



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Consideration of reports submitted by States  
parties under article 40 of the Covenant**

**Initial reports of States parties**

**Malawi\***

[3 April 2012]

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

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## **I Introduction**

1. This report was prepared in line with Article 40 of the International Covenant on Civil and Political Rights (hereinafter the Covenant). Malawi ratified the Covenant on 22 December 1993. The reporting period covers 1995 to 2011. The Covenant is not directly applicable in the courts of Malawi. However, the courts of Malawi have frequently referred to the rights in the Covenant.

2. 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.

3. The Human Rights Committee is hereby referred to Malawi's Core Document which gives a comprehensive narrative on the country's demographic, social and economic structure of Malawi as well as the political, constitutional and legal order of the country. The report presents information on Malawi's implementation of the articles of the Covenant.

## **II. Information on the implementation of the articles of the Covenant.**

### **Article 1- Right to self determination**

4. Malawi became a sovereign State upon attaining independence in 1964 and a republican status in 1966. Section 1 of the 1994 Constitution recognizes this sovereign status with rights and obligations under the Law of Nations. One of the Principles of National Policy in Section 13 of the Constitution states Malawi's quest to govern in accordance with law of nations, and the rule of law and actively support the further development in regional and international affairs. Section 3 of the Constitution highlights the territorial integrity of Malawi and the country has, at all times, and respected the borders of other sovereign nations. Where there has been need for clarifying the borders of Malawi, government has co-operated with its neighbours in establishing the territorial limits of the countries involved.

5. The transformation of Malawi from a one-party State to a pluralistic democracy, in 1993, through a referendum is evident of the right of people of Malawi to determine their political destiny. Since 1994, Malawians have periodically held credible, free and fair presidential and parliamentary elections in order to choose their Government. The Constitution that emerged from the 1993 transformation was formally adopted in 1994 and provisionally applied for a year, after which it became substantively applicable as the Constitution of the Republic. The Constitution creates a constitutional order based on the need for an open, democratic and accountable government.

6. In pursuit of this right, Malawi has, through its duly elected Government established diplomatic, economic, social, cultural or political links with other countries and bodies such as the Southern African Development Community, the Common Market for Eastern and Southern Africa, the African Union, the United Nations, the World Bank and the International Monetary Fund. To this end, Malawi has also pursued economic policies commensurate with its needs and aspirations in order to attain development generally. The

adoption of the Constitution, various pieces of legislation, policies and strategies such as the Vision 2020, the Malawi Poverty Reduction Strategy and the Malawi Growth and Development Strategy, among others, is evident of this fact.

### **Article 2- Implementation of the Covenant under Malawi's Constitutional Framework**

7. The Constitution, in section 4, binds all organs of Government and guarantees "all peoples of Malawi" to equal protection of the Constitution and the laws made under it. Section 11(2)(c) of the Constitution provides that courts of law in Malawi shall, when interpreting the provisions of the Constitution, have regard current norms of public international law and comparable foreign case law. And for as long as it has been ratified by an Act of Parliament, any international agreement shall form part of the laws of Malawi. Section 20 of the Constitution guarantees equality of persons and prohibits discrimination in any form, and all persons are, under any law, guaranteed equal and effective protection against any discrimination on the listed grounds and status. Perpetuation and propagation of discriminatory practices may be criminally punishable by the courts as provided for in section 20(2) of the Constitution.

8. Section 211(1) of the Constitution provides that any international agreement ratified by an Act of Parliament shall form part of the law of Malawi if so provided for in the Act of Parliament ratifying the agreement. International agreements entered into before the Constitution came into force also form part of the law of Malawi. Malawi ratified the International Covenant on Civil and Political Rights on 22 December, 1993. The Covenant, therefore, forms part of the law of Malawi. Malawi is a dualist State and, as such, no international instrument can be directly invoked. However, Chapter IV of the Constitution provides for human rights. The rights listed under Chapter IV largely reflect the provisions of many international instruments that protect human rights generally, including the International Covenant on Civil and Political Rights. Section 10 provides that in interpreting all laws, the provisions of the Constitution shall be regarded as the supreme arbiter and ultimate source of authority. In that regard, courts, tribunals and administrative authorities do consider the provisions of the Covenant in applying the law to ensure conformity with international law and obligations under the Covenant.

9. In the case of *Charles Kafantayeni and others* (Constitutional Case No. 12 of 2005), the court took into account the Covenant enshrined in the Constitution in arriving at its decision. In the case of *Adoption of CJ (An Infant)* (MSCA Adoption Appeal No. 29 of 2009), the court stated that international agreements and customary international law form part of the law of Malawi subject to the provisions of section 211 of the Constitution. Accordingly, courts of law can give effect to the provisions of the Convention in so far as they are not found to be inconsistent with the provisions of the Constitution.

10. Section 15(1) of the Constitution states that all three arms and organs of Government shall respect and uphold all the rights and freedoms enshrined in the Constitution. The Constitution provides for effective remedies where there has been violation of rights or where there is a threat to the enjoyment of such rights. These remedies are available through the courts, the Human Rights Commission, the Ombudsman and other organs of Government. Section 41 as read with section 46 of the Constitution make it possible that any infringement of any right or indeed a mere threat to the enjoyment of any right can be effectively addressed by courts or relevant constitutional bodies. The available remedies have therefore included injunctions, compensation and reinstatement.

### **Article 3- Gender equality**

11. The Constitution in section 20 provides for prohibition of any discrimination and guarantees equality of all people under any law. Section 24 specifically provides for the rights of women granting them full and equal protection under the law as men in areas such

as capacity to enter into contracts, acquire and maintain property, acquire and retain custody or guardianship of children, acquire and retain citizenship and nationality. In addition, the section specifically provides for passing of legislation to eliminate customs and practices that discriminate against women in areas such as sexual abuse, harassment and violence, discrimination at work and in public affairs, and deprivation of property especially inherited property.

12. Section 13 of the Constitution which lists Principles of National Policy provides for Gender Equality to ensure full participation of women in all spheres of Malawian society on the basis of equality with men. In this regard, in pursuance of these constitutional provisions and Goal Number 3 of the Millennium Development Goals on promotion of gender equality and empowerment of women, several legislative and administrative steps have been taken. On the participation of women in public affairs Malawi has women in key public offices such as the Vice President, the Clerk of Parliament, the Ombudsman, the Director of Public Prosecutions, Chairperson of the Electoral Commission. In addition the number of women members of Parliament has steadily increased since 1994 from 10 in the 1994-1999 Parliamentary life cycle, to 17 in 1999 to 2004, to 24 in 2004 to 2009 and currently stands at 43.

13. One of the major challenges in the country's pursuit of equality between men and women has been the elimination of customs and cultural practices against women in marriage, violence against women and property grabbing. In dealing with this, a comprehensive review of laws on marriage and divorce was conducted which has resulted in the Marriage and Divorce Bill. The Prevention of Domestic Violence Act was also passed to deal with cases of violence against women.

#### **Article 4-Derogation of rights in times of emergency**

14. The Constitution of Malawi specifically provides for instances where rights and freedoms can be restricted, limited or derogated from. Section 44 allows restrictions or limitations of rights, if the restrictions or limitations are prescribed by law; reasonable; recognized by international human rights standards; and necessary in an open and democratic society. The Constitution also prohibits restrictions and limitations that negate the essential content of the right or freedom in question. Section 44 of the Constitution expressly provides that there shall be no restrictions or limitation of the following rights: the right to life; the prohibition of torture and cruel, inhuman or degrading treatment or punishment; prohibition of genocide; prohibition of slavery, slave trade and slave like practices; prohibition of failure to meet contractual obligations; prohibition of retrospective criminalization and retrospective imposition of greater penalties; right to equality and recognition before the law; right to freedom of conscience, belief, thought and religion and to academic freedom; and the right to habeas corpus.

