



Human Rights Watch
Submission to the Human Rights Committee
Consideration of Malawi's Periodic Report, 111th Session

Human Rights Watch welcomes the opportunity to provide input to the Human Rights Committee on Malawi's obligations under the International Covenant on Civil and Political Rights (the "Covenant"). This submission focuses specifically on violations of the right to marriage based on "full and free consent" of the spouses, which are inconsistent with article 23 of the Covenant.

This submission is based on the Human Rights Watch's March 2014, *"I've Never Experienced Happiness," Child Marriage in Malawi*.¹

Malawi has one of the highest rates of child marriage in the world. It is ranked eighth of the 20 countries that are considered to have the highest rates of child marriage by the United Nations Population Fund (UNFPA).² On average, one out of two girls in Malawi will be married by their eighteenth birthday, according to the United Nations.³ In 2010, half of the women (50 percent) aged 20 to 24 years were married or in union before age 18 (compared to 6.4 percent of men); while 12 percent of women married before they were 15 (compared to only 1.2 percent of men).⁴ Data shows little to no change in child marriage prevalence for women since 2000, when it stood at 47 percent.⁵ Child marriage prevalence in Malawi is also higher than the regional average for sub-Saharan Africa (37 percent).⁶

¹ Human Rights Watch, *"I've Never Experienced Happiness:" Child Marriage in Malawi*, March 2014, <http://www.hrw.org/reports/2014/03/06/ive-never-experienced-happiness-0>.

² United Nations Population Fund (UNFPA), "Marrying too Young: End Child Marriage," 2012, <http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/MarryingTooYoung.pdf> (accessed January 8, 2014), p. 23.

³ UNFPA, "Profiles of 10 Countries with the Highest Rates of Child Marriage," undated, http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/ChildMarriage_8_annex1_indicator_definition.pdf (accessed July 15, 2013), p. 8.

⁴ National Statistical Office and ICF Macro, "Malawi Demographic and Health Survey 2010," September 2011, <http://microdata.worldbank.org/index.php/catalog/1449> (accessed June 13, 2014), p. 76.

⁵ UNFPA, "Profiles of 10 Countries with the Highest Rates of Child Marriage," p. 8.

⁶ Ibid.

Human Rights Watch has documented how the absence of clear and comprehensive marriage legislation affects the day-to-day lives of girls and women. We interviewed girls and women, as well as government officials, law enforcement officials including magistrates and police officers, traditional leaders, health workers, child protection workers, and social welfare officers. We found that the failure to require “full and free” consent to marriage, the absence of a clear minimum age of marriage consistent with international norms and standards, as well as gaps and inconsistencies in laws on child marriage create real challenges for girls to get help from forced marriages, in violation of national and international law.⁷

Malawi’s Constitution recognizes women’s right to full and equal protection under the law, and non-discrimination on the basis of their gender or marital status.⁸ The constitution calls for legislation to eliminate customs and practices that discriminate against women.⁹ Under article 22 of the Constitution, a person who is 18 years of age may enter into marriage without parental consent, while persons between 15 and 18 must obtain parental consent before entering into marriage. The Constitution does not prohibit marriage of children below 15, but provides that the state is obliged merely to “discourage” marriages where either party is under age 15.¹⁰ The 1903 Marriage Act, which sets 21 as the minimum age of marriage, also allows for marriage of children below 18 years with parental consent.¹¹ The Child Care, Protection and Justice Act does not provide for a minimum age of marriage nor

⁷ Some of the gaps and inconsistencies relate to the definition of a child, and how the age of sexual consent should be applied in relation to child marriages. Under the laws of Malawi, there is no consistent definition of a child. The Constitution and the Child Care, Protection and Justice Act define a child as a person below the age of 16. This definition is inconsistent with the Convention on the Rights of the Child (CRC), ratified by Malawi in 1993, which defines a child as anyone below 18. At the same time, the Prevention of Domestic Violence Act defines a child as a person below the age of 18, although our research found that this definition is rarely applied in law enforcement. Under the customary laws of Malawi, a child becomes an adult on attainment of puberty. A precise legal definition of a child that is consistent with international human rights law is essential to ensure a coherent application of laws protecting children. Malawi’s Penal Code in article 138(2) criminalizes sex with a girl below 16 as defilement, and those convicted under this provision can be sentenced to 14 years in prison. Article 132 defines rape as having “unlawful carnal knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm.” How the current definitions of rape and defilement apply to sexual intercourse in the context of child marriage is unclear.

⁸ Malawi Constitution, art. 24. Discrimination on the basis of sex is also prohibited. *Ibid.*, art. 20 (1).

⁹ *Ibid.*, art. 20(1).

¹⁰ *Ibid.*, art. 22(8).

