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# INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION FOR THE PREPARATION BY THE UN HUMAN RIGHTS COMMITTEE OF A LIST OF ISSUES FOR THE EXAMINATION OF THE INITIAL REPORT OF THE REPUBLIC OF MALAWI UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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**ICJ submission to the Human Rights Committee for the preparation of a List of Issues for the examination of the Initial Report of the Republic of Malawi**

1. During its 108th session, scheduled for 8 to 26 July 2013, the Human Rights Committee (the Committee) is to undertake its examination of the initial report of the Republic of Malawi. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Committee's preparation of the List of Issues for the examination of the report of Malawi. In this submission, the ICJ brings to the attention of the Human Rights Committee issues related to articles 2, 6, 7, 10, 17, 23 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

## ARTICLE 2
## Obligation to give effect to the provisions of the Covenant

2. Article 2(2) of the ICCPR provides that "…each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant". As indicated by the Committee in its General Comment 31, this requires States parties to adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.[1] Article 2 of the ICCPR is binding on every State as a whole, encompassing all branches of government and other public or governmental authorities, at whatever level – national, regional or local.[2]

3. Sections 11(2)(b) and 211 of the Constitution of the Republic of Malawi provide that in settling constitutional disputes, national courts must give regard to: (1) the current norms of international law, including international human rights law; and (2) international agreements ratified by an act of Parliament or entered into before the Constitution of 1994 and which have not subsequently been repudiated by Parliament.[3]

4. In the landmark decision of *Chihana v Republic*, the Supreme Court of Appeal of Malawi stated that the Universal Declaration of Human Rights (UDHR) formed part of national law and could thus be invoked before the Malawi Supreme Court.[4] Because the ICCPR and the UDHR share several common themes and provisions, and since the former is by its very nature a binding instrument on Malawi as a State party, the ICCPR can also be invoked domestically in the same way as the UDHR.

5. However, the Court has recently retreated from this progressive stance in *Malawi Telecommunications Limited v Makande & Omar*,[5] and *In Re: The Adoption of Children Act*; *In Re: CJ A Female Infant*,[6] where the Court held that international agreements and customary international law will not automatically be given effect under domestic law. According to these decisions, whether or not the provisions of a treaty, such as the ICCPR, are given effect domestically in Malawi depends upon whether there exists a domestic law that specifically contradicts the relevant provision(s) of the treaty. Where this is the case, the national law takes precedent. If provisions of a specific international agreement are to be successfully

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[1] Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 7.
[2] General Comment 31, ibid, para 4.
[3] Section 211 of the Constitution of the Republic of Malawi provides that: "Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application."
[4] Malawi Supreme Court of Appeal No. 9 of 1992.
[5] Civil Appeal No. 2 of 2006 (unreported).
[6] Malawi Supreme Court of Appeal, Adoption Appeal No. 28 of 2009.

invoked before the national courts, Parliament must enact legislation to incorporate the treaty into domestic law, in which case the courts will undertake an interpretative exercise between the two national law provisions. Thus, the ICCPR the Malawi courts will only give legal effect to the treaty ICCPR to the extent to that it does not conflict with national legislation.

6. This jurisprudence has made it difficult to challenge a number of laws that contravene the rights guaranteed by the ICCPR. The Parliament of Malawi has adopted a number of laws (such as the amended Police Act,[7] the amended Penal Code, the Local Courts Act,[8] and the Injunctions Act[9] ) that are inconsistent with Malawi's obligations under the Covenant and may not be challenged before national courts.

7. It is a fundamental principle of international law, as reflected in article 27 of the Vienna Convention on the Law of Treaties, to which Malawi is a party, that a State may not invoke its domestic law to excuse a failure to perform an international treaty obligation. The ICJ would therefore call on the Committee ensure that Malawi does not considers international law, to take all necessary measures to incorporate the ICCPR into its domestic legal framework.

