



## **Shadow Report on the implementation of the African Charter on Human and Peoples' Rights (ACHPR) by Malawi**

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## 1. Introduction

The Centre for Human Rights (Centre) takes note of the periodic report submitted by the government of Malawi to the African Commission on Human and Peoples' Rights (Commission) covering the period from May 2015 to March 2019. Malawi submitted the report in fulfillment of its obligations under article 62 of the African Charter on Human and Peoples' Rights (African Charter). This shadow report provides additional/contradictory information to some of the issues covered in Malawi's state report on the African Charter. The Centre in collaboration with other organisations has submitted a separate shadow report on the obligation of Malawi under the Protocol to the African Charter on the Rights of Women in Africa. The Centre has also prepared and submitted a separate shadow report to the Special Rapporteur on Freedom of Expression and Access to Information.

## 2. Implementation of the Access to Information Act (ATI)

The Centre welcomes the efforts of the government of Malawi to improve access to information through the enactment of the ATI.

However, the Centre is concerned about the lack of appointment of information officers (IOs) as required under section 1 of the ATI Act. The absence of information officers has affected the enjoyment of the right to access to information by citizens of Malawi. Under section 12 of the ATI Act, a request for information must be addressed to the information officer. The Centre is also concerned about the ability of the Malawi Human Rights Commission (MHRC) to perform its oversight functions as required under section 7 of the ATI Act as the MHRC has expressed concern over the government's decision to reduce its funding in the 2020/2021 national budget.<sup>1</sup>

The Centre suggests that the Commission should ask the government of Malawi the following questions about the implementation of the ATI:

- i. What are the measures that have been taken by the government of Malawi to appoint information officers in accordance with section 12 of the ATI Act?
- ii. What steps have been taken by the government of Malawi to provide adequate funding for the MHRC to fully discharge its mandate in accordance with section 8 of the ATI Act?

The Centre suggests that the Commission consider adopting the following recommendations to the government of Malawi on the implementation of the ATI:

- i. Provide adequate resources to the MHRC to ensure it discharges its oversight role over the implementation of the ATI Act.
- ii. Appoint information officers to ensure access to information as required by section 12 of the ATI Act.
- iii. Publish the Guidelines for facilitating public access to information as required by section 9 of the ATI Act and take steps to raise awareness on the provisions of the ATI Act and the right to access to information.

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<sup>1</sup><https://times.mw/malawi-human-rights-commission-decries-low-funding/#:~:text=In%20the%202020%2F2021%20national%20budget%20government%20has%20allocated%20K1,oversight%20of%20ATIA%20and%20GEA.> (accessed 4 March, 2021).

- iv. Ensure that the ATI Act is fully implemented and all public bodies and relevant private bodies are in full compliance in proactively providing information regularly in accessible formats

### **3. Situation of human rights defenders in Malawi**

In paragraph 74 of the concluding observations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 –2013), the state was urged to enact a specific law according to international standards and protect human rights defenders, promoting and protecting rights through various activities. In paragraph 133 of the Republic of Malawi periodic report on the African Charter and the Maputo Protocol May 2015 to March 2019 (State Report), Malawi avers that although there was no specific law to protect human rights defenders, they were protected by legislation and constitution to the extent that they were protesting peacefully. The state also stated that it is committed to creating an environment conducive for human rights activists to carry out their work.

However, the Centre is concerned about the shrinking civic space for human rights defenders in Malawi. The use of criminal defamation and cyber security laws, arbitrary arrests of journalists, physical attacks, and censorship of media are serious issues of concern on the realisation of freedom of expression and a big threat to the civic space in Malawi.

