

# **CENTRE FOR HUMAN RIGHTS AND REHABILITATION**



## **MALAWI:**

### **Submission to the UN Universal Periodic Review**

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## **Executive summary**

In this submission, Centre for Human Rights and Rehabilitation provides information under sections B, C and D as stipulated in the *General Guidelines for the Preparation of Information under the Universal Periodic Review*<sup>1</sup>. Most of the information presented in this report were issues of concern from 20 representatives of civil society groups expressed at a CSO meeting on the UPR which was held on 25<sup>th</sup> March 2010.<sup>2</sup>

This report has three sections covering the following areas:

- Section B highlights CHRR's concerns about the status of international human rights law, restrictions on press freedom and the right to privacy.
- Section C highlights CHRR's concerns about torture and other ill-treatment; death in custody; unlawful arrest and detention, violations of the rights to freedom of expression, association, the media and assembly; attacks on journalists and human rights defenders, right to health, and harassment and persecution based on sexual orientation or identity; and finally,
- In section D, CHRR makes a number of recommendations for action by the government of Malawi to address the areas of concern.

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<sup>1</sup> See Human Rights Council Decision 6/102, Follow-up to Human Rights Council resolution 5/1, section I adopted 27 September 2007

<sup>2</sup> List of participants to the meeting is annexed.

## **B. Normative and institutional Framework of the State**

### **The application and relevance of international human rights law in Malawi.**

The 1994 Constitution currently in force, unlike its predecessors, guarantees a broad range of rights encompassing both civil and political rights, some economic, social and cultural rights and the right to development. Malawi has also ratified several international human rights treaties such as the ICCPR, ICESCR, CEDAW, CRC, ICERD, CAT and the African Charter. However, for international treaties to form part of Malawian law, ratification through an Act of Parliament is required. In this regard, CHRR is concerned that, while Malawi is a party to many international treaties, it has not as rule, incorporated them into domestic law through legislation thus rendering them not enforceable in the courts of law. Similarly, CHRR is concerned with Malawi's huge backlog of state reports that have yet to be submitted to rights monitoring bodies.

### **Restrictions on freedom of the press**

Freedom of the press is guaranteed in the Constitution. However, media houses have become a regular target of harassment by government and ruling party officials. For example, on 21<sup>st</sup> January, 2010 government issued a directive to all government controlling officers advising them to stop advertising in a privately owned Newspaper allegedly on suspicion that it carries articles which are critical of government (a copy of the directive is annexed). Similarly, on 4<sup>th</sup> March 2010, the Deputy Minister of Information went to a privately owned MIJ FM radio to stop them airing a live phone in programme on a debate to change the national flag on the basis that only his Ministry can seek people's views. Notably, Government is also yet to pass legislation of the Access to information which was prepared by the CSOs. As a result, journalists fail to access information held by officials who refuse to disclose information arguing that "they don't discuss issues in the media."

On the other hand Public broadcasters in Malawi Broadcasting Cooperation (MBC) and Television Malawi (TVM) have for a long time been criticised for their editorial policy which usually favour the political party(ies) in power. Usually opposition political parties are not given airtime to air out their concerns on these media houses and if at all they are allocated airtime, then it is band publicity. This is more evident in the run up to election. See media coverage analysis done by the Malawi Electoral Commission during the run up to the 2009 General Elections.

## **Right to Privacy**

The right to privacy is recognised in the Malawi Constitution. It is defined as including the right not to be subject to arbitrary searches. However, CHRR is concerned that Parliament recently passed the Malawi Police Act which gives police powers to conduct searches without obtaining a search warrant which is contrary to international policing standards. CHRR fears that the provision may potentially lead to violations of privacy.

## **C. Promotion and protection of human rights on the ground**

### **Torture, cruel, inhuman or degrading treatment**

Malawi Constitution guarantees the inviolability of human dignity thus enjoining the State to respect this principle when enforcing criminal punishment. Torture, cruel, inhuman or degrading treatment or punishment is also constitutionally prohibited. However, cases of torture and other forms of ill-treatment and use of excessive force against criminal suspects especially in places of detention are a common occurrence and are widely reported in the media. In 2009, at least five detainees died in detention. In August 2010, for example, James Chinomba died in police custody after he was allegedly tortured and burnt with iron bars and denied medical care. (See attached for more information) Chinomba was arrested on suspicion of robbery and car hijacking. His family were denied an opportunity to see him and the Police could not disclose his location of detention. After a few days, the family were informed of the death of their relative 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. CHRR is concerned with the impunity enjoyed by Police Officers accused of committing these crimes. While some officers have faced administrative sanctions, very few, have been brought to justice.

CHRR is also concerned with the conditions of Prisons which remain poor despite the perennial calls by the Inspectorate of Prisons imploring the government to take immediate action. 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 specifically requires juvenile offenders to be detained separately to adults. 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. Notably, the Malawi Prisons Bill and Legal Aid Bill which if enacted by Parliament can go a mile to alleviate some of these cases have yet to pass by the National Assembly.

