

ACCESS TO JUSTICE FOR CHILDREN: MALAWI

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

Malawi acceded to the CRC on 2 January 1991.¹ Malawi has also signed and ratified the Optional Protocol on the involvement of children in armed conflict and the Optional Protocol on the sale of children, child prostitution, and child pornography (both were signed on 7 September 2000, and they were ratified on 21 September 2010 and 7 October 2009 respectively).² A full list of other relevant human rights treaties ratified by Malawi is available through the African Committee of Experts on the Rights and Welfare of the Child.³

There is some precedent for direct application of the CRC in Malawi (see section I.D. below) although the CRC has not been fully incorporated into national law. Malawi's constitutional framework shows that the country remains dualist in its approach to the application of international law.⁴

The Constitution is the supreme law of the land. In the Constitution's language: "In the interpretation of all laws and in the resolution of political disputes, the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority."⁵ Regarding international treaties entered into by Malawi, Section 211 of the Constitution provides:

- (1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.
- (2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses.

¹ See United Nations Treaty Collection: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

² See: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

³ African Committee of Experts on the Rights and Welfare of the Child, *Harmonisation of Children's Laws in Malawi*, 2012, p. 10, available at: <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Malawi-Harmonisation-of-Laws-on-Children.pdf>.

⁴ Redson Edward Kapindu, *Malawi: Legal System and Research Resources*, GlobalLex, January 2009, para. 3.6, available at: <http://www.nyulawglobal.org/globalex/Malawi.htm>.

⁵ Constitution of the Republic of Malawi of 1994, section 10(1), available at: <http://www.malawi.gov.mw/images/Publications/act/Constitution%20of%20Malawi.pdf>.

(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.

According to subsection (2), the CRC is binding in Malawi and forms part of national law. Nonetheless, commentators have criticised that this section creates some ambiguity with respect to the application of international law in Malawi as, contrary to subsection (2) of Section 211, a state can only withdraw or be relieved of its international treaty obligations through a procedure spelt out under that particular treaty or general treaty law principles.⁶ Thus, the Constitution leaves the question of the applicability of international agreements entered into prior to the enactment of the Constitution on 18 May 1994 open to some debate.

B. Does the CRC take precedence over national law?

Some legal precedents have granted the CRC precedence over national laws, with the exception of the Constitution. For example, in “the case of *Adoption of CJ (An Infant)* (MSCA Adoption Appeal No. 29 of 2009), the court stated that international agreements and customary international law form part of the law of Malawi subject to the provisions of section 211 of the Constitution. Accordingly, courts of law can give effect to the provisions of the Convention in so far as they are not found to be inconsistent with the provisions of the Constitution”.⁷

C. Has the CRC been incorporated into national law?

The CRC has not been enacted as a freestanding law in Malawi, but the country has adopted some laws concerning the rights of children subsequent to its ratification of the CRC.

Chapter IV of the Constitution, the Bill of Rights, guarantees human rights to “every person” which includes children.⁸ Certain provisions specific to children are also contained in the Constitution, including:

- Section 23, providing for “Rights of Children.”
- Section 42(2), setting forth special provisions relating to accused persons who are children.

Moreover, in 2010, Parliament enacted the Child Care, Protection and Justice Act (the “Child Act”) that Malawi’s second report to the Committee on the Rights of the Child described as “a comprehensive attempt to domesticate the CRC as it extends beyond issues of child justice to include matters pertaining to:

- Duties and responsibilities of parents towards their children;

⁶ Ibid.

⁷ *Initial periodic report of Malawi to the UN Human Rights Committee*, CCPR/MWI/1, 3 April 2012, para. 9, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en..

⁸ African Committee of Experts on the Rights and Welfare of the Child, *Harmonisation of Children’s Laws in Malawi*, 2012, p. 2.

- Determination of children in need of care and protection;
- Guardianship;
- Fosterage;
- Residential placements;
- Powers and duties of child justice courts in care and protection matters;
- Duties and functions of local authorities relating to child justice and protection; and
- Protection of children from undesirable practices.”⁹

On its face, the Act articulates that it is an “Act to consolidate the law relating to children by making provision for child care and protection and for child justice; and for matters of social development of the child and for connected matters”.¹⁰

The Act designates three new bodies to support its enforcement: (1) Child Justice Courts – subordinated to High Courts, designated to rule on all decision making processes regarding child protection (declaring a child in need of protection, appointing a legal guardian, fostering, diverting children and implementing criminal procedures); (2) Child Panels – designated to devise and implement diversion options; (3) Child Case Review Board – designated to consult with reformatory homes and foster homes to ensure compliance with the Act, review child offender cases and children needing protection, design rehabilitation programs, and more.¹¹

D. Can the CRC be directly enforced in the courts?

As discussed below, there is some precedent for application of the CRC itself in the courts of Malawi, at least as a guiding instrument.

Subject to the discussion in the next section, given that Malawi is a “dualist” state, enforcement would not typically be of the CRC directly, but rather of the laws enacted to incorporate it into national law, such as the Child Act. For example, in Malawi’s report to the UN Human Rights Committee with respect to the implementation of the International Covenant on Civil and Political Rights, Malawi noted in 2012 that “Malawi is a dualist State and, as such, no international instrument can be directly invoked. However, Chapter IV of the Constitution provides for human rights. The rights listed under Chapter IV largely reflect the provisions of many international instruments that protect human rights generally, including the International Covenant on Civil and Political Rights. Section 10 provides that in interpreting all laws,

⁹ *Second periodic report of Malawi to the UN Committee on the Rights of the Child*, CRC/C/MWI/2, 17 July 2008, para. 10 & 25, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMWI%2f2&Lang=en.

¹⁰ Child Care, Protection and Justice Act 2010 (No. 22 of 2010) (repealed Children and Young Persons Act), Preamble, available at: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=90369.