8. The ICJ recommends that the following questions be included in the List of Issues for the examination of the Republic of Malawi:

- ***What steps does Malawi plan to take, and what timeframe applies to this, in order to ensure that the ICCPR is fully implemented into domestic law and to ensure that its obligations under the ICCPR may not be overridden by domestic law where any conflict arises between its domestic law and its international obligations?***

**ARTICLE 6**
**Right to Life**

9. The right to life is recognized as a fundamental and non-derogable right in the Constitution in accordance with the ICCPR. However, the Constitution places an internal limitation on the meaning of this right. Section 16 of the Constitution provides that the imposition of the death penalty in respect of a criminal conviction under the laws of Malawi must not amount to arbitrary deprivation of life. Malawi has not yet ratified the Second Optional Protocol to the ICCPR and has rejected recommendations under the Universal Periodic Review (UPR) to proceed to a *de jure* moratorium on the death penalty with a view to its abolition in law.[10] This rejection is also tantamount to a rejection of repeated resolutions adopted by the UN General Assembly, most recently in December 2012.[11] Offences of treason and murder still attract the death penalty under Sections 38(1) and 210 of the Penal Code.

10. In June 2007, the Constitutional Court handed down a landmark decision in the case of *Kafantayeni & others v the Attorney General* concerning the constitutionality of mandatory death penalty.[12] The applicants – six prisoners who were on the death row following convictions on murder charges – challenged the constitutionality of the mandatory death penalty for the offence of murder. While the Constitutional Court held that Section 16 of the Constitution saved the death penalty from being ruled unconstitutional *per se*, it nevertheless held that sections 209 and 210 of the Penal Code, by prescribing the death penalty as a

[7] Bill No. 14 of 2009: Police.
[8] Bill No. 2 of 2010: Local Courts.
[9] Bill No. 27 of 2010: Civil Procedure (Suits by or against the Government or Public Officers) (Amendment) Bill.
[10] Report of the Working Group on the Universal Periodic Review: Malawi, UN Doc A/HRC/16/4 (2011), paras 105.12 and 105.13.
[11] General Assembly resolution 67/176 (2012).
[12] Constitutional Case No 12 of 2005 (unreported) (Kafantayeni Case). Discussed in Mwiza J Nkhata, Bidding farewell to mandatory capital punishment: *Francis Kafantayeni & others v Attorney General*,' (2007) 1(1) Malawi Law Journal 103.

mandatory punishment for murder, were unconstitutional. The Court found that, by imposing the penalty mandatorily, these provisions contravened the right not to be subjected to inhuman treatment or punishment. The court also held that these sections violated the right to fair trial as they prevented judicial discretion in sentencing and undercut the right to appeal against a sentence imposed by a lower court.

11. Despite this decision, Malawi has taken no concrete steps to abolish the mandatory death penalty and, in the interim, to produce a mechanism for dealing with the situation of prisoners on death row. As a result, recourse to capital punishment is still possible in Malawi, even though the country has observed a moratorium on the executions of the death penalty and Heads of State have continued with the practice of commuting death sentences to sentences of life imprisonment. While this practice may be seen to amount to a *de facto* moratorium, it involves an exercise of discretionary powers of the Head of State. The continued existence of the mandatory death penalty in law still prevents a sentencing judge to consider the nature of the offence and the personal circumstances of the offender.

12. The ICJ recommends that the following questions be included in the List of Issues for the examination of the Republic of Malawi:

- ***What measures has Malawi taken to abolish the mandatory imposition of the death penalty under the Penal Code following the decision of the Constitutional Court in Kafantayeni & others v the Attorney General?***
- ***What measures has Malawi taken towards accession to the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty?***
- ***What steps does Malawi intend to take to abolish the death penalty in its legal framework?***

**ARTICLE 7**
**Prohibition against torture and other proscribed ill treatment**

13. The Malawi Constitution guarantees the inviolability of human dignity and specifically enjoins the State to respect this principle when enforcing criminal punishment. Torture and cruel, inhuman or degrading treatment or punishment is also constitutionally prohibited. However, cases of torture and other forms of ill-treatment and use of unlawful, including excessive force against criminal suspects especially in places of detention have been a common occurrence in Malawi. Reports of police resorting to torture or ill-treatment in investigations have been rampant and perpetrators rarely punished.

