

**UNIVERSITY OF PRETORIA
FACULTY OF LAW**



**NATIONAL PROTECTION MECHANISMS FOR HUMAN RIGHTS DEFENDERS IN
MALAWI**

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIRMENTS OF THE MASTER'S
DEGREE IN HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA

By

CHARLES KAJOLOWEKA

PREPARED UNDER THE SUPERVISION OF

DR ASHWANEE BUDOO-SCHOLTZ

UNIVERSITY OF PRETORIA

&

DR JOSEPHINE NDAGIRE

MAKERERE UNIVERSITY

29 OCTOBER 2021

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DEDICATION

To selfless and frontline human rights defenders in Malawi who put their lives, families and everything at risk for defending others and betterment of democratic societies, this is for you.

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TABLE OF CONTENTS

COVER PAGE.....	1
PLAGIARISM DECLARATION	2
DEDICATION	3
ACKNOWLEDGMENT	4
TABLE OF CONTENTS	5
ACRONYMS.....	7
CHAPTER 1: INTRODUCTION.....	8
1.1 Background of the study.....	8
1.2 Problem Statement.....	12
1.3 Research questions.....	13
1.4 Methodology	13
1.5 Scope and limitation of the study.....	14
1.6 Definition of human rights defender.....	14
1.7 Literature Review.....	15
1.8 Overview of the Chapters	21
CHAPTER 2: RISKS AND CHALLENGES FACED BY HRDs IN MALAWI	22
2.1 Introduction.....	22
2.2 Nature and forms of threats and Attacks against HRDs in Malawi.....	22
2.3 Conclusion.....	27
CHAPTER 3: REGIONAL AND GLOBAL HUMAN RIGHTS PROTECTION MECHANISMS FOR HRDs	28
3.1 Introduction.....	28
3.2 International legal framework on the rights and protection of HRDs	28
3.3 African legal and policy landscape on protection of HRDs.....	32
3.4 Protection practices and programs for HRDs	33
3.5 Malawi’s status on regional and global human rights instruments	34
3.6 Conclusion.....	39
CHAPTER 4: LEGAL AND INSTITUTIONAL LANDSCAPE FOR PROTECTION OF HRDs IN MALAWI	40
4.1 Introduction.....	40
4.2 The legal and policy framework.....	40
4.3 Institutional framework.....	49
4.4 Conclusion.....	52
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS	54
5.1 Introduction.....	54

5.2 Global and regional human rights framework for protection of HRDs in Malawi 54

5.3 National human rights framework for protection of HRDs 55

5.4 Barriers that impede protection of HRDs in Malawi 55

5.5 Recommendations 55

5.5.1 Regional and Global measures 56

5.5.2 National legislative measures 56

5.5.3 National Policy Measures 56

BIBLIOGRAPHY 58

ACRONYMS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COMESA	Common Market for Eastern and Southern Africa
CONGOMA	Council for Non-Governmental Organisations in Malawi
CRC	United Nations Convention on the Rights of the Child
CSOs	Civil Society Organisations
EU	European Union
HRDs	Human Rights Defenders
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersex
MCP	Malawi Congress Party
MEC	Malawi Electoral Commission (MEC)
MuU	Memorandum of Understanding
MHRC	Malawi Human Rights Commission
MPS	Malawi Police Service
NHRI	National Human Rights Institutions
NOC	Nyasaland Order-in-Council
NGOs	Non-Governmental Organisations
SALC	Southern Africa Litigation Centre
UN	United Nations
UPR	Universal Periodic Review
WHRDs	Women Human Rights Defenders

CHAPTER 1: INTRODUCTION

1.1 Background of the study

1.1.1 Historical Background (colonial and post-independence)

The history of human rights defenders (HRDs) in Malawi dates back to colonial days prior to independence.¹ HRDs emerged from various formations including of cultural associations, trade and workers unions, cooperatives and independent religious groups.² They were basically a bridge between the government and private sector.³ These associations sought to influence reform of colonial policies for the good of the African people.⁴ Their key functions included promotion and protection of the socio-economic, cultural, political and religious rights and freedoms of the natives against the exploitative nature of colonialism, foreign trade and human trafficking.⁵ They were also campaigning for land rights, access to better education and health services, abolition of racial and employment discrimination, and the right to political participation, among others.⁶ However, the Nyasaland Order-in-Council (NOC) of 1907, the 'constitution' of the time, had no provisions for human rights.⁷ Thus, while the HRDs' movement was beginning to emerge, rights of individuals and groups, including HRDs, never formally existed.

At the attainment of independence in 1964, Malawi, like many former British protectorates, adopted a negotiated colonial Constitution. Unlike the NOC, the independence Constitution contained a bill of rights guaranteeing the civil, political and socio-economic rights and freedoms.⁸ Arguably, the bill of rights was inspired by the 1948 Universal Declaration of Human Rights (Universal Declaration) and an emerging global human rights movement which was gaining

¹ H Chingaibe 'Particularistic concertation: state-business relations and state formation in Colonial Malawi' in S Kunal (ed) *State-business relations and economic development in Africa and India* (2013).

² As above.

³ As above

⁴ J Lwanda & E Chanika 'Democracy, donors and dependency: the rises and falls of non-governmental and civil society organisations agency in malawi opposition politics, 1992 – 2017' (2017) 70 *The Society of Malawi Journal*.

⁵ Chingaibe (n 1).

⁶ Lwanda & Chanika (n 4).

⁷ M Chigaŵa 'The fundamental values of the republic of Malawi Constitution of 1994' (2006).

⁸ As above.

ground at the time.⁹ However, two years after independence, the Government of Malawi banned all non-governmental organisations (NGOs) working on civil and political rights in 1966.¹⁰ Only 'developmental' NGOs working in service provision and humanitarian aid were allowed to operate. Services by NGOs included basic education (literacy), food security and health. This political climate restricted HRDs' constructive dialogue over public policy and governance issues.¹¹ Activities of HRDs deemed 'political' would have led to serious consequences, including detentions. Most strikingly, the bill of rights was removed from the independence Constitution through an amendment.¹²

Furthermore, in a bid to consolidate power, the 1996 constitutional amendment outlawed all opposition political parties, leaving Hastings Kamuzu Banda's Malawi Congress Party (MCP) the only legal political party, eventually establishing a one-party state.¹³ Banda was also declared a 'Life President', a development that would see him rule Malawi for 30 years.¹⁴ In addition, the judiciary which was arguably the only available redress mechanism for human rights violations was substantially weakened.¹⁵ Banda, for example, created traditional courts run by chiefs which adjudicated criminal offenses.¹⁶ For instance, Vera Chirwa, a civil and political activist, was tried and sentenced to death by a traditional court on a charge of treason.¹⁷ Thus, the traditional courts became an instrument of suppressing political dissent.

1.1.2 Transition to Democracy (1992-present)

Two years after the dawn of multi-party democracy in 1993, Malawi adopted a new Constitution which contains a robust bill of rights. The new constitution does not only guarantee the rights of everyone, including HRDs, but also envisions a more open and democratic society in which a

⁹ T Maluwa *The role of international law in the protection of human rights under the Malawian Constitution of 1995* (1995).

¹⁰ OJM Kalinga *Historical Dictionary of Malawi* (2011).

¹¹ E Kadzamira & D Kunje *The changing roles of non-governmental organisations in education in Malawi* (2002).

¹² As above.

¹³ As above.

¹⁴ Sec 25 of the Constitution of the Republic of Malawi, 1966.

¹⁵ Lwanda & Chanika (n 4).

¹⁶ As above.

¹⁷ V Chirwa *Fearless Fighter* (2007).

cross-section of citizen groups were to play an active role in national political life.¹⁸ Furthermore, in 2001, a negotiated Non-Governmental Organisation Act (NGO Act) was enacted to regulate the space and actors. According to Chingaïpe, the NGO Act was framed to encourage self-regulation by civil society organisations through the Council for Non-Governmental Organisations (CONGOMA), with minimal intervention by the state.¹⁹ This democratic landscape has enabled the mushrooming of HRDs who are working in different sectors, including human rights, democracy, and accountability.

Furthermore, most of the NGOs that make up the HRD community in Malawi are affiliated to and organised under several sector network coalitions. For example, the NGO Gender Coordination Network is home to most HRDs working on gender, women and girls rights.²⁰ The Civil Society Education Coalition, and Malawi Health Equity Network are key HRD coalitions on education and health respectively drawing membership from across Malawi.²¹ Other prominent coalitions include Civil Society Agriculture Network, Civil Society Network on Climate Change, NGO Coalition on Child Rights, Federation of Disability Organisations in Malawi, and Natural Resource Justice Network. Furthermore, in compliance with the NGO Act, most NGO HRDs are affiliated to CONGOMA. Similarly, most youth-related NGOs are affiliated to the National Youth Council of Malawi, a statutory organisation mandated to coordinate and regulate youth work in Malawi.²²

HRDs have since 1990s played a critical role in Malawi, including complementing government in service delivery in various sectors: civic education, including during elections; fighting corruption and abuse of public power; monitoring the performance of the public sector and private sector institutions and advocating for reforms; raising awareness on governance and policy issues for the attention of policy makers; advocating for gender equality; safeguarding civil and political rights and civic space; and defending academic freedom and labour rights. HRDs have also been central in defending the rule of law.²³

However, recently, from the general membership of human rights-related NGOs, some civil society organisations (CSOs) and individuals have self-identified themselves as HRDs.²⁴ They

¹⁸ NGO Policy of the Republic of Malawi, 2018.

¹⁹ H Chingaïpe 'Safeguarding the civic space for democratic governance and development in Malawi' (2021).

²⁰ Dan-Church-Aid 'Human rights defenders risk assessment report: Malawi' (2019).

²¹ As above.

²² National Youth Council of Malawi Act, 1996.

²³ Chingaïpe (n 19) 4.

²⁴ Dan-Church-Aid (n 20).

are organising themselves into a solidarity movement to safeguard their work and space. In 2017, the first ever coalition of HRDs in Malawi called Human Rights Defenders Coalition (HRDC) was formed to build protection support system for human rights defenders (HRDs), and to advocate for a conducive operating environment for HRDs.²⁵ The coalition also builds capacity of its members in different areas, including safety and security, and is actively engaged in fighting against corruption.²⁶ The coalition comprises individual and organisation members from diverse backgrounds, and has structures at national, provincial, district and community level with decentralised leadership.²⁷ It is also affiliated to the Southern Africa Human Rights Defenders Network (SAHRDN) and the Pan African Human Rights Defenders Network.²⁸ The coalition also works with international groups such as Frontline Defenders and Human Rights Watch.²⁹

A particular impetus for the coalition's activism was in 2019 when it mobilised and led a historic pro-democracy movement demanding accountability in the alleged mismanagement of Presidential elections in Malawi. Eventually, in February 2020, the Constitutional Court of Malawi nullified the results of the presidential poll and called for a fresh one.³⁰ Thus, a community of HRDs in Malawi has exponentially grown in number, organisation, influence and confidence.³¹

1.1.3 Operating Environment for HRDs

While Malawi's policy and legal framework is generally permissive for HRDs' operations, evidence shows that there is gross state interference in the work of HRDs in practice.³² HRDs continue to face reprisals for their work, including arbitrary arrests, killings, judicial harassment, arsons, physical attacks, and various forms of harassment.³³ Fundamental rights to freedom of assembly and expression are constantly under violent attack by the state. The situation is more precarious for women HRDs and those advocating for minority rights.³⁴ Furthermore, the state is becoming more sophisticated in undermining the legitimacy and stabilisation of HRDs through co-optation

²⁵ International Civil Society Centre 'Human rights defenders coalition: Tackling corruption to defend civic space in Malawi' (2021) <file:///C:/Users/User/Downloads/hrdc.pdf> (accessed 20 October 2021).

²⁶ Dan-Church-Aid (n 20).

²⁷ As above.

²⁸ International Civil Society Centre (n 25).

²⁹ As above.

³⁰ As above.

³¹ As above

³² Chingaipe (n 19).

³³ Dan-Church-Aid (n 20).

³⁴ As above.

of HRDs into government service and creation of pseudo entities.³⁵ Additionally, Malawi has laws that strengthen states' restrictive strategies against operations of HRDs.³⁶ This study proceeds with the assumption that despite Malawi having a relatively strong human rights framework, in practice, the protection of HRDs remains a serious problem.

1.2 Problem Statement

Despite their critical role in consolidating Malawi's democracy and human rights culture, the operating environment for HRDs remains hostile and 'obstructed'.³⁷ HRDs have constantly been a target of violent attacks by state and political agents.³⁸ The state has also often times used criminal laws to subject HRDs to judicial harassment including arbitrary arrests, and prosecution on trumped-up charges.³⁹ Since independence, there has been constant crackdown on fundamental rights including the rights to freedom of association, assembly, and expression as well as right to personal safety and security, privacy and dignity.⁴⁰ Despite a constitutional bill of rights, it can be dangerous to be an HRD in Malawi.

In response to growing hostility and the risks faced by HRDs across the globe, the United Nations (UN) General Assembly in 1999 adopted the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms' (UN Declaration on HRDs).⁴¹ This Declaration guarantees fundamental rights for HRDs including rights to freedom of expression, security, association and assembly.⁴² These rights are critical enablers for the effective operations of HRDs. Furthermore, the UN Declaration on HRDs reinforces the duty of the states to protect

³⁵ Chingaipe (n 19).

³⁶ E.g NGO Act; Penal Code; Police Act; Protected Flag, Emblems and Names Act; and Electronic Transactions and Cyber-security Act.

