) Provide training for personnel that work in the shelters and the victim support units.

4) Create a system on national data on domestic violence available according to international standards

**Issue 9:** Please provide information whether female genital mutilation is explicitly prohibited in the Penal Code. Which steps has the State party taken to combat and prevent such harmful traditional practices?

Female Genital Mutilation (FGM) is not explicitly prohibited in the Penal Code. FGM can fall under harmful practices prohibited by the Gender Equality Act. Accordingly, any person who engages in harmful cultural practices commits an offence and is liable to a fine of one million Kwacha (approx. USD 2,500) and to a term of imprisonment for five years. However, we are not aware of any case were harmful practice has been investigated and prosecuted.

**Recommendations:**

The State Party should:

1) Review the Penal Code and explicitly prohibit FGM and any other harmful cultural practice

2) Sensitise people on the dangers and human rights implications of FGM and other harmful traditional practices

**Issue 10:** Please provide information, on an annual basis, on the number of persons held in pretrial detention, as well as the average length of pretrial detention? Are pretrial detainees held separately from convicted prisoners? Please provide information on the impact of the measures taken to address long pretrial detention periods, as mentioned in the State party’s response to paragraph 12 of the Committee’s previous concluding observations. Please also indicate whether the new Legal Aid Act allows all persons in police custody and in detention on remand to be assisted by a lawyer. Please also indicate which alternative measures to detention, other than bail, can be imposed by the courts.

There are approximately 12,505 prisoners out of which, 1,957, or 16 percent, are in pretrial detention. Authorities hold most homicide suspects in pretrial detention for two to three years, but some homicide detainees remain in prison awaiting trial for much longer periods. Reliable data on the exact number and situation of these long-term pretrial

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detainees is unavailable. Pretrial detainees are not held separately from convicted prisoners.

To reduce case backlog and excessive pretrial detention, certain cases are conducted through “camp courts” organized by civil society groups. Camp courts expedite cases by bringing magistrates to the prison. Paralegals gather cases of pretrial detainees who have been held awaiting trial for excessive periods of time, are held unlawfully, or have been granted bail but cannot afford the terms set by the Court. Magistrates, along with the court clerk and police prosecutor, work through the list granting bail to some, reducing bail, dismissing cases, or setting a trial date. This has somewhat reduced instances of long pretrial detentions.\(^{20}\)

The Criminal Procedure and Evidence Code (CPEC) and the Child Care, Protection and Justice Act introduce a wide range of measures that can be used by authorities to prevent the detention of suspects or to help in the quick disposal of cases. These include cautioning and releasing people suspected of less serious offences,\(^{21}\) referring cases involving children suspected of less serious offences away from formal court proceedings with or without conditions in a process known as diversion\(^{22}\), promoting reconciliation in less serious offences\(^{23}\), and plea bargaining when the accused and the prosecution work out a mutually satisfactory disposition of the case with approval of Court\(^{24}\).

The new Legal Aid Act allows all persons in police custody and detention on remand to be assisted by a lawyer. However, practically there are challenges in complying with this as the police mostly do not allow lawyers to see the detainees. Furthermore, the new Act has not been fully operationalised.

**Recommendations:**

**The State Party should:**

1) Provide more funds to both the judiciary and the prosecutorial authority to enable them deal with cases expeditiously so that the number of pretrial detainees is reduced.

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\(^{21}\) Section 32 A of the CPEC provides that (1) For any offence not amounting to a serious offence and not aggravated in degree, a police officer of the rank of sub-inspector and above may, orally or in writing, caution an arrested person against repetition of criminal conduct and then release him. (2) A person arrested for an offence under subsection (1) may be cautioned and then released where there is enough evidence to warrant a prosecution if he voluntarily admits having committed the alleged offence. (3) A child offender who voluntarily admits the commission of an offence under subsection (1) may be released on caution if his parent or guardian consents to disposal of the case in this manner and if the caution is administered in the presence of such parent or guardian. See also section 94 of the Child Care, Protection and Justice Act

\(^{22}\) Section 2 of the Child Care, Protection and Justice Act – for more details on conditions for diversion see section 112 of the said Act.

\(^{23}\) Section 161 of the CPEC See also section 25 of the Draft Local Courts Act

\(^{24}\) Section 252A of the CPEC
2) Separate pretrial detainees and convicted prisoners in accordance with the law.

3) Implement the Legal Aid Act to allow all persons in police custody and in detention on remand to be assisted by a lawyer.

4) Establish a Criminal Division in the High Court.

5) Promote greater awareness and full implementation of recent legal reforms in the CPEC and the Child Care, Protection and Justice Act by all key institutions.

6) Increase the use of non-custodial measures such as diversion.