14. In August 2010, for example, James Chinomba died in police custody after he was allegedly subjected to torture involving burning with iron bars and subsequent denial of medical care. He had been arrested on suspicion of robbery and car hijacking. His family was denied an opportunity to see him and the Police would not disclose his location of detention. After a few days, the family was informed of the death of James Chinomba, whose body had visible markings of beatings and burns from an electronic iron**.** The police agreed to conduct an autopsy, but the results have not been made public. Another example concerns a prisoner who was paralysed from electrocution while doing private work for a prison official.[13] It was also alleged that a suspect had died from strangulation and assault at the hands of the police in Mangochi.[14] Another victim of police brutality, Atusaye Mwenelupembe, alleged that police beat him and his co-suspects with a '*panga* knife, gun and sticks'.[15] He sustained broken ribs while one of his co-suspects died from the assault.

[13] Emmanuel Muwamba, 'Prisoner electrocuted, paralysed in Mwanza,' The Nation, 11 October 2007.
[14] Emmanuel Muwamba, 'Suspect was strangulated in custody,' The Nation, 23 October 2007, pp 1-2.
[15] Yamikani Simutoe, 'When jail means torture,' Malawi News, 7 – 13 July 2007, p 8.

15. The ICJ is concerned at the impunity enjoyed by Police officers accused of committing these crimes. While some officers have faced administrative sanctions, which do not in themselves amount to an effective remedy for the victims of such violations, few of the Police persons in question have been brought to justice in the criminal justice system. As the Human Rights Committee has affirmed in its General Comment 31 (paragraph 18), States parties are required to bring perpetrators of article 7 violations to justice., The continued application of torture and other ill- treatment by the Police provides evidence of their failure to abide by Constitutional provisions. This is despite Malawi's acceptance of UPR recommendations to eradicate torture, ill-treatment and other excessive force by law enforcement personnel and conduct thorough and impartial investigations into all allegations of torture and physical abuse.[16]

16. Despite undertaking to consider UPR recommendations to ratify the Optional Protocol to the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),[17] the Government of Malawi has failed to take steps to that end, demonstrating its lack of firm commitment to fight and abolish torture and other inhuman or degrading treatment, particularly in custody and detention facilities.

17. The ICJ recommends that the following questions be included in the List of Issues for the examination of the Republic of Malawi:

- ***What measures has Malawi put in place to eradicate the practice of torture and other proscribed ill-treatment under police custody and in detention facilities?***
- ***What measures has Malawi taken to investigate allegations of torture and ill-treatment and, where appropriate, to bring to justice perpetrators and provide remedy and reparation to victims?***
- ***What is the current position of the Government of Malawi concerning ratification of the Optional Protocol to the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, and what specific steps, including a timeframe, does Malawi intend to take to ratify and implement into domestic law the Optional Protocol?***

## ARTICLES 7 AND 1O
## Conditions of Detention

18. The Constitution of Malawi guarantees the inviolability of human dignity. Despite these guarantees, the conditions of prisons remain poor despite the perennial calls by the Inspectorate of Prisons and civil society organisations imploring the Government to take urgent action. Prisons are overcrowded to unacceptable levels. It was reported that Malawian prisons, whose overall capacity is about 5 000 inmates, hold over 10 000 prisoners. Prisoners also receive poor medical care and inadequate nutrition, clothing and sleeping materials. Amnesty International estimated that on average, 20 inmates die in Malawi's prisons every month due to overcrowding, poor sanitation, inadequate food and insufficient medical attention. In some cases, juveniles have been detained with adults despite the fact that the Constitution guarantees that juvenile offenders are to be detained separately from adults.

