



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### 103rd session

17 October – 4 November 2011

## Consideration of reports submitted by States parties under article 40 of the Covenant

### Concluding observations of the Human Rights Committee\*

#### Malawi

1. The Human Rights Committee considered the situation of civil and political rights under the International Covenant on Civil and Political Rights in Malawi in the absence of a report at its 2846th meeting (CCPR/C/SR.2846), held on 25 October 2011. At its 2858th meeting, held on 2 November 2011, it adopted the following provisional concluding observations pursuant to rule 70, paragraph 1, of its rules of procedure.

#### A. Introduction

2. The Covenant came into force for Malawi on 22 March 1994. Malawi was under an obligation to submit its initial report by 21 March 1995 under article 40, paragraph 1 (a), of the Covenant. The Committee regrets that the State party has failed to honour its reporting obligations, despite numerous reminders. This amounts to a serious breach by the State party of its obligations under article 40 of the Covenant. The Committee, however, welcomes the fact that the State party did send a delegation to engage with the Committee on the basis of replies to the list of issues (CCPR/C/MWI/Q/1) compiled by the Committee. It expresses its appreciation for the dialogue the Committee had with the delegation of the State party. The Committee has noted the replies orally provided by the delegation of the State party to questions and comments raised by Committee members.

#### B. Positive aspects

3. The Committee welcomes the ratification of the following treaties:

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\* The Committee considered the situation of civil and political rights in Malawi in the absence of reports. It adopted provisional concluding observations on Malawi. During the 104th session, following the agreement of the State party, the Committee decided to publish the provisional concluding observations on Malawi, including the comments thereon received from the State party.

(a) The International Convention on the Elimination of All Forms of Racial Discrimination, on 11 June 1996;

(b) The International Covenant on Economic, Social and Cultural Rights, on 22 December 1993;

(c) The Convention on the Elimination of All Forms of Discrimination against Women, on 12 March 1987;

(d) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 11 June 1996;

(e) The Convention on the Rights of the Child, on 2 January 1991;

(f) The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, on 21 September 2010;

(g) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, on 7 October 2009;

(h) The Convention of the Rights of Persons with Disabilities, on 27 August 2009.

4. The Committee takes note of:

(a) The commitment by the State party to submit its initial report under the Covenant by 31 March 2012;

(b) The appointment of the Independent Commission to enquire into the arrests, killings and ill-treatment of persons during the July 2011 demonstrations.

### **C. Principal subjects of concern and provisional observations**

5. While welcoming the establishment of the Malawi Human Rights Commission (MHRC) through the Constitution, the Committee is concerned about the guarantee securing the independence of the members of the Commission and about the sufficiency of the financial and human resources required to enable the Commission to fulfil its mandate. The Committee is also concerned about information according to which recommendations made by the Commission are not always implemented by the State party (art. 2).

**The State party should strengthen its efforts to ensure that the MHRC enjoys independence and is afforded the necessary resources to be able to effectively implement its mandate in full compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). The State party should also take necessary measures to effectively implement the recommendations made by the Commission.**

**Response:** The Government of Malawi is committed to ensure that the Human Rights Commission effectively carries out its constitutional and statutory mandate. In that regard all resources will be made available to the Commission to ensure its effectiveness.

6. While noting the replies provided by the State party according to which the provisions of the Covenant can be referred to by domestic courts and tribunals when interpreting the Constitution, the Committee is concerned that the Covenant cannot be directly invoked before courts and tribunals. It is also concerned that the provisions of the Covenant are not all fully incorporated in the legislation of the State party, despite its dualist system (art. 2).

**The State party should ensure the full implementation of the Covenant in its domestic law. The State party should also take appropriate measures to raise awareness of the**

**Covenant among judges, lawyers and prosecutors to ensure that its provisions can be invoked before and taken into account by national courts and tribunals.**

**Response:** Malawi will continue to ensure that key actors are aware of the Covenant. In terms of the Covenant being directly invoked by domestic courts, it would like to emphasize that the Covenant is frequently referred to in domestic cases. Its direct application is currently not possible, as that will require legislation which is not yet being considered. Courts of law are expected under the Constitution of the Republic of Malawi to have regard to acceptable norms of international law in its interpretation of the Constitution.