**Issue 11:** Please provide information on the work of the Prison Inspectorate, as well as the frequency of prison visits. Does the Inspectorate have the power to make unannounced visits? Please clarify to whom the Inspectorate issues its recommendations and whether these are made public. Please also provide information on steps taken to improve detention conditions, including those aimed at nutrition, sanitation, health facilities, and overcrowding. How many inmates have died per year since 2005, and what were the reported causes of death? Please also provide an update on the status of the Prison Services Bill, and clarify which steps are taken to ensure that it is consistent with the State party’s obligations under the Covenant concerning conditions of detention. Please also clarify whether juveniles are separately detained from adults, as provided for in the Constitution and whether men and women are detained in premises that are entirely separate. Finally, please explain which concrete steps the State party has taken to comply with the November 2010 Constitutional Court decision in Gable Masangano v The Attorney General.

1. **The Inspectorate of Prisons**

The Constitution in section 169 establishes the Inspectorate of Prisons, which is charged with among other things “monitoring of conditions, administration, and general functioning in penal institutions taking due account of applicable international standards.” The Inspectorate consists of a justice of appeal or a judge, the chief commissioner of prisons, a member of the Prison Service Commission, a magistrate, and the ombudsman. They draft reports with recommendations, which are placed before Parliament before they are made public. However, the reports are hardly ever placed in the public arena.

While the Constitution provides for the independence of the Inspectorate of Prisons, there are challenges. Firstly, the capacity of the Inspectorate is severely limited since it operates on a part time basis without a Permanent Secretariat. Secondly, the independence of the Inspectorate is seriously compromised by its lack of capacity. The Inspectorate’s Secretariat, if it can be referred to as such, is housed in the Ministry of Internal Security, with one desk officer responsible for Inspectorate matters. This is evidently inadequate and gives rise to concerns about the institution’s independence. Thirdly, the recommendations and observations made by the Inspectorate are hardly taken seriously
and largely ignored by Parliament. This may explain why serious moves towards prison reform have taken such a long time.25

2. Prison conditions
The government still remains largely noncompliant with the Gable Masangano ruling, which required it to improve prison conditions.26 The prison system’s 30 facilities, built to accommodate approximately 5,500 inmates, routinely hold at least double that number. There are approximately about 12,000 inmates in the prisons. Overcrowding, inadequate nutrition, substandard sanitation, poor health facilities, and inadequate infrastructure remain serious problems. Prisons and detention centres, while generally well ventilated, have no provisions for temperature control other than wood fires. Basic emergency medical care generally is available in the daytime but unavailable after regular working hours. For more serious cases of illness and injury, referrals are made to district medical clinics. Potable water is available. Daily prison rations are meagre. Officials allow family members to bring food and encourage inmates to grow vegetables and raise livestock; however, malnutrition in the prison population remains a problem. Between January and September 2013, 38 inmates died in prison, three due to tuberculosis, seven due to pneumonia, and the rest from HIV/AIDS, diarrhoea, and inadequate diet.27

3. Female detainees
The country’s approximately 107 female prisoners are housed within 16 prisons. They are segregated from male prisoners and monitored and controlled by female guards and a female officer-in-charge. Due to the lower numbers of female prisoners, prison conditions are slightly better for women in terms of space and access to prison amenities.28

4. Juvenile offenders
As of September 2013, there were approximately 1,095 offenders between the ages of 18 and 21 in prison, including 1,016 serving sentences and 79 awaiting trial.29 Figures of children (under age 18) in conflict with law deprived of their liberty are unclear. However, it is a matter of concern that the minimum age of criminal responsibility is still seven years despite numerous recommendations of international human rights bodies, including the Committee on the Rights of the Child.30

25 “Pre-trial detention in Malawi: understanding case flow management and conditions of incarceration” OSISA, 2011.
28 Ibid.
29 Ibid
30 See Concluding Observations of the Committee on the Rights of the Child to Malawi, CRC/C/MWI/CO/2, 27 March 2009, §75-76. As to the age of criminal responsibility the Penal Code provides as follows “A person under the age of seven years is not criminally responsible for any act or omission. A person under the age of twelve years is not criminally responsible for an act or omission unless it is proved that at the time of doing
There are two juvenile reformatory centres in Malawi Mpemba and Chirwa. The combined capacity for both is about 500. Some young offenders, when they get lucky, are sent there, but usually young offenders are not separated from adults.