The government of Malawi has continuously used sedition laws to crack down on critics of the government or the president. On 21 August 2018, police arrested Manes Hale, a United States citizen, and charged her with insulting the president under section 4 of the Protected Flag, Emblems, and Names Act of 1996, as amended in 2012, for remarks she wrote concerning the president on Facebook.<sup>2</sup> In February 2016, three political opposition members were arrested and charged with sedition for a WhatsApp conversation allegedly plotting against former President Mutharika.<sup>3</sup>

Also, the government of Malawi has applied the Electronic Transactions and Cybersecurity Act of 2016 (the Cyber Act) to restrict freedom of expression online. Section 87 of the Act criminalises offensive communications and imposes stiff penalties of 1 million MWK (\$1,300) and up to 12 months' imprisonment. In April 2019, Tumpale Mwakibinga was arrested after he posted on his Facebook page a picture allegedly likening the first lady, Gertrude Mutharika, to a cartoon character. He was charged with insulting the modesty of a woman, as well as violations under the Electronic Transaction and Cybersecurity Act of 2016.<sup>4</sup>

The state broadcaster, the Malawi Broadcasting Corporation (MBC), has also been used to target human rights defenders. In its news bulletin on 16 January 2020, MBC described the Human Rights Defenders Coalition (HRDC), a human rights group, as a 'terrorist

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<sup>2</sup><https://www.nyasatimes.com/u-s-citizen-arrested-for-insulting-president-mutharika-utm-members-celebrate-abiti-manice-release/> (accessed 27 February 2021).

<sup>3</sup><https://www.nyasatimes.com/kabwila-arrested-malawi-police-may-arrest-more-whatsapp-coup-plotters/> (accessed 21 February 2021).

<sup>4</sup><https://www.nyasatimes.com/police-arrest-man-for-likening-malawi-first-lady-to-a-cartoon-on-facebook/> (accessed 25 February 2021).

organisation'.<sup>5</sup> HRDC had organised protests demanding electoral justice in the disputed 2019 Presidential elections.

There are also recorded incidents of vexatious litigations against prominent human rights defenders as well as the use of force by the Malawian police against peaceful protesters who were protesting for electoral reforms pursuant to the 2019 election.<sup>6</sup> Leading protesters were arrested and had court cases brought against them on trumped-up charges in a bid to prevent them from leading and being involved in protests.<sup>7</sup> The incidents of violence against human rights defenders were not investigated thoroughly, nor were perpetrators convicted.<sup>8</sup> State machinery such as the police force and the courts were used as vehicles to thwart the citizen voice, including attacks on protesters, the use of live ammunition and teargas.<sup>9</sup>

Attacks against journalists remained rife particularly during elections and civil protests with the police identified as the major culprits. On 8 January 2020, three journalists, Golden Matonga, Steven Zimba and Francis Chamasowa, were detained by the police at Kamuzu International Airport when they were attempting to cover a story on the return of the European Union observer mission to Malawi.<sup>10</sup> On 2 July 2019, Idris Ali Nassah, a newspaper columnist, was assaulted by the ruling party cadres for his criticism of the government. On 4 May 2019, the ruling party cadres invaded Parliament during the State of Nation Address and assaulted journalists including a Cameraman working for a privately owned, Times Groups. The Police took no action. Henry Mhango was reportedly assaulted by the police in Lilongwe using pipes and sticks at Bwalo la Njobvu on 22 January 2021 while in the process of gathering information.<sup>11</sup>

The Centre notes the granting of operating licences to new radio stations by Malawi Communications Regulatory Authority's (MACRA) as referenced in the country report. As of 2016, Malawi had 41 private community radio stations across the country. However, the authorities have been extremely slow in granting licences to new radio stations. There are also concerns about the potentials of MACRA to restrict freedom of expression through the ban of phone-in programs in Malawi.<sup>12</sup>

The Centre suggests that the Commission should ask the government of Malawi the following questions about the situation of human rights defenders in Malawi:

- i. What steps have been taken by the government to guarantee the safety of human rights defenders and media practitioners?

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<sup>5</sup> <https://times.mw/macra-summons-mbc-over-terrorist-remarks/> (accessed 25 February 2021).

