

**NON-GOVERNMENTAL ORGANISATIONS’  
SHADOW REPORT ON THE IMPLEMENTATION OF  
THE INTERNATIONAL COVENANT FOR CIVIL AND  
POLITICAL RIGHTS (ICCPR)  
IN MALAWI**

Submitted to the United Nations Human Rights Committee by the Centre for the Development of People (CEDEP) and the Centre for Human Rights and Rehabilitation (CHRR) and with the assistance of the International Gay and Lesbian Human Rights Commission (IGLHRC).



<http://www.cedepmalawi.org>



<http://www.peacebuildingportal.org>



<http://www.iglhrc.org>

*For 25 October 2011 UN Human Rights Committee Meeting, Geneva.*

## EXECUTIVE SUMMARY

The shocking events of the 20<sup>th</sup> and 21<sup>st</sup> of July 2011, when the Government of Malawi turned on its own people -- harassing, beating and killing opposition demonstrators -- clearly illustrates the climate of fear and rights abuse which currently exists within the State. There is an urgent need for meaningful action from the Human Rights Committee so that all people in Malawi can access and enjoy their most basic Covenant rights.

The current human rights situation in Malawi is extremely serious and possibly deteriorating. While Malawi is a signatory of the *International Covenant for Civil and Political Rights* ("the Covenant" or "the ICCPR") and has a relatively progressive constitution, egregious human rights violations are commonplace and the people of Malawi regularly experience discrimination, violence, and even death on numerous grounds, ranging from sex, sexual orientation, national origin, political belief, political expression, professional activity, prisoner status and/or HIV/AIDS status.

The most serious rights violator in Malawi is the President, Bingu wa Mutharika. His administration acknowledges, encourages and organises the intimidation and unlawful killing of individuals or groups which challenges the regime. He has incited his followers to take to the streets with arms, allowed the police to beat and kill members of the opposition, crushed media dissent, and broken up peaceful assemblies with deadly force. President Mutharika's regime ignores the authority of the national courts system, incites prejudice and hatred of vulnerable minorities and relegates women to the status of second class citizens.

The Parliament of Malawi, dominated by an overwhelming majority of the ruling Democratic Progressive Party (DPP), uses the country's legislative system to legitimize and extend the current climate of violence and oppression. Recent legislative acts include allowing the police to search property without a warrant, allowing the Minister for Information to arbitrarily ban media publications and prohibiting two consenting females from engaging in consensual sexual intercourse.

Malawi is a country where violence and fear increasingly pervades all areas of society, where human rights defenders are beaten and even killed, where individuals who attempt to affect change are met with swift and brutal force. The fact that the Government of Malawi has chosen not to submit a report to the Committee demonstrates the value which the country's administration place on upholding human rights. There is an urgent need for the Committee to take strong, appropriate action so that the people of Malawi can enjoy their full Covenant rights to which they are entitled.

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## INTRODUCTION

This report is a joint submission by the Centre for Human Rights and Rehabilitation (CHRR) and the Centre for the Development of People (CEDEP), in consultation with the International Gay and Lesbian Human Rights Commission (IGLHRC), to the United Nation's Human Rights Committee ("the Committee") on the occasion of its consideration of the State of Malawi's implementation of the International Covenant on Civil and Political Rights ("the Covenant" or "the ICCPR") at the 103<sup>rd</sup> session taking place in Geneva, Switzerland during October 2011.

The purpose of the report is to highlight the widespread and systematic human rights violations which are experienced by individuals in Malawi. In particular, CHRR and CEDEP draws the attention of the Committee to the following breaches of the Covenant:

- The Parliament of Malawi has failed to pass comprehensive gender equality legislation, and laws which do prohibit domestic violence and discrimination against widows are under-used and ineffective.
- Malawian women lose their citizenship when they marry non-Malawian men.
- Malawi continues to practice the death penalty. Although a recent decision of the Constitutional Court suggests that capital punishment cannot be the mandatory sentence for murder, there are no guidelines stipulating its use and the death penalty continues to be imposed routinely.
- The Malawian Police Service has engaged in a widespread campaign of extrajudicial killings without Government censure.
- Individuals in Malawi are arbitrarily arrested and subject to torture while in police custody.
- There are growing encroachments on the right to privacy. The Parliament of Malawi has made it easier for police to search private property without a warrant and has increased mandatory testing for HIV/AIDS.
- The *Penal Code of Malawi* criminalizes consensual sexual intercourse between individuals of the same-sex and provides for a penalty of up to fourteen years imprisonment for those convicted of the offence. It recently expanded this provision to criminalize sex between women for the first time in the country's history.
- The President of Malawi and his government actively encourage discrimination, prejudice and hatred of lesbian, gay, bisexual and transgender Malawians.
- The President has cracked down on the political opposition, human rights defenders and journalists, curtailing their ability to communicate and exposing them to extreme violence.
- The Parliament of Malawi has stifled freedom of expression by permitting the Minister for Information to ban the publication of all materials which, in his or her opinion, are contrary to the public interest.
- On 20<sup>th</sup> and 21<sup>st</sup> July, 2011, the Malawi security forces killed eighteen unarmed individuals who were attempting to exercise their right to peacefully assemble in opposition to the government.

The extent, breadth and severity of the State of Malawi's human rights violations amount to a clear breach of the terms of the Covenant.

## Constitutional and Legal Framework within which the Covenant is Implemented (Article 2)

Section 11(2) (b) and Section 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<sup>1</sup>.

In the landmark decision of *Chihana v Republic*<sup>2</sup>, the Supreme Court of Appeal stated that the *Universal Declaration of Human Rights* (UDHR) forms part of national law and can thus be invoked before the Malawi Supreme Court. The ICCPR and the UDHR share a number of common themes and provisions, so it was arguably implicit that the former could also be invoked domestically.

However, more recently, the Court has pulled back from this progressive stance. In *Malawi Telecommunications Limited v Makande & Omar*<sup>3</sup> and *In Re: The Adoption of Children Act CAP 26:01; In Re: CJ A Female Infant*<sup>4</sup>, the Court has stated that international agreements and customary international law cannot automatically apply domestically. According to these decisions, whether the terms of an agreement, such as the ICCPR, now applies in Malawi law depends upon whether there exists a parliamentary law which specifically contradicts that agreement. Where this is the case, the national law takes precedent. If the Executive wants a specific international agreement to be invoked before the national courts, it should pass appropriate legislation to assimilate the agreement into domestic law.

Thus, the ICCPR is only applicable before the Malawi courts to the extent to which it does not conflict with specific national legislation. Unfortunately, however, the Malawi Parliament has been at the forefront of passing laws which override or infringe upon the enjoyment of Covenant rights. Legislation such as the amended Police Act<sup>5</sup>, the amended Penal Code, the Local Courts Act<sup>6</sup>, the Injunctions Act<sup>7</sup> and the Pensions Act<sup>8</sup> all violate these human rights. Similarly, the Executive branch has also formed numerous obstacles to human rights,

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<sup>1</sup> 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.”

<sup>2</sup> Malawi Supreme Court of Appeal No. 9 of 1992.

<sup>3</sup> Civil Appeal No. 2 of 2006 (unreported).

<sup>4</sup> Malawi Supreme Court of Appeal, Adoption Appeal No. 28 of 2009.

<sup>5</sup> Bill No. 14 of 2009: Police.

<sup>6</sup> Bill No. 2 of 2010: Local Courts.

<sup>7</sup> Bill No. 27 of 2010: Civil Procedure (Suits by or against the Government or Public Officers) (Amendment) Bill.

<sup>8</sup> Bill No. 14 of 2010: Pension.

advocating for policies and administrative decisions which disregard the terms of the Covenant. In fact, as Malawi currently stands, the Executive has become the main perpetrator of human rights violations in the State.