³⁷ SALC 'Reflecting on the Closing of Civic Spaces and its Impact on Marginalised Groups in Southern Africa' (2018) <https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/11/SALC-Closing-Civic-Spaces-Report-FINAL-lo-res.pdf> (accessed 20 October 2021).

³⁸ As above.

³⁹ As above.

⁴⁰ As above.

⁴¹ As above.

⁴² As above.

HRDs. Since its adoption, various national, regional and global instruments and mechanisms have emerged to guarantee protection of HRDs.⁴³

At the national level, Malawi has different mechanisms and instruments that deal with various aspects of human rights, including the legislation and state organs such as the Malawi Human Rights Commission (MHRC), Office of the Ombudsman, Courts, Malawi Police Service, and Legal Aid Bureau.⁴⁴

However, little is known about the extent to which the national human rights protection frameworks guarantee the rights of HRDs in Malawi. There is a dearth of academic literature, documentation and recent data at national level about Malawi's protection mechanisms for HRDs. Thus, this study seeks to contribute to the scholarly work about the protection of HRDs in Malawi.

1.3 Research questions

The main research question is: To what extent does the national human rights framework guarantee the protection of HRDs in Malawi?

This study addresses the following specific questions:

- 1) How does the global and regional human rights framework guarantee the protection of HRDs in Malawi?
- 2) How does the national human rights framework guarantee the protection of HRDs?
- 3) What are the barriers that impede the protection of HRDs in Malawi?
- 4) What measures should Malawi take to ensure a better protection for HRDs?

1.4 Methodology

This study primarily relies on desk-based research, mainly examining existing quantitative and qualitative data and literature concerning the protection of HRDs in Malawi. The research draws

⁴³ E.g the AU has since 1998 adopted the Grand Bay Declaration and Action Plan, and Kigali Declaration. The AU has also developed the Guidelines on Freedom of Association, and established the mandate of special rapporteurs on HRDs and reprisals in Africa. Other countries have also developed national laws for protection of HRDs such as Mali, Ivory Cost and Burkina Faso. See SALC (n 37).

⁴⁴ Dan-Church-Aid (n 20).

from both primary and secondary sources. Primary sources such as Malawi's Constitution, domestic statutes, case law, global human rights treaties, declarations, reports and resolutions of the human rights treaty bodies of the African Union and the UN on the protection of HRDs, are examined. Secondary sources include book chapters, books, journal articles, government and other reports, and general internet sources. Where need be, the study also draws from good practice from other countries.

1.5 Scope and limitation of the study

This research focuses on the protection of HRDs in Malawi, especially the national human rights protection mechanisms. It analyses the main issues and practices that impede the protection of HRDs in Malawi and highlight possible solutions. A major limitation of the study might be a dearth of academic literature on the research topic in Malawi. To mitigate this challenge, the study relies on literature from other jurisdictions such as South Africa. Furthermore, failure to seek ethical clearance from the University of Pretoria due to the lengthiness of the process was a limitation as this meant leaving out empirical research which would have added value to the research. However, this gap was closed by relying on existing quantitative and qualitative data and literature on the research topic.

1.6 Definition of human rights defender

This study adopts the definition of the UN Declaration on HRDs which reads that a human rights defender is:

Any person who, individually or in association with others, acts or seeks to act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms, at the local, national, regional or international levels.⁴⁵

⁴⁵ UN General Assembly 'Report of the Special Rapporteur on Situation of Human Rights Defenders' (2018) <https://undocs.org/A/73/215> (accessed 25 October 2021).

HRDs are identified by what they do.⁴⁶ HRDs even individuals who do not identify themselves as HRDs.⁴⁷

1.7 Literature Review

Since the adoption of the UN Declaration on HRDs, an international protection regime for HRDs has emerged, aimed at protecting and supporting HRDs in the face of threats and risks.⁴⁸ Overtime, this protection regime has received significant scholarly attention possibly as an emerging area of international human rights law. Central to the scholarly work on protection of HRDs include: examining the term 'human rights defender'; the role of HRDs in democratic societies, the challenges HRDs face, the efficacy of protection mechanisms for HRDs; and the risks associated with work of HRDs.⁴⁹ However, the scholarly work specific on Malawi regarding protection of HRDs is almost non-existent. This study therefore contributes in filling this gap by interrogating both external and internal threats HRDs face in Malawi and their potential remedies.

1.8.1 Use and definition of term 'HRD'

Malawian laws governing NGOs do not use the term human rights defender. Hence the term remains undefined.⁵⁰ However, an NGO which falls within the category of the HRD has been defined by the NGO Act of Malawi as an entity 'constituted for a public benefit purpose'.⁵¹

Internationally, the UN Declaration on HRDs, which is a core international instrument on HRDs, does not contain or define term 'human rights defender'. According to Blazevic, this reflects the tensions that marred negotiations during the drafting process.⁵² However, Blazevic argues that the absence of a definition provides flexibility for the mandate holder on protection of HRDs to broaden the constituency of target HRDs. Similarly, Eguren and Patel argue that the prevailing basis for Declaration's definition is inadequate and ambiguous; hence, potentially hindering the

⁴⁶ As above.

⁴⁷ K Bennett & others 'Critical perspectives on the security and protection of human rights defenders' (2015) 10 *The International Journal of Human Rights* <https://doi.org/10.1080/13642987.2015.1075301> (accessed 15 October 2021).

⁴⁸ As above.

⁴⁹ As above.

⁵⁰ M NKhata 'The Situation of Human Rights Defenders in Malawi: a Baseline Study' (2017)

⁵¹ Sec 2 of the NGO Act of Malawi.

⁵² N Blazevic (ed) *Defending Human Rights: A Resource Book for Human Rights Defenders-2nd edition* (2012).

protection of defenders.⁵³ They in turn argue for the development of a critical and ethical framework that focuses on analysing 'what a defender does or does not do in context'.⁵⁴ Relatedly, Bennett *et al* argue that the term HRD is invoked when individuals engaged in rights-related work face threat because of their work.⁵⁵ Thus the term HRD is applied to legitimise and bring visibility to their work.⁵⁶ They also highlight the benefits for using the term HRD, including that it confers on HRDs 'recognition and status within the international human rights framework through which they can access support, protection and redress for violations'.⁵⁷ They also observe that NGOs and individuals use the HRD identity to mobilise funds for programmes supporting protection of HRDs.⁵⁸ The four also emphasise the need for critical appraisal of the construction, function and evolution of the human rights protection regime and its 'multi-scalar social and political effects'.⁵⁹ They stress the need for the development of theory and practice related to the 'risk', 'security' and 'protection' of HRDs.⁶⁰ However, the UN has argued that civil society largely comprises HRDs, hence the need retain the current definition provided under the Declaration on HRDs which encompasses individuals and institutions.⁶¹

In an attempt to address the above tensions in the definition of an HRD, the UN Office of the High Commissioner on Human Rights (OHCHR), has attempted to provide guidance on who should be referred to as an HRD.⁶² According to the OHCHR, the term HRD refers to:

Any person who, individually or in association with others, acts or seeks to act to promote, protect or strive for the protection and realisation of human rights and fundamental freedoms, at the local, national, regional or international levels.⁶³

⁵³ E Eguren & C Patel 'Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders'(2015)19 *The International Journal of Human Rights*.

⁵⁴ As above.

⁵⁵ Bennett & others (n 47).

⁵⁶ As above

⁵⁷ As above

⁵⁸ As above

⁵⁹ As above

⁶⁰ As above

⁶¹ H Dube & others *Civil society in the digital age in Africa: identifying threats and mounting pushbacks* (2020).

⁶² OHCHR 'Human rights defenders: Protecting the right to defend human rights, Fact Sheet No.29' (2004) <https://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> (accessed 25 October 2021).

⁶³ As above

It has further stated that one needs to meet three 'minimum standards' to fit definition for HRD. First, an HRD should accept the 'universality of human rights'. Second, the person's views should be human rights centered, regardless of the technical correctness. Third, an HRD should engage in 'peaceful action'.⁶⁴ Bennett, however, argues that this interpretation still does not adequately address existing questions such as: 'To what extent does a defender need to demonstrate that his/her actions are non-violent?' 'To what extent should a defender be expected to demonstrate knowledge of and respect for the universality of human rights?' and 'What criteria and process should be adopted to determine this?'⁶⁵ Thus, the definition and scope of who a HRD is remains problematic in Malawi's laws and international law.

1.8.2 Role of HRDs

HRDs are central in a functioning of democracy.⁶⁶ According to Gumede, the role of civil society includes connecting citizens with various stakeholders, facilitating civic engagement and participation.⁶⁷ HRDs are conveners of the 'third space' where citizens converge for various but common aspirations.⁶⁸ Recognising the critical role of HRDs, some African countries such as Côte d'Ivoire, Burkina Faso and Mali have adopted laws that specifically promote and protect the rights of HRDs.⁶⁹

In Malawi, HRDs continue to play significant role in public governance and human rights. Their core working areas include human rights and democratic governance; women's rights; anti-corruption and accountability; elections; citizen participation and civic engagement; LGBTI rights or minority rights; rights of persons with disabilities; sexual and reproductive health rights; land rights; environmental rights; labour rights; children's rights; and access to justice and prisoners'

⁶⁴ OHCHR 'Commentary to the declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms' (2011) <https://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersjuly2011.pdf> (accessed 26 October 2021).

⁶⁵ Bennett & others (n 47).

⁶⁶ W Gumede 'Democracy Works Foundation: Policy Brief 16: African Civil Society under Fire' (2017) <https://democracyworks.org.za/policy-brief-16-african-civil-society-under-fire/> (accessed 20 October 2021).

⁶⁷ As above

⁶⁸ L Bernholz 'Philanthropy and Digital Civil Society: Blueprint' (2018) <https://pacscenter.stanford.edu/publication/philanthropy-and-digital-civil-society-blueprint-2018/> (accessed 20 October 2021).

⁶⁹ Dube (n 61).

rights.⁷⁰ Some of the common approaches employed by most of the organisations include advocacy; public education and awareness; legal services including litigation; and research and capacity building. For example, on women empowerment in decision making, the NGO GCN has been leading a 50:50 Campaign, a signature initiative aimed at increasing women representation in Parliament and Local Government in Malawi.⁷¹

According to Lwanda and Chanika, HRDs in Malawi have been crucial in providing 'political opposition' during key democratic moments of the country since 1992. For example, they played key role in early 1990s during the transition period to multiparty democracy. In early 2000, HRDs played a critical role in thwarting the third term bid by the then President Bakili Muluzi, demonstrating the significant role of HRDs in defending the rule of law and democracy.⁷² CSOs also played pivotal activism on Debt Relief through the 'Jubilee 2000 Action for Debt Relief' campaign⁷³ Recently, in 2019 and 2020, in what could be described as the epitome of activism and power of HRDs in Malawi's history, HRDC successfully led widespread protests and legal action that arguably influenced the annulment of the Presidential elections by the Constitutional Court and subsequent change of government.⁷⁴

Furthermore, some NGOs engage with state-party reporting mechanisms under the UN and African Commission., hence increasing state accountability on its human rights obligations.⁷⁵ There are also prominent HRDs advocating for sexual minority rights and environmental rights.⁷⁶ HRDs have also enhanced dialogue between citizens and government.⁷⁷ They have also been instrumental for speaking up for the voiceless and entrenching democracy and the rule of law.⁷⁸

Globally, there is growing recognition of the critical role of HRDs in global development, human rights, and democracy, and the need to support their work. The UN Secretary General, Antonio

⁷⁰ As above.

⁷¹ N Amundsen & H Kayuni (Eds) *Women in Politics in Malawi* (2016).

⁷² Lwanda & Chanika (n 4).

⁷³ O Mwalubunju 'Civil Society' in N Patel & L Svasand (Eds) *Government and Politics in Malawi* (2007) at 26.

⁷⁴ ICNL <https://www.icnl.org/resources/civic-freedom-monitor/malawi?amp> (accessed 2 October 2021).

⁷⁵ T Sangala 'Issa Njauju murder goes to African Commission' *Daily Times* 3 May 2018

<https://www.times.mw/issa-njauju-murder-goes-to-african-commission/> (Accessed 15 October 2021).

⁷⁶ Dan-Church-Aid (n 20).

⁷⁷ As above.

⁷⁸ As above.

Guterres, for instance, has stated that HRDs are critical in upholding and furthering the principles of the UN and advancing peace and sustainable development.⁷⁹

1.8.3 HRDs-state relations

The cost of defending human rights can be exceedingly high. Despite the growing recognition of the critical role they play in development in Malawi, HRDs are under constant threat from both the state and business.⁸⁰ Due to their watchdog role, the relationship between HRDs and power holders has been not healthy.⁸¹ The ability of HRDs to challenge excesses of political authorities has compromised relations between the state and HRDs.⁸² According to Chingaipe, the relations between HRDs and the state in Malawi can be summarised into four categories: synergistic, antagonistic, collusive, and ambivalent.⁸³ Synergistic relations signifies a good relationship between government and HRDs. In this relationship, HRDs do not challenge government policy and largely viewed as collaborators in complimenting government efforts in service delivery. In return, the authorities are supportive and approve or tolerate the work of these HRDs. In Antagonistic relationship, there are constant tensions between HRDs and state authorities and may include HRDs engaging in activities that make government uncomfortable such as corruption. The state in return is often aggressive and does not approve the work of the HRDs. Contrary to antagonism, is the collusive relationship. This involves capture of civic space in which HRDs operate as pseudo entities or agents of the state often created or supported by politicians in government. HRDs are usually partisan and coopted into government. Lastly, an ambivalent relationship entails HRDs having good relationship with the state which grants them access to government policy processes by invitation by government. The HRDs bring alternative policy options to those of the government. In practice, in Malawi, HRDs-state relations have varied depending on the government of the day and the nature of the work pursued by HRDs. HRDs pursuing sensitive governance issues usually attract antagonism with the state.⁸⁴

⁷⁹ Remarks by the UN Secretary General Antonio Guterres to the General Assembly (18 December 2018).