<sup>6</sup> Amnesty International 'Malawi: Escalating crackdown on human rights defenders' 2019 <https://www.amnesty.org/download/Documents/AFR3612352019ENGLISH.pdf>.

<sup>7</sup> Amnesty International <https://www.amnesty.org/en/countries/africa/malawi/report-malawi/>.

<sup>8</sup> Amnesty International (n7 above)

<sup>9</sup> African Centre for Strategic Studies 'Malawi's Year Long Election' <https://africacenter.org/spotlight/malawi-year-long-election/>.

<sup>10</sup> CPJ, 'Malawi detains, charges 3 journalists seeking to cover EU delegation's return.' (accessed on 8 March 2021) <https://cpj.org/2020/01/malawi-detains-charges-3-journalists-seeking-to-co/>.

<sup>11</sup> <https://malawi.misa.org/2021/01/22/misa-malawi-condemns-assault-of-journalist-henry-mhango-by-police-officers/> (accessed on 8 March 2021).

<sup>12</sup> <https://qz.com/africa/1625291/malawi-internet-cut-off-after-polls-close-on-election-day/> (accessed on 8 March 2021).

- ii. What steps has the government taken to hold the police accountable for excessive use of force against human rights defenders and media practitioners?
- iii. What measures has the government taken to ensure that the Malawi Broadcasting Corporation (MBC) is transformed into a public service broadcaster that is protected against undue political influence?
- iv. What measures have been put in place to ensure that MACRA does not violate media independence through arbitrary content regulation of the media?

The Centre suggests that the Commission should make the following recommendations to the government of Malawi on the situation of human rights defenders:

- i. Repeal sections 200 on criminal defamation and sections 50 and 51 on sedition of the Penal Code.
- ii. Repeal sections 24(2)(e) and (f) of the Electronic Transactions and Cyber Security Act of 2016, which are a barrier to the enjoyment of freedom of expression online.
- iii. Adopt measures, including the adoption of a law that guarantee the safety of human rights defenders and media practitioners
- iv. Further, the government should investigate and prosecute cases of excessive use of force and on attacks on human rights defenders and media practitioners
- v. Transform the MBC into a public service media that guarantees balanced media coverage in accordance with Principle 13 of the Declaration.
- vi. Comply with Principle 15 of the Declaration which calls on States to ensure that the licensing of community media should be simple, expeditious and cost effective, and guarantee community participation.

#### **4. Discrimination on the basis of sexual orientation**

Sections 137A and 153 - 156 of the Malawi Penal Code continue to criminalise consensual same-sex acts between adults and non-heteronormative gender identity through prohibitions of ‘unnatural offence, offence against the order of nature, gross indecency’. Although a moratorium on arrests based on these provisions was issued by the minister of justice in 2011 and 2015, a high court gave an order in 2016 that suspended the moratorium until review by the Constitutional Court.

Paragraph 50 of the State Report indicates the establishment of a Gender Equality Act Implementation and Monitoring Plan ‘to provide gender equality, integration, influence, empowerment, dignity and opportunities for men and women in all functions of society’. Nevertheless, the existence of criminalising provisions and the existing uncertainty on their legality have resulted in continuing violence and discrimination against LGBT people in the country, particularly in the issue of access to healthcare.<sup>13</sup> LGBT people are subjected to subpar medical care due to their sexual orientation and gender identity. As a result of the criminalising laws, medical practitioners can refuse to grant treatment on basis of sexual orientation or gender identity and LGBT people have been denied HIV tests and treatment by

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<sup>13</sup> <https://www.hrw.org/news/2018/10/26/malawi-arrests-violence-against-lgbt-people>.

nurses in public hospitals.<sup>14</sup> This discrimination has compelled LGBT people to seek healthcare services from, often underfunded, charitable organisations.