### **Non-Discrimination, Equality between Men and Women (Articles 2 [para 1], 3, 26)**

Articles 2(1), 3 and 26 of the Covenant provide for the respect, equality and nondiscrimination of all individuals on the grounds of, inter alia, race, color and sex. In the landmark decision of *Toonen v Australia* in 1994, the Committee found not only that the reference to “sex” in Articles 2(1) and 26 must be taken to include sexual orientation, but also that laws which criminalize consensual homosexual acts expressly violate the privacy protections of Article 17.<sup>9</sup> In the past twelve months alone, the Committee has twice called upon states to end the criminalization of sexual conduct between adults of the same sex.<sup>10</sup> Furthermore, it has recommended that two states take positive steps to end national prejudice and discrimination against lesbian, gay, bisexual and transgender (LGBT) people.<sup>11</sup> The Committee has been equally strong in expressing its concern for the unequal treatment of women. In its General Comments on Article 3<sup>12</sup>, the Committee stated that countries have a duty not only to adopt measures of protection, but they must also take positive steps in all areas “to achieve the effective and equal empowerment of women”<sup>13</sup>. In particular, the Committee has noted that in many countries, cultural and social traditions persist<sup>14</sup> to deprive women of their rights, especially in terms of property ownership<sup>15</sup>, and their choices, such as the selection of an intimate partner<sup>16</sup>. This is a concern which has been shared by numerous other treaty bodies, most particular the Committee for the Elimination of All Forms of Discrimination against Women (CEDAW). In the CEDAW Committee’s 2010 Concluding Observations on Malawi<sup>17</sup>, the Committee called for the enactment of a Gender Equality Bill, an end to harmful cultures of patriarchy, and stronger protections for women against domestic violence<sup>18</sup>.

### **Discrimination and Violence Targeting the LGBT Community**

<sup>9</sup>Toonen v. Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html> [accessed 28 September 2011].

<sup>10</sup> CCPR/C/ETH/CO/1, 25 July 2011, at para 12; CCPR/C/TGO/CO/4, 18 April 2010, at para 14.

<sup>11</sup> CCPR/C/MNG/CO/5, 2 May 2011 at para 9; CCPR/C/POL/CO/6, 15 November 2010 at para 8.

<sup>12</sup>General Comment No. 28: Equality of rights between men and women (article 3) : . 03/29/2000. CCPR/C/21/Rev.1/Add.10.

<sup>13</sup>General Comment No. 28: Equality of rights between men and women (article 3) : . 03/29/2000. CCPR/C/21/Rev.1/Add.10 at para 3.

<sup>14</sup>General Comment No. 28: Equality of rights between men and women (article 3) : . 03/29/2000. CCPR/C/21/Rev.1/Add.10 at para 24.

<sup>15</sup>General Comment No. 28: Equality of rights between men and women (article 3) : . 03/29/2000. CCPR/C/21/Rev.1/Add.10 at para 25.

<sup>16</sup>General Comment No. 28: Equality of rights between men and women (article 3) : . 03/29/2000. CCPR/C/21/Rev.1/Add.10 at para 24.

<sup>17</sup> CEDAW /C/MWI/CO/6 5 February 2010.

<sup>18</sup>CEDAW /C/MWI/CO/6 5 February 2010 at para 15, 20, 22 and 23.

- ***Criminalization of Homosexuality***

Sections 137A, 153 and 156 of the *Penal Code of Malawi* criminalize consensual sexual activity between individuals of the same sex with penalties ranging up to fourteen years and the option of corporal punishment<sup>19</sup>. Although Sections 153 and 156 were enacted in the early 1960s, the criminalization of sex between women under Section 173 A was only introduced within the last twelve months<sup>20</sup>. This reflects the increasingly uncertain and violent environment that the lesbian, gay, bisexual and transgender (LGBT) community faces in Malawi.

In December 2009, Tiwonge Chimbalanga and Steve Monjeza held a traditional marriage ceremony. News of their relationship became public, and as a result, they were arrested, charged with gross indecency between two males, held without bail, and sentenced to fourteen years in prison<sup>21</sup>. On a mission to Malawi, the Secretary-General of the United Nations raised their conviction in the strongest terms possible with President Mutharika, who was responded with a presidential pardon and release of the two individuals. However, arrests and prosecutions for actual or presumed sodomy persist. Stanley Kanthunkako and Stephano Kalimbakatha have been charged with buggery and gross indecency, and they are awaiting trial at the Zomba Magistrate Court<sup>22</sup>.

Of particular concern is the lack of information about lesbians, bisexual women, and women-who-have-sex-with-women (WSW) in Malawi. The voices of lesbians and bisexual women in Malawi are systematically silenced, and this reality underscores that women do not have a space, even in protest, to express and live their sexual orientation. Patriarchal restrictions and stereotypical attitudes about the appropriate role of the sexes confine women to the margins of public life, and institutions such as forced marriage mean that women have little or no right to assert their true selves, including their sexual orientation. It is vital that the voices and faces of lesbians and bisexual women in Malawi be heard and seen. Information about the the human rights and lack thereof of these women should be documented and published as a matter of urgency.

- ***State Sponsored Homophobia***

<sup>19</sup> Section 137A of the *Penal Code of Malawi*: “Any female person who, whether in public or private, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, shall be guilty of an offence and shall be liable to imprisonment for five years. Section 153: “Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.” Section 156: “Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.”

<sup>20</sup> “Sex between Women Now a Crime in Malawi: New Law Violates Human Rights Obligations of Malawi,” by the International Commission of Jurists, published 9 February 2011. Available online at <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/1339.html>.

<sup>21</sup> Significantly, Tiwonge Chimbalanga is a transgender woman, but because her identity was not recognized by the law, she was prosecuted for acts that only a man can be guilty of.

<sup>22</sup> Information on file with CEDEP.



The political leadership of Malawi strongly incites homophobia. In May 2010, President Mutharika stated publicly that members of the LGBT community are worse than dogs<sup>23</sup>. He has attempted to use the LGBT rights to distract from domestic criticism of his government's regime, including by blaming Malawi's current economic troubles on advocates of same-sex marriage. Indeed, the President has gone so far as to suggest that Western criticisms of the abuses of his regime should not be credited because, he argues, they are merely a thin veil for the same-sex marriage agenda. The notion that western donors are withholding funds because of the same-sex marriage question has created a violent and dangerous backlash against the LGBT community within Malawi and has led to several attempts to harm the security of LGBT rights advocates. Additionally, there have been attacks upon the LGBT community by the President's wife, Callista Mutharika, and by members of the Cabinet who have held press conferences condemning advocates for same-sex rights. In March 2010, the Ministry of Information issued a press release asking the Malawi people to "end" the debate on homosexuality, and the President has said that public and civil servants should not comment on the case of Tiwonge Chimbalanga and Steve Monjeza.

### **Discrimination Against Women**

In Malawi, women are subjected to discriminatory and unequal treatment in all areas of life. The following are some examples.

- ***Laws and Practices Related to Widows***

In 2011, the Malawi Parliament passed the *Deceased Estates (Wills, Inheritance and Protection) Act*<sup>24</sup> in order to address the problem of *property grabbing*, a phenomenon which adversely affects women<sup>25</sup>. While this law should ensure more robust inheritance rights for women, there is an urgent need for government and civil society engagement to ensure (1) that the general public is educated about the law; and (2) that the terms of the law are enforced.

- ***Draft Bills Related to Gender Equality***

The State of Malawi has undertaken some efforts to pass comprehensive legislation on gender equality<sup>26</sup>. However, despite a draft bill having been completed by the *Special Law Commission on Gender Equality* in 2009, there has been no action or deliberation on this bill in the Parliament of Malawi.

- ***Discrimination in Law: Citizenship and Women***

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<sup>23</sup> "Malawi Leader Says Homosexuals 'Worse Than Dogs,'" *Nyasa Times*, 16 May 2011. Available online at the Southern African Litigation Center at [http://www.southernafricalitigationcentre.org/news/item/Malawi\\_Malawi\\_leader\\_says\\_homosexuals\\_worse\\_than\\_dogs](http://www.southernafricalitigationcentre.org/news/item/Malawi_Malawi_leader_says_homosexuals_worse_than_dogs).