19. The Prisons Authorities have cited several reasons for the continuing poor standards within the prisons such as an increasing number of inmates due to rising crime rates and delays in prosecuting criminal cases in courts, lack of human and financial capacity, shortage of prisons and deteriorating infrastructure and equipment.

20. In November 2010, the Constitutional Court in *Gable Masangano v The Attorney General* ordered the Government and the Malawi Prison Services "to take concrete steps and reduce prison overcrowding by half within eighteen months after the ruling, thereafter

[16] Universal Periodic Review of Malawi, above note 11, paras 102.21 to 102.23, 102.35.
[17] Universal Periodic Review of Malawi, above note 11, paras 104.2 and 104.9.

periodically reducing the remainder to eliminate overcrowding". The Court also ordered authorities to improve ventilation in prisons and ensure the realization of other rights such as the right to appropriate accommodation and the right to access medical attention and treatment.[18]

21. Even though then Attorney General, Dr Jane Ansah, indicated to the Human Rights Council during the UPR of Malawi that the State would implement the Constitutional Court decision in the *Gable Masangano* case, the period given by the Court expired in June 2011 and the deplorable prison conditions have remain unchanged.

22. The ICJ recommends that the following questions be included in the List of Issues for the examination of the Republic of Malawi:

- ***What practical steps does Malawi intend to take to give effect to the decision of the Constitutional Court in Gable Masangano v The Attorney General, and to implement its pledge made at the Human Rights Council in that regard?***
- ***What strategies has Malawi put in place to ensure that the Prisons Services Bill and Legal Aid Bill are consistent with its ICCPR obligations concerning the conditions of detention?***

**ARTICLES 17 AND 26**
**Rights to Privacy and Non-Discrimination**

23. Article 17 of the ICCPR provides that no one shall be "subjected to arbitrary or unlawful interference with his privacy". Article 26 guarantees that all persons are equal before the law and entitled without discrimination to equal protection of the law. It prohibits discrimination on a number of grounds, including "sex" and "other status". In *Toonen v Australia*, the Human Rights Committee found that the criminalization of consensual same-sex sexual conduct violated the rights to privacy and to be free from discrimination.[19] In later cases it reaffirmed that the right to be free from discrimination based on sexual orientation was protected under Article 26.[20] In Concluding Observations, the Committee has repeatedly observed that the criminalization of consensual same-sex sexual conduct violates the Covenant.[21] The Committee has also found that a prohibition on same-sex marriage does not violate any provision of the Covenant.[22]

24. The Constitution of Malawi guarantees that all persons have equal status before the law. Section 20 prohibits "discrimination of persons in any form" and lists a variety of prohibited grounds, including "sex" and "other status". Section 21 guarantees the right to "personal privacy". Despite these guarantees, the Penal Code of Malawi penalizes "unnatural offences" and "gross indecency" between males. Under these provisions, Steven Monjeza and Tiwonge Chimbalanga were arrested in December 2009 and ultimately convicted and sentenced to 14 years' in prison before receiving a presidential pardon. The laws under which they were arrested and imprisoned remain in force. After they were pardoned, the Parliament of Malawi adopted a new amendment to the Penal Code captioned "indecent practices between females". The new Section 137A criminalizes private and consensual sex between women.

[18] See *Gable Masangano v The Attorney General & others*, Constitutional Case No. 15 of 2007, available at URL: http://www.malawilii.org/mw/cases/MWHC/2009/31.html.
[19] Communication No. 488/1992 (1994).
[20] See *X v. Colombia*, Communication No. 1361/2005 (2007); *Young v. Australia*, Communication No. 941/2000 (2003); *Fedotova v. Russian Federation*, Communication No. 1392/2010 (2012).
[21] See, e.g., Concluding Observations on Togo, CCPR/C/TGO/CO/4; Concluding Observations on Uzbekistan, CCPR/C/UZB/CO/3; Concluding Observations on Grenada, CCPR/C/GRC/CO/1; Concluding Observations on Tanzania, CCPR/C/TZA/CO/4; Concluding Observations on Chile, CCPR/C/79/Add.104; Concluding Observations on the United States of America, CCPR/C/USA/CO/3.
[22] *Joslin v. New Zealand*, Communication No. 92/1999 (2002).