15. The Constitution in section 45, in line with the Covenant, allows for derogation from rights where a state of emergency has been declared in accordance with the Constitution. A state of emergency may be declared by the President, only in exceptional circumstances expressly provided for under the Constitution, such as where the Defence and Security Committee of the National Assembly has approved the declaration; in times of war, threat of war, civil war or widespread natural disaster; with regard to the specific location where that emergency exists; and that any declaration of a state of emergency shall be publicly announced. Derogation of rights shall also be permissible in a state of emergency only if the derogation is not inconsistent with obligations of Malawi under international law.

16. Having listed a number of rights that may not be derogated from even in a state of emergency, the Constitution in section 45(7) provides that the right to be promptly brought before a court of law, and not to be detained without trial, are both subject to derogation. Derogation may also be permissible in respect of freedom of expression, freedom of

information, freedom of movement, freedom of assembly, right not to be detained for political or other opinion. Such derogation however has to be consistent with Malawi's obligation under international law. In addition, all derogation measures such as the detention of suspects without trial may be challenged in the High Court

#### **Article 5- Limitation of Covenant rights**

17. The Constitution of Malawi specifically provides for instances where rights and freedoms can be restricted, limited or derogated from. Section 44 allows restrictions or limitations of rights, if the restrictions or limitations are prescribed by law; reasonable; recognized by international human rights standards; and necessary in an open and democratic society. The Constitution also prohibits restrictions and limitations that negate the essential content of the right or freedom in question.

#### **Article 6- Right to life**

18. The Constitution provides for the right to life in Section 16(1) and that such life shall not be arbitrarily deprived. Malawi retains the death penalty such that the execution of the death penalty imposed by a court of competent jurisdiction cannot be deemed as arbitrary deprivation. The majority of people in Malawi do not support the abolition of the death penalty as such; Malawi retains the death penalty and has no intentions and immediate plans to ratify the Second Optional Protocol to the Covenant. Section 8 of the Constitution stipulates that the legislature when enacting laws shall reflect, in its deliberations, the interests of all the people of Malawi and shall further the values explicit and implicit in the Constitution. Malawi will continue to listen to the voices of its people regarding the issue of death penalty.

19. Following the case of *Francis Kafantayeni and others* (Constitutional Case No. 12 of 2005), the imposition of the death penalty is no longer mandatory in murder cases. Section 210 of the Penal Code which provided for death as a mandatory penalty for murder was amended in 2010. The Courts have the discretion of imposing a death sentence or life imprisonment for persons convicted of murder and other cases which carry death as a penalty such as treason. Such sentence can only be passed by the High Court.

20. All forms of arbitrary deprivation of life by any person including law enforcement agents are unacceptable in Malawi. Police officers suspected of having arbitrarily deprived life of persons are prosecuted like any other suspect would be. There are cases in which Police Officers have been tried for alleged arbitrary deprivation of life. In *Republic versus Windson Matumba* (Criminal Case Number 14 of 2007), a Police Officer, shot dead Colonel Dzineso, an Army Officer, allegedly is mistaking him for a wanted suspect. He was convicted of manslaughter and sentenced to twelve years imprisonment. In *Republic versus Joshua Cheuka and three others* (Criminal Case number 73 of 2008), Police officers were convicted of manslaughter for shooting charcoal vendors. In the case in which a University student named Fanikizo Phiri was shot by a Police Officer during student demonstrations, the family of the deceased was also compensated.

21. The Government is committed to ensure the full protection of the sanctity of life. However many challenges still remain. On 20 July 2011, nationwide demonstrations organized by Civil Society Organizations resulted in violent deaths and widespread looting and destruction of property. In the aftermath, Government instituted a Commission of Inquiry which started work late 2011 and is yet to conclude its findings. The Human Rights Commission has come up with preliminary report that 19 people died across the country as a result of the 20 July demonstrations and that there was severe destruction of property. It is hoped that the findings of the Commission of Inquiry and the Final Report of the Human Rights Commission will result in full investigation of the deaths and the prosecution of any violators of the right to life.

22. In 2011, Robert Chasowa, a student at the Polytechnic College of the University of Malawi in Blantyre, was found dead in mysterious circumstances. The death of the deceased has been referred to a coroner for inquest. The Human Rights Commission has also been assisting the family of the deceased to seek an inquest hearing at the Magistrate court in Blantyre. Both these processes have not been concluded at the time of this report.

23. In late January 2012, Edson Msiska a student at the Natural Resources College in Lilongwe died in police custody in Mzuzu. An internal inquiry set up by the Inspector General of Police has concluded that he was beaten to death by officers. A full investigation has been commissioned to bring the perpetrators to justice.

#### **Article 7- Prohibition of torture**

24. Section 19 of the Constitution guarantees the inviolability of the dignity of all persons. It provides that no person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment. This right may not be derogated from in accordance with section 45. In the same vein, section 45 prohibits subjection of people to corporal punishment in connection with any judicial proceedings before an organ of the State. As such, even before the Constitutional amendment of 2010, the courts had long stopped issuing corporal punishment when sentencing convicts.

25. The main victims of torture, inhumane or degrading treatment are persons in Police or Prison custody, mainly due to poor conditions of these detentions centres. In an attempt to deal with such violations, several oversight mechanisms have been put in place. Firstly, the independent Police Complaints Commission has been established to investigate cases of abuse or deaths which occur in Police stations or at the instance of Police actions. Secondly, each Police station has a Lay Visitors Scheme, made of local people around the station who will be monitoring conditions of detention. Thirdly, already existing institutions such as the Prison Inspectorate and the Human Rights Commission have mandate to inquire into any such violations in Prisons or Police custody.

26. Malawi ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 11 June 1996. While the Convention is yet to be domesticated, the inclusion of the provision cited above, the review of the Police Act under which a Police Complaints Commission is established, among other things, and the taking of other significant steps to ensure that a culture of torture and inhuman treatment is completely rooted out signifies commitment towards eventual adoption and domestication of CAT. During the Universal Periodic Review process Malawi indicated her intention to ratify the Optional Protocol to CAT.

27. The main allegations of torture and cruel, inhuman or degrading treatment arise against police officers and prison authorities with the victims being suspects and persons in detention. 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.

28. Regarding conditions of detention, a 2008 High Court of Malawi judgment in the case of *Gable Masangano v. Attorney General* (Constitutional Case No. 15 of 2007), required the government to improve prison conditions in line with constitutional and international standards within 18 months. The conditions mainly related to diet, overcrowded prisons cells. Since that judgment some measures have been taken to ensure that prisoners are not kept in conditions which are inhumane and cruel. These include plans to build purpose built prisons to replace old and dilapidated ones, improvement of diet, and

adoption of non-custodial measures such as diversion systems, community service, in order to reduce prison population. In addition a Draft Prison Bill is expected to be passed to replace the current which is outdated and not in line with constitutional requirements.

29. Despite this solid constitutional and legal framework, challenges still remain. Firstly torture has not been criminalized such that alleged perpetrators can only be charged with offences such as assault, or causing grievous bodily harm. Secondly there are no adequate mechanisms for reporting incidents of alleged torture either at the hands of police officers or prison authorities. In this regard, it is hoped that the Police Complaints Commission will establish a clearer and effective mechanism for such reporting. The strengthening of the Inspectorate of Prisons in the Draft Prison Bill will assist in improving the role of the Inspectorate in its monitoring and oversight duties.

#### **Article 8- Prohibition of slavery**

30. Slavery, servitude and forced labour are prohibited under section 27 of the Constitution. Section 44 expressly states that this prohibition is not subject to derogation. This regulation is also provided for under employment legislation which also criminally punishes forced labour and regulates conditions of employment. In order to avoid exploitation of persons, the Constitution provides in section 31 for labour rights, among which are the rights to fair and safe labour practices; fair remuneration; fair wages; and equal remuneration for work of equal value without distinction or discrimination of any kind.