**Recommendations:**

**The State Party should:**

1) Take measures to comply with the High Court ruling of Gable Masangano and improve prison conditions.
2) Enact the Prison Bill without delay to set clear standards for prison administration and conditions of detention
3) Raise the age of criminal responsibility in accordance to international standards; implement alternative measures to deprivation of liberty especially addressed to children and ensure that they are not detained together with adults;

**VI. Elimination of slavery and servitude (art. 8)**

**Issue 12:** Please provide statistical data, by year, on the extent of trafficking in persons, including for sexual exploitation and child labour, including statistics broken down by sex, age and country of origin. Please also provide information on the number of persons prosecuted and convicted and convictions handed down by the courts against the perpetrators of these acts. Please provide information on the impact of steps taken to combat and prevent trafficking and sale of persons, in particular persons under 18 years of age. Please provide an update on the status of the draft Anti-Trafficking Legislation? What concrete measures are in place to protect and rehabilitate victims of trafficking? Please provide information on programs in place for the provision of training to judges, prosecutors and police officers on the identification, investigation and prosecution of trafficking cases.

Official statistics on trafficking in Malawi seem to be non-existent or at least not public. The incidence of internal trafficking is believed to be higher than that of transnational trafficking, and practices such as forced labour exist, particularly on tobacco estates. Children are trafficked primarily within the country for forced labour in agriculture, animal herding, domestic servitude, and to perform forced menial tasks for small businesses. Girls and young women are trafficked internally for forced labour and prostitution at local bars and rest houses. Malawian adults and children are lured by fraudulent offers of

*the act or making the omission he had capacity to know that he ought not to do the act or make the omission.*
employment into situations of forced labor and commercial sexual exploitation in Mozambique, South Africa, and Zambia.31

According to the Centre for Social Research (July 2008) between 500 to 1,500 women and children are trafficked within the borders of Malawi annually.32 Out of this figure, 30% are children aged between 14 to 18 years, and about 400 women and 50 children are trafficked outside the country every year.33

The limited general public awareness on the issue of human trafficking may entail that the vice is not recognised by people as unacceptable conduct and therefore it is widely practiced without any abhorrence, and not reported to relevant authorities.

Malawi does not have a specific anti-trafficking law. The draft Anti-Trafficking Legislation is yet to be passed into law by Parliament. Current domestic legislation prohibits some forms of trafficking through, for instance, the Penal Code and the Child Care, Protection and Justice Act. However, the lack of specific anti-trafficking legislation allows for a range of potentially weak punishments to be imposed on convicted trafficking offenders since the penalties under the aforementioned statutes range from small fines to 2 months to 10 years’ imprisonment. For example, in the case of the Republic v. Masautso Banda, the accused trafficked children from Mchinji to Dedza for labour. He was charged under sections 21 and 24 of the Employment Act for employing 10 persons under 14 years of age. In this case, the accused pleaded guilty and was sentenced to pay a fine of K5,000 (approx. 12 USD); to pay the sum of K1,500 (approx. 4 USD) to each victim for suffering for 3 days and transport money from Mchinji to Dedza. In default, the accused was sentenced to imprisonment for 11 months.34

In 2012 The Malawi Police Service (MPS) provided its first formal report of law enforcement data, from eight districts, which highlighted the government’s conviction of 13 trafficking offenders, the majority of whom were sentenced to significant terms of imprisonment. 10 of the 13 convicted traffickers received jail terms—an improvement from three out of four convicted offenders receiving fines in 2011. However, these 10 convictions occurred in only two districts—Dedza and Phalombe—signaling the need to increase law enforcement efforts and training of police and magistrates country-wide. The majority of trafficking offenders convicted—eight of 13—were charged under the child

31 U.S. State Department Trafficking in Persons Report, June 2009; see also report of the baseline study on human trafficking in six selected districts of Malawi by Robert Mnthenga Chizimba, Grace Tikambenji Malera and Charlotte W Mesikano Malonda, Norwegian Church Aid 2011.
33 Ibid.
34 Republic v. Masautso Banda, Criminal Case No. 347 of 2005 decided at Mchinji Magistrate’s Court (unreported)
trafficking provision of the Child Care, Protection, and Justice Act. However, the government sentenced seven of these convicted offenders to 18 months’ imprisonment, well below the provision’s prescribed maximum penalty of life imprisonment. Three other offenders were charged and convicted of kidnapping under article 257 of the Penal Code; in these cases, magistrates applied stiffer penalties of two to five years’ imprisonment. Of the remaining cases, two offenders received paltry fines, and one received a suspended sentence, serving no time in jail.35

At other times the prosecution has failed to secure a conviction based on the fact that existing laws were not drafted to capture the peculiar nature of the offence of trafficking in persons. This peculiarity is illustrated by the case of the Republic v. Ruth Lourenco36 which involved cross-border trafficking. The facts of the case are as follows: in 1999, three destitute girls from Lilongwe aged between 15 to 19, were arrested in a police raid at a sex club in Amsterdam. They were subsequently deported to Malawi and a local business woman was accused of trafficking them. She stood trial on charges of procuring for prostitution outside Malawi in a highly publicised trial but was acquitted. The acquittal was on technical grounds. By the time the girls were approached by the business woman, due to their destitution, the girls were already notorious prostitutes offering their bodies to men in exchange for money and other material benefits. The court held in this case that as the girls were already prostitutes prior to their recruitment, they could not have been procured for the purpose of prostitution as set out under section 140 of the Penal Code. The accused, was able to go free despite the fact that the girls, in their testimony, had credibly described their ordeal from recruitment to deportation in graphic detail, giving a nondescript glimpse into the immeasurable suffering that trafficking victims face.