The Centre suggests that the Commission should ask the government of Malawi the following questions on discrimination on the basis of sexual orientation:

- i. Has the government of Malawi undertaken any measures to repeal sections 137A, 153, 156, and 157 of the Penal Code that criminalise consensual same-sex sexual acts between adults?
- ii. Has the government of Malawi undertaken any measures to protect citizens from violence on the basis of their real or perceived sexual orientation and gender identity?
- iii. Has the government of Malawi undertaken any measures to ensure that citizens are not denied access to treatment and other healthcare services on the basis of their real or perceived sexual orientation and gender identity?
- iv. Has the government of Malawi undertaken any measures to ensure the safety of human rights defenders and organisations working for the protection of the rights of sexual and gender minorities in the country?

The Centre suggests that the Commission should make the following recommendations to the government of Malawi on discrimination on the basis of sexual orientation:

- i. Review sections 137A, 153, 156, and 157 of the Penal Code that criminalise consensual same-sex sexual acts between adults in order to prohibit violence and discrimination in access to HIV prevention, treatment and care services, as well as to ensure the protection of other human rights of sexual and gender minorities guaranteed under the African Charter and in accordance with Resolution 275 of the African Commission.
- ii. Adopt national legislative measures to prohibit violence and discrimination against anyone on the basis of their actual or perceived sexual orientation or gender identity.
- iii. Adopt legislative measures to protect human rights defenders working on the rights of sexual and gender minorities in conformity with the UN Declaration on Human Rights Defenders 1998 and the Commission's Resolutions on Human Rights Defenders and Resolution 275.

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<sup>14</sup> <https://www.news24.com/citypress/news/covid-19-heightens-queer-struggles-20200408>.

## 5. Child labour

In Malawi's last reporting cycle, the Commission in its Concluding Observations welcomed the steps taken by Malawi to address child labour, through the development of the National Action Plan (2009 to 2016) which provides direction for progressive elimination of child labour<sup>15</sup> and recommended that the state enforce provisions stipulated in the international instruments and domestic legislations which prohibit child labour.<sup>16</sup>

Whereas the state report provides a list of policy and legal frameworks enacted to address the issue, it does not make any mention of the responsibilities of corporations in advancing respect for human rights. The state report notes extensive progress made in the area of strengthening policy and legal frameworks and institutional capacity to eradicate child labour in Malawi.<sup>17</sup> However during the reporting period, there have been increased cases of child labour reported especially within the Tobacco growing sector leading to the [US suspending Malawi Tobacco imports due to child labour](#) allegations and major [suit](#) against British American Tobacco.<sup>18</sup> Child labour is not only a legal problem but also a social challenge that requires multifaceted approaches to tackle. It is critical that regulatory frameworks encompass effective community level engagements and corporate operational level mechanisms to stamp out. The state needs to take decisive action to eradicate child labour through clarifying the responsibilities of companies and enhancing corporate accountability for the vice. Corporate enterprises have the tools of control and influence of outgrowers to ensure child labour is stamped out in all their value and chains of supply and other subsidiaries.

The Centre suggests that the Commission should ask the government of Malawi about concrete steps that it is taken to reduce the incidents of child labour in the country.

The Centre suggests that the Commission should make the following recommendations to the government of Malawi on discrimination on child labour:

- i. Develop a National Action Plan on business and human rights clarifying the nature of obligations and responsibilities of corporate entities for the protection and respect of human rights in the context of business activities as it especially as it relates to child labour.

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<sup>15</sup> Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 –2013) Par. 42

<sup>16</sup> *Id.*, Par. 114

<sup>17</sup> National Action Plan on Trafficking in Persons – 2017 – 2022, See also Paragraphs 141-145 of State Report

<sup>18</sup> Sarah Boseley, "The children working the tobacco fields: 'I wanted to be a nurse'", (June 2018), The Guardian Special Report available at <https://www.theguardian.com/world/ng-interactive/2018/jun/25/tobacco-industry-child-labour-malawi-special-report>.