31. While the general outlook is that slavery in its traditional sense has been eliminated, Malawi, along other like-minded States, has come to realize that there are emerging forms and trends that may be properly termed, modern day slavery. In light of the realization of the emergence of a practice called 'trafficking in persons', Malawi has took stock of its existing policy and legislative framework in order to develop legislation in this regard. In 2005, Malawi ratified the Protocol to the Convention against Transnational Organized Crimes to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The initiative which was led by the Law Commission also noted, with concern, the extent to which trafficking in persons was a problem in Malawi as a source, transit and destination country for trafficked persons.

32. The process of developing legislation was completed in 2011 through the publication of the Law Commission Report on the Development of Trafficking in Persons legislation. Some of the core areas of the proposed legislation include the scope of the proposed law which shall include instances where an offence under the law was committed inside Malawi; was committed by citizen or resident of Malawi; or where the victim is a Malawian. The proposed law shall also apply where the offence is committed outside Malawi but its consequences are felt in Malawi.

33. The proposed law on trafficking in persons shall also criminalize both trafficking in persons and children; and aggravated forms of committing these offences; provide for victim friendly and crime specific methods of investigating the crimes and conducting proceedings in court. The proposed law establishes a Trafficking in Persons Board which shall be responsible for management of the legislation and a Trafficking in Persons Fund which shall primarily be used for funding prevention, care and protection efforts. It also creates care and protection mechanisms of victims which includes witness protection; restrictions on some media activities; non-prosecution of victims for immigration offences and provision of shelters, where necessary.

34. The Commission has also made recommendations towards the amendment of other pieces of legislation where provisions relevant to trafficking in persons are concerned.

**Article 9-Right to liberty**

35. Section 42 of the Constitution provides for what are called a cluster of fair trial rights, which are extended to persons suspected of having committed offences from their moment of arrest, during arrest and during their detention. It is therefore a requirement of the law that on arrest a suspect has to be informed of the reasons for the arrest, and that he has a right to remain silent. The law also requires that such a suspect should be brought to court within 48 hours to be charged or informed of the reasons for further detention. Where such a person has not been brought to court within 48 hours, their detention is unlawful. Arrested persons have a right to bail. The granting of bail is regulated by the Bail Guidelines Act, and various court decisions have laid down principles to guide the courts when required to grant bail. Any suspect has a right to be tried within a reasonable time. Suspects detained unlawfully can sue for compensation for false imprisonment.

36. While the legal standard on the treatment of suspects is clear, challenges have always existed in the realization of such rights. Firstly, suspects are always not brought to court within the required 48 hours. Secondly, the criminal justice system is so overwhelmed such that criminal cases, especially serious ones such as murder take long to complete. In addition, the criminal justice as a whole lacks capacity. Remedial steps have been taken to address some of these challenges. These include the amendment of the Criminal Procedure and Evidence Code which provides for pretrial custody time limits to prevent prolonged detention of suspects before trial. The Government now takes a part in funding of homicide cases which were previously supported by cooperating partners. Government has taken the initiative to ring fence funds not only in the Directorate of Public Prosecutions but also in the Judiciary and Department of Legal Aid. This is aimed at reducing the backlog of homicide cases and reduces the number of people on remand in prisons. The new Legal Aid Act establishes the Legal Aid Bureau which will ensure more suspects get legal representation.

**Article 10- Treatment of persons deprived of liberty**

37. The Constitution of Malawi in section 42 recognizes the need to treat all persons deprived of liberty with respect, dignity and in a humane way. While the Prison Act clearly recognizes the distinction between convicted and unconvicted prisoners, lack of space has at times necessitated the non-adherence to the segregation rule. In case of children section 42 requires that they should first be separated from adults, treated in a manner consistent with the promotion of their dignity and worth.

38. In addition the Child Care, Protection and Justice Act, 2010 requires that children should only be in custody in the rarest of circumstances. For children, there are two reformatory schools for boys where they are held in an effort to prepare them for re-integration into society upon their release. However these two schools are clearly not enough and we currently do not have a reformatory school for girls.

**Article 11- Non-punishment on contractual obligations**

39. The Republican Constitution clearly enshrines human dignity and personal freedoms. In particular, section 19 (6) provides that there shall be a right to freedom and security of person which shall include the right not to be imprisoned for inability to fulfil contractual obligations.

40. While the law is clear, there have been reported instances where the police have arrested people purely because of their failure to pay debts.

**Article 12- Right to movement**

41. The Constitution in section 39 guarantees freedom of movement and residence. Every person shall have the right of freedom of movement and residence within the borders of Malawi. Further to this, every person shall have the right to leave the Republic and to return to it. If at all there are restrictions in terms of national security, public order, public health or morals or other rights and freedoms, these are done pursuant to prescription by law. For instance examination upon entry on health reasons such as out-breaks are done within the purview of the Immigration Act (Cap. 15:03), Refugee Act (Cap. 15:04) and Public Health Act (Cap. 34:01) of the Laws of Malawi. Further to this, the restrictions are done with cognizance of the existence of other rights such as non-discrimination. For Refugees in Malawi, there is a designated place for their residence namely Dzaleka Refugee Camp which is managed by Ministry of Home Affairs and Internal Security. Notwithstanding this, these persons are allowed to visit other areas in Malawi and return to Dzaleka Camp.

**Article 13- Aliens**

42. Pursuant to section 39 stated above and non-discrimination provision in the Republican Constitution Malawi government has put in place mechanisms that help achieve the objects of article 13. The Refugees Act (Cap. 15:04 of the Laws of Malawi) provides for a Refugee Committee that works hand in hand with the Department of Disaster Preparedness and the United Nations High Commissioner For Refugees (UNHCR). Further, there is a procedure that needs to be followed before an alien is expelled from Malawi. Significantly, the Act allows a person claiming to be a refugee to enter and remain in Malawi while the committee processes his application for refugee status. The law also allows refugees seeking the rights of passage going to a country where he or she intends to seek asylum as a refugee. Crucially, the Act also allows people who enter Malawi illegally for purposes of seeking asylum as a refugee to present themselves before a competent officer within twenty four hours of their entry or within such longer period as the competent officer may consider acceptable in the circumstances. The Act further guarantees such persons protection from being detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.

43. In a situation where an asylum's application has been denied, the country ensures that the Asylum is treated humanely and within the standards expected at the international level.

44. Significantly, Malawi allows an asylum seeker, both at the time that his application for a refugee status is being considered and when the same has been denied to enter and remain in Malawi while the committee processes his application for refugee status. The law also allows refugees seeking the rights of passage going to a country where he or she intends to seek asylum as a refugee. The law in Malawi allows people who enter Malawi illegally for purposes of seeking asylum as a refugee to present themselves before a competent officer within twenty four hours of their entry or within such longer period as the competent officer may consider acceptable in the circumstances. Malawi further guarantees such persons protection from being detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status. This is in line with the 1951 Convention, which prohibits sanctions for illegal entry.

45. In relation to refugees, Malawi acceded to the 1951 Convention relating to the Status of Refugees as well as its 1967 Protocol (hereinafter referred to as the "1951 Convention"), following accession on 10 December 1989. On 4 November 1987, the country ratified the

1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The refugee definitions of the 1951 Refugee Convention and the 1969 OAU Convention are incorporated into the country's 1989 Refugees Act. On 7 October 2009, the country ratified the 1954 Convention relating to the Status of Stateless Persons. Malawi has yet to accede to the 1961 Convention on the Reduction of Statelessness. Malawi made reservations to the 1951 Convention regarding articles 2, 7, 13, 15, 19, 22, 24, 28 and 34 of the 1951 Convention relating to the Status of Refugees.