The Government of Malawi sustains minimal efforts to provide protection to trafficking victims. It relies largely on NGOs to identify victims and provide long-term care. In addition, the government has failed to develop or employ systematic procedures for the proactive identification of victims and their referral to care. The government funds one drop-in center (the social rehabilitation center in Lilongwe) that offers counseling and assistance for victims of trafficking and gender-based violence. More than 300 police stations at the sub-district level house victim support units (VSUs) to respond to gender-based violence and trafficking crimes; however, the VSUs lack capacity to respond adequately, providing only limited counseling and, in some districts, temporary shelter to victims. The lack of adequate and longer-term assistance leaves victims vulnerable to re-trafficking; at least one such case was documented during the year.37

35 Trafficking in persons report 2013, op. cit.
36 Republic v. Ruth Lourenco Criminal case No. 150 of 1999 decided at Lilongwe Chief Resident Magistrate’s Court
(unreported)
37 Trafficking in persons report 2013, op. cit.
Recommendations:
The State Party should:

1) Take concerted efforts directed towards awareness raising on the part of the general public, primarily through the media (radio) and other community-based mechanisms in order to address the current knowledge gaps on human trafficking.

2) Expedite the introduction of a specific law on human trafficking that should provide for: the criminalisation of human trafficking; the care and assistance of victim; and harnessing collaboration measures, i.e. setting up a coordinating body, and formulate and implement a national policy on human trafficking.

3) Provide more protection and rehabilitation to victims of trafficking even in the absence of a specific anti-trafficking law.

VII. Right to a fair trial (art. 14)

Issue 13: Please provide an update on steps taken to strengthen the functioning of the judicial system, including efforts to increase access to quality legal assistance and paralegals, as well as the number of judicial officers. Please also indicate whether measures have been taken to reduce the excessive backlog of cases to be handled by courts and, in particular, inform on the impact of steps taken to strengthen the appeals procedure, with the aim of expediting the appeals process and guaranteeing that all appeals are considered promptly by a court.

Since 2012, at least 7 judges have been appointed to the High Court and at least 5 have been promoted to the Supreme Court. This has helped to ease the backlog of cases, but there is still a huge amount of backlog that needs to be cleared. The lack of sanctions against judges who not deliver judgements in good time is worsening the issue of the backlog of cases.

Recommendations:
The State Party should:

1) Increase the number of judicial officers to enable expeditious disposal of cases.

2) Enact legislation that provides for clear sanctions against judges who take long in delivering judgments.

3) Set up other divisions of the High Court like the Criminal Division to expedite the hearing of cases.

VIII. Right to recognition as a person before the law (art. 16)

Issue 14: Please provide information on whether the Disability Bill has been passed by Parliament and what the contents are.
This Bill was passed in 2012. It guarantees rights to non discrimination against people with disabilities in the field of health, education, training, employment and social life. It also grants disabled people who suffer from discrimination remedies enforceable by the courts eg, fines and imprisonment. It also provides for the development of a Malawi sign language as a national language for persons with hearing impairments and recognizing it as an official language.

Information obtained so far is to the effect that the State has started to implement the Act in practice. The Ministry of People with Disabilities and the Elderly has published a summarized and easy to read version of the Act which is being distributed to the public. Furthermore they are sensitizing the people on the existence of the Act in conjunction with the Ministry of Information. However, so far this seems to be the only actions that have been taken in the implementation of the Act. The Ministry has not yet received any complaints from any disabled person that their rights are being violated in breach of the Act. This lack of complaints could be an indication that people are not really aware of the existence of the Act, further it could also be an indication that the complaints mechanism is not easily accessible for those with disabilities.

**Recommendations:**

**The State Party should:**

1) Implement the Act widely in order for it to have meaningful impact, including the development of the sign language

2) Undertake sensitisation campaigns to raise awareness about the Act among the citizenry, these campaigns should specifically also target those with disabilities and the messages should be meaningful to them

**IX. Prohibition of arbitrary or unlawful interference with privacy, family, home or correspondence (art. 17)**

**Issue 15:** Please provide information on the status of the review of the 2010 amendment of the Police Act, which expanded the authorization of searches without a warrant.