¹¹ UNICEF, *Protecting Children in Malawi – A report on the major findings of the mapping and assessment of the National Child Protection System*, 2012, p. 40, available at: <http://www.socialserviceworkforce.org/system/files/resource/files/Protecting%20Children%20in%20Malawi%20-%20A%20report%20on%20the%20major%20findings%20of%20the%20mapping%20and%20assessment%20of%20the%20NCPS.pdf>.

the provisions of the Constitution shall be regarded as the supreme arbiter and ultimate source of authority. In that regard, courts, tribunals and administrative authorities do consider the provisions of the Covenant in applying the law to ensure conformity with international law and obligations under the Covenant.”¹²

Even before implementation of the Child Act, in *Moyo v. Attorney General*, a case concerning the separation of children in detention from adults and the legality of indeterminate sentences in Malawi, the High Court of Malawi held that: “Malawi having acceded to the CRC on 2 January 1991, the said Convention is binding on Malawi and all public or private institutions in this Country.”¹³ The *Moyo* decision cited another decision (*S. Kalanola v. Limbe Leaf Tobacco Ltd*, Civil Cause No. 542 of 1995), which interpreted the Malawi Constitution such that: “binding international agreement[s] before 1994 became part of our Law by operation of the Constitution. The uncertainty in section 211 before the amendment is cured by the amendment. Section 211(a) as amended expressly states that international agreements entered after commencement of the Constitution shall form part of our Law by domestic Legislation. If it meant prior international agreements required domestic Legislation, the Constitution would in section 211(a) have added qualifications to the effect that all international agreements before 1994 would, like the ones after, need domestic Legislation. The Constitution restricts the requirement to Legislation after commencement of the Constitution. On the face of it the Constitution excludes prior international agreements in section 211(a). In my judgment, the Constitution in section 211(2) stresses the non-requirement of domestic Legislation for international agreements prior to the commencement of the Constitution. Moreover, if it was meant that domestication by Legislation apply to international agreements prior to 1994, the Constitution would expressly have said so in section 211(s) having omitted it in section 211(1). This interpretation bases on the Construction of section 211 before and after the amendment. It is not based on an external premise.”

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Yes, there a number examples of domestic courts using or applying the CRC, especially with regard to inter-country adoption, such as:

- *In the matter of the Adoption of Children Act Chapter 26:01 of the Laws of Malawi and in the matter of Chifundo James (an infant) (12 June 2009)*,¹⁴ and *In Re: Adoption of Children Act (Cap.26:01); In Re: David Banda (Adoption Cause No.2 of 2006) (28 May 2008)*,¹⁵ both decisions on inter-country adoption and the best interests of the child;
- *Moyo v. Attorney General (26 August 2009)*, a case concerning the

¹² *Initial periodic report of Malawi to the UN Human Rights Committee*, para. 8.

¹³ See CRIN’s summary of the case: www.crin.org/en/library/legal-database/moyo-v-attorney-general.

¹⁴ See CRIN’s summary of the case: <https://www.crin.org/en/library/legal-database/matter-adoption-children-act-chapter-2601-laws-malawi-and-matter-chifundo>.

¹⁵ See: <http://www.malawilii.org/mw/judgment/high-court/2008/3>.

separation of children in detention from adults and the legality of indeterminate sentences in Malawi;¹⁶

- *Kutty v. Kutty* (16 May 2005), a case regarding the payment of child maintenance;¹⁷
- *The State (ex parte Stanford Kashuga) v. the Second Grade Magistrate Court (Thyolo) and Malawi Prison Service* (4 February 2015), deciding that the applicable age of majority in juvenile justice proceedings should be 18 as per the Constitution and striking down the lower age of majority in the Child Care, Protection and Justice Act.¹⁸

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children’s rights?

Children, through a guardian or “next friend” can bring cases in the domestic courts to challenge violations of their rights in Malawi. The Constitution of Malawi provides that “any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to make application to a competent court to enforce or protect such a right or freedom; and to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require”.¹⁹ Judicial review challenges can therefore be lodged by children seeking review of a law or any action or decision by the Government for conformity with the Constitution.²⁰

It is important to note in this context that there is some unclarity in the laws of the country as to the age of majority and the definition of a child. While the Court in *The State (ex parte Stanford Kashuga) v. the Second Grade Magistrate Court (Thyolo) and Malawi Prison Service* decided that for all criminal justice matters under the Child Act, a child ought to be a person under 18 years of age in line with the constitutional provisions under section 42(2)(g) of the Constitution, a child is otherwise defined as a person under 16 years of age in article 2 of the Child Act.²¹ Despite recommendations by the Malawi Law Commission that the age limit under the Child Act be extended to 18 years, this was not taken up by legislators when the Child Act was developed.²² The UN Committee on the Rights of the Child has also noted with concern that constitutional provisions defining a child remain unclear.²³

¹⁶ See CRIN’s summary of the case: www.crin.org/en/library/legal-database/moyo-v-attorney-general.

¹⁷ See: <http://www.malawilii.org/mw/judgment/high-court-general-division/2005/27>.

¹⁸ See CRIN’s summary of the case: <https://www.crin.org/en/library/legal-database/state-ex-parte-stanford-kashuga-v-second-grade-magistrate-court-thyolo-and>.

¹⁹ Constitution, section, 46(2).

²⁰ Constitution, section 108(2).

²¹ See CRIN’s summary of the case: www.crin.org/en/library/legal-database/moyo-v-attorney-general.

²² Malawi Law Commission, *Report of the Law Commission on the Review of the Constitution*, 2007, p. 30–32, available at: <http://www.sdn.org.mw/lawcom/docs/ConstitutionReviewFinalReport.pdf>.

²³ UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of Malawi*, CRC/C/MWI/CO/2, 27 March 2009, para. 26, available at: http://tbinternet.ohchr.org/_layouts/

Some provisions in the Child Act also give children the right to challenge violations of their rights in court. Section 5, for example, provides that a child (among other persons) may apply to a Child Justice Court for an order to determine parentage. According to Section 9, a child may apply to the Child Justice Court for a maintenance order. Section 40 determines that a child may apply to the Child Justice Court for appointment of a guardian.²⁴ With respect to proceedings involving Child Justice Courts, various entities are entitled to apply for orders for a parentage determination, custody orders, maintenance orders, and care, including: a child, a child's parent, guardian or relatives, social welfare officers, police officers, teachers, health officers, or any other appropriate person.²⁵

Criminal proceedings can be instigated through a complaint before a magistrate by any person who believes that reasonable cause exists that an offence has been committed, or by bringing before a magistrate a person who has been arrested without warrant, or by a public prosecutor or a police officer.²⁶ Private prosecutions as such do not appear to be possible.