7. The Committee is concerned about allegations regarding reported cases of violence and discrimination against people engaging in same-sex relationships in the State party, as well as allegations of incitement to violence against them by some public officials and authorities, despite section 20 of the Constitution, which guarantees equality of persons and prohibits discrimination. The Committee is also concerned about sections 153 and 156 of the Penal Code, which criminalize homosexuality, and about the new amendment to the Penal Code, section 137A, which also criminalizes same-sex relationships between women (arts. 2, 3 and 26).

**The State party should amend its Penal Code to decriminalize homosexuality between adults of both sexes, and conduct awareness-raising campaigns to educate the population on this issue. The State party should also take appropriate steps to protect persons engaged in same-sex consensual relationships against discrimination and violence on the basis of their sexual orientation, and ensure that public officials and public authorities refrain from using language that may encourage hatred and violence against them. In this regard, the State party should prosecute persons allegedly responsible for such acts of discrimination and violence, and punish those who are convicted.**

**Response:** The Government of Malawi has referred to the Law Commission for review of all legislation referred to above. The review process will be thorough and consultative. The Malawi Law Commission is an independent body and its recommendations are seriously considered by the Government of Malawi.

8. While noting the adoption of the Deceased Estates (Wills, Inheritance and Protection) Act in July 2011, the Committee is concerned that some practices that violate women's rights continue to exist in the State party, in particular the appropriation of property from widows, the practice known as "sexual cleansing" and the practice of widows being considered part of the "inheritance" by their brother-in-law or other male relatives (arts. 2, 3, 23 and 24).

**The State party should take appropriate measures to put an end to such practices and protect the equal rights of women, in particular widows. The State party should also prosecute persons allegedly responsible for such practices, and punish those who are convicted. Furthermore, the State party should expedite the consideration and the adoption of the Marriage and Divorce Family Relations Bill, which is currently being considered by the Cabinet, as well as the Gender Equality Bill, which is currently being examined by the Law Commission, and ensure that they are in compliance with the Covenant.**

**Response:** It is hoped the Marriage, Divorce and Family Relations Bill and the Gender Equality Bill will be considered by Parliament shortly.

9. The Committee expresses concern at reports that domestic violence, in particular violence against women, is prevalent in the State party, while noting efforts undertaken by the State party to combat it. The Committee is also concerned that spousal rape has not yet

been explicitly prohibited in the legislation of State party. The Committee is further concerned about the lack of information on the concrete results achieved by various programmes and initiatives carried out by the Department of Gender Affairs in the Ministry of Gender, Child and Community Development (arts. 3, 7 and 23).

**The State party should explicitly criminalize spousal rape in its Penal Code. The State party should also firmly combat domestic violence, in particular violence against women, by applying and continuing to promote the Prevention of Domestic Violence Act, by investigating such cases, prosecuting those responsible and, in particular, by training law enforcement officials to detect and deal with domestic violence. The State party should further strengthen its awareness-raising campaigns on the negative effects of domestic violence and constantly evaluate its programmes and initiatives. It should offer adequate protection to victims, in particular by strengthening the Victim Support Units within police settings, and ensure that women who are victims can complain without fear of reprisals.**

**Response:** Malawi is firmly committed to combating domestic violence, as evidenced by the passing of the Prevention of Domestic Violence Act. With assistance from the Department for International Development of the United Kingdom of Great Britain and Northern Ireland, a programme to review the effectiveness of prosecution of domestic violence cases will commence soon.

10. While noting that the State party has adopted a moratorium on the application of the death penalty, the Committee regrets that the State party has neither ratified the Second Optional Protocol to the Covenant nor abolished the death penalty. While also noting explanations provided by the delegation of the State party, the Committee is concerned that, despite the decision of the Constitutional Court (*Kafantayeni v Attorney General*) on the unconstitutionality of the mandatory death penalty for murder, as still prescribed by sections 209 and 210 of the Penal Code, some courts and tribunals continue in practice to impose the death penalty (art. 6).

**The State party should amend its Penal Code so as to abolish the death penalty. The State party should also ratify the Second Optional Protocol to the Covenant.**

**Response:** Malawi wishes to emphasize that it currently retains the death penalty, which is not illegal under international law. In that regard it urges the Committee to note that the death penalty is no longer mandatory in certain cases, such as murder or treason, as was the case previously. The Government views this as significant progress.