The amendment still stands; the Police can still conduct searches without a warrant. This is contained in section 35 of the Police Act.\(^{38}\) The Police informed that they do conduct

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\(^{38}\) Section 35 of the Police Act provides that (1) Where a police officer of or above the rank of sub inspector has reasonable grounds for believing that anything necessary for the purposes of an investigation into an offence which he is authorized to investigate may be found in any place and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the ground of his belief and specifying in such writing, so far as is possible, the thing for which search is to be made, after giving the copy of a record thereof to the owner or occupant of the place to be searched, search without warrant, or cause search without warrant to be made, for such thing in any place and, if such thing be found,
searches without a warrant in some cases and that they follow all the formalities as provided for under the Police Act. However, we were not able to get independent confirmation of this.

Recommendations:
The State Party should:

1) Sensitize the Police and the public on what the power to search without a warrant entails. This will help to safeguard against abuse of power by the Police.

**Issue 16:** Please provide an update on the status of the HIV/AIDS (Prevention and Management) Bill and clarify how article 10 of the Bill (permitting a health service provider to disclose one’s HIV status) and its provisions on compulsory testing in certain circumstances are in conformity with the rights guaranteed in the Covenant.

The HIV/AIDS (Prevention and Management) Bill has not yet been passed into a law. Malawi needs be careful when passing this law especially on the issues of compulsory testing and disclosure as this can violate people’s right to privacy, dignity and the right not to be discriminated against.

Malawi has made remarkable strides in its battle against HIV, increasing public awareness, prevention, and testing, and making treatment accessible to average individuals. If, however, the draft HIV/AIDS Bill is passed containing sections on mandatory testing of certain groups of people and permitting disclosure by a health provider in certain circumstances, it runs the risk of reversing the success that Malawi has achieved so far in the fight against HIV/AIDS.

seize it and carry it before the nearest magistrate empowered to take cognizance of the offence to be dealt with according to law. (2) A police officer proceeding under subsection (1) shall, if practicable, conduct the search in person. (3) If a police officer of the rank referred to in subsection (1) is unable to conduct a search in person as is required by subsection (2), and there is no other competent officer present to make the search at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him not below the rank of sergeant to make the search; and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, in so far as it is possible, the thing for which search is to be made, and the subordinate officer may thereupon search for such thing in such place without a warrant. (4) Except as otherwise provided in this section, the provision of the Criminal Procedure and Evidence Code as to search warrants shall, so far as may be, apply to a search made under this section. (5) Copies of any record made under subsection (1) or subsection (2) shall forthwith be sent to the nearest magistrate empowered to take cognizance of the offence and to the owner or occupier of the place searched. (6) The occupier of the place searched, or some other person in his behalf, shall, in every instance, be permitted to attend during the search. (7) A search under this section shall be conducted in a humane manner and unnecessary damage to destruction to property and humiliation or any harassment of individuals shall be avoided.
Recommendations:

The State Party should:

1) Review several problematic provisions in the draft Bill and input alternative language especially the ones on mandatory testing of certain groups and of disclosure by a health worker, transforming the draft Bill into one that protects human rights and helps further prevent the spread of HIV in Malawi.

2) The draft Bill should encourage voluntary disclosure and limit forced disclosure to rare circumstances where a real risk of HIV transmission exists, and prohibit it where abandonment, gender based violence, or other harmful circumstances are likely to result.

X. Freedom of conscience and religion (art. 18)

Issue 17: Please provide information on steps taken to ensure that members of religious minorities are not discriminated against on the basis of their religious beliefs, including in access to education, subsidies, and places of worship.

The Constitution and other laws and policies protect religious freedom and, in practice, the government generally respect religious freedom. There is hardly any discrimination in Malawi based on religious affiliation, belief, or practice. However, there is one religious minority, the Rastafarians, who complain that they have limited employment and educational opportunities based on their religion. Rastafarian leaders continued to complain of an unofficial ban on long hair in some government-run schools. Although there is no law relating to hair length, some school dress codes prohibit long hair. Children belonging to Rastafarian religion are forced to cut their hair and/or forced to drop out of government-run school institutions. In addition, according to the President of Rastafari for Unity (Malawian Rastafarian organization), Rastafarians are only able to obtain employment in the private sector because the government does not employ Rastafarians.39

Recommendations:

The State Party should:

1) Clarify its school and employment policies in as far as religious minorities are concerned, especially Rastafarians, and such policies should explicitly prohibit any discrimination on the basis of religion, including rastafarism.

