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RIGHTS  
WATCH

## “Let Posterity Judge”

Violence and Discrimination against LGBT people in Malawi



## **“Let Posterity Judge”**

**Violence and Discrimination against LGBT People in Malawi**

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## Glossary

<b>Bisexual</b>	The sexual orientation of a person who is sexually and romantically attracted to both women and men.
<b>Gay</b>	A synonym for homosexual in many parts of the world; in this report, used specifically to refer to the sexual orientation of a man whose primary sexual and romantic attraction is towards other men.
<b>Gender</b>	The social and cultural codes (as opposed to biological sex) used to distinguish between society’s conceptions of “femininity” and “masculinity.”
<b>Gender Identity</b>	A person’s internal, deeply felt sense of being female or male, both, or something other than female or male. A person’s gender identity does not necessarily correspond to the biological sex assigned at birth.
<b>Homophobia</b>	Fear of, contempt of, or discrimination against homosexuals or homosexuality, usually based on negative stereotypes of homosexuality.
<b>Homosexual</b>	Sexual orientation of a person whose primary sexual and romantic attractions are toward people of the same sex.
<b>LGBT</b>	Lesbian, gay, bisexual, transgender; an inclusive term for groups and identities sometimes associated together as “sexual and gender minorities.”
<b>Lesbian</b>	The sexual orientation of a woman whose primary sexual and romantic attraction is toward other women.

**Men Who Have Sex with Men (MSM)**

Men who engage in sexual behavior with other men, but do not necessarily identify as "gay," "homosexual" or "bisexual."

**Sexual Orientation**

The way in which a person's sexual and romantic desires are directed. The term describes whether a person is attracted primarily to people of the same or other sex, or to both or others.

**Transgender**

An adjective used to describe the gender identity of people whose birth gender (the gender they were declared to have upon birth) does not conform to their lived and/or perceived gender (the gender that they are most comfortable with expressing or would express, if given a choice). A transgender person usually adopts or would prefer to adopt a gender expression in consonance with their preferred gender but may or may not desire to permanently alter their bodily characteristics in order to conform to their preferred gender.

## Summary

They [police] started slapping and punching me, forcing me to confess that I am “gay.” The beating lasted for more than an hour.

—Olivia, 19-year-old transgender woman, May 2018, Lilongwe

In Malawi, a nation that criminalizes same-sex conduct, lesbian, gay, bisexual and transgender (LGBT) people face routine violence and discrimination in almost all aspects of their daily lives. Police often physically assault, arbitrarily arrest and detain them, sometimes without due process or a legal basis, at other times as punishment for simply exercising basic rights, including seeking treatment in health institutions. Several transgender individuals told Human Rights Watch that the combination of criminalization of adult consensual same-sex conduct and social stigma has had an insidious effect on their individual self-expression, forcing them to adopt self-censoring behavior because any suspicion of non-conformity may lead to violence or arrest. Several gay men in the capital city, Lilongwe, married women because of the nation’s anti-homosexuality laws, to conform to society’s expectations, and avoid suspicion and arrest.

The challenges facing LGBT people in Malawi have been further exacerbated by the lack of clarity and divergent opinions regarding the legality of a moratorium on arrests and prosecutions for consensual homosexual acts, issued in 2012 by the Ministry of Justice and Constitutional Affairs. In 2016, a high court order suspended the moratorium pending judicial review by the Constitutional Court. This uncertainty, Human Rights Watch research indicates, seemed to have encouraged private individuals to attack LGBT people with impunity, while health providers frequently discriminate against them on the grounds of sexual orientation.

This report, based primarily on interviews with 45 LGBT people in the nation’s two major cities Lilongwe and Blantyre in 2018 and with Malawian activists, documents the human rights impact of criminalization of same-sex conduct in Malawi.