⁸⁰ Coalition for Human Rights in Development 'Human Rights Defenders Are a Cornerstone of Sustainable Development' (2018)

<https://rightsinddevelopment.org/human-rights-defenders-are-a-cornerstone-of-sustainable-development/> (accessed 8 October 2021).

⁸¹ Lwanda & Chanika (n 4).

⁸² Chingaipe (n 19).

⁸³ As above.

⁸⁴ Nkhata (n 50).

Nesossi explores the nexus between the repression of HRDs and their work of defending human rights. She observes that repression can, paradoxically, create new opportunities for action.⁸⁵ She argues that divisions amongst the political elite may particularly act as an opportunity for change.

1.8.4 Attacks against HRDs and shrinking civic space

According to Southern Africa Litigation Centre (SALC), Malawi's civic space is obstructed. The state is fighting back on its critics using its political machinery.⁸⁶ It observes that despite a relatively enabling environment for operation of HRDs, state authorities are constantly undermining the ability of HRDs through violence, and legal and bureaucratic machinations such as restrictive NGO regulatory laws. Other countries falling in this category include Lesotho, Mozambique, Madagascar, Zambia, and Tanzania.⁸⁷ Furthermore, HRDs face risk of violence and threats of violence against; the existence of repressive laws; weak institutional arrangements; and ineffective implementation of the existing policy and legal framework that relate to HRDs work.⁸⁸ It further establishes that despite the relatively strong legal framework, HRDs in Malawi do not have sufficient protection due to the absence of a specific law for the protection of HRDs.⁸⁹ Nkhata argues that the state of civic space in Malawi is dictated by the particular prevailing political climate, adding that authoritarian regime tend to stifle operations of civic actors. He further observes that the hostility by the state to the civic space is content-dependent, with critical content carrying high chances of state hostility.⁹⁰ Nkhata further observes that the risk faced by an HRD is contingent upon the nature of the issues being pursued. He argues that the more sensitive issues tackled by HRDs increase their risk of hostility from the state.⁹¹ For example, there has been hostility against HRDs advancing LGBTI rights in Malawi.⁹² Homosexuality is criminalised in Malawi's laws.⁹³

⁸⁵ E Nesossi 'Political opportunities in non-democracies: The case of Chinese *weiquan* lawyers' (2015)19*The International Journal of Human Rights*.

⁸⁶ SALC (n 37).

⁸⁷ SALC (n 37).

⁸⁸ Dan-Church-Aid (n 20).

⁸⁹ As above.

⁹⁰ Nkhata (n 50).

⁹¹ As above.

⁹² Dan-Church-Aid (n 20).

⁹³ Secs 53, 156 and 137A of the penal code.

Women HRDs (WHRDs) are most at risk.⁹⁴ A recent study by Dan-Church-Aid shows that WHRDs often become easy target of ridicule, smear campaigns, sexual abuse and harassment due to their work.⁹⁵ As a result, most WHRDs opt out of controversial human rights and governance issues.⁹⁶ This partly explains the male domination in the HRD space. The African Commission has also raised concern over hostilities faced by WHRDs and called for redress.⁹⁷ Jane Barry and Vaida Nainar reflecting on security of women HRDs argue that security has to be integrated and holistic, addressing the needs of women such as employment, and social wellbeing.⁹⁸

While there have been some study reports on the operating environment of HRDs in Malawi, such studies have focused on the general environment, without specific focus on the protection mechanisms of HRDs. Thus, this study seeks to specifically examine the protection mechanism for HRDs in Malawi, unearthing the gaps and recommend resolutions. This study will also capture more recent data and developments in Malawi's civic space, relevant to the work of HRDs.

1.8 Overview of the Chapters

In addition to this introductory chapter (Chapter one), the study continues along four more chapters. Chapter two investigates the situational analysis of HRDs in Malawi drawing the challenges faced by HRDs and their potential impact on the HRDs work. Chapter 3 examines the regional and global human rights legal framework on protection of HRDs; while chapter three analyses the national mechanisms for protection of HRDs in Malawi, drawing attention to legal, policy and institutional frameworks. Finally, chapter 5 presents the conclusion and recommendations of the study.

⁹⁴ Dan-Church-Aid (n 20).

⁹⁵ As above.

⁹⁶ As above.

⁹⁷ African Commission 'Report of the study on women human rights defenders in Africa' (2015).

⁹⁸ As above.

CHAPTER 2: RISKS AND CHALLENGES FACED BY HRDs IN MALAWI

2.1 Introduction

This chapter discusses the persisting impunity for human rights violations against HRDs in Malawi. It analyses the nature and forms of violations, threats, risks and vulnerabilities faced by HRDs in Malawi and their implications to their work.

2.2 Nature and forms of threats and Attacks against HRDs in Malawi

2.2.1 Physical Attacks/Harm

HRDs face various physical attacks, particularly during demonstrations whereby police officers have used excessive force and firearms and caused injury of HRDs or journalists. On 10 September 2011, for example, the house of activist McDonald Sembereka was petrol-bombed, by unknown arsonists allegedly linked to the ruling party agents.⁹⁹ Additionally, in August 2019, human rights activist Billy Mayaya sustained life threatening head injuries after he was stoned by the members of the ruling Democratic Progressive Party during demonstrations organised by the HRDC in Blantyre city demanding resignation of the Chairperson of the electoral body following allegations of election fraud. Mayaya's attack allegedly took place in full view of the police and no arrests were immediately made until there was change of government in June 2020.¹⁰⁰

Women HRDs have also not been spared from physical attacks. In 2004, Emmie Chanika of Civil Liberties Committee was physically assaulted and undressed in public allegedly by the supporters of the ruling United Democratic Party (UDF) during a monitoring exercise of 2004 elections.¹⁰¹

2.2.2 Death Threats and Killings

⁹⁹ Media Institute of Southern Africa 'Arson attacks target rights activists' (2011) <https://ifex.org/arson-attacks-target-rights-activists/> (accessed 27 October 2021).

¹⁰⁰ G Muheya 'Mayaya hackers left scott free, no arrest yet for Mtambo attackers' *Nyasa Times* 16 October 2019 <https://www.nyasatimes.com/mayaya-hackers-left-scott-free-no-arrest-yet-for-mtambo-attackers/> (accessed 18 October 2021). Also see <https://www.faceofmalawi.com/2019/09/26/utm-condemns-assault-of-billy-mayaya-by-dpp-cadets-in-blantyre/> (accessed 18 October 2021).

¹⁰¹ Dan-Church-Aid (n 20).

HRDs in Malawi have faced both death threats and actual killings because of their work. In 2019, for example, an anti-corruption HRD received direct death threats over the phone for the work his organisation undertook in exposing a multi-million kwacha corruption case involving a business tycoon closely linked to the ruling party.¹⁰² Despite reporting to Police, no investigations were opened against the party operative. Furthermore, some HRDs have been killed. On 19 September 2019, about 18 protesters were arrested and detained at the police station in Karonga following the protests organised by the HRDC over what it considered mismanagement of elections by the country's Election Commission. One of the protesters Justin Phiri died in police custody on 26 September of infected wounds which were not treated after he had been severely assaulted by the soldiers during the protests and that the police failed to take him to the hospital.¹⁰³ Other victims include Robert Chasowa, a student activist and critic of the late Malawian president Bingu wa Mutharika ; and Evisole Matafale, a musician and critic of the then ruling UDF who died in police custody in 2002.¹⁰⁴ The 20 July 2011 massacre, in which police fired live ammunition at unarmed protesters, killing 21 in Malawi's main cities of Lilongwe, Blantyre and Mzuzu, is a stark reminder of the unbearably heavy burden of police brutality human rights activists carry in discharge of their work in Malawi.

2.2.3 Arbitrary arrests, Detention and Prosecution

Since 1994, HRDs have faced countless arrests, detentions and prosecutions. For examples, in October 2011, five HRDs including Billy Mayaya and Habiba Osman were arrested for demonstrating at the summit of the Common Market for Eastern and Southern Africa (COMESA) Heads of State.¹⁰⁵ Other HRDs who were arrested on alleged trumped up charges include Gift Trapence and Timothy Mtambo, John Kapito, Sylvester Namiwa, and Beatrice Mateyo.¹⁰⁶ In all these arrests, the state did not succeed in prosecuting the HRDs. As noted by the DCA study report, 'The continued presence in the penal code of vaguely defined and overly broad charges

¹⁰² J Mwale 'Lawyer, CSO leaders getting death threats' *The Nation* 18 January 2017 <https://www.mwnation.com/lawyer-cso-leaders-getting-death-threats/> (accessed 18 October 2021).

¹⁰³ J Mwale 'Karonga beaten protester dies in custody' *The Nation* 26 September 2019 <https://www.mwnation.com/karonga-beaten-protester-dies-in-custody/> (accessed 18 October 2021).

¹⁰⁴ D Smith 'Student activist was murdered, Malawian inquiry rules' *The Guardian* 10 October 2012 <https://www.theguardian.com/world/2012/oct/10/student-activist-murdered-malawian-inquiry> (accessed 18 October 2021). Also see <https://www.refworld.org/docid/3cf4bc0211.html> (accessed 18 October 2021).

¹⁰⁵ Dan-Church-Aid (n 20).

¹⁰⁶ As above.

such as to conduct likely to cause a breach of the peace; sedition and unlawful assembly, have meant that HRDs can easily be picked and charged on these charges'.¹⁰⁷

2.2.4 Harassment and Intimidation

HRDs are subjected to various forms of harassment and intimidation aimed pressuring them to stop pursuing particular issues. These can be one-off or sustained attacks. Presidents and Ministers, for example, have publicly attacked HRDs for being agents of the West and unpatriotic. On 1 January 2020, in his New Year national address, the then President Peter Mutharika labeled, a rights group, the HRDC as a 'terrorist organisation' accusing it of violent protests and scaring investors.¹⁰⁸ HRDC has been organising countrywide protests against alleged election fraud in the 2019 poll. The authorities and political functionaries has also used propaganda /smear campaigns against HRDs to intimidate and discredit the work of HRDs. For example, as one study report captures 'HRDs that champion LGBTI rights have increasingly been denounced as elements of western/imperial influence which only work for financial gain'.¹⁰⁹ Furthermore, authorities in Malawi have on many occasions attacked HRDs and donors for seeking regime change.¹¹⁰ On 5 July 2018, addressing a political rally in Mzuzu, President Peter Mutharika accused Malawi's international donors and partners of trying 'recolonise Malawi' and destabilise his government by sponsoring some CSOs.¹¹¹ As a result, some donors supporting HRDs work may be reluctant to support HRDs working on sensitive human rights and governance issues, hence weakening the mandate of HRDs.

2.2.5 Searches of Offices and Residential Premises

Some HRDs have been subjected to searches of offices and residential premises by police. CEDEP, a human rights organisation, for example, had its offices searched on allegations that

¹⁰⁷ As above.

¹⁰⁸ O Khamula 'Mutharika labels Malawi Rights Group HRDC as terrorist organization: Attacks MCP' *Nyasa Times* 1 January 2020 <https://www.nyasatimes.com/mutharika-labels-malawi-rights-group-hrdc-as-terrorist-organization-attacks-mcp/> (accessed 18 October 2021).

¹⁰⁹ Dan-Church-Aid (n 20).

¹¹⁰ T Chiumia 'Malawi accuses West for seeking regime change' *Nyasa Times* 25 February 2014 <https://www.nyasatimes.com/malawi-accuses-west-for-seeking-regime-change/> (accessed 20 October 2021).

¹¹¹ J Mwale 'APM attacks donors, CSOs' *The Nation* 7 July 2018 <https://www.mwnation.com/apm-attacks-donors-csos/> (accessed 18 October 2021).

they were keeping pornographic materials. Similarly, in March 2012, the police arrested and searched the residence and car of the chairperson of the Malawi Human Rights Commission, a fierce critic of former President Bingu wa Mutharika, on allegations of being in possession of seditious documents and illegal forest.¹¹² Kapito had scheduled to leave for Geneva to present a report on the human rights situation in Malawi at the International Coordinating Committee of National Human Rights Institutions.¹¹³

2.2.6 Attacks on Journalists and critical media

The state has on several times targeted critical media with different forms of intimidation, including use of the Malawi Revenue Authority (MRA), tax collection body, to shut down critical media houses under the guise of noncompliance to tax remittance. For example, in 2017, the MRA closed one of Malawi's leading and critical media, Times Group on allegations of tax non-compliance.¹¹⁴ Furthermore, the communications regulator, Malawi Communications Authority (MACRA) seems politicised and biased in its operations. In 2016, MACRA fined a leading private radio, ZODIAK Broadcasting Station (ZBS) \$ 1250 for allegedly allowing an opposition member of Parliament accuses two former presidents to be responsible for murder of political and civil society activists.¹¹⁵ Similarly, on 6 January 2019, MACRA banned all 'live broadcasts' unless they had a delay machine, a decision that MISA-Malawi, the local chapter of the Media Institute of Southern Africa described as 'not only unreasonable but also ill-timed and a deliberate plot to limit media freedom and freedom of expression'.¹¹⁶ The ban came ahead of May 2019 elections. MISA challenged the directive through the courts and won the case. Again, journalists deemed anti-government have at times been summoned by police.¹¹⁷

¹¹² Criminal Justice Reform 'Malawi Human Rights Commissioner Arrested, Police Crackdown'

<https://acjr.org.za/news/malawi-human-rights-commissioner-arrested-police-crackdown> (accessed 25 October 2021).

