

**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders**

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/18, 32/32 and 34/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **Non-Governmental Organization Amendment Bill 2018 (Amendment Bill)**, which, if adopted, may have a detrimental impact on non-governmental organizations in Malawi.

According to the information received, local non-governmental organizations (NGOs) were not consulted on the Bill's formulation prior to its publication and have therefore opposed its discussion in Parliament. On 4 December 2018 a High Court judge ordered a stay on Parliamentary deliberations until a judicial review is completed. We encourage the Malawi Government and the High Court to consider the analysis and recommendations provided below. We are also hopeful that the Government of Malawi will allow for an open consultation process, which will enable civil society and NGOs to participate meaningfully in this discussion, in particular as they are the object of the proposed Bill.

We welcome the improvements introduced by the Amendment Bill. It establishes a commitment to promote the right to freedom of association as enshrined in Section 32 of the Republican Constitution and it removes the requirement for mandatory double registration of NGOs. It requires that the members of the new regulatory authority have relevant experience and expertise, and that at least half of them are women (section 5). It also stipulates that members of the regulatory authority should act independently of any undue influence or interference from government, a political party or any other sector (section 4).

However, we are concerned that several provisions of the Amendment Bill may impinge on the exercise of the right to freedom of expression and freedom of association guaranteed under Articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR). Specifically, the Amendment Bill, if enacted, would:

- Create ambiguities in relation to the organizations and associations subject to the application of the law and their permissible activities, by including categories of

“Community Based Organizations” and “Faith Based Organizations” without defining them.

- Eliminate existing NGOs’ role in the oversight authority.
- Empower security actors to participate in overseeing NGOs by providing them a seat in the new regulatory authority, which would likely result in a more controlling and security-focused entity rather than in an enabling and supportive authority.
- Grant broad discretion to the new regulatory authority to conduct inspections and impose reporting requirements to NGOs.
- Increase penalties and establish criminal sanctions, including up to seven-years of imprisonment, for failing to comply with the NGO Act.

In this regard, we wish to submit the following comments on these aspects of the Amendment Bill, viewed in light of international human rights standards. We hope these comments will serve as a basis for further discussions. We stand ready to provide technical assistance to relevant authorities, should it be needed.

#### **1. Definitions and basis of NGOs operations**

The Amendment Bill introduces a new definition of NGOs that are subject to application of the law. According to section 2, “‘NGO’ means a Non-Governmental Organization, a Community Based Organization or a Faith Based Organization constituted for the purpose of a public benefit” (emphasis added). However, it does not define what constitutes “Community Based Organization” and “Faith Based Organization” under the Act. We are concerned this might create uncertainty about the law’s scope and make it difficult for organizations to discern their legal obligations and act accordingly.

This could also lead to broad interpretations from relevant administrative and judicial bodies, giving them wide discretionary powers to apply the law and impose burdensome requirements on a diverse groups of community and informal associations that are currently excluded from regulation.

Section 3 of the Amendment Bill establishes the basis of NGOs operations by providing that “The authority to operate NGOs derives from the people of Malawi for whose benefit and on behalf of whom all NGOs operate and to whom the NGOs are accountable under this Act and any written law.” We are concerned this provision is very broad and ambiguous and may serve as basis for restricting NGOs’ permissible purpose and activities.

In addition, the Bill does not clarify how this provision would be enforced, conferring on state authorities a broad margin of discretion that may lead to undue interference with the right to freedom of association.

In accordance with Article 22 of the ICCPR, acceded by Malawi on 22 December 1993, “no restrictions may be placed on the exercise of this right other than those which are prescribed by law”. This requirement implies that the law must be accessible to the public, and its provisions formulated in a precise manner to enable an individual to assess whether his or her activity would be in breach of the law and foresee the likely consequences of any breach. A law may not give broad discretion to those charged with its execution and instead provide sufficient guidance on how to implement it. By not providing clearly and unambiguously drafted definitions of the scope of the NGO Act, the Amendment Bill fails to meet the legality requirement for permissible restrictions of the right to freedom of association under international law.

## **2. NGOs participation role**

The Amendment Bill may significantly reduce NGOs’ participation in furthering the goals of the NGO Act. The existing legislation establishes a coordinating body for civil society, known as the Council for Non-Governmental Organization in Malawi (CONGOMA), and provides it with a consultative role for the purposes of the NGO Act. CONGOMA is currently mandated by law to represent and promote the interest and concerns of NGOs in Malawi before the regulated authority.