<sup>24</sup> *Deceased Estates (Wills, Inheritance and Protection) Act*, 2010.

<sup>25</sup> Ngeyi Kanyongolo, a University of Malawi law lecturer and chairperson of the Blantyre-based Women Lawyers Association of Malawi, defines *property grabbing* as "a practice whereby a widow is forcibly disposed of all the deceased property whatsoever or a larger part thereof, by relatives of the husband during sickness, funeral ceremony or immediately thereafter" ("Property Grabbing Impoverishes Widows," *IPS*, 8 October 2013, available online at <http://ipsnews.net/news.asp?idnews=20520>.)

<sup>26</sup> The Special Law Commission on Developing the Gender Equality Law.



Under Section 9 of the *Malawi Citizenship Act* (1966), a Malawian woman loses her national citizenship when she marries a non-Malawian man<sup>27</sup>. This is in direct contravention to both the *Constitution of the Republic of Malawi*<sup>28</sup> and the Committee's *General Comments* on Article 3<sup>29</sup>.

- ***Laws and Practices Related to Domestic Violence***

Although Malawi has enacted legislation on domestic violence<sup>30</sup>, the law remains underused and ineffective. Indeed, since the domestic violence law was enacted in 2006, there have been no indications that domestic violence has decreased. To the contrary, there is every reason to believe that the prevalence of domestic violence is at least the same and that there may even have been an increase in the number of domestic violence cases resulting in injury or death<sup>31</sup>. Furthermore, since its enactment, the Ministry of Gender has not conducted trainings on gender-based violence or undertaken to integrate the domestic violence law into other areas of law and policy in Malawi<sup>32</sup>. The *Malawi Law Commission on the Review of the Prevention of Domestic Violence* has been established to consider problems with the law in its current form<sup>33</sup>. It is important to note that spousal rape is not criminalized under the current Penal Code, which represents a serious oversight in Malawi's commitment to address domestic violence.

- ***Sex Work***

From September to November 2009, the Malawi Police Service engaged in a campaign of targeted arrests of women sex workers<sup>34</sup>. These women were assaulted, subjected to mandatory HIV testing, and prosecuted under charges of spreading venereal disease<sup>35</sup>. In the case of one woman sex worker living in the Mwanza district, the individual was given

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<sup>27</sup> Chapter 15:01 of the *Laws of Malawi* (2002).

<sup>28</sup> Section 24(2) of the *Constitution of the Republic of Malawi* states that "Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as-- (a) sexual abuse, harassment and violence; (b) discrimination in work, business and public affairs; and (c) deprivation of property, including property obtained by inheritance."

<sup>29</sup> General Comment No. 04: Equality between the sexes (Art. 3): 30/07/1981.

<sup>30</sup> *Prevention of Domestic Violence Act No.5 of 2006*.

<sup>31</sup> The shame and social stigma of being a survivor of domestic violence, compounded with few resources dedicated to domestic violence, mean that it is difficult to know with certainty the prevalence of domestic violence in women's lives in Malawi. However, anecdotal reports and the few media reports that exist paint a frightening picture of a severe problem. See for instance: "Man Kills Girlfriend over Affair," *Malawi Digest*, 7 July 2010, available online at <http://malawidigest.blogspot.com/2010/07/thyolo-man-kills-girlfriend-over-affair.html>. See also: "Man Kills Friend over Woman and Hides in Mozambique," *Club Mozambique*, available online at <http://www.clubofmozambique.com/solutions1/sectionnews.php?secao=international&id=20668&tipo=one>. See also the entire newspaper of the *Daily Times* 31 July 2009.

<sup>32</sup> This statement is based on the perceptions of human rights defenders and based on interviews with police officers working within the Victims Support Unit of the Malawi Police Services conducted between June and August 2010.

<sup>33</sup> The *Malawi Law Commission on the Review of the Prevention of Domestic Violence* was established under Section 132 of the *Constitution of the Republic of Malawi* with the mandate of reviewing laws and making recommendations relating to the repeal and amendment of laws.

<sup>34</sup> The *Daily Times* Newspaper. 1<sup>st</sup> October, 2009. Available online at: [http://www.arasa.info/index.php?option=com\\_content&view=article&id=142:protection-of-human-rights-of-sex-workers-is-key-to-the-hiv-response-in-malawi&catid=58:petitions&Itemid=58](http://www.arasa.info/index.php?option=com_content&view=article&id=142:protection-of-human-rights-of-sex-workers-is-key-to-the-hiv-response-in-malawi&catid=58:petitions&Itemid=58).

<sup>35</sup> Penal Code of Malawi, Article 192. It states that "any person who unlawfully or negligently commits does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be guilty of a misdemeanor."

twenty-four hours to relocate from the area<sup>36</sup>. Sex work, an occupation dominated by women workers, is not legally recognized in Malawi<sup>37</sup>. The lack of recognition of sex work as a legitimate form of labor in Malawi becomes a form of discrimination against women, because women who perform sex work are typically denied the rights and benefits of formal sector employment and subject to arbitrary arrest, increased risk of violence at the hands of state and non-state actors, and subject to social stigma.

## **Right to Life (Article 6)**

Article 6 of the Convention provides that every individual has the right to life, that no person should be arbitrarily deprived of life, and that in countries where the death penalty has not been abolished, such a sanction should be imposed only for the “most serious offences.” The *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (“the *Second Optional Protocol*”) was introduced for the purpose of “the abolition of the death penalty”<sup>38</sup>. In its General Comments, the Committee has stated that the imposition of the death penalty should be a “quite exceptional measure” and must only follow where all “procedural guarantees” have been observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence and minimum guarantees for the defence.<sup>39</sup> In the past twelve months, in its Concluding Observations, the Committee has stated that any imposition of the death penalty must be “in compliance with Article 14 of the Convention” which ensures to the accused a fair and impartial legal system.<sup>40</sup> It has further recommended to three states over the past year alone that they repeal their capital punishment laws.<sup>41</sup> In terms of extra judicial killings, the Committee has noted its grave concern at this practice and recommended that where specific allegations are made, the state must take appropriate action to ensure a prompt and impartial investigation<sup>42</sup>.

- **Death Penalty**

Section 16 of the *Constitution of the Republic of Malawi* provides that an individual sentenced to death under the *Penal Code of Malawi* shall not be arbitrarily deprived of life<sup>43</sup>.

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<sup>36</sup> Criminal Cases number 264 and 378 at Mwanza First Grade Magistrate Court.

<sup>37</sup> In Malawi, prostitution is not prohibited per se. Sections 145 and 146 of the *Penal Code* prohibit living off of earnings from prostitution by men and women. Section 147 of the *Penal Code* prohibits the keeping of brothels for purposes of prostitution. Therefore, an individual can only be accused of or prosecuted for living off of earnings from prostitution if the prosecution can prove that an individual employed, kept or controlled women for purposes of commercial sex work.

<sup>38</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights: Aiming at the Abolition of the Death Penalty*.

<sup>39</sup> General Comment No. 06: The right to life (art. 6): 30/04/1982.

<sup>40</sup> CCPR/C/ETH/1 25 July 2011 at para 19.

<sup>41</sup> Ibid; CCPR/C/KAZ/C/1, 21 July 2011 at para 12; CCPR/C/MNG/C/5, 2 May 2011, at para 6.

<sup>42</sup> CCPR/C/COL/C/6, 4<sup>th</sup> August 2010 at para 12.