**Freedom of expression, association and assembly under attack:**

CHRR is concerned about the increasing restrictions on the rights to freedom of expression, association and assembly in an attempt to stifle voices critical of the Head of State, President Bingu Wa Munthalika and his government. In the last three years supporters of opposition parties and human rights defenders and have been subjected to arrest, ill-treatment and harassment. Several planned peaceful demonstrations organised by those viewed to oppose government policies have been banned. The law requires that organisers of a demonstration inform the police of their planned demonstration 48 hours before the actual demonstration. However, the prevailing practice is that the Police do not respond for demonstrations against government with the intent to declare any demonstrations which may take place as illegal. For instance, heavily armed police officers stopped a peaceful demonstration by 58 Reverends of Protestant Churches of the Livingstonia Synod in northern city of Mzuzu demonstrating against the introduction of quota over merit system of selecting students in public universities even when they had informed the police 48 hours before the march.

On freedom of expression, politicians Kamlepo Kalua and Hophmally Makande were arrested and convicted for expressing views critical of President Mutharika during a political rally in 2009 but were later acquitted by a higher court. Currently former Deputy Director of Political Affairs for ruling Democratic Progressive Party Harry Mkandawire is answering seditious charges for writing a letter to President Mutharika perceived to be critical of his leadership style. Likewise, human rights defenders have also been targeted by the State machinery. Edward Chileka Banda, Executive Director of Eye for Development and two other human rights defenders were arrested for criticising President Munthalika's statement directing officials responsible for administration of the newly-introduced government's Youth Enterprise Development Fund to give priority to the youth belonging to his party. Similarly, government has been issuing threats to NGOs which are seen to be critical to government. For example, on 6<sup>th</sup> April, 2010, the Special Assistant to the President on NGOs went on a public radio called

Capital Radio and TV station to issue stern warnings for the second time to NGOs who criticise government threatening to close them if they do not change. She further asked NGOs to be presenting their draft statements to her office before they are issued in the papers.

### **Right to Health**

The Constitution of Malawi does not expressly provide for the right to health in its bill of rights but only regards it as a principle of State priority. However, Malawi has ratified a wide range of international instruments which guarantee the right to health such as the ICESCR, CRC, the Women's Convention and the African Charter. Although Malawi has made progress in ensuring access to health services and progressively increasing resources to health, it remains with one of the highest maternal mortality rates in the world standing at 807 per 100000 births. The high MMR are in part attributed to shortage of staff and inadequate finances. In this regard, CHRR is concerned that government has failed to provide bursaries to nursing students forcing them to drop out of nursing schools, a situation which will worsen the already worrying shortage of health workers. Furthermore, CHRR is concerned with the revelation that over two – thirds of the Ministry of Health financial resources are consumed by secondary and tertiary care services,<sup>3</sup> which disproportionately disadvantages primary healthcare resulting in de facto discrimination against the majority of Malawians who live in rural areas.

### **Minority Rights: Arrest and persecution based on actual or perceived engagement in consensual same-sex sexual acts**

CHRR is concerned that individuals face arbitrary arrest, harassment and discrimination solely on the basis of their sexual orientation. In December 2009, Steve Monjeza and Tiwonge Chimbalanga were arrested following their public engagement in Blantyre and were subsequently put on trial on charges of gross public indecency which is punishable by a maximum prison sentence of over 14 years. As of 12<sup>th</sup> April, the two were still in detention having been denied bail, four months after their arrests. The Minister of Information, Reckford Thoto issued a statement condemning homosexuality as contrary to “Malawian culture.”

### **Sexual Workers:**

CHRR is also concerned with measures which are aimed at persecuting sex workers. There are widespread accusations of Police Officers raping the workers for them to buy their freedom since prostitution is criminalised. Recently, sex workers demonstrated against this conduct and the

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<sup>3</sup> WHO 2005 – 2009 Country Cooperation Strategy, para 19

proposed HIV and AIDS bill which make it mandatory for them to declare their status to their client which may potentially isolate them as a responsible group for the spread of the virus.

**D. Recommendations for action by Malawi:** CHRR calls on the government of Malawi to:

***Torture, ill-treatment and death in detention***

- Develop and adopt measures to prevent, prosecute and punish acts of torture and ill-treatment by law enforcement agencies to comply with international standards.
- Promptly establish the Police Complaint Commission as provided in the Malawi Police Act.

***Freedom of expression, association and assembly***

- Take concrete and effective measures to protect the rights to freedom of assembly, freedom of expression and freedom of association;
- Adopt steps to ensure media independence from intimidation and suppression including through the enactment of the access to information bill.

***Ensuring Economic, Social and Cultural Rights***

- Continue and strengthen efforts to ensure the progressive realisation of second generation rights, in particular the right to health. CHRR further recommends that Malawi continue to discharge its obligation to seek financial and technical support from the international community as recommended by the Committee on Economic, Social and Cultural Rights.<sup>4</sup>

***Harassment and arrest based on sexual orientation and prostitution***

- Respect, protect, and fulfil the human rights of all persons, without discrimination of any kind;
- Review the Malawian legislation which results in the discrimination, prosecution and punishment of people solely for their sexual orientation or gender identity.
- Immediately and unconditionally release all prisoners of conscience who are held solely on the basis of their actual or imputed sexual orientation or gender identity;
- End incitement to discrimination, hostility or violence against individuals on the basis of their sexual orientation in accordance with the international standards prohibiting advocacy of hatred and discrimination.

***Police Search without Warrant***

- Consider reforms to the newly passed legislation in order to ensure consistency with international practices of policing.

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<sup>4</sup> See General Comment Number 14