

**A SHADOW REPORT TO THE MALAWI GOVERNMENT'S FIRST PERIODIC REPORT ON THE
IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICS RIGHTS
(ICCPR)**

Submitted To

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This report is based on the Shadow Report on the implementation of the African Charter on Human and Peoples' Rights in Malawi, which was submitted to the African Commission on Human and Peoples' rights at the 53RD Ordinary Session, April 2013.

List of Abbreviations and Acronyms

ACmHPR	African Commission on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ART	Anti Retroviral Therapy
ASH	Association for Secular Humanists
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEDEP	Centre for the Development of People
CHRR	Centre for Human Rights and Rehabilitation
CRC	Convention on the Rights of the Child
CSOs	Civil Society Organisations
DC	District Commissioner
ECF	Extended Credit Facility
ERP	Economic Recovery Plan
HRC	Human Rights Commission
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
IPI	Institute for Policy Interaction
MDGs	Millennium Development Goals
MGDS	Malawi Growth and Development Strategy

MMR	Maternal Mortality Rate
PAC	Public Affairs Committee
PMTCT	Prevention of Mother to Child Transmission
TBAs	Traditional Birth Attendants
UDHR	Universal Declaration of Human Rights

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1. Introduction

This shadow report aims to summarise the current state of human rights in Malawi. As Malawi is now reporting to the Human Rights Committee (HR Committee) for the first time it will highlight human rights violations that have not previously been addressed by this body. It has been compiled by the Centre for Human Rights and Rehabilitation (CHRR), with support from Centre for the Development of People (CEDEP). This report is largely based on the report submitted to the African Commission on Human and Peoples' Rights in 2003, but has been updated and adapted to focus on civil and political rights. The methodology used in compiling

the report was essentially observation, desk research and limited interaction with some government institutions. Some Civil Society Organisations (CSOs) were also interviewed and finally, there was a validation workshop on the draft report held in December 2012 in Lilongwe, which was attended *inter alia* by a number of partners and stakeholders including academics. The narration of Malawi's brief history, geography, demography, economy, form of government, legal system and the relationship between and among the arms of government has been skipped as that information is readily available from other sources¹ and is addressed in Malawi's Common Core Document²

Similarly, the basic documents, namely, the constitution,³ the criminal procedure and evidence code,⁴ and the old landmark decisions on human rights⁵ are not discussed in general terms, but only those aspects that relate directly to the concerns highlighted in this report.

First, the discussion will centre on the major human rights instruments to which Malawi is a party and the steps taken thus far to domesticate them, if any.

Second, it will deal with how the State Party has been implementing specific rights protected by the International Covenant on Civil and Politics Rights (ICCPR).

Thirdly, the report notes a number of challenges encountered in the implementation of the ICCPR with regard to the political, economic or social circumstances of Malawi and how the State Party carries out its obligations.

¹ See N Patel & L Svasand *Government and politics in Malawi* Kachere Series (2007). See also RE Kapindu HRI/CORE/MWI/2012

² Act 20 of 1994 and as amended from time to time. The full text is available at: <http://www.sdn.org.mw> (accessed on 23 September 2012).

³ Cap. 8:01 of the Laws of Malawi. The full text is available at: <http://www.malawilii.org> (accessed on 11 October 2012).

⁴ See for example *Chakufwa Tom Chihana v The Republic* (MSCA Criminal Appeal No 9 of 1992) [1993] MWSC 1 (29 March 1993) available at <http://www.malawilii.org> (accessed on 11 October 2012).

Finally, there is a compilation of suggested recommendations or questions made throughout the report, which the NGOs suggest that the HR Committee might take up with Malawi.