¹¹³ As above.

¹¹⁴ T Sangala 'MRA seals Times Group offices' *Daily Times* 13 January 2021 <https://times.mw/mra-seals-times-group-offices/> (accessed 18 October 2021).

¹¹⁵ L M'bwana 'MACRA has fined a Private Radio Station US\$1250 for breaching Broadcasting licence conditions' *Malawi Post* 13 December 2016 <https://www.maravipost.com/macra-fined-private-radio-station-us1250-breaching-broadcasting-licence-conditions/> (accessed 18 October 2021).

¹¹⁶ MISA Malawi 'Ban of live broadcasts ill-timed' (2019) <https://malawi.misa.org/2019/08/06/ban-of-live-broadcasts-ill-timed/> (accessed 18 October 2021)

¹¹⁷ International Press Institute 'Malawi: recent detention of journalists overshadow positive press freedom image' (12 April 2021) (<https://ipi.media/malawi-recent-detentions-of-journalists-overshadow-positive-press-freedom-image/>) (accessed 26 October 2021).

2.2.7 Crackdown on Demonstrations

Holding of demonstrations remains a constant battleground between HRDs and the Police. In many instances HRDs have been stopped from undertaking peaceful and unarmed demonstrations, on the pretext of security reasons. In 2019, for example, the government went to court to stop demonstrations being organized by a coalition of HRDs. In 2002, the then President Bakili Muluzi declared all demonstrations challenging his term limit bid illegal, a decision that was annulled by the courts.¹¹⁸ In some cases, HRDs have arrested for holding what the police have described as illegal demonstrations and unlawful assemblies. In August 2021, activist Sylvester Namiwa was arrested in Lilongwe for allegedly holding illegal protests.¹¹⁹

2.2.8 Mushrooming of 'GONGOs' and State Capture of some HRDs

The state authorities in Malawi continue to apply various tactic to weaken or destabilise the HRD movement. One case is whereby the state turns to sponsor some NGOs to counter and discredit the work of other HRDs, deemed critical of the government. These puppet organisations have been described as Government's Non-Governmental Organisations (GONGOs).¹²⁰ GONGOs tend to discredit legitimacy of HRDs and present themselves as to the public and authorities as patriots. They also enjoy extensive coverage of their issues on the state-controlled media. In July 2019, for example, a group of eleven activists, which may fall in the GONGO category, requested the International Criminal Court (ICC) to investigate leaders of the HRDC for alleged crimes against humanity. The letter dated 31 July 2019 partly stated 'HRDC has vowed to continue to push for these civil unrest which we fear if not stopped might end up into civil war. Already the two parties that are supporting the HRDC in the demos, have been releasing hate audios which is urging the killing of other people. Further, there has been hit list of different people that are being targeted to be killed and urging their supporters to use the coming protest to carry out their actions'¹²¹

¹¹⁸ IOL 'Malawi high court blocks Muluzi crackdown' *IOL* 4 June 2002.

<https://www.iol.co.za/news/africa/malawi-high-court-blocks-muluzi-crackdown-87643> (accessed 18 October 2021).

¹¹⁹ N Meki 'Activist Namiwa spends night in custody' *The Nation* 12 August 2021 <https://www.mwnation.com/activist-namiwa-spends-night-in-custody/> (accessed 17 October 2021).

¹²⁰ Dan-Church-Aid (n 20).

¹²¹ M Mkandawire 'Activists report HRDC, opposition leaders to ICC over post-election violence' *Malawi24* 1 August 2019 <https://malawi24.com/2019/08/01/activists-report-hrdc-opposition-leaders-to-icc-over-post-election-violence/> (accessed 18 October 2021).

Furthermore, the state has also tried to porch some influential HRDs by offering them appointments into government in what has been called ‘state capture of HRDs’ or ‘co-optation’. More recently, in 2021, four senior leaders of HRDC were appointed to various diplomatic posts in foreign diplomatic missions.¹²² Similarly, in October 2011, a prominent activist and coordinator of a leading human rights network, Human Rights Consultative Committee Mavuto Bamusi, was appointed as Presidential advisor on civil society affairs to President Bingu wa Mutharika.¹²³ In addition, President Mutharika in 2011 created a presidential advisory council involving HRDs which possibly weakened the capacity of the HRDs to raise critical governance questions that rocked the country.¹²⁴ When President Joyce Banda took office in 2012, she appointed a renowned activist, McDonald Sembereka, as her advisor on NGOs affairs.¹²⁵ Way back in 1960s, Kamuzu Banda neutralised Trade unions by coopting strong trade unionists, like John Ngwiri, into government service.¹²⁶

The state tactics reflected in both the GONGOs and co-optation of HRDs possibly threaten the legitimacy and integrity of HRD work as the public may increasingly view HRDs as mere political opportunists.

2.3 Conclusion

While the operating environment for HRDs in Malawi is relatively permissive, it remains dangerous for HRDs. HRDs continue to face serious reprisals for their work including arrests, killings, economic marginalisation, and various forms of harassment. Fundamental rights to freedom of assembly and expression are under constant attack by the state. The situation is more precarious for women HRDs due to institutionalised patriarchy within civil society and society in general. HRDs working on politically sensitive issues such as LGBTI are also most risk.

¹²² Nyasa Times ‘Chakwera govt ‘scatters’ militant HRDC leaders to embassies’ *Nyasa Times* 16 June 2021. <https://www.nyasatimes.com/chakwera-govt-scatters-militant-hrdc-leaders-to-embassies/> (accessed 18 October 2021).

¹²³ Lwanda & Chanika (n 4).

¹²⁴ Chingaibe (n 1).

¹²⁵ Nyasa Times ‘Joyce Banda Appoints Nhlane Pres Sec, Rev Sembereka Advisor’ *Nyasa Times* 17 May 2012 <https://www.nyasatimes.com/jb-appoints-nhlane-pres-sec-rev-semberoka-advisor/> (accessed 18 October 2021).

¹²⁶ Lwanda & Chanika (n 4).

CHAPTER 3: REGIONAL AND GLOBAL HUMAN RIGHTS PROTECTION MECHANISMS FOR HRDs

'When the rights of human rights defenders are violated, all of our rights are put in jeopardy and all of us are made less safe.'— Kofi Annan, UN Secretary General¹²⁷

3.1 Introduction

Globally, HRDs operate in hostile and dangerous environments facing countless assaults from state and non-state actors, including killings, torture, physical attacks, stigmatisation, sexual violence, judicial persecution, criminalisation and arbitrary arrests.¹²⁸ According to OHCHR, at least 281 HRDs were killed in 2019, and a total of 1,323 HRDs were killed between 2015 and 2019.¹²⁹ In response, there has been growing international pressure on states to take measures to respect and protect the rights of HRDs. This chapter discusses the regional and global instruments imposing obligations on states regarding protection of HRDs.

3.2 International legal framework on the rights and protection of HRDs

3.2.1 UN Declaration on Human Rights Defenders and other international instruments

The UN Declaration on HRDs came into force in December 1998.¹³⁰ Adopted by the UN General Assembly, the Declaration, is the first and core international instrument on protection of HRDs. It is significant as it recognises, in international law, the importance and legitimacy of fighting for human rights and as well as their need for better protection.¹³¹ The UN Declaration on HRDs which is seen as a 'manifesto for human rights movement'¹³² recognises the central role played by individual and groups in promoting and protecting universally recognised human rights and fundamental freedoms peacefully.¹³³

¹²⁷ UN General Assembly (n 45).

¹²⁸ UN General Assembly 'Special Rapporteur report on situation of human rights defenders' (2021).

¹²⁹ As above.

¹³⁰ UN General Assembly (n 45).

¹³¹ SALC (N 37).

¹³² UN General Assembly (n 45).

¹³³ Arts 1, 5 and 13 of the UN Declaration on HRDs.

Most crucially, the Declaration contains and guarantees a catalogue of rights and freedoms of HRDs. According to the UN Special Rapporteur on the situation of HRDs, the UN Declaration on HRDs enshrines nine fundamental rights for HRDs.¹³⁴ These include ‘the right to be protected; the right to freedom of assembly; the right to freedom of association; the right to access and communicate with international bodies; the right to freedom of opinion and expression; the right to protest; the right to develop and discuss new human rights ideas; the right to a remedy; and the right to access funding.’¹³⁵ The foregoing rights are critical enablers for the creation of an enabling environment for HRDs. Thus, the Declaration is regarded as the ‘basic matrix from which the legal rights of human rights defenders was born’.¹³⁶ As the former UN Secretary General Kofi Anani aptly stated ‘when the rights of human rights defenders are violated, all of our rights are put in jeopardy and all of us are made less safe’.¹³⁷ It is important, however, to recall that the Declaration does not establish any new rights, but rather reaffirms rights that are instrumental to the defense of fundamental human rights that are already enshrined in legally binding international instruments.¹³⁸ Furthermore, articles 2, 9 and 12 of the UN Declaration on HRDs impose obligations on states ‘to protect HRDs against any arbitrary action because of their legitimate exercise of the rights enshrined in the Declaration, and ensure access to effective remedies in the case of violations and prompt and impartial investigations of alleged violations’. Furthermore, the Declaration compels states to ensure accountability of individuals and institutions engaged in violations against HRDs, while also ensuring that HRD victims gave access to remedies and reparation.

Furthermore, the state has obligation to protect HRDs from human rights violations by third parties including the business. In cases where third party actors act under the instruments of the state, the state is held liable.¹³⁹ Under article 12, the state has the obligation to prosecute and punish third party perpetrators is a violation against HRDs. The UN Declaration on HRDs has also provided recognition of human rights defenders and increased the visibility of their work.¹⁴⁰ The Declaration has also paved the way for the establishment of defenders’ support systems including

¹³⁴ UN General Assembly (n 45).

¹³⁵ As above.

¹³⁶ L Lumbu *Compendium on the legal protection of human rights defenders in Africa* (2018).

¹³⁷ UN General Assembly (n 45).

¹³⁸ As above

¹³⁹ OHCHR (n 64).

¹⁴⁰ As above.

the UN mechanism for their protection.¹⁴¹ At the regional levels, the Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights have also set up their own Special Rapporteur mechanisms. In addition to adopting guidelines on HRDs,¹⁴² the EU has also established the initiative called '*Protect-Defenders*' as a mechanism to protect HRDs in high-risk situations.¹⁴³ Various alliances of HRDs have emerged to a large extent been inspired by the Declaration.

At the national levels, some governments have taken stapes to domesticate the UN Declaration on HRDs. Example in Africa include, Côte d'Ivoire, Burkina Faso and Mali.¹⁴⁴ Similarly, Switzerland has promulgated guidelines on the protection of human rights defenders.¹⁴⁵ In 2012, Mexico, enacted a specific law enabling HRDs and journalists to seek protection measures from the government.¹⁴⁶

3.2.2 The Marrakech Declaration.

The Marrakech Declaration (the Declaration) on Human Rights was adopted in 2018, ten years after the UN Declaration on HRDs. Adopted by the Global Alliance of National Human Rights Institutions, the Declaration recognises the central role of National Human Rights Institutions (NHRIs) in expanding civic space and protecting HRDs, with a specific focus on women.¹⁴⁷ This

¹⁴¹ The UN has established Special Rapporteur on Human Rights Defenders with broad mandate including country visits, reporting on the situation of human rights defenders worldwide, as well as to propose possible protection measures.

¹⁴² EU 'Guidelines on Human Rights Defenders'
https://www.ohchr.org/Documents/Issues/Defenders/2008_EU_Guidelines_HRDefenders.pdf (accessed 10 October 2021).

¹⁴³ P Willy & J Spannagel 'The history of the UN Declaration on Human Rights Defenders: its genesis, drafting and adoption' (2019).
<https://www.universal-rights.org/blog/the-un-declaration-on-human-rights-defenders-its-history-and-drafting-process/> (accessed 10 October 2021).

¹⁴⁴ International Service for Human Rights 'ACHPR65: Protecting human rights defenders through protection laws in Africa' (2019) <https://ishr.ch/latest-updates/achpr65-protecting-human-rights-defenders-through-protection-laws-africa/> (accessed 10 October 2021).

¹⁴⁵ Federal Department of Foreign Affairs 'Swiss Guidelines on the Protection of Human Rights Defenders' (2013) https://www.eda.admin.ch/content/dam/eda/en/documents/topics/aussenpolitik/Menschenrechtsverteidigerinnen_eidi/ger/2013-Leitlinien-Schutz-Menschenrechtsverteidiger_EN.pdf (accessed 26 October 2021).

¹⁴⁶ Bennett & others (n 47).

¹⁴⁷ Marrakech Declaration on Human Rights Defenders.