However, generally, children must bring litigation not in their own name, but through a "next friend."²⁷ For example, in *Katimbe v. Yapu* (High Court, Civil Cause No. 65 of 2004), [2005 MWHC 99 (10/01/2005)], the High Court held: "Under Order 80 rule 2 of the Rules of the Supreme Court, a minor is not supposed to bring an action on her own except by her next friend. The rules of practice require that once the Court is apprised of the fact that the plaintiff is an infant, though suing as an adult without a next friend, it will stay all further proceedings unless and until a next friend is added. The reason is clear, an infant has no capacity to sue or be sued".²⁸

Two other potential avenues that may receive complaints by children regarding violations of their rights were established by the 1994 Constitution: the Malawi Human Rights Commission and the Office of the Ombudsman.²⁹ The Commission may investigate violations of human rights on its own initiative or upon complaints received from any person, class of person or body, including by children.³⁰ The Ombudsman may inquire into and investigate any alleged abuse of power or unfair treatment of any person

treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMWI%2fCO%2f2&Lang=en.

²⁴ Child Care, Protection and Justice Act of 2010.

²⁵ See, e.g.: Child Care, Protection and Justice Act of 2010, §§ 5, 8, 9, 23, 33-36.

²⁶ Criminal Procedure and Evidence Code (Cap. 8:01) (1968), §§ 168-245, available at: http://www.malawilii.org/files/mw/legislation/consolidated-act/8:01/criminal_procedure_evidence_code_pdf_15288.pdf.

²⁷ Marshal Chilenga, *Civil Procedure in Malawi*, 201, p. 54 (citing Order 80 Rule 2 of the RSC). According to this publication, a "minor's next friend is normally a relative with no interest in the litigation adverse to that of the minor".

²⁸ Decision available at: <http://www.malawilii.org/mw/judgment/high-court-general-division/2005/99>.

²⁹ UNICEF, *Protecting Children in Malawi – A report on the major findings of the mapping and assessment of the National Child Protection System*, p. 87-88.

³⁰ Constitution, section 129; Human Rights Commission Act § 12 (No. 27 of 1998), available at: http://www.rwi.lu.se/NHRIDB/Africa/Malawi/Malawi_NHRI_Act_1998.pdf; See the Malawi Human Rights Commission's mandate at: <http://www.hrcmalawi.org/mandate.html>.

by an official employed by the Government.³¹

- B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

As set forth above, it appears that the law provides for children of any age to apply to the Child Justice Courts, at least for certain types of orders, including to determine parentage, for a maintenance order, or for appointment of a guardian.³² Child Justice Courts can order parents or guardians to exercise proper care and guardianship, place the child in the custody of a fit and proper person, or place the child under the supervision of a social welfare officer or another person.³³ Child Justice Courts may order a child placed in the care of a foster home.³⁴ All other applications to the courts have to be made by a representative or “next friend” on behalf of the child, as explained in section II.A above.

An appointment for guardianship terminates upon the child turning sixteen, unless exceptional circumstances exist that require a Child Justice Court to grant an order that the appointment be extended.³⁵ This suggests that children above the age of sixteen can bring any challenges in court by themselves in their own name.

- C. In the case of infants and young children, how would cases typically be brought?

With respect to proceedings involving Child Justice Courts, the Child Act envisions applications for various orders can be brought by a child, a child’s parent, guardian or relatives, social welfare officers, police officers, teachers, health officers, or any other appropriate person; and similarly broad responsibilities exist to report to social welfare officers or police officers if a child is in need of protection.³⁶

- D. Would children or their representatives be eligible to receive free or subsidized legal assistance in bringing these kinds of cases?

Section 126 of the Child Act provides that a child has a right to legal representation. Section 127 of the Child Act provides that legal representation shall be provided at State expense under certain circumstances, including if the child is subjected to care and protection proceedings under the Child Act, it is in the best interests of the child and the child, parent, guardian or other appropriate adult cannot afford to engage the service of a legal representative.

³¹ Ombudsman Act 1996, § 5(1), available at: http://www.africanchildforum.org/clr/Legislation%20Per%20Country/Malawi/malawi_ombudsman_1996_en.pdf.

³² Child Care, Protection and Justice Act, § 5, 9, 40.

³³ Ibid., § 37.

³⁴ Ibid., § 49.

³⁵ Ibid., § 42(1).

³⁶ See, e.g.: Ibid., §§ 5, 8, 9, 23, 33-36.

Malawi does technically have a legal aid programme under which children and their representatives could apply for free legal assistance, but many challenges exist regarding its implementation.

As of a few years ago, the programme was enabled by legislation entitled the Legal Aid Act, Cap 4:01 of the Laws of Malawi, which was enacted in 1964 “to make provisions for the granting of legal aid to poor persons and matters connected therewith and incidental thereto.”³⁷ As of a few years ago, the Legal Aid Department received only about 1.5 US cents per capita, and was understaffed, with high turnover, and needed additional funding.³⁸

A new Legal Aid Act of 2010 was passed in 2011 but it took several years for it to come into operation.³⁹ It establishes a Legal Aid Bureau “which has been de-linked from the Ministry of Justice as an autonomous Government body with more extensive scope for provision of legal aid”.⁴⁰ “The Minister of Justice and Constitutional Affairs further introduced the purpose of the [Legal Aid] Bill as to ‘repeal the Legal Aid Act [Chapter 4:01] in order to expand Legal Aid Services to as to make justice accessible to all.’”⁴¹ “This was in conformity with Section 42 of the Malawi Constitution, which obliges the state to provide legal aid to indigent clients in both criminal and civil matters.”⁴²

Under section 23 of the new Legal Aid Act, Malawi does grant powers to courts to proactively direct that a person appearing before them be provided with legal aid, and section 24 provides a right of appeal with respect to legal aid determinations.⁴³ Specifically with respect to children, the Child Act provides that the court may request the legal aid office to appoint a legal representative to represent a child.⁴⁴

The Legal Aid Act also provides for the geographical extension of legal aid services, authorising the opening of District Legal Aid Offices.⁴⁵

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

Some limits exist on representatives bringing cases on behalf of children. Generally, in actions before the High Court, “a next friend must act through

³⁷ See: <http://ruleoflawmalawi.blogspot.com/2011/10/legal-aid-act-2010.html>.

³⁸ Ibid.

³⁹ We were unable to locate an online copy of the new law.