2. Major human rights instruments to which Malawi is a party and their domestication (or lack of)

Malawi is a party to many major human rights instruments at global, regional and sub-regional levels. They include: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶, Convention on the Rights of the Child (CRC),⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸ International Covenant on Civil and Political Rights (ICCPR),⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments and Punishments (CAT),¹⁰ International Covenant on the Elimination of All Forms of Racial Discrimination (CERD),¹¹ Rome Statute of the International Criminal Court (ICC),¹² African Charter on Human and Peoples' Rights (ACHPR),¹³ African Charter on the Rights and Welfare of the Child (ACRWC),¹⁴ and SADC Protocol on Gender and Development.¹⁵

None of these instruments have been specifically domesticated in Malawi in a wholesale manner. They cannot therefore be invoked by citizens in the domestic courts in Malawi.¹⁶

⁶ Ratified on 17 March 1987.

⁷ Ratified on 2 January 1991.

⁸ Ratified on 22 December 1993.

⁹ Ratified on 22 December 1993.

¹⁰ Ratified on 11 June 1996.

¹¹ FE Kanyongolo *Malawi: Justice sector and the rule of law* (2006) 18.

¹² Ratified on 19 September 2002.

¹³ n 4 above.

¹⁴ Ratified on 19 September 1999.

¹⁵ Malawi signed this on 19 October 2009.

¹⁶ *In the Matter of the Adoption of Children Act and In the Matter of Chifundo James (An Infant)* Malawi Supreme Court of Appeal Adoption Appeal No. 28 of 2009. The Malawi Supreme Court of Appeal position on the status of international instruments has been wavering. In *Malawi Telecommunications Ltd v Makande & Omar* MSCA Civil Appeal No 2 of 2006, the same court held that since the 1966 Constitution did not expressly provide for the requirement of domesticating legislation for international treaties to apply in municipal courts, all treaties ratified before the 1994 Constitution took effect, formed part of the law of Malawi in terms of section 211(2) of the Constitution even if no local legislation was enacted to translate them into municipal law. Ordinarily, this would have meant that the ICCPR was enforceable in the domestic arena. This decision, overruled the court's earlier position in *Chakufwa Tom Chihana v The Republic* (ante) which held that before an international agreement could be

However, there is piecemeal domestication of some of the provisions of the instruments in some legislation.¹⁷

However, to the extent that most of the human rights instruments are inspired by the Universal Declaration of Human Rights (UDHR) whose most provisions have matured into customary international law norms,¹⁸ some of the provisions may be relied upon in domestic courts. In fact, according to the case of *Chakufwa Tom Chihana vs The Republic*¹⁹, the UDHR has the force of law in Malawi. All its provisions may actually be invoked in domestic courts in Malawi. In addition, Malawi adopted a new Constitution on 18 May 1995²⁰ which has a somewhat comprehensive Bill of Rights. However, some scholars have argued that socio-economic rights are not given the same level of protection as civil and political rights under the Constitution.²¹ By and large, the Bill of Rights substantially reflects the normative framework set by these instruments.

Recommendation:

The State Party should ensure domestication of the international instruments to which it is party, to enable its citizens invoke them in domestic courts.

enforceable in Malawi, it had to be domesticated first and that specifically, the ACHPR did not have a force of law in Malawi. As matters stand, it would appear that we are back to the *Chakufwa Tom Chihana* position requiring domestication before an international treaty can be directly invoked in the local courts as the *Chifundo James* case is the latest decision on international treaties.

¹⁷ For instance, the Child Care, Protection and Justice Act No. 22 of 2010 does domesticate many of the provisions in the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

¹⁸ See for instance *Filartiga v Pena Irala* (1980) 19 ILM 966.

¹⁹ n 7 above.

²⁰ Section 212(1) of the Republican Constitution.

²¹ C Mbazira 'Bolstering the protection of economic, social and cultural rights under the Malawian Constitution' (2007) 1 (2) *Malawi Law Journal* 220. See also DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 (2) *Journal of African Law* 207.

3. Violations, developments and challenges under the ICCPR: Implementation of civil and political rights

3.1 Obligation to respect and ensure the rights in the Covenant (Article 2)

CHRR and CEDEP have identified one issue of major concern here. It is section 211(2) of the Constitution which provides as follows:

Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act (...) of Parliament.