11. The Committee is concerned at allegations according to which torture is widespread in the State party and sometimes leads to the death of detainees in police custody. The Committee is also concerned about the reported excessive use of force by police officers during arrests and about the fact that some detainees are subjected to torture and cruel, inhuman or degrading treatment (arts. 6 and 7).

**The State party should adopt comprehensive and adequate measures to effectively combat torture and excessive use of force by police officers. The State party should also conduct investigations on all alleged cases of torture and deaths in police custody, prosecute persons who are allegedly responsible, punish those who are convicted with adequate sanctions, and adequately compensate victims. It should further continue to train police officers and other law enforcement officials on the Covenant, particularly on provisions relating to the prohibition of torture.**

**Response:** Malawi is deeply concerned about incidents of torture and use of excessive force. Measures taken to combat this include the amendment of the Police Act to establish the Independent Complaints Commission with powers to investigate cases of torture or deaths in police custody. In addition every reported case of torture is being

investigated. Malawi will provide more detailed statistics in this respect in subsequent dialogue with the Committee.

12. The Committee is concerned about information provided by the State party according to which about 1,200 detainees are under pretrial detention, many of them for long periods. The Committee is also concerned about the backlog of cases to be handled by national courts and tribunals, including those on appeal. The Committee is further concerned that legal assistance is not accessible to all litigants and that the number of judges, magistrates and lawyers remain insufficient in the State party (arts. 7, 10 and 14).

**The State party should strengthen the measures aimed at expediting all cases before national courts and tribunals, so as to avoid long periods of pretrial detention. In that regard, the State party should ensure that persons whose detentions are extended by a decision of a tribunal or a court are legally assisted. The State party should consider also using alternative measures of detention for pretrial detainees. It should further take adequate measures to train judges, magistrates and lawyers in a sufficient number to allow all complainants access to justice.**

**Response:** Malawi has taken significant measures to avoid long periods of pretrial detention. This includes the enactment of specific pretrial custody time limits, the launch of diversion and mediation projects, the use of camp courts, and the use of alternative sentences such as community service.

13. The Committee expresses concern at reports of deplorable conditions of detention in prisons, including a high rate of overcrowding and reported deaths of detainees due to the poor health-care system (art. 10).

**The State party should, as matter of urgency, enhance its efforts to improve the conditions of detention in its prisons, in particular measures to overcome the high rate of overcrowding and to provide sentences alternative to imprisonment. The State party should also investigate deaths reported in prisons and improve the health-care system. It should further train prison officers and facilitate complaints from detainees about their conditions of detention, investigate and prosecute persons allegedly responsible for such violations, and punish those who are convicted.**

**Response:** Following a High Court decision in *Masangano v. Attorney General*, the Government is aware of its obligations to ensure that prison conditions improve. This has resulted in improvements in the quality of food for prisoners, and plans to build new and purpose-built prisons. With assistance from the European Union, training sessions with prison staff have commenced to ensure that staff are aware of the legal obligations with respect to treatment of prisoners.

14. The Committee is concerned about allegations according to which searches without a warrant are common in the State party (art. 17).

**The State party should take all necessary measures to repeal the 2010 amendment to the Police Act, which expands the authorization of searches without warrant, in order to prevent arbitrary searches and interference with liberty and privacy.**

**Response:** Section 35 of the Police Act which allows police has been referred to the Law Commission for review.

15. The Committee is concerned about trafficking in persons, in particular of minors for sexual exploitation or child labour purposes, which allegedly remains common in the State party. The Committee is also concerned about the lack of comprehensive information on this issue, and statistical data on the number of persons concerned, as well as about the number of persons prosecuted and convicted. It is further concerned about the lacuna on

trafficking in the Penal Code with regard to women, child prostitution and trafficking for forced labour (arts. 3, 7, 8 and 24).