#### **Article 14-Fair administration of justice**

46. Malawi guarantees equality before the law. Section 44 (1) of the Constitution prohibits derogation, restriction or limitation with regard to right to equality and recognition before the law. Further, section 42 of the Constitution guarantees rights for every person who is detained. It stipulates that the said person has a right to (a) be informed of the reason for his or her detention promptly and in a language which he or she would understand, (b) detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State to consult confidentially with a legal practitioner of his or her choice, be informed promptly of his or her rights, where interests of justice require be provided with services of a legal practitioner by the State, to be given means and opportunity to communicate with relatives, be visited by those necessary like spouse, medical practitioner, religious counsellor of his choice, to challenge the lawfulness of his detention in person or through his legal practitioner, and to be released from unlawful detention.

47. Pursuant to these values, the High Court in the *Gable Masangano v. Attorney General and Others* (Constitutional Case No. 15 of 2007) considered and inter alia, confirmed government's obligation to fulfil these undertakings. It is pursuant to the above that Malawi Government initiated projects such as construction in northern Malawi of the Mzimba Model Prison. This is a progressive realization of these rights and considering the economic needs to be taken into account, government is trying every effort to have it done.

48. Malawi government makes it possible for a provision of an interpreter for free to the accused person or suspect. Further to this, there is a Constitutional right to silence enshrined in the Constitution section 42(2) (f) (iii). The Malawi Supreme Court of Appeal in the Case of The Republic -v Lucius Chicco Banda (Criminal Appeal No. 1 of 2007) held that right to remain silent remains one of special rights accorded to an accused person during interrogation or trial.

49. The exception to the general rule of right to silence is permissible in cases there is a reverse onus placed on a suspect. An example in this regard is section 32A of the Corrupt Practices Act.. This provision requires public officers to explain their wealth where it is deemed to be way above their known sources of income. A conviction may result where there is a non-satisfactory explanation. The use of provisions such as section 32 is internationally recognized. Illicit enrichment is specifically mentioned as a corruption offence in Article 20 of the United Nations Convention against Corruption, Articles 8 and 9 of the African Convention on Preventing and Combating Corruption and the Inter-American Convention against Corruption, respectively.

50. In both Conventions States parties are urged pass legislation making illicit enrichment an offence. In this regard the use of reverse onus in combating the offence of illicit enrichment is internationally recognized as compatible with human rights standards. Section 32 of the Corrupt Practices Act therefore meets international standards.

51. Recognizing the welfare of children and the best interests of the child under the Constitution; respecting the Constitutional court decision in *Evance Moyo v. Attorney General* (Constitutional Case Number 12 of 2007) that treatment of juveniles should be in

tandem with Malawi's obligations under the Convention on the Rights of the Child (CRC), the Malawi government enacted the Child, Care, Protection and Justice Act( Act No. 22 of 2010) providing for promotion of child rehabilitation through care, protection and justice.

52. The newly enacted Criminal Procedure and Evidence Code (Amendment), Act No. 16 of 2009 includes provisions for appeal upon conviction, a person not to be tried of the same offence (autrefois convict and autrefois acquit) and procedure where there has been miscarriage of justice. It is an established principle that evidence obtained from a compelled or tortured confession offends the Republican Constitution's section 42 (2) (c). Only free and voluntary confession evidence is admissible before the Courts in Malawi. This has even been upheld by the High Court of Malawi in the case of Republic –v- Chizumila (Confirmation Case No. 316 of 1994); *Republic v. Chinthiti* (Criminal Case No. 17 of 1997 (unreported). This unreported case is extensively discussed in *Palitu and Others v. the Republic* (Criminal Appeal No. 30 Of 2001).

53. On the set up of the judiciary in Malawi we refer the Committee to the Core Document as submitted. The media has access to court proceedings in Malawi subject to normal and acceptable restrictions to ensure a fair trial. On access to legal assistance we refer the Committee to the Core Document under Legal Aid while noting that free legal assistance is strictly available in capital offences, and inadequate due to capacity constraints in other matters.

#### **Article 15- Retroactive application of laws**

54. Malawi legal system does not allow for retrospective application of law. Therefore no one can be charged of an offence which did not constitute a criminal offence under national or international law at the time when it was committed was not recognized by law.

#### **Article 16- Equality before the law**

55. The Republican Constitution in section 44 (1) (g) prohibits derogation, restrictions or limitations with regard to right to equality and recognition before the law. Section 15 of the Constitution gives legal personality to natural persons as well as organizations in so far as the protection and enforcement of human rights is concerned. Consequently under section 41 and 46 where there is violation or threat of violation of any right or freedom, such natural and legal persons can seek redress under the law by using the courts, Human Rights Commission, Ombudsman or indeed any relevant tribunal.

#### **Article 17- Right to privacy**

56. Malawi Government fully respects the right to privacy. The right to privacy is provided for in the Constitution section 21. It provides for the right not to be subjected to searches of his private possessions, seizure of private possessions and interference with private communications, including mail and all forms of telecommunications. Further to this the Constitutional Court in The State and Director of Public Prosecutions, Lilongwe Chief Resident Magistrate and Inspector General of Police Ex-parte Right Honourable Dr. Cassim Chilumpha, SC (Constitutional Case number 5 of 2006) echoed the same sentiments about the respect and protection of right to privacy by the State. In this case tape recordings of the complainant were made without his permission and knowledge and the court found that his right to privacy was violated and the state was ordered to pay compensation.

57. The right to privacy can be limited especially in cases of searches by the police. The general rule remains that a search should strictly be conducted with a warrant. The exception is provided in Section 35 of the Police Act allows police to search without a warrant in certain circumstances. Under section 35 of the Police Act, only an officer of or

above the rank of sub-inspector may conduct a search without a warrant. Government is aware, of this limitation on the enjoyment of the right to privacy under the Constitution, and considered the matter thoroughly in terms of whether it may be justified under section 44 of the Constitution. Government considered that the right to privacy may be limited in certain circumstances and hence provided for stringent measures under which the restriction or limitation may be imposed.

58. Section 35 may only be invoked where there exist reasonable grounds for the belief that anything necessary for purposes of an investigation into any offence may be found in the place under search; where such a thing cannot be obtained if there is undue delay; the searching officer records in writing his grounds for the belief he held, specifying in the record, the things to be searched for; the searching officer sends copies of the record of search to the nearest magistrate empowered to take cognizance of the offence suspected and the owner or occupier of the place searched; where the occupier or owner of the searched place or his or her representative is present during the search; and where the search is conducted in a humane manner and unnecessary damage or destruction to property and humiliation or embarrassment is avoided.

59. Government was convinced when it adopted the proposal for enactment that the safeguards listed here would protect individuals from arbitrary interference of their right to privacy.

60. However, since there were concerns raised by members of the public and some civil society leaders regarding the import and implications of implementing this provision, Government has since referred this provision to the Law Commission for further consideration in light of the matters raised against it.

#### **Article 18- Freedom of thought, conscience and religion**

61. The Republican Constitution in section 33 provides for every person's right to freedom of conscience, religion, belief and thought, and also to academic freedom. Considering that other rights such as right to education or health can at times be hampered by freedom of conscience, Malawi government takes reasonable steps to raise awareness among parents of the need to protect children and not interfere with their right to education and health in the name of protecting their freedom of conscience. The freedoms protected in section 33 cannot be derogated from under section 44 of the Constitution. The manifestation of these freedoms however is subject to state regulation for purposes of public health, security and order. In this regard government has taken steps against religious sects which prevent vaccination of children as this poses a health risk to particular communities.