<sup>43</sup> Section 16, Chapter 4, *Constitution of the Republic of Malawi*: “Every person has the right to life and no person shall be arbitrarily deprived of his or her life: Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she

Although the Malawi Constitutional Court recently held that the mandatory imposition of the death penalty is unconstitutional<sup>44</sup>, the death penalty is still applied at times, albeit inconsistently<sup>45</sup>. There are currently no set guidelines for death penalty sentences, and individuals who are convicted of murder continue to be executed periodically. While it is desirable that Malawi sign the *Second Optional Protocol* and follows through with the full abolition of the death penalty, at the very least, there is an urgent need for clear rules and procedures which state how the courts should sentence those convicted of murder.

- **Extrajudicial Killings**

There have been unprecedented numbers of extrajudicial killings by the police service in Malawi in recent years. In June 2008, the Reverend Chande Mhone died after being assaulted by police officers at an opposition United Democratic Front meeting in Lilongwe<sup>46</sup>. In November 2009, four individuals, including Robert Chima, Christopher Masamba and Hebert Ngulube were killed by the Kafukule Police Unit in Mzimba District<sup>47</sup>. In May 2010, police officers from Limbe and Ndirande Township killed Peter Chitaukele at his home in Ndirande Township, Blantyre<sup>48</sup>. (The reasons for his death remain unclear.) In January 2011, two individuals were killed by the police in Lilongwe. It is alleged that one was denied medical attention while in custody, even though he was suffering from bullet wounds, leading to his death. In September 2011, a student who was a critic of President Bingu wa Mutharika at Malawi Polytechnic, University of Malawi, was found dead. While the police insisted that the student committed suicide, the renowned Malawian pathologist, Dr. Charles Dzamalala, determined that the student was killed.<sup>49</sup> The police confirmed that the dead student was wanted by the police to answer charges of insulting the head of state, leading many to conclude that the police themselves were responsible for his death. These are just a small sampling of the many killings carried out by police<sup>50</sup>.

There has been little or no attempt by the Malawian authorities to prosecute, prevent or address extrajudicial killings by police. To the contrary, in January 2011, President Mutharika called upon the police to institute a “shoot to kill” policy for individuals suspected of theft<sup>51</sup>. Although this measure was criticized by the Chairperson of the Malawi Human

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has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.”

<sup>44</sup> *Kafantayeni v Attorney General*, Constitutional Case No 12 of 2005 [2007] MWHC 1 in which the Court stated that the mandatory imposition of the death sentence for murder with malice aforethought under Sections 209 and 201 of the Penal Code were contrary to the provisions of the Malawi Constitution.

<sup>45</sup> During the Universal Periodic Review of Malawi in November 2010, the Attorney General stated that Malawi will keep death penalty. “Malawi to Keep Death Penalty,” *Maravi Post*, 17 March 2011, online at <http://www.maravipost.com/malawi-politics/politics/4868-malawi-to-keep-death-penalty.html>.

<sup>46</sup> *The Daily Times*, June 2008.

<sup>47</sup> *The Daily Times*, November 2009. Story by Karen Msiska.

<sup>48</sup> *The Nation Newspaper*, May 2009. Story by Nthara.

<sup>49</sup> “Robert Chasowa was Assaulted – Autopsy,” *The Nation Newspaper*, 5 October 2011. Available online at [http://www.nationmw.net/index.php?option=com\\_content&view=article&id=25868:robert-chasowa-was-assaultedautopsy&catid=1:national-news&Itemid=3](http://www.nationmw.net/index.php?option=com_content&view=article&id=25868:robert-chasowa-was-assaultedautopsy&catid=1:national-news&Itemid=3). Robert Chasowa Autopsy Report available online at [http://www.mwnation.com/index.php?option=com\\_rokdownloads&view=file&Itemid=357&id=179:chasowa-post-](http://www.mwnation.com/index.php?option=com_rokdownloads&view=file&Itemid=357&id=179:chasowa-post-)

<sup>50</sup> In December 2010, three robbery suspects were killed in police custody in Kanengo, Lilongwe as a result of beatings and torture. In February 2011, a suspect died in Nthisi while in police custody. The Malawi Police Service claimed that the suspect hanged himself. In March 2011, a suspect died in police custody at Mulenga Police Unit in Zomba. The suspect is alleged to have been assaulted by the police.

<sup>51</sup> “Bingu wa Mutharika Calls for ‘Shoot to Kill’ Police Action,” *Africa Global Village*, 23 January 2011, available online at <http://www.africaglobalvillage.com/en/southern-africa/malawi/568-malawi.html>.

Rights Commission, John Kipto, the President responded by stating that robbers should not be entitled to find “solace” in the “misleading advice” of human rights bodies<sup>52</sup>.

The events of the 20<sup>th</sup> and 21<sup>st</sup> of July 2011 represent a particularly egregious violation of Article 6 of the Covenant. The killing of at least eighteen unarmed political protestors by police officers underscores how little regard the Malawi authorities currently have for their Convention obligations<sup>53</sup>. While the dead were labeled thieves by the government, the police responsible for their murder were later awarded financial bonuses<sup>54</sup>.

**Prohibition against Torture and Cruel, Inhuman or Degrading Treatment or Punishment; Right to Liberty and Security of Person; Treatment of Persons Deprived of Their Liberty  
(Articles 7, 9, 10, and 13)**

The Convention, particularly by its Articles 7, 9 and 10(1), recognizes the right of every individual to be free from torture, arbitrary arrest and cruel, inhuman or degrading treatment or punishment. In its General Comments on Article 7, the Committee has noted that States have a positive obligation to provide specific training for law enforcement officers and must hold responsible all those who violate the prohibition on torture.<sup>55</sup> The time and place of all interrogations must be recorded, together with the names of all those present, and this information should be available for purposes of judicial or administrative proceedings. Where there has been a breach of Article 7, a court must refuse to accept any evidence that results there from.<sup>56</sup> By its General Comments on Article 10, the Committee has stated “treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule...[which] must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>57</sup> The Committee has used its recent Concluding Observations to call for an end to “enforced disappearance”, “arbitrary detention,”<sup>58</sup> “torture” and “forced displacement.”<sup>59</sup> It has reaffirmed that a judge should not admit evidence obtained under torture,<sup>60</sup> and where allegations of mistreatment in detention have been made, the State must put in place the appropriate structures to ensure that all claims are robustly and

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<sup>52</sup> “Ntaba Attacks MHRC for Faulting Bingu’s ‘Shoot-to-Kill’ Notion: Why are They Siding with Criminals?,” *Malawi Voice*, 23 January 2011. Available online at <http://www.malawivoice.com/latest-news/ntaba-attacks-mhrc-for-faulting-bingu%E2%80%99s-shoot-to-kill-notion-why-are-they-siding-with-criminals/>.

<sup>53</sup> Letter to President of Malawi RE: SECURITY FORCES’ USE OF FIREARMS AGAINST PROTESTORS from Amnesty International, Council on Global Equality, Human Rights First, International Commission of Jurists, International Gay and Lesbian Human Rights Commission, Southern African Litigation Centre. See: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1422.html> (consulted 06/10/2011).

<sup>54</sup> *The Daily Times* reported the awarding of K60 000 to each officer who participated in the July 20-21, 2011 crackdown.

<sup>55</sup> General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/1992.

<sup>56</sup> *Ibid* at paras 11 and 12.

<sup>57</sup> General Comment No. 21: Replaces General Comment 9 concerning humane treatment of persons deprived of liberty (Art. 10): 10/04/1992 at para 4.

<sup>58</sup> CCPR/C/TGO/CO/4, 18 April 2011 at para 17.

<sup>59</sup> CCPR/C/ETH/CO/1, 25 July 2011 at para 16.

<sup>60</sup> CCPR/C/KAZ/CO/1 21 July 2011, at para 22.

transparently investigated.<sup>61</sup>

Although the environment for human rights has improved overall since the adoption of the current constitution in 1994, arbitrary arrest; torture and cruel, inhuman or degrading treatment or punishment; as well as the mistreatment of those deprived of their liberty remains widespread. The police, for instance, routinely arrest a suspect's relative in an attempt to draw a wanted individual out of hiding<sup>62</sup>. Furthermore, in instances of arbitrary arrest and torture, the Government of Malawi has shown itself unwilling to systematically and unequivocally hold perpetrators accountable or to offer relief.