⁴⁰ Justice Andrew Nyirenda SC, Judge of the Supreme Court of Appeal, *An overview of pretrial justice in Malawi*, 2011, p. 2, available at: http://www.osisa.org/sites/default/files/sup_files/Speech%20by%20Justice%20Andrew%20Nyirenda%20-%20overview%20of%20pre-trial%20justice%20in%20Malawi.pdf.

⁴¹ Desmond Mudala Kaunda, in: The Danish Institute for Human Rights, *Expanding Access to Justice for the Poor – Malawi’s Search for Solutions*, December 2011, p. 32, available at: www.humanrights.dk/files/media/billeder/udgivelser/desmond_report_ok.pdf.

⁴² Ibid.

⁴³ Ibid., p. 35.

⁴⁴ Child Care, Protection and Justice Act, §§ 126-131.

⁴⁵ Kaunda, *Expanding Access to Justice for the Poor – Malawi’s Search for Solutions*, p. 34.

a legal practitioner and must file a written consent to so act.”⁴⁶ Various sections of the Child Act determine that the views of the child are to be taken into account in legal proceedings: section 8(4) provides that a Child Justice Court shall consider “the views of the child” in applications regarding custody and section 55 determines that the wishes of the child must be ascertained with respect to fostering.

The Child Act also provides that a decision regarding guardianship or custody should be made in the best interests of the child if a child’s rights are being infringed by a parent, guardian or a custodian and a report is made to the authorities.⁴⁷ Yet, the UN Committee on the Rights of the Child has noted that while the Law Commission Review of the Constitution of Malawi recommended that the principle of the best interests of the child be included in the Constitution, the principle is still not fully taken into account in domestic legislation, programmes and services for children.⁴⁸

Applications to determine parentage may be made by a child, the child’s parent or guardian, a probation officer, a social welfare officer, or any other interested person as a Child Justice Court deems fit.⁴⁹ Applications for maintenance may be made by a child, the child’s parent or guardian, a relative of the child, a social welfare officer, a police officer, a teacher, a health officer, or any other appropriate person.⁵⁰ Members of the child’s family, child care providers, members of the community, and medical officers have a duty to report to a social welfare officer or police officer any reasonable belief that the child is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed or sexually abused.⁵¹ The Child Act does not appear to limit the ability to seek court intervention on such grounds such as by requiring parent or guardian consent.

III. How can children’s rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

A challenge regarding violations of the Child Act can be brought in the Child Justice Courts which are provided for in the Child Care, Protection and Justice Act. Child Justice Courts are based within the Magistrates Courts⁵² and have first instance jurisdiction over children matters.⁵³ Where a matter involving a child is otherwise liable to be heard by the High Court, it shall be

⁴⁶ Chilenga, *Civil Procedure in Malawi*, p. 55.

⁴⁷ Child Care, Protection and Justice Act, § 75.

⁴⁸ UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of Malawi*, para. 30.

⁴⁹ Child Care, Protection and Justice Act, § 5.

⁵⁰ *Ibid.*, § 9.

⁵¹ *Ibid.*, §§ 33-36.

⁵² See: http://www.judiciary.mw/index.php?option=com_content&view=article&id=4&Itemid=102.

⁵³ Child Care, Protection and Justice Act, § 134.

heard by the High Court, but the High Court shall comply with the requirements of the Child Act in respect of the child.⁵⁴ The Child Justice Courts have jurisdiction over cases challenging parentage, maintenance, care and protection, and criminal cases involving child offenders. As of 2012, four Child Justice Courts had been established across the country in Lilongwe, Blantyre, Mzuzu and Zomba. In addition, in each of the 28 districts of Malawi, one magistrate has been designated child justice magistrate and magistrates are receiving training on the Child Act.⁵⁵

Children can also lodge judicial review proceedings through their representatives directly at the High Court, for example in order to challenge violations of their fundamental rights enshrined in the Constitution. Pursuant to section 108 of the Constitution, the High Court of Malawi has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.⁵⁶ The High Court can review any law and any action or decision of the Government for conformity with the Constitution, only unless otherwise provided by the Constitution itself.⁵⁷

Section 129 of the Constitution gives the the Malawi Human Rights Commission a broad mandate to promote, protect and investigate violations of human rights. The Commission may investigate violations of human rights on its own initiative or upon complaints received from any person, class of person or body, including by children.⁵⁸ The Malawi Human Rights Commission has powers of investigation and recommendation, but does not have judicial or legislative power.⁵⁹ However, it has powers to assist with alternative dispute resolution and to refer matters to competent authorities.⁶⁰ Complaints may be brought before the Commission on behalf of individuals or groups of individuals by the individuals themselves, legal practitioners, their representatives, third parties, non-governmental organisations, professional associations or any other representative organisations having an appropriate interest in the matter.⁶¹ The Human Rights Commission also encompasses two departments which are specifically concerned with children's rights: a thematic committee and a child rights directorate.⁶²

The Office of the Ombudsman has the power to “investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is a remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other

⁵⁴ Ibid.

⁵⁵ UNICEF, *Protecting Children in Malawi – A report on the major findings of the mapping and assessment of the National Child Protection System*, p. 11, 80.

⁵⁶ Constitution, section 108(1).

⁵⁷ Constitution, section 108(2).

⁵⁸ Constitution, section 129; Human Rights Commission Act § 12 (No. 27 of 1998), available at: http://www.rwi.lu.se/NHRIDB/Africa/Malawi/Malawi_NHRI_Act_1998.pdf; See the Malawi Human Rights Commission's mandate at: <http://www.hrcmalawi.org/mandate.html>.

⁵⁹ Constitution, section 130.

⁶⁰ Human Rights Commission Act § 22.

⁶¹ Human Rights Commission Act, § 16(2).

⁶² See Human Rights Commission thematic committees at: http://www.hrcmalawi.org/thematic_committees.html; See Human Rights Commission directorates at: <http://www.hrcmalawi.org/Directorates.html>.

practicable remedy”.⁶³ The Ombudsman has subpoena powers and also the power to initiate contempt proceedings before the High Court.⁶⁴ The Ombudsman shall inquire into and investigate “any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society”.⁶⁵

Regional mechanisms

Individuals, including child victims, his/her parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as “communications”) to the African Committee of Experts on the Rights and Welfare of the Child (“African Committee”) about violations of the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”).⁶⁶ All available domestic remedies must have been exhausted before bringing a case to the African Committee.⁶⁷ The complaint must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.⁶⁸ The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁶⁹

Individuals, groups or NGOs may also submit complaints (known as “communications”) to the African Commission on Human and Peoples’ Rights (“African Commission”) about violations of the African Charter on Human and Peoples’ Rights (“African Charter”).⁷⁰ All available domestic remedies must have been exhausted before bringing a case to the African Commission.⁷¹ The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether or not the complainant wishes to remain anonymous

⁶³ Constitution, section 123.