62. However this is still a problem as some religious groups still maintain the position by refusing vaccination for their children. Such was the case in the case of *The Republic v Jamison Ofesi and 10 Others* (Criminal Cause No. 64 of 2010, Unreported) where the accused persons were parents who had refused to vaccinate their children against the measles outbreak because they believed that to do so ran against their religious beliefs. They were convicted and fined for failure to provide necessities of life for their children.

63. Malawi has many religions and religious denominations and we refer the Committee to the Core Document on the religious characteristics of the population. Religious groups are registered mainly under the Trustees Incorporation Act. In addition, there are various groupings which act as umbrella organizations for particular religious denominations such as Malawi Council of Churches, the Evangelical Association of Malawi, and the Muslim Association of Malawi.

64. In 2011 a dispute on academic freedom arose in the University of Malawi where lecturers felt their right to freely exercise their freedom was under a threat when one of

them was summoned by the head of the Police Service. This matter has since been resolved with Presidential assurance of academic freedom.

#### **Article 19-Freedom of expression**

65. Section 34 of the Constitution states that every person has a right to freedom of opinion, including the right to hold opinions without interference to hold receive and impart opinions. Further, Section 35 of the Constitution states that every person shall have the right to freedom of expression. Access to information is a right enshrined in the Constitution under section 37 where it stipulates that every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his rights. This is subject to any Act of Parliament. It is therefore imperative to state that Malawi government guarantees the right to hold opinions without interference, right to freedom of expression, receive and seek information. Subject to some other provisions such as penal laws, excise of these rights carry special duties and responsibilities.

66. Malawi has a thriving media both in print and electronic form. Electronic media is regulated by the Communications Act (Cap 68:01 of the Laws of Malawi) which establishes the Malawi Communications and Regulatory Authority (MACRA). The body is responsible for the granting of licences to radio stations. At the time of this report Malawi had a total of twenty five (25) radio stations. In terms of public broadcasters, there is the Malawi Broadcasting Corporation which provides both radio and television services. Operating on tax payers' money, the broadcasters are expected to offer fair coverage. The main challenge faced here is that since 1994 there has been a perception of bias by public broadcasters in favour of the ruling party, especially during election time.

67. During the July 20, 2011 demonstrations covered in the Core Document, MACRA ordered several private radio stations off air because they were deemed to be inflaming incidents of violence across the country with their live coverage. While MACRA has authority to revoke broadcasting licences, such revocation is always subject to judicial review. In the case of The State and MACRA ex-parte Joy Radio Limited (Miscellaneous Civil Cause No. 143 of 2008), a decision by MACRA to revoke the license of Joy Radio was reversed by the High Court.

68. Print media it is regulated for instance under section 46 of the Penal Code, where the Minister can initiate revocation process of a license of a publication that does not conform to established duties and responsibilities. It has to be noted that this is not outright power accorded to the Minister as the same powers can be subjected to judicial review by the High Court in the event that there has not been reasonable exercise for the same. Section 46 has been subject of controversy both locally and internationally. Locally the amendment has been subject to an application for judicial review on whether it meets constitutional requirements. Internationally Malawi received an inquiry from the Special Rapporteur on promotion and protection of opinion and expression.

69. We refer the Committee to a comprehensive response made to the Special Rapporteur. The response is attached hereto as the appendix. In addition to this, section 46 of the Penal Code has been referred to the Law Commission for a review.

#### **Article 20-Prohibition of propaganda for war**

70. Section 17 of the Constitution prohibits genocide. Further to this section 217A of the newly enacted Penal Code (Amendment) Act (Act No. 1 of 2011) provides for punishment against genocide. It is therefore against law to advocate for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Further to this penal provisions prohibit violence. It should therefore be noted that Malawi government is

trying to make it possible within law that such activities should not be propagated in Malawi.

#### **Article 21- Right to peaceful assembly**

71. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed. This is a right enshrined in the Republican Constitution section 38. Further to this the Malawi Parliament has enacted the Police Act where it provides for procedures to be followed before an assembly or demonstration can take place. The decision to grant permission for holding of an assembly or demonstration rests with local authorities such as the District Commissioner. The organizers of any such assembly or demonstration are required to liaise with the local authorities on issues such as date of the event, route to be used, and the number of people expected at such an event. Such notice of the event is required at least 48 hours prior to the event. The role of security forces in such events is crucial and critical and they can advise the local authorities whether it is appropriated to hold such events. It must be emphasized though that the decision to grant permission rests with such local authorities.

72. The challenges faced in the enjoyment of these freedoms are enormous as demonstrated by the events of July 2012. The Commission of Inquiry established to investigate the events of this day may shed more light on the causes of violence that day with its final report. However it is clear that the concept of organizing such large assemblies and demonstrations is fairly new to both the organizers as well as the security forces. According to the National Police Headquarters, about 15 criminal cases involving forty one persons were commenced.

#### **Article 22- Freedom of association**

73. The Constitution provides for labour rights as well. Section 31 states that every person shall have the right to fair and safe labour practices and to fair remuneration. Further to this, all persons shall have the right to form and join trade unions or not to form or join trade unions. Therefore in all intents and purposes, with the enactment of the Labour Relations Act and Employment Act, Malawi government realizes the importance of enhanced democratic accountability and human rights observance by according all persons the right to freedom of association with others, right to form and join trade unions. This is a fair labour practice that Malawi observes as stated in Trade Union Members –v- N.S.C.M Milling Division (Matter No. 8 of 1999, Industrial Relations Court of Malawi).

74. Malawi has a thriving civil society community. We refer the Committee to the Core Document on Civil Society. Malawi also has the office of the Registrar of Political Parties which ensures the implementation of everyone's right to form a political party. However, there have at times been complaints that there have been attempts to block registration of political parties. Such was the case in the case of The State and The Honourable Attorney General (Representing Ministry of Justice, Department of the Registrar General) and The Maravi People's Party and The People's Progressive Movement, ex parte Joyce Banda for herself and on Behalf of the People's Party, (Civil Cause No. 83 of 2011 (Unreported) where the Applicant brought proceedings because the office of the Registrar of Political Parties refused to register the party on the basis that the party colours, the name of the party and symbol resembled those of another party. The claim succeeded in the High Court Malawi. There are currently forty five (45) registered political parties in Malawi.

#### **Article 23-Right to family/marriage**

75. According to Section 22 of the Constitution of Malawi, the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Each member of the family is entitled to enjoy full and equal respect and to be protected by

law against all forms of neglect, cruelty or exploitation. All men and women regardless of nationality have the right to marry and found a family and no person shall be forced to enter into marriage. Section 22 further states that no person over the age of eighteen years shall be prevented from entering into marriage and for persons between the ages of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians. Under Section 22 (8), the State shall actually discourage marriage between persons where either of them is under the age of fifteen years.

76. The main challenge in ensuring equality of rights and responsibilities during marriage is people's culture/perceptions which still has gender stereotypes at its centre. Malawi still faces challenges in this respect, in particular, there are cultural practices that favour men as opposed to women or the male as opposed to the female child in a family set up. An example is where a woman is at times forced to marry her brother in law following the death of her husband or, where a male child is given financial support by his family to attain education whereas a female child is encouraged to stay at home and help to look after the family.

77. Under section 13 of the Constitution of Malawi, the State is required to progressively adopt and implement policies and legislation aimed at recognizing and protecting the family as a vital and fundamental social unit. To this end, Malawi has adopted policies and enacted laws aimed at addressing some of the challenges affecting the family unit. An example is the Prevention of Domestic Violence Act which was enacted in 2006 and makes provision for the prevention of domestic violence and for the protection of persons affected by domestic violence and for matters connected therewith, all of which contribute towards the protection of the family as an important social unit. In addition to this, the Government recently created victim support units in Police Station which are meant to help victims of domestic violence and help to address the problem of domestic violence.