¹¹ The Marriage Act in article 19 states: “If either party to an intended marriage, not being a widower, widow or divorced person, is not over eighteen years of age, the written consent of the father or mother, or if both be dead or of unsound mind or absent from Malawi, of the guardian of such party, must be produced annexed to such affidavit as aforesaid, before a licence can be granted or a certificate issued.”

prohibit child marriages, but provides criminal penalties for those who force a child to marry.¹²

Human Rights Watch found that in practice, girls in Malawi are often married on attainment of puberty or before.¹³ In some cases that we documented, girls aged 10 to 12 were married. As a matter of international law, older children have the right to participate in decisions about whom and when they marry as soon as they have the maturity to understand the implications of their decisions.¹⁴ But no matter what their age, the traditionally low status of children, especially girls, in many Malawian communities and entrenched cultural beliefs undermine their ability to oppose the wishes or opinions of parents, guardians, or community elders. Accounts from girls and women in our report show that families often force girls into marriage, including those who are lawfully old enough to marry under the Constitution.

The government of Malawi has not enacted the Marriage, Divorce and Family Relations Bill, a comprehensive family law developed in 2006 that has stronger protections from child and forced marriage and provides 18 as the minimum marriage age. The absence of clear family legislation means that most matters relating to marriage, divorce, maintenance payments, and domestic violence are handled through customary procedures, which often discriminate against women. These customary procedures fail to protect girls against forced marriages or enable them to access justice for serious harms suffered.

Malawi has rejected calls by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the CRC Committee to increase the minimum age of marriage to 18. The CEDAW Committee has specifically addressed the need for Malawi to make every effort to raise awareness of and increase women's access to healthcare facilities, to put in place measures to reduce maternal mortality by identifying and

¹² Child Care, Protection and Justice Act, 2010, art. 81 (a).

¹³ Malawi Human Rights Commission, "Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi," 2005, http://www.medcol.mw/commhealth/publications/cultural_practices_report.pdf (accessed September 3, 2013), p. 88; and Malawi Law Commission, "The Report of the Malawi Law Commission on the Review of Laws on Marriage and Divorce," June 2006, http://www.lawcom.mw/docs/Report_on_the_review_of_Marriage_and_Divorce_Act.pdf (accessed June 13, 2014), p. 13.

¹⁴ The Convention on the Right of the Child in article 12 states that governments shall assure a child who is capable of forming his or her views the right to freely express those views in accordance with the age and maturity of the child. CRC, art. 12. However, there are challenges in determining the age a child should be before he or she can "consent" fully and freely to marriage and sexual relations, and with full understanding of the implications of such a union, including the risks of underage marriage. See UNICEF Innocenti Digest, "Early Marriage: Child Spouses," pp. 9-11, for a discussion on the difficulty of determining full and free consent to marriage for different categories of children under the age of 18.

addressing causes of maternal death and to eradicate harmful traditional practices and customs against women.¹⁵ The CEDAW Committee called on Malawi to take all necessary measures to expedite the enactment of outstanding bills, including the Marriage, Divorce and Family Relations Bill.¹⁶ The CRC Committee also addressed the need for Malawi to take legislative and awareness raising measures to prohibit and eradicate traditional practices, including child and forced marriages that are harmful to the health, survival and development of children, boys as well as girls, and the need to strengthen sex education and reproductive and mental health counseling services.¹⁷

Suggested Recommendations

Human Rights Watch urges the Committee to make the following recommendations to the government of Malawi:

- Revise the Marriage, Divorce and Family Relations Bill to include a provision that clearly establishes the requirement for full and free consent of both partners to a marriage.
- Enact and implement the revised Marriage, Divorce, and Family Relations Bill.
- Adopt a comprehensive approach to combat child marriage. Such an approach should be set out in a national action plan, and include legal reforms and programmatic initiatives that address the causes and consequences of child marriage, as well as protection for girls and women who seek redress through the justice system.
- Carry out a nation-wide awareness-raising campaign to inform the public about child marriage, focusing on the rights of victims as well as the responsibilities of law enforcement, prosecution, and other relevant authorities.
- Remove all gaps, including complex readmission procedures, for all married girls who wish to continue with education.
- Provide regular training for police and prosecutors on their legal responsibilities to investigate and prosecute child marriage offenses.

¹⁵ CEDAW Committee, "Concluding Observations of the Committee to End All Forms of Discrimination against Women, Malawi," January 22, 2010, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MWI/CO/6&Lang=En (accessed June 13, 2014), paras. 35, 37 and 41.

¹⁶ *Ibid.*, paras. 14 and 15.

¹⁷ CRC Committee, "Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations, Malawi," January 24, 2002, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/418/00/PDF/G0241800.pdf?OpenElement> (accessed June 13, 2014), paras. 425(b) and 429.