25. In December 2011, the then President Bingu wa Mutharika reportedly ordered the Malawi Law Commission to review portions of the Penal Code, including the provisions referenced above.[23] There had also been early indications that Her Excellency President Joyce Banda had committed to a review and repeal of these laws. However, the latest statements by both President Banda and Minister of Justice Ralph Kasambara indicate that the laws remain in place and that there is no Government commitment to repealing or suspending them.[24]

26. The ICJ recommends that the following questions be included in the List of Issues for the examination of the Republic of Malawi:

- ***Has the Malawi Law Commission begun its review of Sections 137A, 153 and 156 of the Penal Code? If so what is the status of its review?***
- ***What concrete steps does Malawi intend to take to guarantee the rights of lesbian, gay, bisexual and transgender (LGBT) Malawians, including the right to non-discrimination and equality before the law?***

**ARTICLE 23**
**Right to a Family**

27. The Constitution of Malawi guarantees the right of all men and women to marry and found a family.[25] According to the Constitution, no person over the age of 18 years can be prevented from entering into marriage.[26] The Constitution also provides that a marriage between persons aged between 15 and 18 years can only be entered into with the consent of their parents or guardians.[27]

28. However, the Constitution does not expressly proscribe marriages between persons aged below 15 years, which seem to be at most simply discouraged.[28] As a result, many girls especially in rural areas drop out of school and many are forced into early marriages. This scenario has had an impact on the country's efforts to reduce maternal mortality, as some 30 percent of maternal deaths are amongst teen girls mostly in the rural areas where basic emergency obstetric care is not available or is not easily accessible.

29. Although the Constitution expressly proscribes forced marriages, a study conducted by the Malawi Human Rights Commission in 2006 revealed that these marriages were still prevalent in Malawi.[29] Calls to increase the minimum age for marriage to 18 years (as recommended by both the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women) have been rejected by Malawi.[30] During the UPR of Malawi, the Government rejected the recommendation of Hungary to increase the minimum age for marriage.[31]

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[23] Rex Chikoko, 'Mutharika orders a review of 'bad' laws,' The Daily Nation, 8 December 2011, available at URL : http://www.nation.co.ke/News/africa/Mutharika-orders-a-review-of-bad-laws-/-/1066/1286390/-/p2hyicz/-/index.html.
[24] Simeon Maganga, 'Kasambara denies suspending gay law,' The Daily Times, 7 November 2012, available at URL: http://www.bnltimes.com/index.php/daily-times/headlines/national/12302-kasambara-denies-suspending-gay-law; 'President Banda exonerates herself on homosexuality: Malawians to decide,' Nyasa Times, 31 December 2012, available at URL: http://www.nyasatimes.com/2012/12/31/president-banda-exonerates-herself-on-homosexuality-malawians-to-decide/.
[25] Section 22(3), The Constitution of Malawi.
[26] Section 22(6), The Constitution of Malawi.
[27] Section 22(7), The Constitution of Malawi.
[28] Section 22(8) of the Constitution provides: "The State shall actually discourage marriages between persons where either of them is under the age of fifteen years".
[29] Malawi Human Rights Commission, Cultural practices and human rights: a Study into cultural practices and their impact on the enjoyment of human rights, particularly the rights of women and children in Malawi, (2006) pp 17–76.
[30] Committee on the Elimination of Discrimination against Women, *Concluding Observations: Malawi*, UN Doc CEDAW/C/MWI/CO/6 (2010), Recommendation 20.
[31] Universal Periodic Review of Malawi, above note 11, para 105.7.

30. The ICJ recommends that the following questions be included in the List of Issues for the examination of the Republic of Malawi:

- ***What policy, administrative and legislative measures has Malawi undertaken to put an end to the high prevalence of early marriages and to bring the minimum age for marriage in line with international standards?***