78. Parents and guardians are also given rights and duties towards children under the Child Care, Protection and Justice Act, 2010. For example, Section 3 provides that a parent or guardian shall not deprive a child of his or her welfare and has responsibilities whether imposed by law or otherwise towards the child which include the responsibility to-

- (a) Protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards;
- (b) Provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including in particular adequate diet, clothing, shelter and medical attention;
- (c) Ensure that during the temporary absence of the parent or guardian, the child shall be cared for by a competent person;
- (d) Exercise joint primary responsibility for raising their children,.

79. In cases of dissolution of marriage, be it a marriage at law, by repute, by permanent cohabitation or at custom, the paramount consideration is the welfare of the child when it comes to custody of the child as was decided in the cases of *Chilingulo v. Chilingulo & Others* (1990) 13 MLR 110 and *Kamanga v. Kamanga* (1990) 13 MLR 165. The same applies to children born outside wedlock. In fact Section 23 of the Constitution of Malawi explicitly confers equal rights to children before the law regardless of the circumstances of their birth. In addition to this, according to Section 3 of the Deceased Estates (Wills & Inheritance) Act (Act No. 14 of 2011) makes provision for children born outside wedlock to inherit property just like those born within wedlock as the definition of a child explicitly includes those born out of wedlock.

80. Section 22 (5) of the Constitution of Malawi recognizes all marriages at law, custom and marriages by repute or by permanent cohabitation. However, there is no legislation governing marriages by repute or permanent cohabitation. As a result, there are uncertainties surrounding such marriages in terms of matrimonial rights and duties of the parties when it comes to issues such as dissolution of the marriages or distribution of matrimonial property.

#### **Article 24- Child rights**

81. According to Section 23 of the Constitution of Malawi, children are persons under sixteen years of age. They have rights in addition to the rights of all individuals.

82. Section 23 of the Constitution further provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law. They have the right to a given name and a family name and the right to a nationality. They also have the right to know, and to be raised by their parents.

83. The Office of the National Registration Bureau is responsible for the registration of births and deaths under the National Registration Act. A duty is imposed on the father or mother of a child to register his or her birth. Malawi, however, still faces challenges in this respect because there still remain a number of children that are born at home in the villages and not the hospitals whose births remain unregistered.

84. Section 23 of the Constitution of Malawi also states that children entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to be hazardous; interfere with their education; or be harmful to their health or to their physical, mental or spiritual or social development. Sections 21 to 23 of the Employment Act (Cap.55:01) provides for additional protection of children between the ages of 15 and 18 who are employed and prohibits the employment of children under the age of 14 years. Section 24 goes on to criminalize any act that contravenes the provisions contained in Sections 21 to 23.

85. Malawi is also a party to the Convention on the Rights of the Child and has also ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

86. However, challenges still remain and the violation of children's rights still takes place. Malawi recognizes this and is progressively making efforts to address this issue. For example, the Government has introduced several policies and measures aimed at protecting orphaned children since they are vulnerable members of the society. This can be illustrated through the creation of the Ministry of Gender, Children and community Development to promote the welfare and protection of women and children. The Ministry through the Child development and welfare department strengthens the capacity of families and communities to provide support, care and protection to vulnerable children, the aged, marginalized families and those affected by HIV and AIDS.

87. In addition to this, the Children and Young Persons Act of 1969, which was considered by the Law Commission to be obsolete in view of developments in the area of child justice, was repealed. This was replaced by the Child Care, Protection and Justice Act which consolidates the law relating to children. The Act seeks to improve child care and protection systems by giving, among other things, duties and responsibilities to parents toward their children.

88. In order to ensure protection of violation of children's rights, Section 132 of the Act establishes Child Justice Courts which actively adjudicate over children's matters, promote diversion and prohibits unnecessary detention of children.

89. In terms of abandoned children, Sections 38 to 48 of the Child Care, Protection and Justice Act 2010, makes provision for the procedure for abandoned or neglected children to be taken care of, be it in terms of providing foster care for them or giving legal guardianship to someone for their care.

90. In addition to this, the Penal Code has also recently been amended to include and create (among other things) offences against morality relating to children under sections 160A to 160G. These amendments include offences such as procuring children to take part in public entertainment, photographing or filming a child in a prohibited sexual act, indecent practice in the presence of a child and sexual activity with a child. In addition to this the age in relation to sexual offences under the Penal Code has been raised from fourteen to sixteen years.

#### **Article 25- Right to conduct public affairs**

91. According to section 40 of the Constitution, every person shall have the right to form, to join, to participate in the activities of, and to recruit members for a political party; to campaign for a political party or cause; to participate in peaceful political activity intended to influence the composition and policies of the Government; and freely to make political choices. It goes further to say that every person shall have the right to vote, to do so in secret and to stand for election for public office.

92. Apart from the Constitution, Malawi also has subsidiary legislation governing presidential and local elections which provides for not only the procedures to be followed but also reiterates the rights mentioned under the Constitution in this regard. These include the Public Service Act( Cap.1:03) and the Parliamentary and Presidential Elections Act( Cap.2:01).The holding of Local Government Elections has faced challenges, for example, they have not been held for some time now due to lack of funding. However a Bill to facilitate the holding of Presidential, Parliamentary and Local Government elections in 2014 has been drafted and will be discussed by Parliament soon.

93. The elections themselves though largely deemed free and fair have not been free from complaints of irregularities some of which end up in court as was the case in the case of *The State and the Malawi Electoral Commission, Ex Parte Yerehiah Chihana* (Miscellaneous Cause No. 41 of 2009) where the Applicant brought a claim for violation of his right to stand for election to hold public office in accordance with Section 40 of the Constitution. The Courts held that such a right can only be either derogated from, limited or restricted in accordance with section 44 (2) of the Constitution and because the Respondent had not shown on a balance of probabilities that there was reason justifiable in terms of section 44 (2) of the Constitution to warrant the limitation, restriction or derogation from the applicant's right to stand for elective office or the rights of such of his constituents as want to vote for him the applicant and they were ordered to remain free to exercise such rights unless and until the Respondents showed on a balance of probabilities that whatever derogation, limitation or restriction they were seeking was prescribed by law, reasonable, recognized by international human rights standards and was necessary in an open and democratic society.

94. Malawi has the office of the Registrar of Political Parties which ensures the implementation of everyone's right to form a political party. However, there have at times been complaints that there have been attempts to block registration of political parties. Such was the case in the case of *The State and The Honourable Attorney General (Representing Ministry of Justice, Department of the Registrar General) and The Maravi People's Party and The People's Progressive Movement, ex parte Joyce Banda for herself and on Behalf of the People's Party*, where the Applicant brought proceedings because the office of the Registrar of political parties refused to register a party on the basis that the party colours,

the name of the party and symbol resembled those of another party. The claim succeeded in the High Court Malawi.

#### **Article 26- Equal protection by law**

95. Section 20 of the Constitution of Malawi makes provision for the equality of all persons before the law and equal protection without any discrimination. It also provides that discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

96. It goes on to say that legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts. Section 4 of the Constitution also provides that the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of the Constitution and laws made under it.

97. The Principles of National Policy enshrined under Section 13 of the Constitution requires that the State should actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving gender equality for women with men through:

(a) Full participation of women in all spheres of Malawians society on the basis of equality with men;

(b) The implementation of the principles of non-discrimination and such other measures as may be required; and

(c) The implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

98. In spite of these legal provisions, Malawi recognizes that cases of discrimination still exist, most especially in relation to persons with disabilities, persons suffering from HIV and AIDS, and most especially gender based discrimination. Existing inequalities between men and women are largely due to customary laws and traditions. There is discrepancy between the declaration in the Constitution and the actual relationship between men and women.