CHRR's and CEDEP's understanding of this provision is that, the State Party can one day wake up and decide through its domestic legislation to override binding international human rights agreements or instruments. If this understanding is correct, then, it is unfortunate to have such a provision in the Constitution. This section of the Constitution has the potential to be used to violate not only the Charter but also other human rights instruments. It is a matter of concern to CHRR and CEDEP.

Recommendation:

The State Party should either amend this section of its Constitution or repeal it, as it is now a settled position in international law generally that domestic law or legislation cannot be used by a State Party as a defense or excuse to break or breach its international law obligations.

3.2 Equality before the law, equal protection of the law and non-discrimination (Articles 3 and 26)

Although section 20 of the Constitution prohibits discrimination, 'sexual orientation' is not included as a prohibited ground. The explicit inclusion of 'sexual orientation' as a prohibited ground of discrimination would definitely assist in recognizing, protecting and respecting the rights of sexual minority groups in Malawi.

In this context, it is important to mention that section 20(1) of the Constitution was amended by the State Party. 'Nationality' was replaced with 'national' as a prohibited ground and after other status, there was added, 'or condition'.²²

CHRR and CEDEP reiterates its view and conviction that the Constitution has left a gap as far as equality before the law and equal protection of the law is concerned by not explicitly including 'sexual orientation' as a prohibited ground for discrimination under Section 20. In the same vein, some sections of the Penal Code criminalise homosexual practices between consenting adults. Criminalisation of homosexual practices tends to drive gay persons underground and this makes it difficult for them to access healthcare services and to be reached with targeted information. It is worth noting that the President of the Republic of Malawi, Honorable Dr. Mrs. Joyce Banda in her maiden State of the Nation Address promised Malawians that her Administration would repeal laws that criminalise homosexual practices. However, until now, nothing tangible has been done to fulfill that promise.

Section 9 of the Citizenship Act²³ clearly discriminates against women on the basis of their marital status when it provides that a citizen of Malawi, being a woman, who acquires by marriage the citizenship of some country other than Malawi shall cease on the first anniversary of the date of that marriage to be a citizen of Malawi. This does not happen to male citizens of Malawi who acquire by marriage the citizenship of some other country other than Malawi. This differentiation cannot pass the limitation test under section 44(1) of the Constitution.

²²

The section now reads as follows:

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, national, ethnic or social origin, disability, property, birth or other status or condition.

²³

Cap. 15:01 of the Laws of Malawi.

The State Party recently passed the Gender Equality Legislation. This Bill seeks to ensure equality between men and women at all levels. The State Party should promote awareness of this new law as it would level the playing field between men and women at all levels.

Recommendation:

- (a) The State Party should amend its Constitution and other legislation and explicitly include, 'sexual orientation' as a prohibited ground of discrimination to ensure protection of sexual minorities in Malawi.**
- (b) The State Party should decriminalise homosexual activities or practices between consenting adults in its Penal Code and other legislation.**
- (c) The State Party should immediately amend or repeal section 9 of the Citizenship Act to ensure that it does not discriminate against women.**
- (d) The State Party should ensure popularization of the Gender Equality legislation and ensure its enforcement accordingly.**

3.3 Right to life (Article 6)

There are many positive steps that have been taken by Malawi in implementing this right, but some concerns still remain. The State Party report makes reference to the case of *Francis Kafantayeni vs The Attorney General*²⁴ following which the death penalty is no longer mandatory in murder cases. In that case, the High Court ordered that all murder convicts should be re-sentenced. As of now, no murder convicts have been re-sentenced. This matter is of great concern because it means that all the current sentences are unlawful and the State Party cannot continue holding onto convicts illegally and violate their right to fair trial as guaranteed in its Constitution.

²⁴ Constitutional Case No. 12 of 2005 (High Court of Malawi) (Principal Registry) (Unreported).

The Committee should ask the State Party what plans it has put in place to ensure that all murder convicts are re-sentenced and by what date.