XI. Freedom of opinion and expression (art. 19)

Issue 18: Please indicate whether the State party considers repealing the provisions of the Penal Code that empower the Minister of Information to ban newspapers. Please also provide information on the number of journalists and human rights defenders who have been arrested since 2005, the grounds for their arrest, as well as the outcome of the arrests. Please also inform on the status of the Access to Information Bill and how the regulation of access to information and freedom of expression in Malawi is compliant with article 19 of the Covenant, in particular with regard to the Committee’s general comment no. 34 of 2011 (CCPR/C/GC/34).

1. Provision to ban newspapers
Section 46 of the Penal Code which empowered the Minister of Information to ban publications was repealed in 2012. The state must be commended on taking this important step.

2. Arrests of journalists
Despite Constitutional guarantees of media freedom, a number of journalists still continue to face challenges.

In the year 2006 armed police harassed two journalists, Julius Bonnex and Maurice Nkahiwe, from the Daily Times when they covered an allegedly controversial prayer meeting. Photojournalist Bonnex was forced to delete photographs on his camera of vendors fleeing the police for fear of being tear gassed. The Chronicle editors Rob Jamieson and Dickson Kashoti and reporter Arnold Mlelemba were arrested and charged with criminal libel allegedly for publishing a defamatory article against the then attorney General. They were later released on bail. Even before the completion of this trial, the trio received a Summons for Civil Suit for damages for the alleged defamatory publication. Both matters had not yet been finalised by end of 2006 and we couldn’t get updated information.

In September 2006, Maxwell Ng’ambi a reporter with BT newspaper Limited was prosecuted for criminal libel for allegedly writing a defamatory story against Hetherwick Ntaba, a senior official in the then ruling DPP. He was convicted of criminal libel and his sentence to a fine of MK 10,000 (USD 25) or six months imprisonment with hard labour was suspended for one year.40

In the year 2007 and 2008 there were no known arrests, but there were harassment and beatings. Deborah Chipofya Nyangulu a journalist with Blantyre Newspapers Limited was

40 So this is democracy? State of the media in southern Africa, 2006 annual publication of the Media Institute of Southern Africa.
harassed in the line of duty by the then ruling party supporters at a presidential press conference for asking inappropriate questions. Wyford Banda of zodiac broadcasting was beaten for asking the DC of Machinga about the 2008 national population census.\footnote{41}

In 2012, Clement Chinoko, a journalist with Blantyre Newspapers Limited was arrested for writing a story on an alleged engagement ceremony involving two women. He was released on bail the same year.

Also in 2012, police arrested and charged journalist Justice Mponda of the online publication \textit{Malawi Voice} with publishing false news. The court acquitted Mponda due to the government’s failure to pursue the case.

In 2013 police arrested and detained Sylvester Namiwa, a journalist with Galaxy FM Radio, for two hours after he listed on air the names of individuals and companies alleged to be involved in stealing government funds as a part of the MKW 20 billion (approx. USD 70 million) Cashgate corruption scandal. He was charged with publishing content likely to incite violence. As of December 2013 Namiwa was free on bail with no trial date announced.\footnote{42}

3. \textbf{Arrests of Human Rights Defenders}

In October 2011, police arrested five civil society activists – Habiba Osman, Billy Mayaya, Brian Nyasulu, Ben Chiza Mkandawire, and Comfort Chiseko – on charges of “holding an illegal demonstration.” They were taking part in a small, peaceful demonstration outside Parliament, calling on President Mutharika to hold a referendum, resign, and hold an early election. The activists were released on bail five days later.

In 2012, police without a warrant arrested John Kapito, the then chairman of the government-funded Malawi Human Rights Commission and a prominent critic of the government's human rights record in Lilongwe, accusing him of possessing forex illegally.

4. \textbf{The Access to Information Bill}

The Access to Information Bill has not yet been tabled before Parliament. The current regulation of access to information and freedom of expression in Malawi complies to a limited extent with article 19 of the Covenant, in particular with regard to the Committee’s general comment no. 34 of 2011 (CCPR/C/GC/34) in that the press are often left to freely write and publish on a range of issues and citizens are able to express their opinions freely in any form whether oral, written or electronic.

\footnote{41} Ibid.\footnote{42} Malawi 2013 Human Rights Report. \url{www.usembassy.gov}
However, there is not full compliance in that the Public Broadcaster MBC is not independent and the hand of Government is still heavily involved in its editorial; further the Government does not put information in the public domain so that the citizens can easily access the same. A good example would be on the issue of the sale of the Presidential jet whereby the Government has not released any documentation on the same, instead it has given contradictory statements on what actually transpired. Lastly, there is no compliance because Malawi is yet to enact the Access to Information Bill.