Many interviewees, particularly gay men and transgender women, told Human Rights Watch that the lack of certainty about the moratorium on arrests and prosecutions, combined with routine discrimination and stigma in health care settings, creates barriers



to seeking HIV services and treatment. Punitive legal environments, stigma, and discrimination based on sexual orientation together with high levels of violence against key populations impedes sustainable national responses to HIV, interviewees told Human Rights Watch. Evidence shows that when discrimination in public health care centers and hospitals is routine, this leads to a climate of fear that fuels human rights violations and deters transgender women, gay men and other men who have sex with men (MSM) from seeking and adhering to HIV prevention, treatment, care, and support services.

The moratorium can be traced back to a Blantyre court's 2010 conviction of Steven Monjeza and Tiwonge Chimbalanga, who were arrested and charged with "unnatural offenses" and "indecent practices between males" under sections 153 and 156 of Malawi's Criminal Code. The magistrate sentenced them to 14 years in prison, one of the longest sentences for consensual same-sex conduct anywhere in the world in recent memory, according to activists in Malawi.

Bingu wa Mutharika, who was president at the time, pardoned Monjeza and Chimbalanga in May 2010 on "humanitarian grounds," following international condemnation of the conviction, and the visit of the United Nations Secretary-General. Mutharika's successor, Joyce Banda, pledged to decriminalize same-sex relations, and while she took no further action to amend the laws, her justice minister Ralph Kasambara suspended their enforcement in 2012 "until the time that parliament makes a decision."

In December 2015, justice minister Samuel Tembenu reaffirmed the 2012 moratorium but a year later, following successful litigation initiated by Christian religious leaders, the Mzuzu High Court issued an order suspending the moratorium pending judicial review.

Other government institutions have also taken steps that could lead to the overturning of Malawi's discriminatory laws. In September 2013, the Malawi High Court in Lilongwe commenced a review of the constitutionality of section 153(a) of the Penal Code that punishes "carnal knowledge against the order of nature" with up to 14 years in prison. The process is currently held up on procedural grounds but could be a path to decriminalizing consensual same-sex conduct in the country. And in 2017, after initially announcing that it would conduct a public inquiry "to inform the national position on the controversial issue of LGBTI," the Malawi's Human Rights Commission relented after pressure from some of

the nation's human rights groups and announced that it would instead conduct a study on the rights of LGBT and intersex people in Malawi.

Criminalization means that in practice police violate the rights of LGBT people with impunity, with transgender people—who draw the attention of police officers because of their gender non-conformity but are often misread by police as “lesbian” or “gay” – apparently bearing the brunt of the violations. Olivia's story was particularly harrowing. She told Human Rights Watch: “On November 6, 2017, police officers came to my house looking for me after my best friend was beaten by a mob at the market. I was not at home at the time, so they arrested my father instead. I went to the police station to look for him and when I arrived, three police officers took me into a small office inside the police station to question me. One of the officers said that because of the way I look and dress, I must be gay. They started slapping and punching me, forcing me to confess that I am “gay.” The beating lasted for more than an hour. They told me to come back the next day. When I arrived, they immediately took me into a cell, but did not charge me with any crime. I was detained for five hours, and finally released when my mother paid 5000 MWK [US\$7].”

Olivia's experience is not atypical. Phillip, a 23-year-old transgender man from Lilongwe, told Human Rights Watch that in May 2017, three police officers physically assaulted him and a transgender male friend, warning them to stop “doing lesbian activities” and telling them that they were “unwanted people in Malawi.”

Criminalization also contributes to a climate of impunity for crimes committed against LGBT people by members of the public. In one of the cases documented in this report police refused to open a case when a transgender man reported a burglary at a police station, instead, police threatened to arrest him on homosexuality charges. He was detained for several hours and only released after paying a bribe. Many other LGBT people told Human Rights Watch that they were afraid to report crimes to the police.