The Committee should also ask the State Party why the Dr. Kalonga Stambuli Commission of Inquiry Report has never been released, almost a decade after it was prepared. Dr. Kalonga Stambuli died under very mysterious circumstances and Malawians are still eager to know how he died and what or who killed him.

Recommendation:

- (a) The State Party should ensure that it takes steps and measures to comply with the *Francis Kafantayeni vs The Attorney General* decision by ensuring that all murder convicts are re-sentenced as a matter of urgency.**
- (b) The State Party should ensure that the Dr. Kalonga Stambuli Commission of Inquiry Report is released and action should be taken against any person or persons who played a part in his death.**

3.4 Prohibition of torture, cruel, inhuman or degrading treatment or punishment and conditions in detention (Articles 7 and 10)

The State Party has made reference to the case of *Gable Masangano vs The Attorney General*²⁵. Until now (more than three years later), the State Party has not yet fully complied with the judgment. The Court in that case, gave the State Party eighteen (18) months within which it should have implemented the decision. The period expired a long time ago and the Commissioner of Prisons was quoted in the print media as saying that his Department was not

²⁵ Constitutional Case No. 15 of 2007 (High Court of Malawi) (Lilongwe District Registry) (Unreported).

going to implement the court's decision because it does not receive adequate funding from the State Party. Such flagrant disregard for court decisions, breeds contempt for the courts and it undermines the rule of law. Furthermore, statistics show that 30 prisoners die every month in Malawi prisons.²⁶

The Committee might wish to ask the State Party how much has been allocated in the current budget towards the construction of the two prisons and request status reports of these projects as prison congestion has been there for rather too long now²⁷ and it had indicated to the High Court in the *Masangano case* that these would be constructed starting from 2009 but until now, there is nothing on the ground.

The problem of overcrowding in Malawi's prisons is compounded by the fact that persons who have committed petty offences are also sent to prisons. The laws in Malawi do provide for other alternative sentences such as diversion and community service orders but these are not often utilised.

The Committee may wish to inquire from the State Party why its courts do not often use these alternatives to custodial sentences despite having clear provisions in its laws.

Refugees were attacked and beaten in Dowa by local Malawians. This was being disrespectful to fellow beings.

The Committee may wish to inquire from the State Party what measure it has put in place to ensure that attacks on refugees does not occur again.

3.5 Right to liberty and security of person (Article 9)

²⁶

'30 prisoners die monthly' *Weekend Nation* 31 October 2009 4.

²⁷

See *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995).

CHRR and CEDEP has identified one issue of concern in relation to this article; Family members continue to be arrested in Malawi by the Police as a method of compelling family members to reveal the whereabouts, or 'bring out' suspected criminals.²⁸ A number of activists in Malawi such as Ralph Kasambara, John Kapito, politician Atupele Muluzi were arrested by the State Party for advocating for change of political leadership in Malawi. Some were threatened with death, including Undule Mwakasungula Executive Director of CHRR and Gift Trapence Executive Director of CEDEP including vandalising of CHRR offices for being in the forefront in criticizing the undemocratic leadership of late Muthalika. Others such as Rafiq Hajat, the Executive Director for Institute for Policy Interaction (IPI) had their offices burnt down. Rev MacDonald Sembereka had his house in Balaka, in the south of Malawi, burnt down by what were generally believed to be government operatives.²⁹ A student activist, at the University of Malawi, Robert Chasowa was killed on campus by persons suspected to be hired by or connected to the Professor Bingu wa Mutharika administration. The Commission of Inquiry released its report on the matter. About ten individuals linked to the killing of Robert Chasowa were arrested by the State Party and charged with murder and were subsequently released on bail by the High Court. They are awaiting murder trial. Senior police officers named in the report were sent on forced leave to pave way for further investigations.³⁰

The Committee may wish to inquire from the State Party on the measures it has taken to investigate and bring to book persons who were responsible for those arbitrary arrests, death threats and arson of offices and homes of human rights and political activists.

