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Sex Between Women Now a Crime in Malawi: New Law Violates Human Rights Obligations of Malawi

The International Commission of Jurists (ICJ) expresses grave disappointment at Malawi's recent enactment of a law criminalizing sexual relations between women. Such a law is an affront to human dignity and seriously undermines Malawi's human rights commitments under international law.

The ICJ urges that the Parliament undertake an immediate review with an eye to repealing all laws that currently criminalize sexual activity on the basis of the sex of the partners.

In December 2010, the Parliament passed a bill amending the Penal Code of Malawi. In late January 2011, President Bingu Wa Mutharika assented to the bill, thus completing its enactment into law. The new Section 137A, captioned "Indecent practices between females," provides that any female person who, whether in public or private, commits "any act of gross indecency with another female" shall be guilty of an offence and liable to a prison term of five years.

"The criminalization of private sexual activity between consenting adults of the same sex, whether women or men, runs counter to Malawi's obligations to protect the human rights of all citizens of Malawi, regardless of sexual orientation," said Alli Jernow, Senior Legal Advisor for the Sexual Orientation & Gender Identity Project. *"If used to prosecute women for their private consensual sexual relationships, the new law threatens the universal rights to privacy and freedom from discrimination."*

Speaking in Geneva last September, the UN Secretary-General Ban Ki-moon stated, "Laws criminalizing people on grounds of sexual orientation and gender identity violate the principle of non-discrimination. They also fuel violence, help to legitimize homophobia and contribute to a climate of hate."

The Republic of Malawi has turned a deaf ear to the calls of UN Secretary-General Ban Ki-moon, High Commissioner for Human Rights Navanethem Pillay, and Archbishop Desmond Tutu and many others. Indecent practices between males are already criminalized in Malawi. Last May Tionge Chimbalanga and Steven Monjeza were convicted of this offense and were sentenced to 14 years in prison before receiving a presidential pardon. By adding "indecent practices between females" to the Penal Code, the Republic of Malawi has not only acted contrary to its own human rights obligations, it has contributed to the severe stigmatization and discrimination experienced by gay and lesbian Malawians. All laws criminalizing consensual sexual activity between adult same-sex partners should be repealed.

The ICJ is an international non-governmental organisation comprising sixty of the world's most eminent jurists and has a worldwide network of national sections and affiliated organisations

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Legal Background

Universality - The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, provides: “All human beings are born free and equal in dignity and rights.”

Non-Discrimination - The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which Malawi acceded to in 1993, prohibit discrimination, including discrimination on the basis of sexual orientation. The treaty monitoring bodies for both treaties have made clear that the phrase “other status” in the non-discrimination provision includes sexual orientation. See *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992, at para. 8.7; *Young v. Australia*, UN Doc. CCPR/C/78/D/941/2000, at para. 10.4, *X v. Colombia*, UN Doc. CCPR/C/89/D/1361/2005, at para. 7.2; CESCR, General Comment No. 20 (The nature of non-discrimination in economic, social and cultural rights), UN Doc. E/C.12/GC/20, at para. 32.

Privacy - Article 17 of the ICCPR provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” In the case of *Toonen v. Australia*, the UN Human Rights Committee held that Tasmania’s law criminalizing sexual activity between men was a violation of Toonen’s right to privacy under Article 17.

Global Developments - Around the world, both legislatures and courts have acted to end the criminalization of same-sex sexual conduct. In the United Kingdom, the Parliament repealed such laws with the enactment of the Sexual Offences Act 1967. In 1981, the European Court of Human Rights found Northern Ireland’s sodomy laws to violate the right of privacy guaranteed by Article 8 of the European Convention on Human Rights and Fundamental Freedoms. In Hong Kong, the Legislative Council decriminalized consensual same-sex conduct between adults in 1991. In South Africa, the United States, Fiji, Nepal and India, courts reached the conclusion that the criminalization of consenting sexual activity between same-sex partners violated constitutional and international guarantees of equality, dignity, privacy and non-discrimination. Most recently, Sao Tomé and Príncipe and Nauru committed to decriminalization during the Universal Periodic Review.

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