There have been complaints of torture in numerous police stations across Malawi, including Karonga, Mzuzu, Ntchisi, Nkhotakota, Salima, Lilongwe, Kanengo, Kawale, Limbe, Bvumbwe, Blantyre, Chikhwawa and Mwanza<sup>63</sup>. For instance, in 2006, Mr. Kalasi of Lilongwe was severely beaten and suffered a dislocated knee when in custody at a police station in Kawale. He had been arrested on suspicion of stealing copper wires belonging to Malawi Telecommunications Limited<sup>64</sup>. Similarly, in 2010, Mathews Mkwate was beaten on the buttocks with a hot panga knife at Lilongwe police station. He suffered injuries so severe that he could not sit down, and during his trial at Lilongwe Magistrate Court, Mr. Mkwate had to crawl on the floor because he was unable to walk<sup>65</sup>. There are numerous other accounts which illustrate not only the frequency but also the violence and brutality of attacks on individuals while in police custody<sup>66</sup>. While NGOs and lawyers periodically access and monitor detention facilities, they are powerless to influence the treatment of the individuals incarcerated<sup>67</sup>.

In the past eighteen months, there have been two particularly distressing incidents of police brutality and inhumane treatment. First, during the 20<sup>th</sup> and 21<sup>st</sup> of July 2011 marches, civil society leaders including Billy Mayaya, Peter Chinoko, Undule Mwakasungula<sup>68</sup> were all viciously assaulted. Mr. Chinoko's injuries were so serious that he had to be treated with a plaster of paris<sup>69</sup> ("cast"). Second, in July 2010, the police arrested six Somali refugees. They were detained for three days, and then deported on the 17<sup>th</sup> of July. When Ethiopia refused to accept the individuals, they were returned to Somalia and kept in an airport police cell for four months. During that period, the men obtained a release order from the High Court of

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<sup>61</sup> CCPR/C/KAZ/CO/1 21 July 2011, at para 14; CCPR/C/BGR/CO/3 25 July 2011, at para 8.

<sup>62</sup> In 2008, to force an individual to present himself to police on allegations of treason, the police arrested his pregnant wife. (Information on file with CEDEP.)

<sup>63</sup> While it is difficult to estimate the number of cases of torture by police in Malawi, it is clear that torture is routine and widely used.

<sup>64</sup> *The Republic of Malawi v Kalasi*, Lilongwe Magistrate Court, 2006.

<sup>65</sup> *The Republic of Malawi v Mkwate and Others*, Lilongwe Magistrate Court, before Her Worship Nthara, 2010.

<sup>66</sup> In March 2011, Mr Pego was severely beaten at Chipoka Police Station and eventually died. In July 2011, police officers from Kawale Police Unit in Lilongwe severely assaulted Mr Wasili of Area 23 in the city of Lilongwe when they went to arrest him on charges of possession of stolen property. During the arrest, Mr Wasili tried to explain that the property belonged to a known person. By the time the police realized that they had targeted the wrong person, Mr. Wasili had several wounds on his body, could not move without the support of a stick and had to be hospitalized at Kamuzu Central Hospital.

<sup>67</sup> Interview with Gift Trapence via email on 7 October 2011. Interview on file with the International Gay and Lesbian Human Rights Commission.

<sup>68</sup> Interview with Undule Mwakasungula and Gift Trapence, 20 July 2011, via phone, on file with the International Gay and Lesbian Human Rights Commission (IGLHRC).

<sup>69</sup> Picture available of Mr. Peter Chinoko.



Malawi, but the immigration authorities refused to comply. When finally removed from custody, the individuals were placed in *no man's land* between Malawi and Zambia and eventually had to flee to Mozambique. The Government refused to comment on the case<sup>70</sup>.

The Committee's General Comment 15 on Article 13 provides that "[a]n alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one." Furthermore, the Comment provides that "[a]liens have the full right to liberty and security of the person," and if lawfully deprived of their liberty, "they shall be treated with humanity and with respect for the inherent dignity of their person."<sup>71</sup>

While the specific rights of article 13 only protect those aliens who are lawfully in the territory of a State party, the Committee's General Comment 15 notes, "However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13."<sup>72</sup> This provision is particularly relevant to asylum seekers, who are "rarely in a position to comply with the requirements of legal entry."<sup>73</sup> Article 31(1) of the Convention Relating to the Status of Refugees prohibits the imposition of penalties on refugees whose entry or presence within a country is illegal, so long as there is good cause for such irregular entry or presence.<sup>74</sup>

In the face of such extensive torture and abuse of individuals in state custody, there is no question that the State must take seriously the need to hold officers accused of torture accountable. Though there are occasionally examples of accountability, it appears that state authorities are rarely held accountable for torture<sup>75</sup>.

- ***Laws and Practices Related to Domestic Violence***

Although Malawi has enacted legislation on domestic violence<sup>76</sup>, the law remains underused and ineffective. Indeed, since the domestic violence law was enacted in 2006, there have been no indications that domestic violence has decreased. To the contrary, there is every reason to believe that the prevalence of domestic violence is at least the same and that there may even have been an increase in the number of domestic violence cases resulting in injury or death<sup>77</sup>.

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<sup>70</sup> Interview with the wife of Ali Muhammad Jamma, one of the refugees as reported by Zodiak Broadcasting Station. UNHCR Malawi is aware of this matter.

<sup>71</sup> General Comment No. 15: The Position of Aliens under the Covenant (1986).

<sup>72</sup> *Id.* at para. 9.

<sup>73</sup> Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26); Annex II (comments p. 57).

<sup>74</sup> Generally speaking, any individual who has not secured refugee protection in another country has "good cause" for irregular entry or presence. *See e.g.*, Guy Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 3.1 (UNHCR ed., 2003).

<sup>75</sup> For example, according to Gift Trapence, the police officers who shot dead a driver of charcoal were convicted and sentenced to 14 years imprisonment with hard labour.

<sup>76</sup> *Prevention of Domestic Violence Act No.5 of 2006*.

<sup>77</sup> The shame and social stigma of being a survivor of domestic violence, compounded with few resources dedicated to domestic violence, mean that it is difficult to know with certainty the prevalence of domestic violence in women's lives in Malawi. However, anecdotal reports and the few media reports that exist paint a frightening picture of a severe problem. *See for instance*: "Man Kills Girlfriend over Affair," *Malawi Digest*, 7 July 2010, available online at <http://malawidigest.blogspot.com/2010/07/thyolo-man-kills-girlfriend-over-affair.html>. *See also*: "Man Kills Friend over Woman and Hides in Mozambique," *Club Mozambique*, available

Furthermore, since its enactment, the Ministry of Gender has not conducted trainings on gender-based violence or undertaken to integrate the domestic violence law into other areas of law and policy in Malawi<sup>78</sup>. The *Malawi Law Commission on the Review of the Prevention of Domestic Violence* has been established to consider problems with the law in its current form<sup>79</sup>. It is important to note that spousal rape is not criminalized under the current Penal Code, which represents a serious oversight in Malawi's commitment to address domestic violence.

## **Prohibition of Arbitrary or Unlawful Interference with Privacy, Family, Home or Correspondence (Article 17)**

Article 17 of the Covenant provides for the right to privacy. In its *General Comments*, the Committee has stated that Article 17 grants the right, *inter alia*, to be free from interference with one's home, reputation or personal information<sup>80</sup>. Specifically, Article 17 provides that, "(1) No one shall be subjected to [...] unlawful attacks on his honor and reputation," and "(2) Everyone has the right to the protection of the law against such interference or attacks." The Human Rights Committee's General Comment No.16 with respect to article 17 of the Covenant explains that the right to be free from unlawful reputational attacks "is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons."<sup>81</sup>

- ***Unlawful Searches***

Although the *Malawi Criminal Procedure and Evidence Code* mandates that police obtain a search warrant before searching or seizing an individual's property, Parliament has recently created an exception to this rule in a 2010 amendment to the Police Act<sup>82</sup>. While the amendment also establishes an Independent Complaints Commission, the reality is that search without warrant is commonplace in Malawi<sup>83</sup>.