3.6 Freedom of movement (Article 12)

The Constitution guarantees freedom of movement and residence. However, Malawi's Penal Code, in section 184, retains the offence of rogue and vagabond. This section provides *inter alia*

²⁸ A classic example is Sandra Solomon who was arrested at Soche Police Station in Blantyre for the offence committed by someone else.

²⁹ <http://www.nyasatimes.com/malawi/2011/09/13/mcp-udf-pp-condemn-house-torching/>.

³⁰ 'Chasowa saga: Police officers on forced leave' *Malawi News* 8-14 December 2012, 1 and 3.

that every suspected or reputed thief who has no visible means of assistance and cannot give account of himself or any person found on the road or at a public place at such time and under such circumstances as to lead to a conclusion that such a person is there for an illegal or disorderly purpose such person is a rogue and vagabond. Offences such as this, infringes on the right to free movement and they give licence to law enforcement agencies to arrest any person who is homeless or poor. In fact, this law is often used for arresting commercial sex workers, when sex work in itself is not an offence in Malawi.

3.7 Access to justice (Article 14)

The main concern here relates to undue and unreasonable delays in delivering judgments by the courts in Malawi. Courts in Malawi can take up to eight years or more without delivering their judgments. What is disheartening is the fact that even in cases where the courts are expected to deliver their judgments with speed such as applications for injunctions or interdictions they do take years to do so in some cases. These delays are an infringement of this right.

The Committee might like to ask what measures has the State Party taken to address this problem?

A Judge of the High Court who was answering a criminal charge and whose case is pending before the Judicial Service Commission in Malawi is still sitting on the Bench. However, magistrates who were charged with criminal offences were immediately interdicted by the State Party and some were successfully prosecuted. These junior judicial officers were not sitting and hearing cases. The confidence that people have in the delivery of justice is totally undermined when judicial officers suspected to have committed offences are treated differently in similarly situated circumstances.

The Committee may wish to inquire from the State Party the reasons for this differentiation between magistrates and judges when both are suspected to have committed crimes or misconduct.

Judicial independence is protected by the Constitution.³¹ However, it came under severe assault in 2001 when the National Assembly attempted to impeach three High Court judges for alleged incompetence and misconduct. The alleged misconducts were all flimsy and the State President at the time did not remove the judges as requested by the National Assembly.³² A Judge's home was also searched by junior police officers in 2009. The State Party has also refused to implement revision of remuneration debated and approved by the National Assembly.³³ The State Party has also been undermining the independence of the judiciary by making political statements against judges for doing their work simply because most of the decisions made by the courts did not go in its favour. The State Party has also been disobeying many court orders issued by the courts. For instance, it disobeyed an order by the High Court that declared unconstitutional a presidential order of 28 May 2002 banning public demonstrations against a proposed amendment to the Constitution to provide for a third term of office for the State President. The State Party also defied a High Court order requiring it to restore the security and other entitlements of the State Vice President after their removal on the spurious grounds that he had constructively resigned from his position.³⁴

There are only about 350 lawyers in Malawi at the moment.³⁵ This negatively impacts on the rights of accused persons to access justice especially at the High Court and Supreme Court of Appeal. The State Party has therefore taken legislative measures to address the acute shortage of lawyers in the country. In 2009 the State Party commissioned a review of the Legal Education

³¹ Section 9 as read with section 103(1) of the Constitution of the Republic of Malawi Act No 20 of 1994.

³² FE Kanyongolo *Malawi: Justice sector and the rule of law* (2006) 80-81.

³³ *The State –And- President of the Republic of Malawi, Minister of Finance, Secretary to the Treasury, Ex-Parte Malawi Law Society*, Constitutional Cause No. 6 of 2006 (High Court) (Principal Registry) (Unreported).

³⁴ n 61 above, 52.