⁶⁴ Constitution, section 124.

⁶⁵ Ombudsman Act, § 5(1).

⁶⁶ African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), Article 44, available at: <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/acerwc-charter-full-text/>. For more information about communications, see: <http://acerwc.org/the-committees-work/communications/>.

⁶⁷ African Committee of Experts on the Rights and Welfare of the Child, *Communications*, available at: <http://acerwc.org/the-committees-work/communications/>.

⁶⁸ War Resisters’ International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, *African Committee of Experts on the Rights and Welfare of the Child: communication procedure*, 2012, available at: <http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

⁶⁹ Ibid.

⁷⁰ African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at: <http://www.achpr.org/instruments/achpr>.

⁷¹ Ibid., Article 56(5).

and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.⁷² The African Commission will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁷³ If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples' Rights.⁷⁴

Individuals or NGOs with observer status before the African Commission may bring their case to the African Court on Human and Peoples' Rights⁷⁵ alleging violations of the African Charter.⁷⁶ All available domestic remedies must have been exhausted before bringing a case to the Court.⁷⁷ The complaint must include, amongst other things, details of the applicant's identity, notwithstanding his/her request to remain anonymous.⁷⁸ The complaint must be written in one of the official languages of the Court,⁷⁹ and must be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court.⁸⁰ Applicants are entitled to be represented or to be assisted by legal counsel and/or by any other person of the applicant's choice.⁸¹ The Court may, in the interest of justice, provide

⁷² Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, Rule 93, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

⁷³ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, *African Commission on Human and Peoples' Rights: communication procedure*, 2012, available at: <http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

⁷⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5, available at: <http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, Rules 84(2) and 118, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010>; Several examples of cases brought before the Commission regarding Malawi are available at: <http://caselaw.ihlda.org/acmhpr/search/?c=48>.

⁷⁵ The African Court on Human and Peoples' Rights will be incorporated into the African Court of Justice and Human Rights once the Protocol on the Statute of the African Court of Justice and Human Rights comes into force. The Court's Human Rights Section will have jurisdiction over human rights instruments including the African Charter on the Rights and Welfare of the Child and the African Charter on Human and Peoples' Rights. Individuals and NGOs accredited to the African Union or its organs will be able to submit complaints to the Court provided that the State concerned has made a declaration recognising the Court's competence to receive such complaints: see A4ID, *African Court of Human and Peoples' Rights*, 27 February 2012, available at: <http://www.a4id.org/sites/default/files/user/African%20Court%20of%20Human%20and%20People%27s%20Rights.pdf>.

⁷⁶ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Articles 5(3) and 34(6), available at: <http://www.achpr.org/instruments/court-establishment>.

⁷⁷ *Ibid.*, Article 6(2).

⁷⁸ African Court on Human and Peoples' Rights - Rules of Court, Rules 34 and 40, available at: http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf.

⁷⁹ *Ibid.*, Rule 34; the official languages of the Court are: Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language.

⁸⁰ *Ibid.*, Rule 40.

⁸¹ *Ibid.*, Rule 28.

free legal representation and/or legal assistance to the applicant.⁸² If the Court finds that there has been a violation of the African Charter, it will make “appropriate orders to remedy the violation, including the payment of fair compensation or reparation”.⁸³

B. What powers would courts have to review these violations, and what remedies could they offer?

Child Justice Courts may hand down decisions on convictions and sentencing in criminal proceedings involving children and can adopt different orders relating to parentage, maintenance, custody, guardianship and protection.⁸⁴

The High Court has broad powers, both in its capacity as appellate court and court of first instance. In judicial review proceedings, where the court finds that rights or freedoms granted by the Constitution have been unlawfully denied or violated, it has the “power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated”.⁸⁵ The High Court also has the “power to award compensation to any person whose rights or freedoms have been unlawfully denied or violated where it considers it to be appropriate in the circumstances of a particular case”.⁸⁶ The High Court can also issue judgments and injunctions, summonses, warrants, orders, rules, notices, as appropriate in both civil and criminal proceedings.⁸⁷

The Human Rights Commission shall, upon hearing complaints brought before it or based upon any investigations it has carried out, (a) seek an amicable settlement through conciliation and, where appropriate, on the basis of confidentiality; (b) inform the complainant and the respondent of their respective rights, remedies or obligations and the Commission shall promote a party’s access to the remedies; (c) may render such assistance or advice as the party that brought the complaint or petition may reasonably require; (d) may transmit a complaint, petition or any other matter to any other competent authority; (e) make recommendations to the competent authority, proposing amendments or reforms of the laws, regulations or administrative provisions or practices if the Commission has identified such laws, regulations or administrative provisions to have created the difficulties or hardships encountered by the persons who brought the complaints or petitions; and (f)

⁸² Ibid., Rule 31.

⁸³ Ibid., Article 27(1).

⁸⁴ Child Care, Protection and Justice Act, § 134(1).

⁸⁵ Constitution, section 46(3).

⁸⁶ Ibid., section 46(4).

⁸⁷ Chilenga, *Civil Procedure in Malawi*, p. 116-120 (citing Order 80 Rule 2 of the RSC); Courts Act (1958), see inter alia § 3, available at: http://www.malawilii.org/files/mw/legislation/consolidated-act/3:02/courts_act_pdf_20355.pdf.

may recommend to the relevant authority the prosecution of any person found to have violated human rights or the taking of any other action and any such authority shall consider the recommendation and take such action as it deems appropriate.⁸⁸

After holding any inquiry or investigation, the Ombudsman shall (a) notify the person who laid the matter before him of the outcome, or that the matter will not be inquired into or investigated; (b) take appropriate action or steps to call for or require the remedying or reversal of matters or instances through such means as are fair, proper and effective, including by (i) negotiation and compromise between the parties concerned; (ii) causing the complaint and the Ombudsman's finding thereon to be reported to the superior of an offending person; (iii) referring the matter to the Attorney General or the Director of Public Prosecutions or both.⁸⁹ If the Ombudsman is of the opinion that any instance or matter inquired into or investigated can be rectified or remedied in any lawful manner, he shall notify the organ of Government of his findings and the manner in which the matter can be rectified or remedied.⁹⁰

- C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Research suggests that all of the above mentioned challenges must involve one or more individual child victims as challenges must either be brought by a child or his/her representative directly or by representative bodies or civil society organisations on behalf of an individual victim or group of victims.