- ***HIV/AIDS Status***

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online at [http://www.clubofmozambique.com/solutions1/sectionnews.php?](http://www.clubofmozambique.com/solutions1/sectionnews.php?secao=international&id=20668&tipo=one)

[secao=international&id=20668&tipo=one](http://www.clubofmozambique.com/solutions1/sectionnews.php?secao=international&id=20668&tipo=one). See also the entire newspaper of the *Daily Times* 31 July 2009.

<sup>78</sup> This statement is based on the perceptions of human rights defenders and based on interviews with police officers working within the Victims Support Unit of the Malawi Police Services conducted between June and August 2010.

<sup>79</sup> The *Malawi Law Commission on the Review of the Prevention of Domestic Violence* was established under Section 132 of the *Constitution of the Republic of Malawi* with the mandate of reviewing laws and making recommendations relating to the repeal and amendment of laws.

<sup>80</sup> General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) : 08/04/1988.

<sup>81</sup> ICCPR, General Comment No. 16, The right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17), ¶ 1 (1988) UN Doc. No CCPR/C/21/Rev.1/Add.7.

<sup>82</sup> Since this amendment was made, police can conduct a search in any public or private property and obtain a warrant from the court afterwards. Police Amendment Act.

<sup>83</sup> For example, the Malawi Police Service has roadblocks in all major cities and border posts where people are searched on daily basis without a search warrant.



In a 2009 report<sup>84</sup>, the Malawi Law Commission proposed the *HIV/AIDS Prevention and Management Bill* which would mandate testing for all pregnant women, military recruits, police and prison officer recruits, Immigration Office recruits, domestic workers and sex workers<sup>85</sup>. The Bill is currently at cabinet level and soon will be subject to debate in the National Assembly. Mandatory testing is a serious concern, as is the confidentiality of individuals' HIV status. For instance, fourteen women subjected to mandatory HIV tests were exposed in an article in the *Daily Times*, which printed their test results.<sup>86</sup>

## **Freedom of Opinion and Expression (Article 19)**

Article 19 of the Covenant affirms the rights of free expression and opinion. In its most recently published General Comments, the Committee stated that both of these ideas represent “the foundation stone for every free and democratic society.”<sup>87</sup> All domestic laws should uphold freedom of expression, and media within the state must be able to operate without “censorship or restraint.” Freedom of opinion extends to all areas of society, including “political discourse,” “discussion of human rights,” and “journalism.” In the past twelve months, the Human Rights Committee has noted its strong concern for the State blocking of internet media sources, as well as the verbal and physical harassment of journalists and human rights defenders.<sup>88</sup>

Specifically, Article 19 asserts that, “everyone shall have the right to hold opinions without interference; and that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.” The freedoms to hold and express opinions have been enshrined repeatedly by the Human Rights Committee as central to the human rights system and the ICCPR. In General Comment No. 22, the Committee states that Article 19.1 includes the right of everyone to hold opinions without interference and that this right is unconditional.<sup>89</sup> The Human Rights Committee stated in General Comment No. 25 that a commentary on public issues without censorship or restraint is vital to informed public opinion.<sup>90</sup>

- **Actions of the President Against the Opposition**

The President of Malawi has been at the forefront of efforts within Malawi to curtail freedom of opinion and expression. In March 2011, he called upon his supporters to deal with non-governmental organizations, members of the political opposition, and anybody who disagreed

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<sup>84</sup> Malawi Law Commission. Available online at <http://www.lawcom.mw/index.php/reports>.

<sup>85</sup> Section 19 of the draft *HIV and AIDS (Prevention and Management) Bill*.

<sup>86</sup> The Daily Times Newspaper. 1<sup>st</sup> October, 2009. Available online at: [http://www.arasa.info/index.php?option=com\\_content&view=article&id=142:protection-of-human-rights-of-sex-workers-is-key-to-the-hiv-response-in-malawi&catid=58:petitions&Itemid=58](http://www.arasa.info/index.php?option=com_content&view=article&id=142:protection-of-human-rights-of-sex-workers-is-key-to-the-hiv-response-in-malawi&catid=58:petitions&Itemid=58).

<sup>87</sup> CCPR/C/GC/34, 21 July 2011.

<sup>88</sup> CCPR/C/KAZ/CO/1 21 July 2011, at para 25; CCPR/C/ETH/1 25 July 2011 at para 24.

<sup>89</sup> ICCPR, General Comment No. 22, Right to Freedom of Thought, Conscience and Religion, ¶ 3, (1993) UN Doc. CCPR/C/21/Rev.1/Add.4.

<sup>90</sup> ICCPR, General Comment No. 25, ¶ 12, The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service, *supra* note 163.

with him<sup>91</sup>. He equated criticism of his government with persons attacking the father of a household as the older children simply watch on. The President has said that his supporters should defend him today just as the notorious Malawi Young Pioneers did during the Malawi Congress party regime between 1964 and 1994. (Domestically, this is well-understood code. The Young Pioneers were well known for their harassment and unlawful detention of political opposition and civil society.) In July 2011, the President threatened to “smoke out” opposition and NGO leaders for leading demonstrations on the 20<sup>th</sup> and 21<sup>st</sup> of July<sup>92</sup>. These threats were later repeated in August 2011 at an Agricultural Fair, where the President suggested that he would wage a war against his critics<sup>93</sup>. On 19<sup>th</sup> July, 2011, the youth wing of the ruling Democratic Progressive Party (DPP), known as the ‘cadets,’ took to the streets with panga knives and threatened to ‘deal with’ anyone who criticized the actions of the President.

- **Threats to NGOs and Human Rights Defenders**

The situation of NGOs and human rights defenders in Malawi is of particular concern. In March 2011, the offices of the Center for Human Rights and Rehabilitation (CHRR) were attacked by unknown individuals<sup>94</sup>. Chijere Mwase, an employee of the Ministry of Information, has physically threatened both the acting national coordinator of the Human Rights Consultative Committee (HRCC), Reverend Mac Donald Sembereka, and the Executive Director of CHRR, Undule Mwakasungula<sup>95</sup>. In September 2011, a personal house in Balaka belonging to Reverend Sembereka, as well as a house belonging to opposition politician Salim Bagus were set on fire using petrol bombs<sup>96</sup>. In the same month, a team of six DPP cadets driving in a Toyota Hilux double cab with registration number ZA 9622 attacked Dennis Bisika, an activist in Zomba at the Ndindeya Motel. He sustained injuries to his legs, arms and knees during the incident<sup>97</sup>. These events are just a small sampling of the widespread, targeted abuse that has been directed at NGO and human rights defenders in Malawi<sup>98</sup>.

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<sup>91</sup> The President addressed a political rally in Blantyre at Kamuzu Stadium on 6<sup>th</sup> March, 2011 where he stated this. His implication was clear: supporters should use violence to silence dissent. It was reported by *The Nation* newspaper on March 7 with a story titled “DEAL WITH MY CRITICS, BINGU TELLS DPP RALLY” with a sub-headline “says demonstrators should pay fees to get permission.”

<sup>92</sup> The President held a function where police graduates were pass out on 22<sup>nd</sup> July, 2011 in Zomba Malawi where he said this. The President’s remarks were reported by *The Nation* and *The Daily Times* and almost all private radio stations in Malawi.

<sup>93</sup> This was when the President was opening a Agriculture Fair on 25<sup>th</sup> August, 2011 at Trade Fair Grounds in Blantyre. The President’s remarks were reported by *The Nation* and *The Daily Times* and almost all private radio stations in Malawi.