³⁵ □ Interview with Ms Rose Banda, Administrative Assistant at the Malawi Law Society Secretariat in Blantyre, Interview conducted on 15 October 2012.

and Legal Practitioners Act.³⁶ One of the new proposals is that private universities will now be able to offer law degrees and that foreign trained lawyers will now be able to be trained at the Malawi Institute of Legal Education and upon doing a conversion course then be admitted to the Malawi Bar.

The Committee may wish to inquire from the State Party why almost three years after the Legal Education and Legal Practitioners Act was amended, the Malawi Institute of Legal Education is nowhere in sight. What is delaying its operationalisation? What steps have been taken so far to ensure that the Malawi Institute of Legal Education is up and running as a matter of urgency?

The State Party also amended the Courts Act,³⁷ to increase the jurisdiction of the magistrates' courts.³⁸ Cases that were going to the High Court, where it is almost mandatory to have a legal practitioner, will now be handled by magistrates' courts, where legal representation is optional. This has ensured more access to justice.

Five persons were arrested in Malawi for being suspected to be Al Qaeda suspects. Their families went to the High Court and obtained an Order of Injunction restraining the State Party from rendering them to the United States of America Government without first hearing them. The State Party herein disregarded the Court Order and proceeded to render them to the United States of America Government in violation of the due process of the law and their right to reside in Malawi.³⁹

³⁶ □ Cap.3:04 of the Laws of Malawi.

³⁷ □ Cap 3:01 of the Laws of Malawi.

³⁸ □ 'Courts act amended' *The Nation* 27 November 2009 6.

³⁹ For more details, see Kanyongolo (n 12 above) 53, and 'Mw helped CIA to Torture Suspects' *The Sunday Times* 10 February 2013, 1, 2, and 6.

The State Party should explain the status of the five Al Queda suspects that were forcibly removed from Malawi. Where are they now? Why was the due process of law not followed when rendering them to the United States of America Government?

Recommendation:

- (a) The State Party should safeguard the independence of the judiciary and should desist from making comments in public against judicial officers. It should ensure that judicial officers are properly remunerated and protected.**
- (b) The State Party should ensure that any searches to be conducted in homes of Judges or any judicial officers should be carried out by senior police officers.**
- (c) The State Party should ensure that extraordinary rendition operations are carried out under the due process of the law.**
- (d) The State Party should obey all court orders, unless the same have been stayed, varied or overturned by a higher court to avoid undermining the sanctity and independence of the courts.**

3.8 Freedom of thought, conscience and religion (Article 18)

There are persons who do not believe in God in Malawi. A good example is the Association for Secular Humanists (ASH).⁴⁰ These co-exist with those that believe in God and they have been accorded space in Malawian society. There are also persons who belong to what may be called minority faiths such as Bahai, Hindu, African Traditional Religions etc. CHRR took note of an incident that happened around September 2012 at Makapwa Primary School in Thyolo where the Headmaster of the school sent away three Rastafarian children for having dreadlocks. The Rastafarian community commented on the issue that their children were being denied the right

⁴⁰ 'In God we don't trust' *Nation on Sunday* 26 February 2012 1.

to education due to their religious belief. On the other hand, the Ministry of Education stated that Schools have guidelines in order to ensure uniformity among pupils.⁴¹

3.9 Freedom of opinion, expression and information (Article 19)

The right of access to information is guaranteed under section 37 of the Constitution. However, there are three challenges with access to information in Malawi. First, the wording of the constitutional provision is very problematic. It provides as follows:

Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.

By linking the right of access to all information to the exercise of some right, the right is rendered illusory to those that may require information from the State but are unable to demonstrate the right for which such information shall be exercised. Many states on the continent no longer have ‘the requirement for the exercise of his rights’.⁴² The wording of the provision also assumes that all rights, for which the information will be sought for, will necessarily have to be exercised. Some rights are just demanded without necessarily being exercised. For instance, the right to a clean environment cannot be exercised. It can only be demanded or safeguarded.

Second, there are many sections in the Penal Code that criminalise free expression of opinions.⁴³

⁴¹ <http://www.bnltimes.com/index.php/malawi-news/headlines/national/11656-schools-reject-rastafarian-pupils> (accessed on 26 November 2012).