99. In this regard, Malawi has taken and continues to undertake measures aimed at addressing these issues which include but are not limited to the following:

100. Malawi ratified the International Convention against Racial Discrimination and the Convention on Elimination of Discrimination against Women. In recent years, there have been more women involved in the decision making process than before as evidenced by the current female vice president, the former female Attorney General and currently a female Director of Public Prosecutions, just to mention a few.

101. In light of the disparities that exist between what is contained in the Constitution, applicable international instruments and what is on the ground, the Government, through recommendations of the Law Commission, is introducing policies that prohibit traditional beliefs and customs that reinforce gender inequalities in decision-making patterns, inheritance rights, education and health and which perpetuate women's secondary status in society and which invoke exploitative sexual relations. It recommends that employment in the public service of women be not less than 40% in any department and that there be equality in access to education and training, including scholarships. It also recommends

taking active measures that ensure the enrolment at tertiary education institution of either sex to a minimum of 40 per cent. These recommendations will be incorporated into the Gender Equality Bill which is currently under consideration by Cabinet before being tabled in Parliament.

102. In relation to persons with disabilities, they are equally protected under section 20 of the Constitution. In addition Section 13 states that the Government shall implement policies to ensure they have adequate and suitable access to public places, fair opportunity in employment and full participation in all spheres of Malawian life. In 2009 Malawi ratified the Convention on the Rights of Persons with Disabilities. Also currently being considered by Cabinet is a Bill on Persons with Disability which will address discrimination of people with disabilities.

103. A Bill on HIV and AIDS (prevention and management) is also currently under consideration by parliament which when enacted will address some of the issues to do with discrimination of those living with HIV and AIDS but also gender based violence as it will outlaw customary discriminatory practices such as widow cleansing and widow inheritance as well as discrimination against people perceived to be HIV positive.

104. Malawi also recently enacted the Deceased Estates (Wills and Inheritance) Act no. 14 of 2011 which addresses the issue of gender based discrimination, most especially the issue of property grabbing from a woman following the death of her husband.

105. In terms of discrimination based on sexual orientation, the vast majority of society has not accepted homosexuality and 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.

106. The law criminalizes engaging in homosexual acts under sections 137A, 153 and 156 of the Penal Code of Malawi.

107. Section 137A criminalizes gross indecency between females whereas Section 153 criminalizes gross indecency between males.

108. Section 153 of the Penal Code criminalizes unnatural offences which include any person who has carnal knowledge of any person against the order of nature.

109. The State has prosecuted individuals under these provisions for engaging in homosexual acts. For example, in the highly publicized case of *the Republic v. Tiwonge Chimbalanga and Steven Monjeza* (Criminal Case number 359 of 2009 Magistrates Court) two male individuals were tried and convicted of the offence of indecent practices between males, however they were later pardoned and released.

110. Despite recent debate over homosexuality in Malawi, the general consensus still remains, that is, the majority of Malawians do not support homosexuality. In order to take the minority views into account, the relevant laws that criminalize such practices have since been referred to the Law Commission for a comprehensive review.

#### **Article 27- Minorities**

111. Malawi is made up of the following ethnic minorities: Chinese, Indians, Pakistanis and people of Caucasian descent. In terms of religion, the country largely includes Christians and Muslims; however, there are also religious minorities which exist, these include: Hindus, Jehovah's Witness, Baha'i Faith, traditional religion and many others. The main languages that are spoken are English and Chichewa but there exists minority languages owing to the many tribes such as Tonga, lomwe, yao, sena and many others.

112. According to Section 26 of the Constitution every person has the right to use the language and to participate in the cultural life of his or her choice regardless of their

ethnicity, religious or linguistic origin. Under Section 32 of the Constitution, every person also has the right to freedom of association, which includes the freedom to form associations.

113. In addition to this, Section 33 of the Constitution also provides that everyone has the right to religion, freedom of conscience and belief. Every person in the country is allowed to assemble freely and associate with any person for legitimate purposes. As in any democratic country, these rights may be limited taking into account the interests of national security, public safety, public order, morality or health. In terms of religion the various religious groups/associations need not even be registered. For those who wish, they can register as charities and enjoy several advantages of a charitable trust.

114. The Jehovah's Witnesses are no longer prohibited as was the case before the multiparty dispensation. Religious associations are recognized by government and are often involved in many spheres of Government work and their views are sought in some policy formulation.

115. Malawi is a country with rich and diverse culture and values with numerous tribes that are quite distinct from one another. This is in addition to the various groups from different ethnic origins. All of these groups coexist in harmony and the country has not experienced tribal wars or any conflict arising from differences in ethnicity, religion or languages. This is an indication of the respect that each group has for the rights to culture of others.

## Appendix

### Response to Special Rapporteur on the promotion and protection the rights to freedom of opinion and expression

In the matter of the Penal Code (Amendment) Bill, 2009

and

In the matter of the amendment of section 46 of the Penal Code

### Introduction

1. In a letter reference number AL G/SO 214 (67-17) MWI 4/2010 dated 30 December, 2010 addressed to His Excellency Ambassador ST.D. Matenje, the United Nations Special Rapporteur (the “Special Rapporteur”) on the promotion and protection of the rights to freedom of opinion and expression indicates that, according to information which he has received, the amendment to section 46 of Penal Code contained in the Penal Code (Amendment) Bill, 2009, which was passed by the National Assembly on 19 November, 2010, if assented to His Excellency the President, poses a threat to freedom of the press in Malawi.

2. The Special Rapporteur states that according to information received by him-

(a) “On 19 November, 2010, the Parliament of Malawi passed an amendment to section 46 of the Penal Code on the “power to regulate publications”, which would allow the banning of newspaper from circulation at the Minister’s discretion: “if the Minister has reasonable grounds to believe that the publication or importation of any publication would be contrary to the public interest, he may, by order published in the Gazette, prohibit the publication or importation of such publication.”.

(b) Compared with the previous text of the Penal Code, which gave the [Minister] powers to regulate importation based on public interest, the proposed amendment appears retrogressive.

(c) The proposed amendment contravenes section 36 of the Constitution of Malawi on “freedom of the press” which stipulates that, “the press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.”.

3. In his letter the Special Rapporteur-

(a) Appeals to the Government “to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which provides that “everyone shall have the right to freedom of expression; this right shall include to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media if this choice.”.

(b) “Reiterates the principles enunciated by Commission on Human Rights Resolution 2005/38, which calls on States, while noting that article 19, paragraph 3, of the International Covenant on Civil and Political Rights provides that the exercise of the right to freedom of opinion and expression carries with it special duties and responsibilities, to refrain from imposing restrictions which are not consistent with paragraph 3 of that article, including on (ii) the free flow of information and ideas, including practices such as the

banning or closing of publications or other media and the abuse of administrative measures and censorship.

(c) “Calls on the President of Malawi not to sign the proposed legislation as it stands presently, and to ensure that any law that is adopted conforms to international human rights norms and to Malawi’s obligations under international law”; and

(d) “Requests a response from the Government within sixty days”, and undertakes to ensure that the Government’s response to his letter is accurately reflected in the reports to be submitted to the Human Rights Council for its consideration.

4. It is quite apparent that the Special Rapporteur has been misinformed regarding the text of the amendment of section 46 of the Penal Code. It is not correct that section 46 of the Penal Code, as amended, “would allow the banning of newspaper from circulation at the Minister’s discretion” as indicated in the Special Rapporteur’s letter, or at all. It is also certainly not correct that “compared with the previous text of the Penal Code, which gave the [Minister] powers to regulate importation based on public interest, the proposed amendment appears retrogressive” as indicated in the Special Rapporteur’s letter, or at all.