<sup>94</sup> Interview with the Executive Director of CHRR, Mr Undule Mwakasungula

<sup>95</sup> This was reported by *The Nation* and *The Daily Times* and almost all private radio stations in Malawi.

<sup>96</sup> This was reported by *The Nation* and *The Daily Times* and almost all private radio stations in Malawi.

<sup>97</sup> This was reported by *The Daily Times*, Zodiak Broadcasting Station and Capital Radio.

<sup>98</sup> In addition to the above incidents, NGO leaders Dorothy Ngoma of the National Organisation of Nurses and Midwives (NONM); Benedicto Knodowe of the Civil Society Coalition for Quality Basic Education (CSCQBE); Rafik Hajat of the Institute for Policy Interaction (IPI); Undule Mwakasungula of CHRR; and Dr. Jessie Kwabwila Kapasula, Acting President of the Chancellor College Academic Staff Union (CCASU) all received death threats. The same intimidation and death threats were targeted at the Chairperson of Malawi Human Rights Commission (MHRC), Mr. John Kapito, and his family. MHRC is a national human rights institution. On 25<sup>th</sup> September 2011, twenty unknown thugs attacked the house of Mr. Peter Chinoko who is National Coordinator for the Catholic Commission for Justice and Peace (CCJP) Lilongwe dioceses. Mr. Chinoko has been one of the key NGO leaders championing for political and economic reforms in Malawi.

- **Attacks on Journalists**

There is a sustained attack on press freedom in Malawi. In 2005, a journalist Mabvuto Banda of *The Nation Newspaper* and Raphael Tenthani of the British Broadcasting Company (BBC) were both arrested for writing that President Bingu wa Mutharika was not spending nights at the State House because it was haunted by ghosts<sup>99</sup>. Another journalist, Horace Nyaka, who worked for the Vice-President, was arrested on suspicion of having conspired with the two journalists to write the story<sup>100</sup>. In February 2008, Mike Chipalasa of the *Daily News* was arrested on a charge of publishing false information. Mr. Chipalasa had quoted the leader of the Opposition in Malawi, John Tembo, who alleged that the Government of Malawi had hired rigging experts for the 2009 Presidential and Parliamentary elections<sup>101</sup>. In September 2011, a journalist named Ernest Mawhayo working for Catholic Montfort Media was arrested for taking photos of the magnificent house built by the President at Ndata Farm in Thyolo<sup>102</sup>. These stories and the countless others like them<sup>103</sup> illustrate just how far the ruling class in Malawi is willing to go in order to retain control of the media.

During the 19<sup>th</sup> and 20<sup>th</sup> of July 2011 demonstrations, a total of twenty-two journalists were beaten and assaulted by the Malawi Police Service. Two journalists, Collins Mtika and Vitima Ndovi were arrested and spent several days in custody. Most journalists had their cameras confiscated, broken and their writing materials thrown away. One photo-journalist, Amos Gumulira, was hospitalised for seven days because of the serious head injuries he suffered as a result of beating by Malawi Police<sup>104</sup>.

- **Media Censorship**

In April 2007, the Malawi Communications Regulatory Authority (MACRA) banned all private media outlets from broadcasting political rallies live without its prior permission<sup>105</sup>. This move primarily targeted the main private radio stations, Capital Radio, Joy Radio, and Zodiac Broadcasting Station. MACRA claimed it acted in order to curb the airing of “hate

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<sup>99</sup> This was reported by both *The Nation* and the BBC.

<sup>100</sup> This was reported by *The Daily Times* and by the Zodiac Broadcasting Station. See also the article on [http://www.ifex.org/malawi/2005/03/18/journalists\\_ordered\\_to\\_report\\_to/](http://www.ifex.org/malawi/2005/03/18/journalists_ordered_to_report_to/).

<sup>101</sup> This was reported by *The Daily Times* and the Zodiac Broadcasting Station.

<sup>102</sup> This was reported by *The Nation* and Zodiac Broadcasting Station.

<sup>103</sup> In 2007, a journalist, Dickson Kashoti, working for a local newspaper, the *Daily Times* was assaulted by a member of parliament Mr. Njobvuyalema. The Member of Parliament was later arrested and prosecuted on charge of assault. In March, 2008 another journalist Wanangwa Tembo was arrested for taking pictures without permission. Tembo was arrested when he started taking pictures of a mob of people who had come to see a police officer being arrested by the Anti Corruption Bureau (ACB). In May, 2008, a journalist Maxwell Nga’ambi formerly of a local newspaper, the *Nation* was arrested by prison authorities for trying to interview a jailed politician Mr Sam Mpasu. He charged with an offence of giving false information to prison authorities but was acquitted. In November, 2010, Mike Chipalasa again had to be rescued by police when the ruling party, DPP, wanted to beat him for asking the President what was perceived to critical questions. This was when the State President was addressing a press conference on arrival from outside Malawi. In January, 2011 a journalist for *Weekend Times* Kandani Ngwira was arrested for harassing a member of parliament. Police dropped the charges saying it was mistaken identity.

<sup>104</sup> This was reported by *The Nation*.

<sup>105</sup> This was reported by *The Daily Times* and private radio stations.

messages,” even though there was no evidence to support this accusation<sup>106</sup>. In 2008, a private radio station, Joy Radio, was closed by MACRA and its licence was revoked. The station was owned by former President, Dr. Bakili Muluzi. It remained closed for several months before a Court ruled that the licence should be returned<sup>107</sup>.

The Parliament has amended Section 46 of the *Penal Code of Malawi* so that the Minister for Information may prohibit the publication or importation of materials that he or she believes to be contrary to the public interest. With no clear guidelines as to what constitutes a publication contrary to the public interest, Section 46 is a sweeping power for the minister to stifle freedom of opinion and ban all publications which are critical of the current ruling class<sup>108</sup>.

### **Freedom of Assembly and Association (Articles 21 and 22)**

Articles 21 and 22 of the Covenant provide for the right of peaceful assembly and association. Although the Committee has not issued General Comments on these topics, it has used its Concluding Observations to underline their importance. In particular, the Committee has criticized laws which require state sanctioning of assemblies<sup>109</sup>, which force people to assemble in inaccessible areas,<sup>110</sup> and which prolong assembly appeal procedures to the extent that the right is thus void.<sup>111</sup>

The Human Rights Committee has denounced attacks on demonstrations and obstacles to peaceful protest as violations of Article 21. In Its concluding observations on Argentina, the Committee recommended that “[a]ttacks against human rights defenders and persons participating in peaceful demonstrations should be promptly investigated and the perpetrators disciplined or punished as required” and that the State Party provide information on measures taken in its next report.<sup>112</sup>

With respect to Article 22 of the Covenant, the Committee has reiterated concern about reports of cases of intimidation and harassment of human rights activists by the authorities and stated that, “the free functioning of non-governmental organizations is essential for the protection of human rights.”<sup>113</sup> Political rights, guaranteed in Article 25, include the right and the opportunity, without any distinctions as to any rights described in Article 2, including political or other opinion, and without unreasonable restrictions, to take part in the conduct of

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<sup>106</sup> This was reported by private radio stations and *The Daily Times* quoting MACRA spokesperson Zadziko Mankhambo.

<sup>107</sup> Media Report and Court Proceedings. This was reported by *The Nation* and *The Daily Times*.

<sup>108</sup> Media Report and Court Proceedings. It was reported by *The Nation* and *The Daily Times* quoting the gazetted law and the former Information Minister Vuwa Kaunda and also the Media Institute of Southern Africa, Malawi Chapter.

<sup>109</sup> CCPR/C/JOR/C/4, 18 November 2011 at para 15.

<sup>110</sup> CCPR/C/KAZ/C/1, 21 July 2011 at para 26.

<sup>111</sup> CCPR/C/POL/C/6, 15 November 2010 at para 23.

<sup>112</sup> Human Rights Committee, Concluding Observations, Argentina, ¶ 13, (2001) UN Doc. CCPR/56/40.