Malawi's anti-homosexuality laws contravene several regional and international human rights treaties which Malawi has ratified, including the African Charter on Human and Peoples' Rights (African Charter), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The laws fail to conform to the right to non-discrimination, the right to equality before the law and equal protection of the law, and the right to privacy, and they contribute to violations of the right to liberty and security of the person, the right to the highest attainable standard of health, and the right to freedom of association.

Human Rights Watch calls on the government of Malawi to abide by its 2012 commitment and decriminalize consensual same-sex conduct, and on parliament to repeal all the anti-homosexuality provisions in the Penal Code. The Human Rights Commission should ensure that its study on LGBTI issues in Malawi provides information on rights abuses of LGBT people and make concrete recommendations to improve their situation. Furthermore, the Human Rights Commission in accordance with its mandate should establish a mechanism for receiving, processing and investigating complaints and support strategic litigation efforts aimed at ending discrimination on the basis of sexual orientation and gender identity. Human Rights Watch also urges the Ministry of Health to ensure non-discrimination on the basis of sexual orientation in provision of health and HIV-related services.

## Methodology

This report is based primarily on information collected during two weeks of field research in Lilongwe and Blantyre in May 2018, telephone interviews in June and July 2018, and interviews with Malawian activists during the Pan Africa International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) Conference held in June 2018 in Gaborone, Botswana.

In November 2017, on the sidelines of the 61st ordinary session of the African Commission on Human and Peoples' Rights (African Commission) held in Banjul, Human Rights Watch, in partnership with Centre for the Development of the People (CEDEP), an LGBT organization in Malawi, and African Men for Sexual Health and Rights (AMSHeR), a regional organization, convened a side-event on the human rights situation of LGBT people in Malawi. At the end of the event, Malawi-based LGBT organizations and their Southern Africa-based partner organizations requested that Human Rights Watch research the human rights impact of criminalization of adult consensual same-sex conduct in Malawi based on our expertise in documenting LGBT human rights abuses.

Representatives of three Malawian organizations—CEDEP, Ivy Foundation, and Lesbian, Intersex, Transgender and other Extensions (LITE) Foundation—helped identify interviewees known to have experienced violations. Human Rights Watch interviewed 45 LGBT people in Lilongwe and Blantyre. The two cities were selected based on the presence of non-governmental organizations, community-based activists and LGBT individuals known to the three organizations.

The interviewees included 13 transgender men, nine lesbians, nine transgender women, nine gay men, four bisexual men and one bisexual woman. Many of the most serious human rights violations documented in this report were against transgender people. Ordinary citizens and some members of the police force regard them as “lesbian” and “gay” due to lack of understanding of gender identity. They are primarily targeted on basis of presumed sexual orientation based on their gender expression.

The Malawi penal code expressly criminalizes sexual relations between women. According to interviewees, in popular perception lesbians are seen as women who transgress gender norms. Lesbians who conform to feminine gender expectations are generally able to go unnoticed and hence avoid social stigma. Transgender men, on the other hand, are perceived as lesbian based on their gender presentation. Because transgender men are

more visible, and seen as lesbian, they are particularly vulnerable to discrimination, abuse and even violence.

Human Rights Watch is aware that in many countries, intersex people experience human rights violations similar to those faced by LGBT people, as well as other violations specifically related to their sex characteristics, such as medically unnecessary surgeries conducted without informed consent. However, we did not seek out interviews with intersex people for this report and did not encounter any openly intersex people in the course of our research, so throughout this report we refer to “LGBT” people rather than “LGBTI” people.

In addition to interviewing LGBT people, a Human Rights Watch researcher also interviewed officials of the Malawi Law Reform Commission and the Ministry of Justice and Constitutional Affairs, a representative of the United Nations in Malawi, and attorneys involved in impact litigation cases before Malawi courts. Due to potential security risks for the researcher, we did not seek explanations and accounts of incidents from police stations and health care centers. Furthermore, we were concerned about reprisals against human rights defenders in retaliation for their engagement with an international human rights organization.