**The State party should strengthen its efforts to eliminate trafficking in persons, in particular of women, girls and boys, for sexual exploitation and child labour. The State party should also prosecute all persons allegedly responsible, and punish those who are convicted. It should continue to train law enforcement officials and immigration officers and offer protection and rehabilitation to victims, and enhance its cooperation with neighbouring countries. The State party should pursue its campaigns to raise awareness among the population regarding the negative effects of trafficking. It should amend the Penal Code to prevent trafficking of women, child prostitution and trafficking for forced labour.**

**Response:** Malawi has drafted an anti-trafficking bill which will be considered by Parliament soon.

16. The Committee is concerned at reports that freedom of opinion and expression is threatened in the State party, in particular at reports that journalists and human rights defenders cannot express their views, including by criticizing the authorities, without fear of reprisals consisting of arrests, ill-treatment, harassment and prosecution. The Committee is also concerned about the banning of newspapers (art. 19).

**The State party should, as a matter of urgency, effectively guarantee the freedoms of opinion and expression in the State party. In that regard, the State party should consider repealing the provisions of the Penal Code that empower the Minister of Information to ban newspapers; ensure that journalists and human rights defenders can freely express their opinions without any fear; investigate and prosecute persons responsible for arrests and threats against them, and punish those who are convicted; and adequately compensate victims. The Committee draws the attention of the State party to its general comment No. 34 (2011) on the freedoms of opinion and expression.**

**Response:** Malawi is very committed to ensuring that its people fully enjoy the freedoms of expression and opinion.

17. While taking note of information provided by the delegation of the State party, the Committee is concerned that the freedom of assembly and association is not always effectively guaranteed, in particular as evidenced by refusals to authorize peaceful demonstrations. The Committee is also concerned about allegations of arrests, killings and ill-treatment having occurred in the State party during the demonstrations of July 2011 (arts. 6, 7, 21 and 22).

**The State party should strengthen its efforts to effectively guarantee the freedom of assembly and association, including by removing obstacles to the right to demonstrate and by applying the 48-hour notification rule. The State party should also investigate and prosecute persons allegedly responsible for arrests, killings and ill-treatment of demonstrators in July 2011, and punish those who are convicted. In this regard, the State party should further provide the Independent Commission, set up to inquire into these events, with sufficient resources to carry out its mandate and implement its recommendations.**

**Response:** Malawi is committed to ensuring that its people are free to assemble and demonstrate. The Police Act clearly provides for procedures to be followed in that regard. The events of 20 July 2011 are being investigated by a commission of inquiry.

18. The Committee is concerned that corporal punishment still exists in some settings in the State party (arts. 7 and 24).

**The State party should take all measures to ensure that corporal punishment does not continue to exist. Response:** Corporal punishment is outlawed.

19. The Committee is concerned about the reported practice of forced and early marriages by some parts of its population (arts. 3, 23 and 24).

**The State party should take appropriate measures, including through legislative steps, to protect children against forced and early marriages. In this regard, the State party should conduct awareness-raising campaigns on the negative effects of forced and early marriages. It should also investigate complaints from the victims, prosecute persons who are allegedly responsible, and punish those who are convicted with appropriate sanctions. Response:** Malawi will take significant steps to end such practices.

20. The Committee expresses concern at the fact that local government elections have not taken place since 1995, when they should be held once every five years, as required by the Local Government Elections Act (art. 25).

**The State party should take appropriate measures to organize, as soon as possible, the next local government elections, including by allocating the necessary budget for this purpose.**

**Response:** Malawi will hold general elections in 2014, which is less than two years away. A bill that will facilitate tripartite elections in 2014 is at present before the National Assembly. In view of this, it is expected that the local government elections will also be held at that time.

21. The Committee notes that the State party faces serious hardships to fulfil its reporting obligations under the Covenant. The Committee, therefore, encourages the State party to solicit technical cooperation from the appropriate United Nations entities, in particular the Office of the United Nations High Commissioner for Human Rights, to assist it in developing the capacities to meet its reporting obligations under the Covenant.

**Response:** Malawi fully shares these observations and has already taken some steps towards requesting some assistance from the Office of the United Nations High Commissioner for Human Rights. Already the Government has held discussions with a team of experts from that Office to identify areas of assistance.

22. The Committee proposes to finalize these provisional concluding observations under rule 70, paragraph 3, of its rules of procedure, by the end of its 104th session. Any comments that the State party intends to provide should be submitted to the Committee by 29 February 2012.

23. The Committee requests the State party to submit its initial report by 31 March 2012, in accordance with the commitment given by the State party's delegation.

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