The Amendment Bill removes all references to CONGOMA in the Act. It repeals part VII of the NGO Act, removing all statutory responsibilities of CONGOMA and placing those duties under a new regulatory authority. Also, Sections 5 and 6 of the Amendment Bill remove the consultative role of CONGOMA in the designation and removal of members of the regulatory authority. While the Amendment Bill provides that the appointment of those members will be done by the Minister “in consultation with relevant professional and other bodies”, it does not determine which are these bodies and leaves consultation with non-governmental organizations at the complete discretion of the competent authorities.

In addition, the Bill eliminates the “General Assembly of NGOs”. According to the existing legislation, the General Assembly is attended every year by CONGOMA, all NGOs registered under the Act and the regulatory authority “for purposes of good administration and proper management.” During the General Assembly, NGOs receive the regulatory authority’s annual report and discuss any relevant matter concerning the sector.

It has been stressed by the Special Rapporteur on the rights to freedom of peaceful assembly and association that “composition of the supervisory body also needs to be independent from the executive power to ensure its decisions are not arbitrary” (A/HRC/23/39, para 38). Similarly, the ACHPR Guidelines on Freedom of Association and Assembly in Africa state that “matters relating to the oversight of associations shall be overseen, where necessary, by a single body that conducts its functions impartially and fairly.”

While we recognize that regulatory practice and design depends on the given context in each State, oversight bodies should be designed in a way that can effectively

facilitate oversight of the rights to freedom of association in a professional, consistent, and apolitical manner. We are concerned that by reducing existing NGOs' role in regulatory issues, the Amendment Bill will diminish the authority's capacity to fulfill this goal. Non-governmental organizations can play an important role in informing regulatory authorities about their needs and interests and to ensure accountability of the authority. Equally important, NGOs' consultative role in decisions regarding the composition of the regulatory authority can also enhance the institution's independence and foster public confidence in it.

### **3. Composition of new regulatory authority**

Section 5 of the Amendment Bill changes the composition of the regulatory authority by including a representative of "the Secretary responsible for home affairs and internal security" as an ex officio member. We are concerned this change might prompt the oversight body to take a security-oriented regulatory approach, rather than a supportive and enabling approach. The amendment may also weaken the public trust in the regulatory system.

Based on international regulatory good practices, the composition of the regulatory or oversight bodies should support and reinforce the independence and objectivity that is required by a State in fulfilling its obligations with respect to freedom of association. The ACHPR Guidelines on Freedom of Association and Assembly in Africa state that oversight bodies "shall have oversight only in relation to essential, minimum internal governance structures and standards. The powers of such a body shall be clearly delimited by law in accordance with regional and international human rights standards".

While it appears the amendment is seeking to address legitimate security interests, we believe a role for security actors in the oversight of non-governmental organizations could undermine the authority's ability to facilitate the exercise of freedom of association. On that point the report of the ACHPR Study Group on Freedom of Association and Assembly in Africa stressed that "security and intelligence authorities should not be given a special role in overseeing association; while they may naturally investigate associations on activities under their general mandates to explore criminal activities, providing a special role to such authorities relative to civil society is invariably in practice an indication that the authorities view civil society as a whole and indeed their own people as a threat that must be managed and kept under control."

We encourage Malawi to explore employing other means, such as financial regulation and police cooperation, to effectively address legitimate security concerns.

### **4. Functions of the new regulatory authority**

Section 7 of the Amendment Bill grants the regulatory authority new powers to supervise non-governmental organizations, such as to "promote transparency and accountability of NGOs to the beneficiaries and the Authority", "inspect NGOs for

compliance with this Act and any other written laws” and “issue or revoke certificates of registration”.

The Amendment Bill also places duties formerly attributed to CONGOMA under the new authority, including to “represent and promote the collective interests and concerns of NGOs in Malawi”. Section 9 the Amendment Bill introduces a new sub section 2 that provides that “the Authority shall have power to verify information submitted in accordance with subsection 1 and impose any measure it deems fit where the Authority is of the view that an NGO fails or refuses to comply with section” (emphasis added).