Interviews were conducted primarily in English by an English-speaking researcher or in Chichewa with the assistance of translators. All persons interviewed provided verbal informed consent to participate and were assured that they could end the interview at any time or decline to answer questions. Participants were not compensated, but we reimbursed transport costs and the cost of a meal to those who travelled long distances from their homes to meet Human Rights Watch. All interviewees have been given pseudonyms, with the exception of activists who are identified by their first and last names, and, in some cases, other identifying information has been withheld to protect their privacy and safety.

The report draws from relevant published sources, including United Nations documents, reports by other human rights organizations and academic articles. All documents cited in this report are publicly available or on file with Human Rights Watch.

On October 1, 2016, Human Rights Watch wrote to officials in the Ministry of Justice and Constitutional Affairs (see Annex 5), the Ministry of Health and Population (Annex 6) the Ministry of Home Affairs and Internal Security (Annex 7) and the Malawi Human Rights Commission (Annex 8) to present an advance and embargoed draft copy of the report and

to request an official response. The government ministries and Human Rights Commission have not responded to our letters at time of writing.

# I. Background

On Gays and Lesbians: Government should come up clear on the DPP [Democratic Progressive Party] administration stand on the issue of gays and lesbians. Gays and lesbians are worse than dogs, sons and daughters of the evil one – Jabulosi [Satan] their father. Arresting them won't address this problem because sooner or later they are being released on bail. The best way to deal with them is to KILL them! It is pathetic to see our media houses parading these dogs on TV and newspapers hiding behind human rights – human rights my foot! THE DEVIL HAS NO RIGHTS!

—Facebook post by Ken Msonda, Spokesperson and Administrative Secretary of the Peoples' Party, Malawi, January 2, 2016 [posted in personal capacity]<sup>1</sup>

Opposition politician Ken Msonda's incitation to violence against LGBT people came in reaction to the Malawian government's reaffirmation, in December 2015, of a moratorium on arrests and prosecutions for consensual same-sex conduct. Defiant when a prosecutor charged him with hate speech over the Facebook post, Msonda told a journalist, "I stand by what I said and I will repeat it in court - homosexuals have no rights in Malawi and that is why they are being arrested."<sup>2</sup>

Msonda's claim that "homosexuals have no rights in Malawi" disregards Malawi's obligations under the constitution, regional and international law, which protect the rights of everyone, regardless of their real or perceived sexual orientation or gender identity. Malawi's Penal Code, however, fails to respect these universal rights. Chapter XV of the Code, on "Offences Against Morality," contains several provisions that criminalize adult consensual same-sex conduct.<sup>3</sup> Section 153 provides that any person found guilty of committing an "unnatural offence /offence against the order of nature" is liable to 14 years

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<sup>1</sup> Ken Msonda, Facebook post, January 2, 2016 (since removed from Facebook), cited in Ex Parte Application // Gift Trapence, 1<sup>st</sup> Applicant and Timothy Pagonachi, 2<sup>nd</sup> Applicant Skeletal Arguments – The State and Director of Public Prosecutions, Respondents, Constitutional Case No. 1 of 2017, Malawi High Court [on file with Human Rights Watch]

<sup>2</sup> Frank Namangale, "Court summons Msonda over gay remarks," *The Nation*, January 9, 2016 <https://mwnation.com/court-summons-msonda-over-gay-remarks/>

<sup>3</sup> Malawi Penal Code, Chapter 7:01 Laws of Malawi, <http://crm.misa.org/upload/web/12-LAWS%20OF%20MALAWI%20PENAL%20CODE.pdf>

in prison, with or without corporal punishment.<sup>4</sup> Section 154 punishes attempted unnatural offences with seven years' imprisonment, and section 156 punishes "gross indecency" between males with five years in prison, with or without corporal punishment.<sup>5</sup> These laws date back to British colonialism,<sup>6</sup> but former president Bingu wa Mutharika's government enacted a new anti-homosexuality law in January 2011, amending the Penal Code to extend the crime of "gross indecency" to women. Section 137A provides that any female person who, whether in public or private, commits "any act of gross indecency with another female" shall be guilty of an offence and liable to a prison term of five years.<sup>7</sup>