Recommendations:
The State Party should:
1) Stop arrests and any other type of harassment against journalists and human rights defenders.
2) Enact the Access to Information Bill
3) Place information in the public arena so that citizens can have access to it and enjoy their right to access information as provided for in the Constitution.

XII. Freedom of assembly and association (arts. 21, 22)

Issue 19: Please provide an update on the status of the work of the Commission of Inquiry, set up to investigate the handling of demonstrations on 20 July 2011. Please clarify whether persons who have been found responsible for killings and ill-treatment of demonstrators have been punished and whether compensation has been offered to victims or their relatives.

The inquiry into the demonstrations on 20 July 2011 was conducted. A number of police officers were arrested. However, the prosecutions are yet to be commenced. President Joyce Banda gave the families of the victims MK 30,000,000 (approx. USD 78,000) to divide amongst themselves\(^{43}\). The members of the family have however sued Government in a civil action for compensation, which is pending.

Recommendations:
The State Party should:
1) The state must expeditiously prosecute those that were involved in the 20 July 2011 killings; sanction those responsible according to the laws, and provide adequate reparation to victims and families.

XIII. Freedom of movement, marriage, family and measures for the protection of minors (arts. 12, 23 and 24)

<table>
<thead>
<tr>
<th>Issue 20: Please clarify whether the State party has prohibited corporal punishment in all settings, including in the home and private alternative care settings? Please also provide information on steps taken to prevent sexual abuse of children, and to prosecute and punish perpetrators.</th>
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</table>

The Child Protection, Care and Justice Act prohibits corporal punishment. However, as recognised by the Committee on the Rights of the Child, enforcement still proves difficult.44

Sexual abuse of children and the punishment of its perpetrators are partially taken care of under the Penal Code, which creates an offence of defilement for anyone who has sex with a girl under thirteen years of age. The same is punishable with life imprisonment. However, the public feel that the above law does not deter perpetrators because of the Courts’ perceived practise of leniency towards perpetrators. Furthermore, the said law does not offer any protection for the boys.

The State needs to take charge and exert more control with regards to the prosecution and punishment of perpetrators who sexually abuse children. A good example is the recent case whereby the family of a defiled girl who was also infected with the HIV virus received a paltry sum of MK 7000 (approximately USD 17) from the offender for them to withdraw the case against him. The family withdrew the case against him and now the offender is free. The offender would not have been set free without the involvement and/or consent of the State’s prosecutorial services.

**Recommendations:**
**The State Party should:**

1) Enforce legislation to abolish corporal punishment in all settings, including the home and private alternative care settings.

2) Amend the Penal Code to criminalise sexual abuse of children regardless the sex of the child.

3) Promulgate sentencing guidelines with regard to sexual offences against children so that there is consistency in sentencing and the sentences should be proportionate to the seriousness of the crime.

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The Child Care, Protection and Justice Act prohibits forced marriages against children; anyone convicted is liable to ten years imprisonment. However, the said Act does not prohibit early marriages and these are allowed in the Constitution: as long there is parental consent, children as young as fifteen can get married. Malawi has one of the highest rates of child marriages in the world. On average, one out of two girls in the country will be married by her eighteenth birthday. In 2010, half of women aged 20 to 24 years were married or in union before they were 18. Some are as young as 9 or 10 when they are married.45

The law has still not been amended to raise the minimum age for marriage to 18. Malawi government has yet to enact the Marriage, Divorce and Family Relations Bill (Marriage Bill), a comprehensive family law that was developed in 2006 and has stronger protections for children against forced marriage. Among other things, the bill proposes that the minimum age of marriage be raised to 18.

The government of Malawi has created a public impression that it supports the Marriage Bill, but its actions indicate otherwise. The former President Joyce Banda made several public comments committing her government to passing the bill without delay. In 2012, she issued a presidential directive that the bill shall be presented for debate before Parliament. But on November 1, 2013, during the High Level Task Force for Women, Girls, Gender Equality and HIV for Eastern and Southern Africa, she made comments that suggested a change of mind, she stated that:

“There is no question about my personal commitment to the raising of the marriage age. I am however aware that this is a delicate issue among some traditional leaders, conservative communities, faith leaders and some legislators. That is why, in my opinion, it is best that we do our homework by engaging all stakeholders and bring the bill to Parliament at the right time for us to succeed”.46

45 “I’ve Never Experienced Happiness” Child Marriage in Malawi. 2014 Human Rights Watch
46 ibid
Recommendations:
The State Party should:

1) Take the necessary legislative steps for the enactment of the Marriage, Divorce, and Family Relations Bill, and together with relevant ministries and government agencies, promptly carry out its provisions.

2) Together with the Ministry of Home Affairs and Internal Security, provide regular training for police and prosecutors on their legal responsibilities to investigate and prosecute forced child marriage.