⁴² See for instance section 32(1) of the Constitution of the Republic of South Africa 1996 and section 35(1) of the Constitution of the Republic of Kenya (2010).

⁴³ For instance, sections 50 and 51 still criminalise sedition, section 60 criminalises publication of false news likely to cause fear and alarm to the public, section 60A criminalises communication of false statements which may be published generally outside Malawi, the Censorship and Control of Entertainment Act, Cap.21:01 of the Laws of

The other challenge is that there is no enabling legislation to give full effect to section 37 of the Constitution. The Access to Information Bill has been gathering dust for the past eight years or so. The importance of this Bill cannot be over-emphasised. If passed into law, it will allow journalists, lawyers, accountants, teachers, researchers among others to freely access public information.

The Committee may wish to take up this matter with the State Party. Specifically, the Committee might ask what is the current status of the Access to Information Bill? When is it likely to be tabled before the National Assembly? What is the State Party currently doing in readiness for its passage?

3.10 Freedom of assembly (Article 21)

This right has been under serious threat from the State Party recently. The State Party used its security apparatus and other machinery to frustrate free assemblies. For instance, during the late President Professor Bingu a Mutharika's regime in 2011 when the Public Affairs Committee (PAC) organised a national conference at Sunbird Mount Soche Hotel in Blantyre, South of Malawi, to review the political and economic governance of the country, the State Party literally ordered the Management of Sunbird Mount Soche Hotel to cancel the booking for the venue of the conference as the meeting was described as a coup d'état financed externally and implemented by CSOs in the country. In 2008, the former Head of State, Dr. Bakili Muluzi was prevented from addressing a public rally in Mulanje. In fact, Dr. Muluzi obtained an injunction against the Malawi Police restraining them from stopping him from addressing the rally. The State Party instead deployed the Malawi Army to prevent Dr. Muluzi from holding a public rally.

Malawi empowers the Censorship Board to ban any publication deemed to be undesirable, section 4 of the Protected Flag, Emblems and Names Act, Cap. 18:03 of the Laws of Malawi criminalises insulting, or ridiculing or showing disrespect to or with reference to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, among many others.

The State Party may wish to comment on these incidences and inform the Committee what it has done to ensure that all persons in Malawi are guaranteed the right to free assembly.

3.11 Freedom of association (Article 22)

This right is being abused by politicians when it comes to crossing the floor as provided for in section 65 of the Constitution which limits the movement of members of the National Assembly from one political party represented in the National Assembly, other than by that member alone, to another political party represented in the National Assembly or joining any other political party or association or organisation whose objectives or activities are political in nature. This provision has been interpreted by the Supreme Court of Appeal for Malawi to mean that a member of the National Assembly may also cross the floor when he or she joins any political party or organisation outside the National Assembly whose objectives or activities are political in nature.⁴⁴ However, at the moment over forty (40) members of the National Assembly moved from their political parties represented in the National Assembly and joined the party in power, but the Speaker of the National Assembly has not declared the seats of those members of the National Assembly vacant. In fact, the State Party has taken a position that it cannot implement section 65 of the Constitution because it does not have money to conduct by-elections.

Recommendation:

- (a) The State Party should amend section 65 of its Constitution so that crossing the floor should be limited to movement within the National Assembly and not outside the National Assembly as there is no floor to be crossed outside the National Assembly.**
- (b) The State Party should take steps to ensure full implementation of section 65 of its Constitution as failure to do so, amounts to suspending a constitutional provision which is against constitutionalism and the rule of law.**

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

3.12 Protection of family (Article 23)

Article 18 of the African Charter on Human and Peoples' Rights provides that the family shall be the natural unit and basis of society and that the state shall protect its physical and mental health. The right to marry and found a family is also guaranteed under section 22 (1) of the Constitution. However, the arrest and prosecution of the first gay couple in Malawi was viewed by some as protection of the family unit. This is a matter of concern to CHRR and CEDEP. The State Party acknowledges that there is no legislation governing marriage by repute or permanent cohabitation and that there are still uncertainties surrounding such marriages in terms of matrimonial rights and duties, dissolution and distribution of matrimonial property.