The laws have rarely been enforced throughout Malawi's post-colonial history, but in December 2009, police in Blantyre arrested Steven Monjeza and Tiwonge Chimbalanga after local Blantyre newspapers reported on their traditional engagement ceremony. Prosecutors charged them with "unnatural offenses" and "indecent practices between males" under sections 153 and 156 of Malawi's Criminal Code.<sup>8</sup> In May 2010, a Blantyre magistrate court convicted them and sentenced them to 14 years in prison, the maximum sentence for "unnatural offenses." As far as Malawian activists are aware, no one had ever received such a lengthy sentence for consensual same-sex conduct in Malawi, and Human Rights Watch research suggests that such sentences are extremely rare in most parts of the world. Nevertheless, there are numerous countries where homosexuality is punishable by death.<sup>9</sup> Handing down the sentence, the Chief Resident Magistrate in Blantyre, Nyakwawa Usiwa-Usiwa, stated:

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<sup>4</sup> Ibid, section 153: Any person who— (a) has carnal knowledge of any person against the order of nature; or has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.

<sup>5</sup> Ibid, section 154: Any person who attempts to commit any of the offences specified in the last preceding section shall be guilty of a felony and shall be liable to imprisonment for seven years, with or without corporal punishment. Section 156: Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.

<sup>6</sup> Human Rights Watch, *This Alien Legacy, The Origins of "Sodomy" Laws in British Colonialism*, 2008 [https://www.hrw.org/sites/default/files/reports/lgbt1208\\_webwcover.pdf](https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf)

<sup>7</sup> ILGA, "State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition", 2017, [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf), p.93

<sup>8</sup> "Malawi: Drop Charges Against Same-Sex Couple," Human Rights Watch news release, January 12, 2010, <https://www.hrw.org/news/2010/01/12/malawi-drop-charges-against-same-sex-couple>.

<sup>9</sup> Free and Equal United Nations Fact Sheet, "The death penalty is the legally prescribed punishment for homosexuality-related offences in Iran, Mauritania, Saudi Arabia, the Sudan, Yemen, and may be applied by religious courts in regions of Somalia and Nigeria." [https://www.unfe.org/system/unfe-43-UN\\_Fact\\_Sheets\\_-\\_FINAL\\_-\\_Criminalization\\_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf)



...[W]e are sitting in place of the Malawi society. Which I do not believe is ready at this point in time to see its sons getting married to other sons or cohabiting or conducting engagement ceremonies. I do not believe Malawi is ready to smile at her daughters marrying each other. Let posterity judge this judgment.

So this case being "the first of its kind", to me, that becomes "the worst of its kind". I cannot imagine more aggravated sodomy than where the perpetrators go on to seek heroism, without any remorse, in public, and think of corrupting the mind of a whole nation with a chinkhoswe ceremony. For that, I will give you a scaring sentence so that the public must also be protected from others who may be tempted to emulate their [horrendous] example.<sup>10</sup>

International condemnation of the conviction, including in the form of a visit from the UN Secretary-General to plead for their release, led then-President Bingu wa Mutharika to pardon the two individuals in May 2010 on "humanitarian grounds."<sup>11</sup> But their release did not reflect any commitment on the part of the government to revisit its discriminatory laws; indeed, in 2011, the government enacted a bill extending the crime of "gross indecency" to women.<sup>12</sup>

Joyce Banda who succeeded Mutharika when he died in April 2012, in her first state of the nation address in May 2012, as part of a broader package of reforms, pledged to repeal a number of repressive laws, including sections 137A and sections 153 to 156 of the Penal Code.<sup>13</sup> She did not follow through on her commitment, but in November 2012, justice

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<sup>10</sup> Chief Resident Magistrate's Court at Blantyre, Criminal Case Number 359 of 2009, Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepa, full judgment, <https://malawilii.org/node/4837> (accessed July 26, 2018).