Declaration among others calls for the 'establishment of national protection systems for human rights defenders'.¹⁴⁸

3.2.3 Other international human rights instruments

The International Covenant on Civil and Political Rights (ICCPR) is a central international human rights instrument guaranteeing the rights of HRDs. Article 6 of the ICCPR recognises the inherent right to life of every individual, including HRDs, and clarifies the obligations of states. The Human Rights Committee has stated that 'states have the obligation to respect the right to life of HRDs and refrain from engaging in any conduct resulting in an arbitrary deprivation of life'.¹⁴⁹ The ICCPR also obligates state parties 'to take appropriate measures or to exercise due diligence to prevent and investigate instances of potentially unlawful deprivations of life by state and non-state actors and, where appropriate, to prosecute those responsible'.¹⁵⁰

In addition, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also gives legitimacy to the work of women rights defenders.¹⁵¹ It articulates women's rights to be free from all forms of violence and discrimination, and guarantees rights to freedom of speech and association.¹⁵² It also urges State Parties to ensure participation of women in public life including politics and civil society organisations.¹⁵³ Most significantly, under article 17, the Convention establishes a Committee on the Elimination of Discrimination against Women (CEDAW Committee)¹⁵⁴ which, under the Optional Protocol adopted in 1999, can be accessed by WHRDs when faced with reprisal violations.¹⁵⁵ In response to growing reprisals against HRDs, including women, who cooperate with human rights treaty bodies on 21 June 2021, the CEDAW Committee adopted the 'Guidelines to address allegations of reprisals and acts of intimidation

¹⁴⁸ As above.

¹⁴⁹ UN Human Rights Committee 'General comment 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (2018) paras 7, 13, 15 & 17.

¹⁵⁰ UN Human Rights Committee General Comment 31 [80], 'The nature of the general legal obligation imposed on States Parties to the Covenant' (2004) paras 8, 15–16 & 18.

¹⁵¹ Arts 7(c), 8 & 11(f) of CEDAW.

¹⁵² African Commission (97)

¹⁵³ Art 7 of CEDAW.

¹⁵⁴ The Committee is a body of independent experts that monitors implementation of the CEDAW

¹⁵⁵ African Commission (n 97).

against individuals and organisations cooperating with the Committee'.¹⁵⁶ It has also appointed a Rapporteur on reprisals.¹⁵⁷

3.3 African legal and policy landscape on protection of HRDs

Since the adoption of the UN declaration on HRDs the African Union has produced three key declarations concerning HRDs, namely, the Grand Bay Declaration and Action Plan of 1999, the Kigali Declaration of 2003, and the Cotonou Declaration on Strengthening and Expanding the Protection of All HRDs in Africa in 2017. This legal framework is reinforced by the Guidelines on Freedom of Association and Assembly in Africa and the African Commission's Declaration of Principles on Freedom of Expression and Right to Information in Africa.¹⁵⁸ These instruments affirm the rights of defenders in their activities and provides testimony to the recognition of defenders by African leaders. The Grand Bay Declaration among others calls on African governments to take measures to implement the UN Declaration on Human Rights Defenders in Africa and emphasises the vital role played by HRDs in attaining these goals.¹⁵⁹ Similarly, the Kigali Declaration adopted by the Ministerial Conference of the African Union on human rights in Africa recognises the role of HRDs in the 'promotion and protection of human rights in Africa' and calls on member states and regional institutions to protect them.¹⁶⁰ The Cotonou Declaration specifically calls for protection of HRDs working in conflict and post-conflict states, sexual orientation, land governance.¹⁶¹

In addition, there are various regional human rights texts affirming the rights of HRDs. For example, the African Charter on Human and Peoples' Rights (African Charter) guarantees the rights of human rights defenders and their equal protection under the law.¹⁶² Under article 6, the African Charter protects the right to liberty and security of every person in addition to the right of everyone to receive information, express and disseminate opinions under Article 9. Most crucially for HRD's work, the African Charter provides for the rights to freedom of association, assembly

¹⁵⁶ OHCHR <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> (accessed 27 August 2021).

¹⁵⁷ As above.

¹⁵⁸ Lumbu (n 136).

¹⁵⁹ Par 19 of the Declaration of Grand-Bay.

¹⁶⁰ Para 28 of Kigali Declaration.

¹⁶¹ Cotonou Declaration.

¹⁶² Arts 3 & 4 of the African Charter.

and movement.¹⁶³ Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) imposes obligations on states to fight against all forms of discrimination against women. Among others the Protocol requires state parties to take all 'appropriate measures to punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims'.¹⁶⁴ These provisions of the protocol are significant in safeguarding women HRDs.

3.4 Protection practices and programmes for HRDs

Besides the regional and global efforts on protection of HRDs, over the past 23 years, a range of innovative practices to support HRDs have emerged. HRDs themselves have been instrumental in shaping the development of such practices.¹⁶⁵ First, there are various HRDs coalitions that have formed, including the continental Pan African Human Rights Defenders Network in addition to sub-regional networks such as Southern Africa Human Rights Defenders Network. Similarly, networks also exist at national level in some countries like Malawi.¹⁶⁶ These networks are aimed at providing support to human rights defenders, including providing protection support such as evacuation to HRDs at risk.¹⁶⁷ Further, some best practices also include States introducing national legislative frameworks to protect HRDs and creating national protective mechanisms to institutionalise those frameworks. Examples include Cote d'Ivoire, Burkina Faso and Mali.¹⁶⁸ Other interventions have also included training of HRDs in various areas such as safety and security. The Special Rapporteur on HRDs, however, notes that despite important role of regional organisations and networks in the protection of human rights defenders, 'many of the initiatives continue to suffer from significant resource constraints'.¹⁶⁹

Despite considerable achievements by the UN Declaration on HRDs and other attendant regional instruments, mechanisms and initiatives regarding protection of HRDs, there have been some significant gaps. First, being soft laws, almost all instruments on HRDs except for treaty

¹⁶³ Arts 10, 11 & 12 of the African Charter.

¹⁶⁴ Art 4 (2) (e) of Maputo Protocol.

¹⁶⁵ UN General Assembly (n 45).

¹⁶⁶ Malawi has the HRD network named Human Rights Defenders Coalition (HRDC)

¹⁶⁷ UN General Assembly (n 45).

¹⁶⁸ Dan-Church-Aid (n 20).

¹⁶⁹ As above.

conventions, are non-binding on states.¹⁷⁰ It is possibly for this reason that during the drafting process, some stakeholders advocated for a binding convention for protection of HRDs.¹⁷¹ After the adoption of the UN Declaration on HRDs, however, there has been no significant push for a binding convention.¹⁷² Furthermore, others have argued that this Declaration is also used to advocate restrictions on the work of HRDs by some states. According to the OHCHR, in the UN, some states, including Cuba and Russia have undermined the UN decisions on protection of HRDs on the basis that the Declaration provides room for restrictions to the rights of HRDs and for lack of clear definition of HRDs.¹⁷³ Thus such states have challenged the recognition of HRDs insisting that resolutions and reports on HRDs should reflect the ‘individuals, groups and organs of society’ as reflected in the Declaration.¹⁷⁴

3.5 Malawi’s status on regional and global human rights instruments

3.5.1 Human rights treaties

Malawi has ratified various important international protocols and conventions on human rights including the Universal Declaration on Human Rights; International Convention on Civil and Political Rights (ICCPR); First Optional Protocol to the International Covenant on Civil and Political Rights (1996); Covenant on Economic, Social and Cultural Rights, UN Convention Against Torture, and Rome Statute of the International Criminal Court (1998), UN Convention on the Rights of the Child (CRC), Convention on the Elimination of all forms of Discrimination Against Women 1979 (CEDAW); UN Convention Against Enforced Disappearances, and Convention on the Elimination of All Forms of Racial Discrimination (1996). Other international instruments include the Convention to Suppress, and Punish Trafficking in Persons especially Women and Children, and the Convention against Transitional Organised Crime.

¹⁷⁰ OHCHR (n 64).

¹⁷¹ As above.

¹⁷² As above.

¹⁷³ As above.

¹⁷⁴ As above.

At regional level, Malawi has ratified the African Charter on Human and People's Rights¹⁷⁵; Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa (the Maputo Protocol)¹⁷⁶, and African Charter on the Rights and Welfare of Children in Africa.¹⁷⁷ Malawi has also ratified the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights (African Court Protocol), and has further deposited the declaration under article 34(6) of the Protocol on the Establishment of an African Court on Human and Peoples' Rights, granting its citizens and NGOs in Malawi direct access to the Court.¹⁷⁸

By ratifying various global and regional human rights treaties, Malawi assumes the obligation to uphold and protect human rights. Further, in terms of section 11(2) of the Constitution, Malawi Courts are enjoined to have regard to international law when interpreting constitutional provisions.

However, Malawi is yet to domesticate most of the regional and international instruments. In terms of section 211(1) of the Constitution, Malawi follows a dual legal system whereby unless an international instrument is domesticated, it cannot be invoked in local courts.¹⁷⁹ This prolonged process for domestication of international law under its legal architecture affects the implementation of the fundamental rights and freedoms under international law.¹⁸⁰ For example, despite ratifying the UN Convention Against Torture, Malawi has not expressly criminalised torture under its penal laws.¹⁸¹

Further, Malawi has not yet ratified some key regional and global human rights treaties which would give effect to protection of HRDs. These treaties including the Optional Protocol to the UN Convention against Torture; Second Optional Protocol to the International Covenant on Civil and

¹⁷⁵ Ratified on 17 November 1989 file:///C:/Users/User/Downloads/malawi_state_report_eng.pdf (accessed 25 October 2021).

¹⁷⁶ Ratified on 20 May, 2005 file:///C:/Users/User/Downloads/malawi_state_report_eng.pdf (accessed 25 October 2021).

¹⁷⁷ Ratified on 16 September 1999 file:///C:/Users/User/Downloads/malawi_state_report_eng.pdf (accessed 25 October 2021).

¹⁷⁸ African Commission <https://www.achpr.org/states/detail?id=30> (accessed 25 October 2021).

¹⁷⁹ For international treaties to form part of Malawian law, ratification through Parliament is required. However, this rule applies in respect of all treaties entered into after the Constitution took effect. It is therefore of paramount importance that the Government of Malawi direct efforts towards the domestication of these instruments.

¹⁸⁰ Republic of Malawi 'Periodic report on the African Charter on human and people's rights and the Maputo Protocol' (2020).

¹⁸¹ As above.

Political Rights which seeks to abolish the Death Penalty; Protocol to the Organisation of the African Unity Convention on Prevention and Combating of Terrorism; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, and African Union Convention on Cyber Security and Personal Data Protection.¹⁸²

3.5.2 The African Court on Human and Peoples' Rights (African Court) and the African Commission on Human and Peoples' Rights (African Commission)

Remarkably, Malawi is one of the few out of 55 African Union member states that have ratified the protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.¹⁸³ It has further deposited a declaration under article 34(6) of the African Court Protocol, which allows individuals and NGOs to seize the African Court directly. For Instance, in *Charles Kajoloweka v Republic of Malawi*, a human rights activist, Charles Kajoloweka, challenged the decision of the Malawi Supreme Court awarding \$29,000 costs against the activist in a public interest litigation case.¹⁸⁴ Eventually, on 27 March 2020, the African Court ruled that it has jurisdiction to consider and decide the case and, in the interim, it issued an order staying enforcement of the costs bill against him.¹⁸⁵ This demonstrates the significance of Malawi's ability to protect HRDs through regional judicial mechanism. HRDs also have access to the African Commission on Human and Peoples' Rights. So far there is no known complaint filed the African Commission in relation to protection of HRDs from Malawi. It is, however, important to highlight that most HRDs in Malawi have limited knowledge about the African Court and the African Commission.¹⁸⁶

3.5.3 State party reporting mechanism

Pursuant to article 62 of the African Charter and article 26(1) of the Maputo Protocol, Malawi has deposited two periodic state party reports to the African Commission on its implementation of the

¹⁸² As above.

¹⁸³ C Rickard 'Malawi case flags growing threats to human rights, role of African Court' Africanlii 13 May 2020 <https://africanlii.org/article/20200513/malawi-case-flags-growing-threats-human-rights%2C-role-african-court> (accessed 13 March 2021).

¹⁸⁴ *Charles Kajoloweka vs Republic of Malawi*, Application 055 of 2019, African Court on Human and Peoples' Rights.

¹⁸⁵ Rickard (n 183).

¹⁸⁶ Dan-Chaurch-Aid (n 20).

African Charter and the Maputo Protocol.¹⁸⁷ The periodic reports take stock of the progress and challenges in implementation of the country's human rights obligations. In response, the African Commission has provided feedback in form of Concluding Observations. The state party report mechanism also substantially deals with the situation of HRDs. The mechanisms have been significant in highlighting the plight of HRDs and finding long lasting solutions to improve the operating environment for HRDs in Malawi. For example, in its Concluding Observation to the 2015 state party report on Malawi, the African Commission urged Malawi to adopt a law for protection of HRDs in line with the UN Declaration on HRDs and the African Commission's resolutions on HRDs.¹⁸⁸

At UN level, Malawi has undergone three cycles of Universal Periodic Review (UPR).¹⁸⁹ At the end of each cycle, recommendations were made to Malawi.¹⁹⁰ Under the UPR, Malawi has received critical feedback on situation of HRDs. During the 2nd UPR cycle, for example, the government received 53 recommendations relating to the space for civil society, of these recommendations, 22 were accepted and 31 were noted.¹⁹¹ Further, in 2012, the Special Rapporteur on the situation of HRDs raised concern about the situation of HRDs in Malawi, in relation to restrictions on the rights to freedom of assembly and of expression.¹⁹² The report bemoaned the violent attacks against HRDs and protesters leading to injuries and deaths, and called for expeditious prosecution of perpetrators, and compensation of the victims.¹⁹³

Furthermore, the UPR mechanism also provide opportunity to the United Nations Country Team in Malawi to submit reports on human rights including situation of HRDs. In its report to the 3rd Cycle, 36th Session, the UN Country Team for Malawi highlighted the concern over shrinking civic space through use of excessive force by police during demonstrations in 2019, and the

¹⁸⁷ Malawi's initial report was deposited on 19 July 2015, covering the period between 1995 and 2013; while the second report was submitted in February 2020.