- D. Is any form of collective action or group litigation possible, with or without naming individual victims?

We were unable to locate relevant provisions in the Code of Civil Procedure or the Court Act addressing this issue, specific to children's rights or human rights issues. However, generally, Malawi does have procedures for representative actions where numerous persons have the same interests.⁹¹

- E. Are non-governmental organizations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Research suggests that non-governmental organisations are not permitted to file or intervene in cases before the Malawian courts. Nonetheless, NGOs can bring complaints before non-judicial bodies. Complaints may e.g. be brought before the Human Rights Commission on behalf of individuals or groups of individuals inter alia by third parties, non-governmental

⁸⁸ Human Rights Commission Act, § 22.

⁸⁹ Ombudsman Act, § 8(1).

⁹⁰ Ibid., § 8(2).

⁹¹ Chilenga, *Civil Procedure in Malawi*, p. 56.

organisations, professional associations or any other representative organisations having an appropriate interest in the matter.⁹²

Representative action is also possible before the African Court on Human and Peoples' Rights. As of March 2014, Malawi was one of only seven countries that had made a declaration accepting the jurisdiction of the Court and thus allowing claims to be brought before that Court by NGOs with observer status before the African Commission on Human and Peoples' Rights.⁹³ There is also a legal aid scheme that applies in the African Court of Human and Peoples' Rights.⁹⁴

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Depending on the type of order sought, challenges can be filed in the Child Justice Courts or the High Court. The initial filing process in the Child Justice Courts is unclear as the Child Act provides that rules regulating the procedure and practice in these courts may be drafted by the Chief Justice,⁹⁵ but this does not appear to have taken place. Proceedings before the High Court are instituted by issuing an originating process, which involves presenting such process to the court office, paying a fee and receiving a stamp with the court's official seal.⁹⁶ The originating process is typically an originating summons and typically must be served on the defendant within four months.⁹⁷

Children wishing to lodge a complaint before the Ombudsman can do so by communication in writing addressed to the Ombudsman. If a child is currently being detained and cannot him or herself submit a complaint, a communication must be sent to the Ombudsman by the person in charge of the facility the person is detained, or by any other person.⁹⁸

Complaints to the Human Rights Commission can be launched by filling in the 'Complaints Registration Form' which is available on the Commission's website.⁹⁹

B. Legal aid / Court costs. Under what conditions would free or subsidized legal aid be available to child complainants or their representatives through the

⁹² Human Rights Commission Act, § 16(2).

⁹³ See: <http://www.african-court.org/en/index.php/about-the-court/brief-history>.

⁹⁴ See: http://www.african-court.org/en/images/documents/New/English_Legal_Aid_Policy_for_the_Court_2013-2014.pdf.

⁹⁵ Child Care, Protection and Justice Act, § 185.

⁹⁶ Chilenga, *Civil Procedure in Malawi*, p. 29.

⁹⁷ *Ibid.*, pp. 29-36.

⁹⁸ Ombudsman Act, § 7.

⁹⁹ See: <http://www.hrcmalawi.org/index.html>.

court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

As discussed above (section II. D.), children are technically entitled to free legal assistance provided by the State under sections 126 and 127 of the Child Act, but many challenges exist regarding the practical implementation of legal aid across Malawi. It is therefore unclear how far children and their representatives can rely on the state-sponsored legal aid system when bringing challenges of child rights violations in court.

Despite the intended improvements of the new Legal Aid Act, Justice Andrew Nyirenda, Judge of the Supreme Court of Malawi, has identified the following persisting challenges in the implementation of legal aid across the country:¹⁰⁰

- lack of access to legal aid, poor record keeping, and inadequate human and material resources;¹⁰¹
- coverage by the state legal aid system is incomplete at best;
- access to legal aid ‘at all stages’ of the criminal justice system is generally unavailable;
- budgetary allocation for legal aid is minimal;
- persons accused of crimes cannot expect legal advice at all times in mounting a defense or informing a plea to a serious charge; or representation in cases attracting a prison sentence;
- lawyers are few in number and generally unavailable in rural areas;
- paralegals, or trained non-lawyers, are not provided in most districts in a systematic manner;
- community legal services are not available in every district or accessible by every person in need of such services;
- information on legal aid is not available to the general population;
- there is a lack of overarching legal aid ‘strategy’ to maximise the use of the resources available.¹⁰²

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practicing lawyers on a pro bono basis, through a children's rights organization, or under an agreement that does not require the payment of legal fees up front?

A list of lawyers currently licensed to practise in Malawi is available through the Malawi Law Society,¹⁰³ but it is unclear in how far pro bono advice would be available.

The Centre for Human Rights and Rehabilitation (CHRR) in Lilongwe operates a paralegal clinic that is aimed at providing small scale legal advice

¹⁰⁰ Justice Nyirenda SC, *An overview of pretrial justice in Malawi*, p. 7.

¹⁰¹ Ibid., p. 2.

¹⁰² Ibid., p. 7.

¹⁰³ See: http://malawilawsociety.net/lawyers_with%20valid_licences.pdf.

to members of the community, usually regarding cases alleging human rights violations. The service is free and involves counseling, representation during litigation and refereeing of cases to relevant authorities and institutions.¹⁰⁴ The Malawi Human Rights Commission may also be able to offer free legal assistance to children.¹⁰⁵

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

We were unable to locate relevant provisions in the Civil Procedure Act, Rules of Court, Penal Code, Criminal Procedure and Evidence Act or any other primary source material addressing the issue of timing of cases with relation to children, nor was it addressed in any of the secondary sources we reviewed, with respect to court filings. It is therefore to be presumed that there are no special provisions allowing for young adults to bring cases about violations of their rights that occurred when they were children. The Limitation Act governs limitation periods for civil claims in Malawi which are six years for tort and contract claims.¹⁰⁶

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The Criminal Procedure and Evidence Code provides for the types of evidence admissible and/or required to prove a violation. A wide range of possible modes of evidence is available, from confessions to witness statements, expert witnesses or documentary evidence, and evidence given by children.¹⁰⁷ Malawian law typically provides for trial evidence through the exchange of witness statements, and cross-examination is limited (absent leave of court) to the matters stated.¹⁰⁸ Special provisions apply to evidence given by victims of sexual offences: the court may sit in closed session; a screen, partition or one-way glass may be used to obscure the witness's view of a party to whom the evidence relates; the witness may be accompanied by a relative or friend for the purpose of providing emotional support; or the evidence of the witness may be given at a place outside the courtroom and transmitted to the courtroom by means of closed circuit television.¹⁰⁹

The Child Act provides for specific procedures that allow the Child Justice Courts to assist children presenting evidence. The child is supposed to give evidence only if of an age that he or she can understand the nature and consequences of an oath or affirmation.¹¹⁰ There are also provisions allowing

¹⁰⁴ See: http://www.chrrmw.org/paralegal_bg.php.