<sup>11</sup> "Malawi pardons jailed gay couple," *BBC*, May 29, 2010 <https://www.bbc.com/news/10190653>

<sup>12</sup> ILGA, "State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition", 2017, [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf), p.93

<sup>13</sup> Malawi President Banda's State of the Nation Address delivered on 18 May 2012 <https://dochot.org/Documents/malawi-president-banda-s-state-of-the-nation-address-delivered-on-18-may-2012>

minister Ralph Kasambara suspended enforcement of the laws “until the time that parliament makes a decision.”<sup>14</sup>

Banda’s party lost the 2014 presidential elections, but a new government in 2015 reaffirmed its commitment to observing the 2012 moratorium in 2015 after police in Lilongwe arrested two men on charges of homosexual conduct.<sup>15</sup> In December 2015, members of a Community Policing Forum in Area 25, a township in Lilongwe, had apprehended two men whom they suspected of being gay, physically assaulted one of them, and handed them to the police at Nsungwi in Area 25, who transferred them to a police station. According to case notes from the Centre for the Development of People (CEDEP), based on their interviews with the victims:

The two men were transferred to a police station where they were interrogated and further insulted. Their pictures were taken by police officers without their consent and widely distributed on social media in Malawi. They were later made to walk to a nearby clinic for a medical examination. On the way to the clinic, their hands cuffed, the officers accompanying them made sure to draw peoples’ attention in a bid to humiliate them. At the clinic they were made to strip and an invasive examination of their private conducted. Still in handcuffs, they were later taken to Kamuzu Central Hospital (KCH), Lilongwe’s referral hospital, for further tests. On December 8, 2015 they were granted police bail and charged with contravention of section 153(a) of the Penal Code.<sup>16</sup>

On December 18, responding to outcry from activists over the arrest, Minister of Justice Samuel Tembenu, issued an official statement reaffirming the government’s commitment to the moratorium.<sup>17</sup> Tembenu affirmed that the charges against the two men had been dropped, stating:

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<sup>14</sup> “Malawi: Courageous Move to Suspend Anti-Gay Laws,” Human Rights Watch News Release, November 6, 2012 <https://www.hrw.org/news/2012/11/06/malawi-courageous-move-suspend-anti-gay-laws>

<sup>15</sup> “Malawi: Moratorium on Anti-Gay Arrests Reaffirmed,” Human Rights Watch News Release, December 21, 2015 <https://www.hrw.org/news/2015/12/21/malawi-moratorium-anti-gay-arrests-reaffirmed>

<sup>16</sup> CEDEP case note, on file with Human Rights Watch.

<sup>17</sup> Statement by Minister of Justice and Constitutional Affairs on Arrests Concerning Homosexual Acts available at: <http://76crimes.com/2015/12/19/malawi-drops-charges-against-2-arrested-for-gay-sex/>. See also “Malawi: Moratorium on Anti-Gay Arrests Reaffirmed,” Human Rights Watch News Release, December 12, 2015 <https://www.hrw.org/news/2015/12/21/malawi-moratorium-anti-gay-arrests-reaffirmed>

Malawi as a member of the international community is also committed to adhere to universally accepted human rights standards. The Government therefore acknowledges the view expressed by international human rights bodies that the inclusion of offenses prohibiting homosexuality in our statute books/within our legislation may be at variance with the views held by such bodies. Consequently, the Government has committed itself to review the penal laws on homosexuality under the Penal Code, but this has to be done in consultation with the people of Malawi as prescribed by the Constitution.<sup>18</sup>

It was in this context that Ken Msonda, the opposition People’s Party MP, took to Facebook to advocate killing LGBT people—leading two activists to file criminal charges against him for inciting violence, as discussed further in section III below.