¹⁸⁸ Republic of Malawi (n 180).

¹⁸⁹ UPR is a UN process which involves a review of the human rights situation of all UN Member States. See <https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (accessed 25 October 2021).

¹⁹⁰ Malawi submitted its three reports in 2010, 2015 and 2020.

¹⁹¹ CIVICUS 'Malawi Joint Submission to the UN Universal Periodic Review 36th Session of the UPR Working Group' (2019) <https://www.civicus.org/documents/Malawi.JointUPRSubmission.pdf> (accessed 28 October 2021).

¹⁹² Human Rights Council Working Group on the Universal Periodic Review 'Twenty-second session' (4–15 May 2015).

¹⁹³ As above

amendment of NGO Act which threatened free operation of HRDs.¹⁹⁴ It further urged government to align the NGO bill amendments with international standards.¹⁹⁵ It is also important to highlight that, in some cases, the Malawi Government has in its reports to the UN acknowledged the violations against HRDs. For example, in its third UPR report the government stated: 'Regrettably, during the reporting period, there were several incidents of attacks on human rights defenders'.¹⁹⁶

The state party mechanism also provides a critical space for Malawi civil society groups to provide their perspective of human rights situation in the country through shadow reports. For example, in their shadow report on the 3rd UPR for Malawi, a group of three CSOs brought to the attention of the UPR Working Group various cases of attacks against HRDs in Malawi including bombing of offices of HRDs, physical attacks against HRDs, state encroachment on freedoms of assembly, expression, and association.¹⁹⁷ Similarly, in its shadow report to the 3rd UPR cycle for Malawi, Amnesty International brought to the attention of the UN Human Rights Committee concerns about threats, actual attacks and trumped-up charges against HRDs in Malawi and called on Malawi to guarantee safety of HRDs.¹⁹⁸

While state party reporting provides significant avenue for protecting HRDs, weak implementation of the recommendations of human rights bodies remain a major challenge. According to the CIVICUS, under Malawi's second UPR examination, the government received 20 recommendations related to the protection of HRDs and journalists.¹⁹⁹ , of which, 17 were accepted and three were noted. However, the government has not implemented any of the recommendations.²⁰⁰ It is also important to note that Malawi has not been consistent in its state

¹⁹⁴ UN Malawi 'Submission by the United Nations country team for the Republic of Malawi for the UN universal periodic review: 3rd cycle, 36th Session' (2019).

¹⁹⁵ As above

¹⁹⁶ Republic of Malawi report to Human Rights Council 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21' (2020).

¹⁹⁷ CIVIUS & Others 'Malawi Joint Submission to the UN Universal Periodic Review 36th Session of the UPR Working Group' (2019) <https://www.civicus.org/documents/Malawi.JointUPRSubmission.pdf> (accessed 27 October 2021).

¹⁹⁸ Amnesty International 'Submission for the Un Universal Periodic Review 36th session of the UPR working group' (2020).

¹⁹⁹ CIVICUS (n 197).

²⁰⁰ As above.

party reporting timelines. For example, Malawi only deposited its first report to the African Commission in 2015, 23 years after accession. The first report was due in May 1992.²⁰¹ Similarly, Malawi's second report which was due on 25 April 2017, was only submitted in 2020, inconsistent with the two-year report requirement provided under section 62 of the African Charter. Malawi, however, has been consistent in its reporting obligations to the UPR mechanism having submitted all the three reports in time.

3.6 Conclusion

Since the adoption of the UN declaration on HRDs in 1998, there has been exponential increase of financial and technical resources within the UN system directed to protection of HRDs. Furthermore, Malawi has demonstrated strong commitment to international law, including ratification of binding treaties, and allowing HRDs access to the African Court, the African Commission and UN human rights council his coupled with Malawi courts' enjoyment to have regard to international law when interpreting constitutional provisions, active state party reporting mechanism form a relatively strong landscape for protection of HRDs in the country. The totality of these global and regional frameworks and initiatives applicable to Malawi have significant potential to guarantee protection of HRDs.

However, in practice, the available mechanisms remain insufficient to address the ongoing human rights violations faced by HRDs in Malawi and across the globe. The lack of binding force of the UN Declaration on HRDs and many other soft law instruments, coupled with the general lack of awareness of regional and international mechanisms among HRDs and state officials, remain notable barriers that need redress. In addition, Malawi's failure to ratify key regional and international treaties with effect on HRDs and human rights is threat to the protection of HRDs.

²⁰¹ As above.

CHAPTER 4: LEGAL AND INSTITUTIONAL LANDSCAPE FOR PROTECTION OF HRDs IN MALAWI

4.1 Introduction

Since 1994, Malawi has adopted a robust legal, policy and institutional framework charged with diverse roles on human rights protection. However, to what extent do these legal and institutional frameworks guarantee protection of HRDs in Malawi? This chapter delves into an in-depth examination of the legislative, policy and institutional frameworks on protection of HRDs in Malawi. The analysis is carried out in light of the obligations and commitments Malawi has under international law concerning HRDs.

4.2 The legal and policy framework

4.2.1 The Constitution

The Constitution of the Republic of Malawi under Chapter 4 enshrines a comprehensive bill of rights which is relevant for a protective and enabling environment for the work of HRDs. Some of the fundamental rights freedoms in the bill of rights include equality and non-discrimination, privacy, personal liberty and human dignity, right to protection from subjection to torture, inhuman or degrading treatment and punishment.²⁰² Furthermore, the bill of rights also provides for the right to freedom of association and right to the freedom of conscience, religion, belief and thought including academic freedom, right to freedom of opinion and the right to the freedom of expression. The right to access information is provided by section 37 while section 38 guarantees freedom of assembly. Section 15(2) lays down the protection mechanisms in line with democratic societies through judiciary, ombudsman, and the Human Rights Commission for violation of human rights. Furthermore, section 16(6)(a)(ii) of Malawi's Statute Law (Miscellaneous Provisions) provides for an application of *habeas corpus* which is a protective mechanism which is critical in cases of missing persons in the hands of the state because it allows for an application to be made for the missing persons to be brought by the state before the courts within 48 hours as stipulated in section 42(2) of the Malawi Constitution. This protects HRDs from enforced disappearances as a judicial mechanism.

²⁰² Chapter 4 of the Constitution of the Republic of Malawi.

The rights in Chapter 4 of the Constitution are guaranteed to everyone. As noted by Nkhata, this shows universal applicability of the Malawi Constitution.²⁰³ In addition, the Constitution overrides all other laws.²⁰⁴ It is also important to note that the architecture of the Constitution accords international law a major role in constitutional adjudication.²⁰⁵ International agreements which were already binding on Malawi before the commencement of the 1994 Constitution, will continue to bind Malawi unless otherwise provided under an Act of Parliament.²⁰⁶ However, international treaties entered into after the adoption of the Constitution require domesticating legislation before they can be directly applicable in Malawi, and where an international treaty is inconsistent with the Constitution or a law in Malawi, then it loses precedence.²⁰⁷ Furthermore, one major challenge with Malawian Constitution is its restrictive *locus standi* regime.²⁰⁸ According to section 15(2), those approaching the courts alleging violations of human rights or seeking remedies should demonstrate sufficient interest. Thus, Malawi's restrictive approach has the potential of limiting HRDs work particularly in defending violations of rights of vulnerable groups including HRDs who cannot act for themselves Malawian. Comparatively, Zimbabwe has a more permissive regime. Under section 85(1) of the Zimbabwean Constitution, individuals can seek redress before the courts in cases that directly affect, the public, and on behalf of individuals who cannot represent themselves.²⁰⁹ Thus, the Zimbabwean Constitution provides space for HRDs to use public interest litigation in their work.

4.2.2 NGO Act 2001

The NGO Act is the overarching law regulating the NGO sector in Malawi. Overall, it seeks to provide a conducive and accountable operating environment for NGOs, and enhance a better working relationship between the NGOs and the government. i.²¹⁰ Furthermore, section 6 of the NGO Act establishes the NGO Board of Malawi (NGO Board), a regulatory body mandated to

²⁰³ NKhata (n 50).

²⁰⁴ Sec 5 of the Constitution of the Republic of Malawi.

²⁰⁵ Maluwa (n 9).

²⁰⁶ Sec 212(2) of the Constitution of the Republic of Malawi.

²⁰⁷ Sec 211(1) of the Constitution of the Republic of Malawi.

²⁰⁸ Sec 15(2) of the Constitution of the Republic of Malawi.

²⁰⁹ Sec 85(1)(a)-(e) of the Constitution of the Republic of Zimbabwe.

²¹⁰ Sec 3 of NGO Act of the Republic of Malawi.

oversee the implementation of the NGO Act. One core duty of the NGO Board is to register and regulate operations of NGOs. Thus, the NGO Board retains the powers to withhold, suspend or cancel registration of NGOs for failing to comply with provisions of the Act.²¹¹ It is important to state that the NGO Act does not recognise individual HRDs. at local level, CBOs are registered under Social Welfare Department in the Ministry of Gender and Social Welfare.²¹²

Section 24 of the NGO Act establishes the Council for Non-Governmental Organisations in Malawi (CONGOMA), charged with mandate to coordinate NGOs and promote their collective interests.²¹³ Some of its specific functions include: enhancing and improving the operational environment for NGOs and promoting and facilitating coordination, collaboration and cooperation between the NGO community, the government, the donor community and the business sector in Malawi.²¹⁴

While at face value the NGO Act provides a relatively conducive legal framework for operations of civil society in Malawi, it contains retrogressive provisions that stifle operations of HRDs and NGOs at large.

(a) Restrictive definition of NGOs

The Act defines 'NGO' as an organisation that is 'constituted for public benefit purposes'.²¹⁵ The definition of 'public benefit purposes' has been understood to refer to developmental role of NGOs in areas of government interest, and excludes other groups such as trade unions, faith based organisations. This definition is a limitation on an NGO's permissible purposes. As noted by International Centre for Non-Profit Law (ICNL), under international law, individuals should be free to form legal entities that permit them to associate to pursue any legal or lawful interests, without restricting them to government interests.²¹⁶ In the *United Communist Party of Turkey and Others v Turkey*, the European Court of Human Rights stated that even the pursuit of ideas 'that offend, shock or disturb are permissible associational aims'.²¹⁷ According to ICNL, allowing NGOs the

²¹¹Sec 23 of the NGO Act of the Republic of Malawi.

²¹² ICNL <https://www.icnl.org/resources/civic-freedom-monitor/malawi/> (accessed 2 October 2021).

²¹³ Sec 24 (n 210).

²¹⁴ Sec 25 (n 210).

²¹⁵ Sec 2 (n 210).

²¹⁶ ICNL 'On Malawi's non-governmental organizations (amendment) bill, revised 2020' (2020).

²¹⁷ *United Communist Party of Turkey and Others v Turkey* ECHR (1998).

freedom to pursue any legitimate and lawful aim shows that a government is tolerant, values diversity and encourages pluralism, peace, stability and respect for the rule of law. Denial contravenes articles 22 and 10 of the ACHPR and falls short of the permissible restrictions under these instruments.²¹⁸ It possibly can be argued that it is not a legal requirement that NGOs serve ‘public benefit purposes’, but rather that they may serve any legitimate and lawful aim.

(b) Barriers to the operation of NGOs

As stated above, section 20 of the NGO Act provides for the mandatory registration of all NGOs. This provision is inconsistent with article 22 of the ICCPR, which has been consistently interpreted to prohibit mandatory registration of NGOs.²¹⁹ As noted by ICNL, ‘requiring an organisation to register prior to operating violates core principles of international law, which forbid the freedom of association from being contingent on registration or legal entity status’.²²⁰ In agreement, the African Commission’s Study Group on Freedom of Association and Assembly in Africa has also stated that ‘States should not require associations to register in order to exist and operate freely’.²²¹ The mandatory registration can also be used by repressive regimes to refuse registration of organisations viewed by authorities to have politically sensitive objectives. For instance, in 2013, the Minister of Justice refused to register the Association for Secular Humanism (ASH) under the Trustees Incorporation Act of 1962 because the ‘anti-God’ views of the Association conflicted with the Minister’s religious beliefs.²²² The Association was later registered after a new Minister was appointed.²²³ Thus, the registration of NGOs can be politicised and is subject to the views and prejudices of the ministerial decision-maker. In addition, the government may also use section 20 above to shut down unregistered organisations.²²⁴ Similarly, although

²¹⁸ ICNL (n 216).

²¹⁹ M Kiai ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/26/29’ (2014) http://freeassembly.net/wp-content/uploads/2014/05/A-HRC-26-29_en1.pdf (accessed 27 September 2021).

²²⁰ ICNL (n 216).

²²¹ The African Commission ‘Report of the study group on freedom of association & assembly in africa’ <http://www.achpr.org/files/special-mechanisms/human-rights-> (accessed 28 September 2021).

²²² Nyasa Times ‘Register anti-God group, urge Malawi’s rights groups’ *Nyasa Times* 8 August 2013 <https://www.nyasatimes.com/register-anti-god-group-urge-malawis-rights-groups/> (accessed 22 September 2021).

²²³ As above.