We believe these provisions grant broad discretionary power to a new regulatory authority. The powers granted to regulatory authorities should be carefully crafted and limited. The power to initiate inspections and audit NGOs for compliance with the NGO Act and “other written laws” is particularly chilling. Concern has been expressed in relation to the use of the transparency and accountability argument “to exert extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment” (A/HRC/23/39, para 38).

The ACHPR Guidelines on Freedom of Association and Assembly state that inspections by oversight bodies shall only be permitted following a “judicial order in which clear legal and factual grounds justifying the need for inspection are presented” and “where there is a well-founded evidence-based allegation of a serious legal violation”. The Guidelines also indicate that “regulations on inspections shall clearly define the powers of inspecting officers, ensure respect for privacy, and provide redress for any violations committed through the inspection process.”

It is of concern that the Amendment Bill does not provide objective criteria or grounds on which an inspection can be authorized nor any procedures and safeguards that can protect non-governmental organizations from unfair treatment and harassment. Consequently, the Bill falls short of the “prescribed by law” standard as noted above.

## **5. Criminal sanctions**

Section 16 of the Amendment Bill provides for an increase in fines for failure to comply with the NGO Act and “imprisonment for a period of seven years for each trustee or director unless he proves that he was not aware of the commission of the offence.” We are extremely concerned that the Amendment Bill imposes such severe penalties, including imprisonment, and does not clarify which contraventions can lead to them and what are the applicable procedural guarantees. Circumstances where criminal as opposed to civil sanctions apply to associations should be exceptional and narrowly construed.

The attachment of personal criminal liability to a trustee or director of an NGO without specifying the basis and standard for such liability is also worrisome. We wish to recall that violations of the law by an association should not lead to criminal prosecution of its representative. The organization itself should be liable for those contraventions. Liability for criminal wrongdoing by NGOs members should only be possible under very

clear and narrowly drawn grounds, consistent with international human rights law and best practice.

In this regard, the report of the ACHPR Study Group on Freedom of Association and Assembly in Africa stressed that “in broad terms an association, as a legal person, is responsible solely for associations carried out under those auspices. Individuals, similarly, are responsible for their own actions. It is essential that this distinction be recognized in states’ domestic laws and practices, and that in no cases liability improperly imputed from one actor to another.” The proposed amendments in this Section do not comply with the requirements of legality, proportionality and necessity and may infringe upon due process guarantees.

## **6. Other concerns**

There are provisions under the current NGO that do not comply with international norms and standards but were not revised by the Amendment Bill. In particular, the Amendment Bill retains a registration requirement for NGOs to operate in Malawi. In the past, we have reiterated that the right to freedom of association equally protects associations that are not registered, particularly when the procedure to establish an association is burdensome and subject to administrative discretion. Furthermore, notification procedure rather than a prior authorization procedure requesting the authorities to establish an association as legal entities, better complies with international human rights law (A/HRC/20/27, para 56 and 58).

It has been indicated by the Special Rapporteur on the rights to freedom of peaceful assembly and association that “under this notification procedure, associations are automatically granted legal personality as soon as the authorities are notified by the founders that an organization was created. In most countries, such notification is made through a written statement containing a number of elements of information clearly defined in the law, but this is not a precondition for the existence of an association. It is rather a submission through which the administration records the establishment of the said association. Such a notification procedure is in force in a number of countries (e.g. Cote d’Ivoire, Djibouti, Morocco, Portugal, Senegal, Switzerland and Uruguay).” (A/HRC/20/27, para 58).

We moreover refer to resolution 2005/38 of the Commission on Human Rights, highlighting that the right to peaceful assembly and association and the right to take part in the conduct of public affairs, are intrinsically linked to freedom of opinion and expression. In this context, states are to take all necessary measures to create conditions for the promotion of these rights. The promotion of civil society is fundamental to ensure stability and economic growth, and states should take all measures to promote civil society, including through legislation that is in compliance with international human rights law.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) within 48 hours. They will

also subsequently be made available in the usual report to be presented to the Human Rights Council.

While waiting for your response, we urge all relevant authorities in Malawi to take all necessary measures to ensure full compliance of domestic legislation with international human rights norms and standards, in particular, reversing or revoking the legislative provisions and other measures that impose undue limitations to the rights to freedom of association. We also asked your Excellency's Government to provide for a fully participatory and inclusive consultation process, with sufficient opportunity for meaningful dialogue between the authorities and non-governmental organizations on this important issue.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule

Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst

Special Rapporteur on the situation of human rights defenders