#### **Background to amendments of the Penal Code**

5. The Government, through its Ministry of Justice, on 19 November, 2010, in response to gross misrepresentations published in the Daily Times of 19 November, 2010, in a Press Release (the “Press Release”), which was aired on radio, and subsequently published in The Daily Times and The Nation newspaper, provided the background to the amendment of the section and provided a justification for the amendment of section 46 of the Penal Code. A copy of the article that appeared in The Daily Times newspaper and the Press Release are attached for onward transmission to the Special Rapporteur for his information.

6. The Government wishes to take this opportunity to reiterate its position stated in the Press Release, namely, that the Penal Code (Amendment) Bill, 2009, including the amendment of section 46 of the Penal Code, is premised on the recommendations of the Special Law Commission on the Review of the Penal Code (the “Commission”) contained in the Report dated 28 June, 2000 (the “Report”); this Report was compiled after an extensive consultative process. The amendments to the Penal Code contained in the Penal Code (Amendment) Bill, 2009, which the Government subsequently adopted, are all intended to ensure conformity with the Constitution and precepts of democracy.

7. It is also pertinent to state that all the background information relating to the amendments to the Penal Code, including the Report and the Penal Code (Amendment) Bill(s) are, and have been, in the public domain since 2000 when the Report was first published. The Penal Code (Amendment) Bill itself has been re-published several times and has been outstanding on the Order Paper of the National Assembly since 2001.

8. The Report, and the recommendations of the Commission contained therein, including the recommendation relating to amendment of section 46 of the Penal Code, were the subject of at least two independent consultancies commissioned by the National Assembly, and the Legal Affairs Committee of the National Assembly itself held several public hearings on the recommendations of the Commission incorporated in the Penal Code (Amendment) Bill. No one raised any objection to the recommendation of the Commission in relation to section 46 of the Penal Code or in relation to the Penal Code (Amendment) Bill(s).

9. The present Legal Affairs Committee of the National Assembly also recently further considered the Penal Code (Amendment) Bill, 2009, and in its Report reference number NA/PC/LA/42/1/10 adopted by the Committee on 11 February 2010, specifically

considered the amendment proposed to section 46 of the Penal Code, and the Committee did not find the amendment objectionable. A copy of the Report of the Legal Affairs Committee of the National Assembly is attached.

10. As indicated in the press release, the matter of the amendment of section 46 of the Penal Code was first raised, and adversely commented upon, by persons who deliberately ignored, or did not know or take the trouble to investigate or acquaint themselves with the background to the amendments proposed in the Penal Code (Amendment) Bill, 2009, including the amendment of section 46 of the Penal Code; one uniformed commentator, according to the Daily Times newspaper, even suggested that “the formulation of the Penal Code [(Amendment) Bill, 2009] is strategic towards the 2014 elections”.

#### **Amendment of section 46 of the Penal Code**

11. With respect to section 46 of the Penal Code specifically, the Government wishes to state that the section, which regulates the importation of publications, provides as follows-

“If the Minister is of the opinion that the importation of-

- (a) any publication; or
- (b) all publications published by any person,

*would be contrary to the public interest, he may, in his absolute discretion, by order, prohibit the importation of such publication or publications, and in the case of a periodical publication may, by the same or a subsequent order, prohibit the importation of any past or future issue thereof*.<sup>1</sup>

12. The Commission in its Report reviewed section 46 of the Penal Code and noted that the section-

(a) Left too much discretion to the executive branch of Government in controlling importation and production of publications; and

(b) Uses the words “opinion” and “absolute discretion” in conferring power on the Minister.

13. The Commission, accordingly, recommended that in order to protect fundamental freedoms in the Constitution, such as freedom of expression and freedom of opinion, the power of the Minister should be subjected to the test of reasonableness, and further that section 46 of the Penal Code should be replaced with a new section which should read as follows:

*“If the Minister has reasonable grounds to believe that the publication or importation of any publication would be contrary to the public interest, he may, by order published in the Gazette, prohibit the publication or importation of such publication.”*<sup>2</sup>

14. A copy of an extract from the Report is attached for onward transmission to the Special Rapporteur.

<sup>1</sup> In his letter the Special Rapporteur wrongly suggests that the section provides as follows- “if the Minister has reasonable grounds to believe that the publication or importation of any publication would be contrary to the public interest, he may, by order published in the Gazette, prohibit the publication or importation of such publication.”

<sup>2</sup> This is the proposed amended text of section 46 of the Penal Code referred to in the letter of the Special Rapporteur.

15. The Government adopted this particular recommendation and this is what is reflected in the Penal Code (Amendment) Bill, 2009. A copy of the Penal Code (Amendment) Bill, 2009 is attached.

16. It should be noted, that the amendment of section 46 of the Penal Code-

(a) Is based on a recommendation of the Commission, which the Government adopted;

(b) Is an improvement of the current section 46 of the Penal Code which places absolute powers in the Minister, and is not retrogressive as claimed, by certain quarters; and

(c) Takes into consideration fundamental freedoms as enshrined in the Constitution.

17. The Government wishes to emphasize that the amendment of section 46 as contained in the Penal Code (Amendment) Bill, 2009 applies the test of reasonableness to the Minister's decision, as recommended by the Law Commission. Unlike under the previous section 46, where the Minister had absolute discretion, the amended section 46 requires that the Minister provides reasonable grounds for any decision to prohibit the publication or importation of any publication. Furthermore, the exercise of ministerial power under the proposed new section 46 of the Penal Code is subject to judicial review by the Courts in Malawi.

#### **The right of freedom of the press is not absolute**

18. The Government acknowledges that section 36 of the Constitution of Malawi, which provides that "the press shall have the right to report and publish freely, within and abroad, and to be accorded the fullest possible facilities for access to public information", guarantees freedom of the press. However, the Government states that the right is not absolute, and may certainly be limited or restricted in accordance with section 44 (1) and (2) of the Constitution of Malawi.<sup>3</sup>

19. The Government also wishes to point out that, as provided by article 19, paragraph 3 of the International Covenant on Civil and Political Rights, freedom of expression and freedom of the press carries special duties and responsibilities and can be subjected to restrictions. As stated by the Human Rights Committee in its general comment No. 10 on article 19, paragraph 4:

*Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes.*

20. The purposes for which restrictions may be imposed are in respect of the rights or reputations of others, and the protection of national security or of public order (*ordre public*), or of public health or morals. The Government also wishes to note the draft general comment No. 34 (to replace general comment No. 10) which reinforces the above conditions for any restrictions.

<sup>3</sup> Section 44 of the Constitution provides-"(1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those presented by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(2)Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom, and shall be of general application.

21. The Government's view is that section 46 of the Penal Code is amended, is a lawful, reasonable and necessary restriction to freedom of expression and freedom of the press. The restriction is, or will be, provided by a law of general application. Secondly the restriction is based on a reasonable test, and before any publication is restricted or prohibited the Minister has to be satisfied that the restriction or prohibition is reasonable in an open and democratic society like Malawi. Thirdly as highlighted above, the Minister's decision to restrict or prohibit any publication is subject to judicial review.

22. The Government certainly does not share the view that section 46 of the Penal Code, as amended, violates freedom of expression and freedom of the press as asserted in the letter from the Special Rapporteur, or at all. The Government is of the view that the restriction or probation contemplated in section 46 of the Penal Code, as amended, is not inconsistent with section 36 of the Constitution of Malawi, or the requirements of article 19 of the International Covenant on Civil and Political Rights as further explained by the Human Rights Committee in general comment No. 10 and draft general comment No. 34, as alleged, or at all.

23. The Government wishes to convey to the Special Rapporteur its sincere appreciation for raising the concerns herein with the Government and providing the Government the opportunity to be heard. The Government hopes that the views and position of the Government expressed herein will be properly reflected by the Special Rapporteur in his report to the Human Rights Commission on this matter.

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