²²⁴ E.g on 31 July 2020, the Minister of Gender, Community Development, and Social Welfare ordered the NGO board to close at least 120 NGOs in Blantyre city for allegedly operating without registration with the NGO board. She argued

the NGO Board has not, to date, de-registered any NGO, the Board has several times threatened to close NGOs that did not register with the NGO Board.²²⁵ Relatedly, the mandatory membership to CONGOMA violates the right to freedom of association, which includes the right not to participate in an association.²²⁶ Evidence also reveals that government can use the mandatory registration provision to crack down on critical HRDs.²²⁷ Stringent conditions were attached to their bail, including a bail bond of one million Kwacha (1300 USD each, surrender all travel documents to the police, and report to the police every second Friday. Further, on 22 March 2019 the NGO Board wrote the Centre for Development of People (CEDEP), a human rights organization working on LGBTIQ rights that it was an illegal entity as it was not registered with the NGO board and instructed the NGO to register within 14 days or risk legal action by the Board.²²⁸

(c) Over regulation of NGOs threatening the existence of NGOs

Thirdly, the Act provides that for an NGO to get registered with the NGO board it must have first signed the Memorandum of Understanding (MoU) with the government Ministry responsible for the NGO's sphere of activities.²²⁹ This could be interpreted that NGOs require advance approval from government to carry out their activities and that all NGOs must implement their activities within the sphere of government agenda or priorities. NGOs working outside government areas of interest, might not secure MoUs with government ministries; hence, denied registration status. This could be more perilous for NGOs working in politically sensitive areas such as the human rights for LGBTI) considering that homosexuality is criminalised under Malawi laws.²³⁰ Therefore

their operations were illegal and in violation of the NGO Act. See <https://www.nyasatimes.com/minister-kaliati-orders-closure-of-over-120-ngos-operating-illegally/> (accessed 26 September 2021).

²²⁵ T Sangala 'MEHN registers with NGO board' *Times Group* 14 July 2015 <https://times.mw/mehn-registers-with-ngo-board/> (accessed 26 September 2021).

²²⁶ ICNL (n 216).

²²⁷ In July 2019, two activists, Gift Trapence and McDonald Sembereka were arbitrarily arrested and detained for 48 hours by Malawi Police on allegations of operating an illegal NGO, despite the fact that their NGO is duly registered under the Companies Act. Also see <https://www.frontlinedefenders.org/en/case/judicial-harassment-human-rights-defenders-gift-trapence-and-macdonald-semberoka> (accessed 1 October 2021).

²²⁸ Dan-Church-Aid (n 20).

²²⁹ Sec 20 (3)(iv) (n 210).

²³⁰ Sec 46 of the Penal Code of the Republic of Malawi.

restricting NGOs to pursue areas in line with government spheres of interest constitutes a limitation on an NGO's permissible purposes that violates freedom of association.

(d) Crackdown on NGOs

The NGO board has vast discretionary powers to suspend, cancel, and revoke NGO registration if it is satisfied that the NGO is non-compliant with the NGO Act.²³¹ Such broad powers can be abused, including closure of NGOs. Under international norms protecting the right to freedom of association, an organisation may be involuntarily dissolved only in the very limited circumstances. According to the United Nations Human Rights Council, measures to enforce compliance by NGOs should be proportionate and reasonable.²³² The grounds included in section 23(1)(a)(b)(c) of the NGO Act for suspension, cancellation or suspension of NGO registration do not meet this strict test, since it is likely that even minor deviations constitute basis for deregistration. In addition, the section does not include the procedural safeguards recommended under international law which requires that suspension may only apply after court order, and dissolution after a full judicial procedure and exhaustion of appeal mechanisms.²³³ Comparatively, as a best practice, the South Africa's Nonprofit Organisations Act, 1997 (NPO Act) prescribes the conditions which must be met to cancel a nonprofit organisation's registration.²³⁴ Malawi NGO Act falls short of this best practice. Section 23(4) of the NGO Act provides room for organisations to appeal the decisions of the NGO board through the High Court some affected NGOs may not have the financial and technical capacity to approach the courts.²³⁵

(e) Financial Barriers

The NGO Act requires the NGO Board and CONGOMA to set registration and annual fees as may be deemed appropriate, subject to review from time to time. However, fees charged by both CONGOMA and NGO Board can be prohibitive for small organisations, hence undermining the freedom of association. According to the 2021 NGO Fees Regulation, NGOs are required to pay MK 250,000 (approximately USD 310) to the NGO Board as fees for registration.²³⁶ This is in

²³¹ Sec 23(2) (n 210).

²³² UN Human Rights Committee General Comment 31(6) (n 150).

²³³ UN General Assembly 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association' (2012) para 75-76.

²³⁴ See secs 20(1), 17, 18 & 19 of NPO Act.

²³⁵ ICNL <https://www.icnl.org/resources/civic-freedom-monitor/malawi> (accessed 29 September 2021).

²³⁶ Republic of Malawi 'NGOs (Fees) Regulations, 2021' (2021).

addition to the annual fees NGOs are required to pay to the NGO board.²³⁷ Currently, government has classified NGO annual fees into three categories²³⁸ determined by the annual income of the NGO for the previous year.²³⁹ Again, for an NGO to register with CONGOMA and NGO Board, it must first register with the Registrar General under the Trustees Incorporation Act whose registration fees at present is MK 50,000 (approximately USD 62). Thus on average, an NGO needs approximately USD 415 to get registered in addition to annual fees. This multiple registration is burdensome and costly for NGOs.²⁴⁰ Failure to pay annual fees attracts serious sanctions including deregistration.²⁴¹

(f) Increased monitoring of operations and funding sources

Under section 22(1) of the NGO Act, NGOs are required to submit their annual reports and disclose the sources of their funding. NGOs are also required to provide personal details of their trustees, workers and even auditors. Additionally, section 22 (c) broadly authorises the Board to request any such further documentation or information regarding the officers and activities of a registered NGO.²⁴² African Commission Guidelines has stated that the general reporting requirements should be simple and not overly burdensome and should be aimed at 'ensuring financial propriety'.²⁴³ Further, ICNL observes that requirements to provide personal details of trustees or workers of an NGO compromise individuals' rights to privacy.²⁴⁴

4.2.3 Police Act 2010

The Police Act contains several provisions that are relevant for the enjoyment of the right to freedom expression and opinion, and the right to freedom of assembly and demonstration. It also

²³⁷ Sec 20(3) of the NGO Act.

²³⁸ According to the NGOs Fees Regulation of 2021, NGOs with annual income falling below MK 100 million (USD 124, 000) pay MK 100,000 (USD 125); those with above 100 million but below MK 500 million (620,000) pay MK 250, 000 (USD 310); NGOs with annual income over MK 500 million but below MK 2 Billion (USD 2,480,000) pay MK 1 million (USD 1,235); while those earning over MK 2 Billion pay MK 2 million (USD 2,470).

²³⁹ Republic of Malawi (n 236).

²⁴⁰ Dan-Church-Aid (n 20).

²⁴¹ Sec 23 (n 210).

²⁴² ICNL (n 216).

²⁴³ Art 48(b) African Commission Guidelines on Freedom of Association and Assembly in Africa.

²⁴⁴ ICNL (n 216)

deals with the regulation of assemblies and demonstrations.²⁴⁵ Part IX of the Police Act deals with the regulation of assemblies and demonstrations. However, the Police Act contains certain provisions that have sparked tensions on enjoyment of fundamental civil and political rights, particularly the right to freedom of expression and opinion, and the right to freedom of assembly and demonstrations.²⁴⁶ For instance, the police have tended to interpret the notice to demonstrate by conveners to the district commissioner (DC) under section 96 of the Act to mean request for permission to demonstrate. Conversely, HRDs interpret the provision requiring them to merely inform the DC on their plan to demonstrate or assemble. On 11 August 2021, Sylvester Namiwa, an activist and head of the Centre for Democracy and Economic Development Initiative (CDEDI) was arrested alongside 10 protesters for allegedly holding illegal protests.²⁴⁷ Thus, the Police Act has been used to suppress the rights to freedoms of peaceful assembly, association, and expression of HRDs.

In addition, section 106 (1) of the Police Act imposes on conveners of demonstrations liability for damages arising from assemblies and demonstrations. To illustrate this, in August 2019, about 26 claimants sued the leaders of HRDC, for allegedly failing to ensure that the demonstrations were peaceful, causing damage and looting to their property during protests. The 26 claimants, demanded K 545 802 450 (about \$ 730,000).²⁴⁸ Notably, this claim for damages followed a statement by the Minister of Home Affairs calling on the public to file the claims against HRDC.²⁴⁹ Such sanctions incentive by the Police Act may have far reaching adverse impact on HRDs ability to discharge their mandate. The criminal liability of conveners is chilling and offers no protection to HRDs but criminalises their work.

4.2.4 The Penal Code

The Malawi's Penal Code contains several offences which have a bearing on the work of HRDs. Defamation is criminalised under section 200(1) of the Penal Code Similarly, sections 61 of the

²⁴⁵ Part 6 of the Police Act of the Republic of Malawi.

²⁴⁶ Secs 96, 98, 99, & 101 of the Police Act of the Republic of Malawi.

²⁴⁷ N Meki 'Activist Namiwa spends night in custody' *The Nation* 12 August 2021

<https://www.mwnation.com/activist-namiwa-spends-night-in-custody/> (accessed 25 September 2021).

²⁴⁸ Amnesty International (n 198).

²⁴⁹ F Kadzanja 'HRDC sued for K500 million' *Daily Times* 26 August 2029 <https://times.mw/hrdc-sued-for-k500-million/> (accessed 25 September 2021).

penal code imposes criminal sanctions against the defamation of foreign dignitaries. Furthermore, the government also uses sedition laws in sections 50 and 51(3) of the Penal Code to crack down on critics of the government or the president. Section 50 of the Penal Code describes seditious intention as, among other things, ‘to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government.’ In addition, the penal code empowers the government to seize any machine used for the publication of suspected seditious material.²⁵⁰ Section 64 relates to the management of an unlawful society. These defamation and sedition provisions run counter to international law on freedom of expression. In *Lohe Issa Konate v Republic of Burkina Faso*, the African Court overturned the conviction of Lohé Issa Konaté, a journalist on defamation charges for publishing newspaper articles on corruption involving a state prosecutor.²⁵¹ The Court found that the conviction was in violation of freedom of expression. Principle 24 of the African Commission Declaration of Principles on freedom of expression and information (African Commission declaration on FoE and ATI) call on states to amend laws that criminalise freed speech.²⁵²

4.2.5 The Electronic Transactions and Cyber-security Act, 2016 (the Cyber Act)

The Electronic Transactions and Cyber Security Act became law in 2016 (Cyber security Act). The aim of the legislation is to regulate information and transactions online.²⁵³ In fortifying the right to information under section 37 and right to privacy in section 21(c) of the Constitution, sections 72, 73, and 74 of the Cyber security Act) provide for limited data protections. It is however important to note that Malawi does not have a data protection law that ensures the protection of personal information in line with Principle 42 of the African Commission Declaration on FoE and ATI . Thus, HRDs are prone to having their privacy breached and personal information released in the public realm. This violates section 21 of the Malawi’s Constitution which guarantees the right to privacy.

Further, under this Cyber security Act the government could legally shutdown internet with the backing of provision 24(2)(f), on the vague ground called ‘technical restriction’. On 21 May 2019,

²⁵⁰ Sec 52 of the Penal Code.

²⁵¹ *Lohé Issa Konaté v. The Republic of Burkina Faso* Application 004/2013, African Court on Human and People’s Rights.

²⁵² African Commission Declaration of Principles on Freedom of Expression and Access to Information in Africa.

²⁵³ Sec 3 of Electronic Transactions and Cyber Security Act of the Republic of Malawi

Net Blocks recorded an internet disruption in Malawi hours after Malawians voted to elect the President, new MPs, and local councilors.²⁵⁴

4.3 Institutional framework

4.3.1 Courts (Judiciary)

The judiciary is established under Chapter 9 of the Constitution. The courts have jurisdiction over ‘all issues of judicial nature’.²⁵⁵ The Judiciary is also charged with responsibility to uphold the supremacy of the Constitution, and enforce respect for human rights. Any individuals can approach the courts to seek remedy on human rights violations they allege to have suffered.²⁵⁶ The courts also retain the powers to make orders to prevent violations. In cases of violations of non-derogable rights such as murder and torture, the courts have powers to prescribe criminal penalties.²⁵⁷ Thus, the courts provide an important protection mechanism for HRDs at risk or those who fall victim due to their work.

In addition, the courts have on various times protected the fundamental freedoms including freedom of assembly, association and expression. In the *Attorney General vs Trapence, Mtambo and Malawi Human Rights Defenders Coalition*, for example, the Supreme Court of Malawi has affirmed that the right to freedom of assembly or protest is not subject to approval by authorities and that the lack of capacity by the Police is not a reasonable ground for prohibition of the right to freedom of assembly or protests.²⁵⁸ The court also held that there should be other means to curb violence than through banning demonstrations. In another recent case, in 2018, three human rights NGOs successfully obtained a court injunction restraining Parliament from considering the NGO Amendment Bill for being inconsistent with human rights standards.

However, the courts have also at times been limited in protection of HRDs. First, Malawi applies restrictive *locus standi* regime.²⁵⁹ Comparatively, Zimbabwe has a more permissive regime. Under

²⁵⁴ Netblocks ‘Internet disrupted in Malawi on election day’ <https://netblocks.org/reports/internet-disrupted-in-malawi-on-election-day-Q8oOrl8n> (accessed 25 October 2021).

²⁵⁵ Sec 103 of the Constitution of the Republic of Malawi.

²⁵⁶ Sec 46(2) of the Constitution of the Republic of Malawi.

²⁵⁷ Sec 46(5) of the Constitution of the Republic of Malawi.

²⁵⁸ *Attorney General v Trapence & Others* (2020) MWHC 131.