3) Carry out awareness-raising campaigns to prevent the practice of early marriages.

Issue 22: Please provide information on the impact of measures taken to eliminate child labour and economic exploitation of children, especially on tobacco and tea farms, subsistence farms and in domestic service. Please also inform on the progress made to prevent children from living in the streets and the prevalence of this phenomenon on an annual basis.

One of the measures that has helped in the fight against child labour was the introduction of the ILO’s Support for the National Action Plan to combat child labour in Malawi, called “SNAP”. The SNAP model combines a community-based child labour monitoring system, investment in infrastructure, and coordinated community action to identify child labourers and give them a chance to access education, training and eventually, employment. The child labour monitoring (CLM) system identifies children in, or at risk of child labour, offering them appropriate alternatives. The system also provides for the monitoring of the child labour situation in target areas such as on Malawi’s tobacco plantations and other rural settings. Since the introduction of the SNAP program in Malawi in 2009, which was funded by the US Department of Labour, more than 5,500 children have been withdrawn or prevented from entering child labour and more than 300 of these children have completed vocational training. Over 800 parents have benefited from livelihood support and were equipped with skills and knowledge on income-generation - such as saving money and setting up their own business through the ILO’s Start your Own Business Tools.47

While the government should be commended for working hard to eliminate child labour, the challenges are still enormous. More resources and strategies need to be mobilised and drawn up to address the children’s problems. There is need for the Government to enact legislation to protect children from child labour, such as the Tenancy Bill. Further, there is need to fully implement key legislation which protects children against child labour, like

47 www.ilo.org
the Employment Act, which prohibits the employment of anyone below the age of 14 years and its contravention attracts five years imprisonment.

Recommendations:
The State Party should:
1) Finalise the enactment of laws that protect children against child labour like Tenancy Bill and enforce already existing legislation, such as the Employment Act, that prohibits the employment of anyone below 14 years old.
2) Come up with concrete policies to protect children against child labour.

XIV. Rights of persons belonging to minorities (art. 27)

Issue 23: Please provide information on measures taken to ensure that members of ethnic, religious or linguistic minorities enjoy the right, in community with other members of their group, to their own culture, to profess and practice their own religion, and to use their own language. Please also provide information on indigenous peoples in Malawi and how their rights are being respected.

In general, Malawians do enjoy freedom to practise the religion of their choice, to practise the culture of their choice and to use the language of their choice. However, there have been some cases on religious divide, particularly in Mangochi, between Muslims and Christians, with Muslims declaring Mangochi as a Muslim state. This followed after Muslims in Mangochi confiscated pork from a seller who was selling the same in an open market place, and another chief went as far as to order that all those rearing pigs should leave his area. These actions were condemned by Muslim leaders, however it shows the potential for religious violence that is in that area and the importance of the State’s involvement in educating people about religious rights and freedoms.

Recommendations:
The State Party should:
1) Sensitise people on everyone’s right to freedom of religion especially in places like Mangochi where there tend to be some clashes between Muslims and Christians.

XV. Dissemination of information relating to the Covenant (art. 2)

Issue 24: Please provide information on steps taken to disseminate information on the Covenant and its First Optional Protocol, the submission of the initial report of the State party, the previous Concluding Observations, and its forthcoming examination by the Committee. Please also provide more information on the involvement of civil society, non-
governmental organizations (NGOs), and the Malawi Human Rights Commission in the preparatory process of the report.

In general, there has not been any deliberate effort by the State to disseminate information on the Covenant and its First Optional Protocol, the submission of the initial report of the State party, the previous Concluding Observations, and its forthcoming examination by the Committee. It is probable that the only people aware of the above are the ones who participated at the National Task Force to prepare the report (see paragraph below). It is highly doubtful that even lawyers and judges or parliamentarians, let alone ordinary citizens, are aware that the State submitted an initial report to the Committee or that there is a forthcoming examination by the Committee.

To a certain extent, CSOs and the Malawi Human Rights Commission were involved in the preparatory process of the report. The report was prepared by a National Task Force chaired by the Ministry of Justice and Constitutional Affairs. Members of the Task Force included Ministry of Foreign Affairs, Office of the President and Cabinet, Ministry of Information, Ministry of Education, Ministry of Lands, Ministry of Internal Security, the Law Commission, the Human Rights Commission, the Anti-Corruption Bureau. Civil Society organizations were also represented on the Task Force by the Human Rights Consultative Committee and the Public Affairs Committee. However, at the end of the day the report is a Government report they are the ones that decided on the final content of the report.

**Recommendations:**

**The State Party should:**

1) Disseminate the above information publicly among public servants and ordinary citizens. State should use different mediums like the media so that they can reach ordinary Malawians.