<sup>113</sup> Human Rights Committee, *Concluding Observations, Belarus, (1998)* ¶ 19, UN doc. CCPR/C/79/Add.86.

public affairs.<sup>114</sup> Because freedom of expression, assembly, and association are essential conditions for the effective exercise of the right to vote and must be fully protected, the Human Rights Committee directs States to take positive measures to overcome limitations.<sup>115</sup>

Additionally, the Committee on Economic, Social and Cultural Rights has also considered freedom of assembly, stating that it is essential to the enjoyment of other rights, which exist under that Convention<sup>116</sup>.

In the past six months, there has been an egregious violation of the right to free assembly in Malawi. The high watermark was reached on 20<sup>th</sup> and 21<sup>st</sup> of July, 2011 when the Government brutally cracked down upon and suppressed protests aimed at institutional corruption, inefficiency and human rights violations<sup>117</sup>. In the weeks leading up to the demonstrations, the President had been attempting to use legal channels in order to prohibit the protesters from assembling<sup>118</sup>. On 19<sup>th</sup> July, 2011, youth members of the ruling DPP party, known as the cadets, took to the streets with Panga Knives and threatened to ‘deal with’ anyone who criticised the President.<sup>119</sup>

During the actual demonstrations on 20<sup>th</sup> and 21<sup>st</sup> July, a total of eighteen unarmed protesters were killed<sup>120</sup>. Eight individuals were shot by security forces in the northern city of Mzuzu. In that town alone, 44 people, including six children, were treated for gunshot wounds at the Central Hospital<sup>121</sup>. Other protestors were killed after police used teargas on demonstrators in Lilongwe, the capital, and Blantyre<sup>122</sup>.

Civil society leaders and human rights defenders were particular targets for the police as they assembled with the protesters. On 20<sup>th</sup> July, 2011 Billy Mayaya, Peter Chinoko and Undule Mwakasungula were all assaulted<sup>123</sup>. Mr. Chinoko’s injuries were so serious that he had to be treated with plaster of paris (“cast”). There were also concerted attacks on journalists who attempted to cover or publicise the demonstrations. Collins Mtika and Vitima Ndovi were each arrested and spent several days in custody. The majority of journalists had their cameras broken, and their materials for taking notes were thrown away. One photographer, Amos Gumulira, was hospitalised for seven days because of the serious head injuries which he suffered.

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<sup>114</sup> ICCPR, Art. 25 (1966) U.N. Doc.A/6316.

<sup>115</sup> ICCPR, General Comment No. 25, ¶ 12, The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service, *supra* note 163.

<sup>116</sup> The right to the highest attainable standard of health : 08/11/2000. E/C.12/2000/4. (General Comments), at para 3.

<sup>117</sup> Letter to President of Malawi RE: SECURITY FORCES’ USE OF FIREARMS AGAINST PROTESTORS from Amnesty International, Council on Global Equality, Human Rights First, International Commission of Jurists, International Gay and Lesbian Human Rights Commission, Southern African Litigation Centre. See: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1422.html> (consulted 06/10/2011).

<sup>118</sup> See: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1422.html> (consulted 06/10/2011).

<sup>119</sup> Letter to President of Malawi RE: SECURITY FORCES’ USE OF FIREARMS AGAINST PROTESTORS from Amnesty International, Council on Global Equality, Human Rights First, International Commission of Jurists, International Gay and Lesbian Human Rights Commission, Southern African Litigation Centre. See: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1422.html> (consulted 06/10/2011).

<sup>120</sup> *Ibid*

<sup>121</sup> See: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1422.html> (consulted 06/10/2011).

<sup>122</sup> See: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1422.html> (consulted 06/10/2011).

<sup>123</sup> Interview with Mr. Mwakasungula (on file with CEDEP and CHRR).



In the immediate aftermath of the protests, the President took a number of further steps to undermine the ability of individuals to peacefully assemble in opposition. In late July 2011, he threatened to “smoke out” opposition and NGO leaders who been a part of the earlier demonstrations<sup>124</sup>. He repeated these threats in August and suggested that he would begin to wage war against his critics.<sup>125</sup> Far from sanctioning the police officers who had been involved in the July killings, the President rewarded their acts with a financial bonus.

## RECCOMENDATIONS

- Malawi should clarify the extent to which the Covenant may be invoked before the national courts, and should ensure that individuals have full and effective access to their Covenant rights within the domestic legal system.
- Malawi should pass comprehensive gender equality legislation. In addition, it should put in place the appropriate structures and education to ensure that the 2011 inheritance legislation and the domestic violence laws are observed and enforced.
- Malawi should repeal those portions of the *Citizenship Act* which deprive Malawi women of their citizenship where they marry a non-Malawi man.
- The Malawi government should provide gender-sensitive trainings for law enforcement officers, prosecutors and judges.
- Malawi should sign the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* and follow through with the abolition of the death penalty. In the alternative, Malawi should provide clear guidelines as to the circumstances in which an individual convicted of murder will be put to death.
- Malawi should take all necessary steps to ensure that members of the national security and police forces do not engage in the extra judicial killing of individuals. Where an allegation of extra judicial killing is made, Malawi should ensure that there are the appropriate structures to promptly and impartially investigate the claims, and to bring the offending officers to justice should the allegations be substantiated.
- Malawi should ensure that individuals are not subject to arbitrary arrest or detention. Where an individual is taken into police custody, Malawi should ensure that he or she is guaranteed his or her Covenant rights, most particularly the rights to be free from torture and cruel, inhuman or degrading treatment.
- Where an allegation of torture or cruel, inhuman and degrading treatment is made, Malawi must ensure that there are the appropriate structures to promptly and impartially investigate the claims, and to bring the offending officers to justice should the allegations be substantiated.

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<sup>124</sup> Function for graduating police officers on 22<sup>nd</sup> July in Zomba, Malawi

<sup>125</sup> Opening of Agricultural Fair on 25<sup>th</sup> August, 2011 at the Trade Fair Grounds in Blantyre

- Malawi should repeal all laws which criminalize consensual sexual intercourse between individuals of the same sex.
- The President of Malawi and members of the Cabinet should refrain from using language which is likely to incite discrimination, prejudice or hatred of vulnerable journalists, human rights defenders, the political opposition, the LGBT community, and/or any again any other group.
- Essential to the prohibition of extra-judicial killings, torture and cruel, inhuman or degrading treatment is the operation of an Independent Police Complaints Commission. Malawi should ensure that such a Commission exists within the State and that it can work impartially and free from pressure by the legislative and executive branches of Government.
- Malawi should respect and uphold the privacy rights of each individual. In particular, Malawi should ensure that individual's property shall not be searched without a valid warrant and that individuals shall not be arbitrarily forced to submit to HIV/AIDS testing.
- Malawi should ensure that members of the political opposition are entitled to freely express their opinions without fear of Government reprisal, particularly the threat of physical violence.
- Malawi should ensure that human rights defenders are free to operate within the State, without harassment from the President or members of his government and free from the threat of physical violence.
- Malawi should ensure freedom of the media. Journalists must be free to write and communicate without fear of reprisal, particularly the threat of physical violence. Malawi should repeal the recent amendment to Article 46 of the *Penal Code of Malawi*, and ensure that the President and members of his Government do not ban media publications for mere political reasons.
- Where an allegation of intimidation or physical violence has been made by a member of the opposition, human rights defender or journalist, Malawi must ensure that there are the appropriate structures to promptly and impartially investigate the claims, and to bring the offending individuals to justice should the allegations be substantiated.
- Malawi should ensure that individuals have the right to peacefully assemble, irrespective of whether they gather to support or oppose the President and members of his government.
- Malawi should ensure that the events of 21<sup>st</sup> and 22<sup>nd</sup> Jof uly, 2011 are promptly and impartially investigated. Where it is found that a police or security officer breached the law or the terms of the Covenant, Malawi should ensure that he or she is brought to justice.