¹⁰⁵ See: <http://www.hrcmalawi.org/index.html>.

¹⁰⁶ Limitation Act (1967), part I, section 4, available at: http://www.malawilii.org/files/mw/legislation/consolidated-act/6:01/civil_procedure_suits_by_or_against_government_of_14101.pdf.

¹⁰⁷ Criminal Procedure and Evidence Code, §§ 168-245.

¹⁰⁸ Chilenga, *Civil Procedure in Malawi*, p. 97.

¹⁰⁹ *Ibid.*, § 71A.

¹¹⁰ Child Care, Protection and Justice Act, § 144.

for closed hearings in the Child Justice Courts.¹¹¹ The proceedings of a Child Justice Court shall be informal and the presiding officer is tasked to ensure that “a) technical language is not used during hearing; b) no person puts on official uniform or professional robes or dress save only if it is strictly required to do so for the child to make an identification or for purposes of evidence as the court may authorize; c) there are regular breaks with such necessary provisions for the child as the Minister may prescribe by regulations; and d) children with disabilities are accorded assistance to meet their special needs where necessary”.¹¹² Other procedures attempting to assist children also exist, but may not work in the child’s favour at all times. For example, generally parents or guardians are required to attend Child Justice Court proceedings.¹¹³

The Human Rights Commission can conduct open or closed hearings during its investigation of any matter at its own discretion.¹¹⁴ Matters brought before the Ombudsman are confidential.¹¹⁵

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Research suggests that there is a significant backlog in the Malawian courts, as noted by the UN Human Rights Committee in 2014,¹¹⁶ and it may therefore take a considerable amount of time until a decision can be expected. The Government has taken a number of measures to ensure the right to fair trial and reduce the backlog of judicial cases, including through the additional appointment of judges, but as of July 2014, the problem was still persisting.¹¹⁷

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

Decisions by the Subordinate Courts, such as the Magistrates Courts and Child Justice Courts, can be appealed to the High Court. Decisions by the High Court, sitting in its capacity as general division, commercial division or in a constitutional capacity, can be appealed to the Supreme Court of Appeal of Malawi.¹¹⁸ As of 2012, however, the High Court did not have any specific judges designated to review cases from the Child Justice Courts.¹¹⁹

It has been reported that the civil appeal system has “serious problems in

¹¹¹ Ibid., §§ 102(3), 110(5)/(6), 117(10).

¹¹² Ibid., § 145.

¹¹³ Child Care, Protection and Justice Act, § 135

¹¹⁴ Human Rights Commission Act, § 18(7).

¹¹⁵ Ombudsman Act, § 10.

¹¹⁶ See: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14848&LangID=E>.

¹¹⁷ Ibid.

¹¹⁸ Constitution, section 103(3), 104(2), 110(1); Courts Act, see inter alia sections 18-28; For a diagram of the structure of the Malawian courts, see: http://www.judiciary.mw/index.php?option=com_content&view=article&id=15&Itemid=109.

¹¹⁹ UNICEF, *Protecting Children in Malawi – A report on the major findings of the mapping and assessment of the National Child Protection System*, p. 11.

practice”.¹²⁰ It was observed that it takes too long to process records for appeal and it takes even longer to get feedback from the High Court. Most Magistrates claimed that they were not receiving any feedback from the High Court on civil appeals, due to the fact that most civil appeals were not even being heard. Consequently, they had serious doubts as to the usefulness of the appellate process”.¹²¹

Decisions by the Ombudsman’s office can be appealed to the High Court on the application of any person with sufficient interest in a case decided by the Ombudsman.¹²²

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

While Malawi is a mixed legal system of English common law and customary law,¹²³ the common law doctrine of precedent is observed and judges are bound by the decisions of higher courts. Therefore, any judicial decision can have long-term impacts on future decisions.

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

There appears to be general respect of court orders by people and institutions other than government.¹²⁴ There have been some highly publicised cases in which court orders have been disobeyed in circumstances that undermine the authority of the courts. However, cases of disrespect for court orders by individuals are the exception rather than the rule and cases of disobedience often involve defendants who cannot afford to comply with court orders requiring the payment of money.¹²⁵

Judgments and injunctions issued by the High Court are enforceable through contempt of court, writs of execution, attachment orders, writs of possession, etc.¹²⁶

While the UN Committee on the Rights of the Child has appreciated the

¹²⁰ Wilfried Scharf, Chikosa Banda, Ricky Rontsch, Desmond Kaunda, and Rosemary Shapiro, *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums*, p. 5, 2002, available at: <http://sitere.sources.worldbank.org/INTJUSFORPOOR/Resources/AccessToJusticeforthePoorinMalawi.pdf>.

¹²¹ Scharf, Banda, Rontsch, Kaunda, Shapiro, *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums*, p. 5.

¹²² Constitution, section 123(2).

¹²³ CIA World Factbook, *Malawi*, available at: <https://www.cia.gov/Library/publications/the-world-factbook/geos/mi.html>.

¹²⁴ AfriMap - Africa Governance and Monitoring Project, *Malawi: Justice Sector and Reform, Part II - Access to Justice*, p. 141, available at: <http://www.afriMap.org/english/images/report/mal-eng-part-2-chapter-6.pdf>.

¹²⁵ Ibid.