²⁵⁹ See sec 15(2) of the Constitution of the Republic of Malawi.

section 85(1) of the Zimbabwean constitution, any persons representing their own interest, individual acting on behalf of others who cannot act for themselves, any person acting in the public interest, or any association acting on behalf of its members is entitled to approach courts alleging violation of human rights.²⁶⁰ Malawian. Thus, Malawi's restrictive application of *locus standi* has the potential of limiting HRDs work particularly public interest litigation. Furthermore, the courts have also at times awarded huge legal costs against HRDs in public interest litigation which have adverse effect on public interest litigation.²⁶¹ Another major problem with the Malawi judiciary is the fact that there is no Constitutional Court ready to deal with constitutional questions. The procedure is that an application for referral on the constitutional question with regards to fundamental rights can be referred to the Chief Justice to give certification for a panel of judges to preside over the constitutional issue in terms of section 9(3) of the Courts Act. The CJ can decide not to on his own.

In addition, in some cases there has been political interference by the Executive in the work of the Judiciary. For example, in 2020, following the nullification of the 2019 presidential election results and an order for fresh elections, the Executive attempted to unlawfully remove the Chief Justice Andrew Nyirenda.²⁶² This was largely seen by stakeholders as an attempt to threaten the independence of the judiciary ahead of the fresh elections as ordered by the Constitutional Court.²⁶³

4.3.2 Malawi Human Rights Commission (MHRC)

Established under Section 129 of the Constitution, MHRC has broad mandate of promoting and protecting human rights including investigating violations of the rights.²⁶⁴ The Commission investigates violations of human rights and recommends prosecution and remedies. The

²⁶⁰ Sec 85(1)(a)-(e) of the Constitution of Zimbabwe.

²⁶¹ J Mwale 'Court fines CSO leader K21m' *The Nation* 24 June 2019 <https://www.mwnation.com/court-fines-cso-leader-k21m/> (accessed 29 September 2021).

²⁶² C Pensulo 'Forced retirement of Malawi's chief justice before June election blocked' *The Guardian* 16 June 2020 <https://www.theguardian.com/global-development/2020/jun/16/forced-retirement-of-malawis-chief-justice-before-june-election-blocked> (accessed 16 September 2021).

²⁶³ M Mkandawire 'Refrain from attempts to fire judges – Malawi Law Society tells Executive' *Malawi24* 14 June 2020 <https://malawi24.com/2020/06/14/refrain-from-attempts-to-fire-judges-malawi-law-society-tells-executive/> (accessed 16 September 2021).

²⁶⁴ The Constitution of the Republic of Malawi.

Commission may also recommend measures necessary for the effective protection and promotion of human rights.²⁶⁵

In relation to HRDs, the Commission has occasionally condemned the State for violations against HRD. As a way of example, on 4 July 2019, the Commission in its statement titled 'A call to the Protection of the Safety Human Rights Defenders (HRDs) in Malawi' condemned the death threats and attacks against members of the Human Rights Defenders Coalition and called on the Police to investigate the incidents. It also called upon 'the state to prioritise the provisioning of protection to HRDs, noting that their work is in the interest of the nation'.²⁶⁶ Similarly, on 17 August 2021 the Commission condemned the arrest of activist Sylvester Namiwa who was arrested for organizing demonstrations on allegations that the demonstrations were not sanctioned by Lilongwe City Council.²⁶⁷ Such critical positions of the Commission standing in solidarity with HRDs at risk are a testimony to the Commission's commitment to the Marrakech Declaration which recognises the central role of National Human Rights Institutions (NHRIs) in expanding civic space and protecting HRDs.²⁶⁸ Though some HRDs feel there is room for improvement for the MHRC in protecting HRDs²⁶⁹

Further, the Commission is hardly accessible to most citizens, particularly the rural masses. At present, the Commission has three provincial offices located in three major cities. This possibly affects grassroots HRDs in accessing the Commission. In addition, political interference in appointment of Commissioners is another major concern undermining the independence of the Commission. For example, in March 2019, the Ombudsman challenged the illegal appointment of two MHRC Commissioners who were not recommended according to law.²⁷⁰ Previously, the Commission has also faced reprisals including arrests of the Commission's leadership for its

²⁶⁵ Sec 12 of Human Rights Commission Act of the Republic of Malawi.

²⁶⁶ Malawi Human Rights Commission 'A call to the Protection of the Safety Human Rights Defenders (HRDs) in Malawi' (2019).

²⁶⁷ Malawi Human Rights Commission 'Press Statement Condemning the arrests and ill treatment of human rights activists' (2021).

²⁶⁸ Marrakech Declaration on Human Rights Defenders among others calls for the establishment of national protection systems for human rights defenders, who need an enabling environment which is accessible and inclusive and in which all rights are respected.

²⁶⁹ Dan-Church-Aid (n 20)

²⁷⁰ M Munthali 'Malawi: Analysis of 2019 On Governance and Human Rights' *All Africa* 30 December 2019 <https://allafrica.com/stories/201912310221.html> (accessed 14 September 2021).

critical positions on State human rights violations. The Commission also faces perennial funding constraints from government. These limitations clearly violate the Paris Principles.²⁷¹ In addition, for unknown reason, the MHRC does not have 'Affiliate Status' with the African Commission on Human and Peoples Rights, hence limiting its protection role through regional mechanisms.

4.3.3 Malawi Police Service (MPS)

MPS is a frontline law enforcement institution and central providing protection of human rights. Established under Section 152 of the Constitution and operationalised by the Police Act of 2010, the core mandate of MPS is to 'provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of this Constitution and any other law'.²⁷² Individuals whose violations have been violated visit any police station and file statement of claim.²⁷³ In Malawi, however, the Police is the primary state agent in sanctioning the work of HRDs than in affording the necessary protection.²⁷⁴ Police officers have often used excessive force and firearms, causing injury of HRDs or journalists, stop demonstrations, and arbitrary arrest and detain HRDs. Recently, a report of the MHRC indicates that on 8 October 2019, police officers raped and defiled women and girls in the outskirts of the Capitol Lilongwe city during demonstrations against alleged election fraud.²⁷⁵ Again, senior police officers were implicated in the murder of student activist, Robert Chasowa in 2011.²⁷⁶

4.4 Conclusion

Malawi has a relatively strong legal and institutional framework for the protection of human rights. The Constitution coupled with various human rights oriented state institutions statutes contribute to an enabling environment for the work and protection of HRDs. Similarly, the jurisprudence of the courts, state party report mechanism, and many international human rights instruments Malawi has ratified have been instrumental in strengthening the foundation for protection of HRDs.

²⁷¹ The Paris Principles set out the international minimum standards that all NHRIs should meet.

²⁷² Sec 153 (2) of the Constitution of the Republic of Malawi.

²⁷³ Police have for example investigated and successfully prosecuted suspects in the abductions and killings of persons with albinism.

²⁷⁴ Dan-Church-Aid (n 20).

²⁷⁵ *State v Inspector General of Police & Others ex-parte M.M. & Others* (2020) MWHC 24.

²⁷⁶ T Sangala 'I did not kill Robert Chasowa—IG' *Daily Times* 29 June 2018 <https://times.mw/i-did-not-kill-robert-chasowa-ig/> (accessed 10 October 2021).

However, Malawi does not have law that specifically protects HRDs. HRDs are protected under the same framework that protects everyone in the country. Furthermore, in practice, the implementation of the laws for the protection of HRDs is replete with several shortcomings, including weak institutional frameworks.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This research has interrogated to the extent to which the national human rights framework in Malawi guarantee protection of HRDs. It proceeded with the assumption that despite the existence of strong human rights frameworks, the protection of HRDs is not guaranteed. Chapter Two of the research interrogated the international and regional frameworks on protection of HRDs against which the Malawi's protection mechanism for HRDs can be assessed particularly drawing inspiration from the UN Declaration on human rights defenders. Chapter three discussed the national legal framework, interrogating the legal and institutional frameworks on protection of HRDs. In Chapter Four, the hypothesis has been established that in practice, HRDs in Malawi face serious risks and challenges, and continue be targeted by state authorities and their agents. This chapter revisits the main findings of the research and offers recommendations on the same.

5.2 Global and regional human rights framework for protection of HRDs in Malawi

The study has established that the adoption of the UN declaration on HRDs in 1998, has exponentially increased the global attention to the protection of HRDs. Furthermore, Malawi is party to various binding international instruments including the ICCPR, African Charter on Human and Peoples Rights, and Malawian citizens have direct access to the African Court on Human and Peoples Rights; which provide the basis for protection of HRDs. This coupled with Malawi courts' enjoinderment to have regard to international law when interpreting constitutional provisions, and the state party reporting mechanism under the UN and African Commission form a strong landscape for protection of HRDs in the country.

However, in practice, Malawi has not domesticated the UN Declaration on HRDs through national legislation, rendering the Declaration not enforceable by the courts. Furthermore, the Declaration and many other soft law instruments on protection of HRDs, by their nature, lack binding force. Another major challenge of the international protection regime is the weak enforcement of special mechanisms such as recommendations of treaty bodies, and the general lack of awareness of regional and international mechanisms among HRDs and state officials. In addition, Malawi's failure to ratify key regional and international treaties with effect on HRDs and human rights also remain a threat to the protection of HRDs. Thus, the enforcement of international protection

regime for HRDs in Malawi remains insufficient to address the ongoing human rights violations faced by HRDs.

5.3 National human rights framework for protection of HRDs

This research has established that Malawi does not have a specific law for protection of HRDs. It has not domesticated the UN declaration on HRDs. HRDs are protected under the same framework that protects everyone in the country. Furthermore, Malawi still retains laws that stifle the operations of HRDs including defamation and sedition laws in the penal code, NGO Act, Cyber and Security Act. In addition, the institutions charged with protection of human rights including the MHRC and judiciary face serious capacity challenges such as underfunding and inadequate personnel. However, Malawi has a comprehensive bill of rights enshrined in the Constitution which guarantees civil, political and socio-economic rights which are relevant for providing an enabling operating environment for HRDs. In addition, various statutes and policies such as the Access to Information Act, NGO Act, the Human Rights Commission Act, the Penal Code, NGO Policy and MGDS, also contribute to an enabling environment for the work and protection of HRDs. Similarly, the jurisprudence of the courts, state party report mechanism, and many international human rights instruments Malawi has ratified are key in protection of HRDs.

5.4 Barriers that impede protection of HRDs in Malawi

Employing the PESTEL analysis, this study has established that the operating environment for HRDs in Malawi remains dangerous. HRDs continue to face serious reprisals for their work including arrests, killings, economic marginalization, and various forms of harassment. Fundamental rights to freedom of assembly and expression are under constant attack by the state. The situation is more precarious for women HRDs and those working on politically sensitive issues that challenge political authorities. The state is the main perpetrator of violence against HRDs.

5.5 Recommendations

Given the complexity and scale of challenges faced by HRDs in their work, improving the operating environment for HRDs requires holistic strategies. These include: legislative and policy reforms, institutional strengthening, capacity building of HRDs and state institutions, and other

measures. Despite the identified shortcomings in protection of HRDs in Malawi, Malawi still has an opportunity to build a sustainable and effective national mechanism for protection of HRDs.

5.5.1 Regional and Global measures

The UN and the African Commission should:

- 1) Adopt a binding treaty on protection of HRDs
- 2) Raise awareness about existing HRDs protection mechanisms among HRDs in Malawi

5.5.2 National legislative measures

Malawi parliament should:

- (1) Enact specific legislation for protection of HRDs;
- (2) Amend the NGO Act in order to make it compliant with the Constitution and international standards;
- (3) Repeal legislation that is inconsistent with the Constitution and international law, particularly any affecting the exercise of rights to freedom of association, peaceful assembly, expression, and press;
- (4) Amend section 15(2) of the Constitution to broaden the *locus standi* regime in order to entitle any persons representing their own interest, individual acting on behalf of others who cannot act for themselves, any person acting in the public interest, or any association acting on behalf of its members to approach courts alleging violation of human rights.
- (5) Domesticating the regional and international human rights instruments Malawi has ratified to make them applicable in domestic courts

5.5.3 National Policy Measures

Judiciary:

- (1) Establish a permanent Constitutional Court. Having a dedicated bench of judges to deal with constitutional matters will ensure expeditious redress of human rights issues that are constitutional in nature that come before the courts.
- (2) Adopt a court procedure regime that is supportive of public interest litigation

Executive:

- (1) Ensure implementation of the UN Declaration on HRDs
- (2) Establish protection programs for HRDs at risk

- (3) Ensure implementation of the concluding observations and recommendations issued by human rights treaty bodies regarding HRDs
- (4) Ensure adequate funding of human rights institutions in order for them to adequately discharge their mandates
- (5) Ratify various international human rights instruments Malawi has not ratified
- (6) Implement comprehensive reforms for the Malawi Police Service to ensure professionalism and independence, and ensure that all law enforcement officers receive systematic human rights training

Malawi Human Rights Commission:

- (1) Attain the Affiliate Status before the African Commission on Human and People's Rights
- (2) Ensure implementation of the Marrakech Declaration

5.5.4 Other stakeholder

HRDs:

- (1) Advocate for enactment of specific legislation on the protection of HRDs
- (2) Advocate for repeal of laws and policies that shrink civic space
- (3) HRDC and other networks should ensure mobilization and participation of more women and grassroots HRDs in HRD movement
- (4) Promote solidarity building interventions and the social recognition and celebration of the work HRDs.

Funders:

- (1) Support and assist HRDs to conduct advocacy on the development of conducive laws, policies and regulations to protect their rights.
- (2) Provide dedicated support to existing HRD-led protection networks, in particular, the HRDC to sustain its growth and capacity in protection of HRDs.

[Word Count:17,881]

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