The Committee might wish to ask what the State Party doing to clarify this state of affairs?

The State Party undertook a review of all statutes governing marriages in Malawi. The Law Commission came up with a comprehensive Bill to govern all forms of marriages. Among other things, the Bill seeks to create a uniform system of rights within marriage and prohibit early marriages. However, until now, the Bill has not been debated and passed by the National Assembly.

Recommendation:

- (a) The State Party should ensure passage of the Marriage, Divorce and Family Relations Bill into law as soon as it is practically possible.**

3.13 Right to take part in the conduct of political affairs (Article 25)

In May 2009, Malawi held one of the most successful, violence free and peaceful general and presidential elections on the continent. Every citizen who satisfied the legal requirements was allowed to vote and stand for any public office of his choice in line with the guarantees of section 40 (1) (c) of the Constitution.

One point, made in para.93 of the State party report, deserves to be noted; there the State party refers to the Public Service Act, Cap. 1:03 of the Laws of Malawi and the Parliamentary and Presidential Elections Act, Cap. 2:01 of the same laws as subsidiary legislation. With the greatest respect, these are not subsidiary legislation. These are principal legislation.

4. Challenges encountered in the implementation of the ICCPR

There are numerous challenges being encountered in the implementation of the ICCPR. They relate mainly to political, administrative, economic factors and archaic laws as under the discussion of civil and political rights. For example, the State Party has not yet domesticated it save for some articles. Clearly, there is absolutely no political will to give it legal effect in the domestic arena in its entirety. This has resulted in the citizens of the country having difficulties to enforce its articles in the domestic courts as is ably demonstrated by the case of *Chakufwa Tom Chihana v The Republic*.⁴⁵

5. Conclusion

Overall, Malawi is making some significant strides in the realization of human rights under the ICCPR and its Constitution. However, a number of concerns have been identified in this report, which we suggest the Human Rights Committee might wish to raise with the State party. These include:

- **While some human rights are protected in the Constitution, the ICCPR as a whole has not been domesticated. Does the State Party have plans to domesticate the Covenant and if so when? If not, why not?**
- **Why has Malawi not fulfilled its reporting obligations under the ICCPR until now?**

⁴⁵

n 7 above.

- **Is section 211(2) of the Constitution not in conflict with principles of International Law? Does the State Party have plans to review and, if necessary, clarify, amend or repeal this provision?**
- **Is section 9 of the Citizenship Act not discriminatory against women? If yes, does the State Party plan to review and amend or repeal it?**
- **What measures has the State Party taken so far to repeal laws that criminalise homosexual practices between two consenting adults?**
- **How does the State Party guarantee that freedom of religion is guaranteed, including in access to education?**
- **Why is the State Party failing to re-sentence all murder suspects in line with the *Kafantayeni* judgment?**
- **What is the status of the Dr. Kalonga Stambuli Commission of Inquiry Report?**
- **What measures has the State Party taken to investigate and bring to book persons who were responsible for arbitrary arrests, death threats and arson of offices and homes of various human rights and political activists in Malawi?**
- **What is the State Party doing about various laws that unduly restrict and criminalise freedom of expression in Malawi?**
- **What is delaying the operationalisation of the Malawi Institute of Legal Education?**

- **What is being done to ensure that the implementation of article 18 of the ACHPR, which protects the family, does not result in discrimination against same sex couples, in light of the arrest and subsequent prosecution of the first gay couple in Malawi?**
- What is being done to ensure that the perpetrators of injustice including those responsible for the killing of the 20 peaceful and unarmed protesters during the Bingu Muthalika dictatorial leadership.
- **Why has Malawi not operationalised the Independent Police Complaints Commission established under the new Police Act?**