¹²⁶ Chilenga, *Civil Procedure in Malawi*, p. 116-120 (citing Order 80 Rule 2 of the RSC).

work undertaken by the Malawi Human Rights Commission in conducting investigations, carrying out research and providing legal advice on child rights issues, the Committee has voiced regret at the limited human and financial resources available to the Commission and that its recommendations are not considered and followed up adequately and in a timely manner.¹²⁷ The courts have also previously shown an unwillingness to enforce the determinations of the Ombudsman as was the case in *Munthali v Malawi Institute of Education*.¹²⁸

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

Practical challenges to children's access to justice

As has been discussed, Malawi still faces significant challenges with access to justice.¹²⁹ Some of the many practical challenges include:

- There is limited access to the courts themselves especially in rural areas, and the courts are poorly resourced and poorly managed.¹³⁰
- Effective costs are high. Magistrate level courts may be 25 to 40 kilometers away from people who live in villages. The High Court in Malawi could be in a city over 200 kilometers away.¹³¹ As many such villagers live on less than a dollar a day, one can imagine the challenges presented simply to secure transportation, food, and potentially accommodations in order to travel to the courts.
- From a practical perspective, the Malawi legal system leaves many without access to legal advice and representation.¹³²
- The judiciary is chronically underfunded.¹³³
- Magistrates lack sufficient training in law to competently manage and decide cases.¹³⁴

National Child Justice Forum Strategic Plan

In an attempt to address some of the challenges faced by children in the justice system, Malawi's judiciary seeks to inter alia implement training on the provisions of the Child Act and establish more Child Justice Courts as part of

¹²⁷ UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of Malawi*, para. 14-15.

¹²⁸ AfriMap - Africa Governance and Monitoring Project, *Malawi: Justice Sector and Reform, Part II - Access to Justice*, p. 146; *Munthali v Malawi Institute of Education*, Miscellaneous Case 84 of 2003.

¹²⁹ Kaunda, *Expanding Access to Justice for the Poor – Malawi's Search for Solutions*, p. 23-24.

¹³⁰ Scharf, Banda, Rontsch, Kaunda, Shapiro, *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums*, p. 10.

¹³¹ Kaunda, *Expanding Access to Justice for the Poor: Malawi's Search for Solutions*, p. 11.

¹³² Scharf, Banda, Rontsch, Kaunda, Shapiro, *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums*, p. 9.

¹³³ *Ibid.*, p. 21.

¹³⁴ *Ibid.*, p. 23.

the National Child Justice Forum's Five Year Strategic Plan 2012-2016.¹³⁵

Discrimination of certain groups of children

Discrimination of certain groups of children also remains a problem in Malawi. The UN Committee on the Rights of the Child has continuously voiced concern that de facto societal discrimination persists against girls and vulnerable groups of children, including children with disabilities and orphans.¹³⁶

Traditional and non-state justice systems

Most Malawians cannot access the formal state mechanisms for resolving civil disputes and non-state institutions and processes in what is known as the 'informal' or 'primary' justice sector are widely used. An assessment by the British Department for International Development in 2004 confirmed that most Malawians depend on non-state institutions, of which the most frequently used were found to be traditional family counsellors (*ankhoswe*), traditional leaders, religious leaders and community, non-governmental and faith-based organisations.¹³⁷ The most common types of disputes dealt with in these fora involve land, chieftaincy, marriage and domestic violence.¹³⁸

Non-judicial ways to report and challenge child abuse

Where a challenge of children's rights violations in court is not an option due to the backlog in the courts, children or their representatives may consider any of the following avenues to report and challenge violations.

The resources of the country devoted to the protection of children, while expanding, are still limited. As of 2012, the Ministry of Gender, Children and Community Development had deployed seven Social Welfare Officers at the national level and about 140 at the district level, a ratio of 0.98 per 100,000 people.¹³⁹ Their role is to identify, assess, and follow up on child protection cases, supervise child care institutions, and liaise with the justice sector and with Community Child Protection Workers.¹⁴⁰ As of 2012, about 800 Community Child Protection Workers existed, who report on child protection cases, offer mediation and counseling and support the Social Welfare Officers. The Malawi Police have approximately 50 police officers with training in child protection, and manage nearly 400 Victim Support Units.¹⁴¹ Four hospitals (in Lilongwe,

¹³⁵ National Child Justice Forum's Five Year Strategic Plan 2012-2016, p. 17, available at:

http://www.judiciary.mw/index.php?option=com_phocadownload&view=category&id=4&Itemid=203.

¹³⁶ UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of Malawi*, para. 28.

¹³⁷ Department for International Development, *Briefing: Non-state Justice and Security Systems*, May 2004, p. 10-13, available at: <http://www.gsdrc.org/docs/open/SSAJ101.pdf>.

¹³⁸ Afrimap, p. 146; GTZ Forum for Dialogue and Peace, *Primary Justice Pilot Project of Malawi: Rapid Assessment Report*, Lilongwe, June 2005.

¹³⁹ UNICEF, *Protecting Children in Malawi – A report on the major findings of the mapping and assessment of the National Child Protection System*, p. 11.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

Blantyre, Mzuzu and Zomba) host One Stop Centres specialising in violence against women and children. There are also 300 Community Victim Support Units to provide services to victims, more than 10,000 Community-based Childcare Centres and nearly 3,000 Children's Corners offering interventions for children.¹⁴²

The One Stop Centres provide services to support those experiencing physical and emotional abuse, including health care, police and legal support services.¹⁴³ The Victim Support Units offer counseling, mediation, court referrals, and criminal investigation referrals.¹⁴⁴ Community-based Childcare Centres were created to support young children from vulnerable households. The nearly 3,000 Children's Corners are geared towards children age eight and older, offering sports, education, and general support.¹⁴⁵

There is also a National Child Helpline. Its objective is to assist with eliminating child abuse, violence against children and exploitation of children in schools and communities.¹⁴⁶ The helpline offers telephone counselling and referrals, counselling for walk-in clients, follow-up in cases of violence against children, and temporary accommodation for survivors of abuse and violence.¹⁴⁷

This report is provided for educational and informational purposes only and should not be construed as legal advice.

¹⁴² Ibid.

¹⁴³ Ibid., p. 71.

¹⁴⁴ Ibid., p. 72.

¹⁴⁵ Ibid., p. 70.

¹⁴⁶ Ibid., p. 91.

¹⁴⁷ See: <http://www.yoneco.org/site/index.php/our-innovative-approaches/220-tithandizane-national-child-helpline-listening-to-children-s-voices>.