Other opponents of the moratorium took other measures to challenge it. In 2016, three applicants sought a court order declaring the moratorium illegal and unconstitutional—in other words, seeking to reactivate the anti-homosexuality law. They argued that only parliament had the legal mandate to suspend or repeal laws in Malawi. The Mzuzu High Court issued an injunction in their favor in May 2016, ruling that the moratorium should be suspended pending judicial review by a panel of no less than three judges.<sup>19</sup> No date had been set for the judicial review at time of writing.

Both Malawian and international organizations have supported the moratorium as an intermediate measure to end arbitrary arrests of LGBT people, but also maintain that it does not go far enough, and that Malawi must follow through on its commitment to repeal the discriminatory laws. When the UN Human Rights Committee reviewed Malawi’s rights record in July 2014, CEDEP and the Centre for Human Rights and Rehabilitation (CHRR) submitted a shadow report calling for decriminalization of adult consensual same-sex conduct and the prohibition of discrimination on the grounds of sexual orientation.<sup>20</sup> The

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<sup>18</sup> Ibid.

<sup>19</sup> The State v Minister of Justice and Constitutional Affairs and Others Ex-Parte Kammasamba and Others (17 of 2016) [2016] MWHC 503 (11 May 2016) <https://malawilii.org/mw/judgment/high-court-general-division/2016/503>

<sup>20</sup> “A Shadow Report to the Malawi Government’s First Periodic Report on the Implementation of the International Covenant on Civil and Political Rights (ICCPR) Submitted to the Human Rights Committee for the Preparation of the List of Issues, July

Human Rights Committee, in concluding observations issued in August 2014, expressed concern about the criminalization of same-sex conduct in Malawi and related forms of discrimination and violence based on sexual orientation, gender identity and sex characteristics, and the fact that stigma impedes access to health care services for LGBTI people.<sup>21</sup>

**UN Human Rights Committee Recommendations to the Government of Malawi,  
August 2014:**

- Review its legislation to explicitly include sexual orientation and gender identity among the prohibited grounds of discrimination and repeal the provisions that criminalize homosexuality and other consensual sexual activities among adults.
- Introduce a mechanism to monitor cases of violence against lesbian, gay, bisexual, transgender and intersex persons and undertake all necessary measures to prevent those cases, prosecute the perpetrators and compensate the victims;
- Ensure that public officials refrain from using language that may encourage violence and raise awareness to eliminate stereotyping and discrimination; and
- Guarantee effective access to health services, including HIV/AIDS treatment, for lesbian, gay, bisexual, transgender and intersex persons.

In a separate development that has potential to do away with section 153(a) of the Penal Code, in September 2013, the Malawi High Court issued a notice that it would review the conviction of three individuals for "unnatural offenses," based on the constitutionality of this provision. The case, which could lead to decriminalization of same-sex conduct but has faced significant delays, is discussed in greater detail in Section III below.

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2013", *Centre for Human Rights and Rehabilitation (CHRR)* and *Centre for the Development of the People (CEDEP)*, July 2013, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MWI/INT\\_CCPR\\_NGO\\_MWI\\_14672\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MWI/INT_CCPR_NGO_MWI_14672_E.pdf)

<sup>21</sup> CCPR/C/MWI/CO/1/Add.1 para 10

## II. Abuses against LGBT People

In March 2017, I was living in Blantyre and dating a lady, but she was married to a man. People in the area found out about it and word got to her husband. At that time, I was staying at a hostel for our soccer club. She came to visit me at the hostel, stayed there for two nights. Her husband and brother came to my hostel looking for her. She saw them first and ran away. They were carrying bricks and started beating me with the bricks all over my body, shouting that I must stop being a lesbian, stop sleeping with fellow ladies. They forced me to go with them to their house. When we arrived, the husband asked me if I was sleeping with his wife. Out of fear for my life, I lied and said we were just friends. He fetched a metal rod and threatened to break my knees if I did not tell him the truth. Then he threatened to call the police to deal with me, to have me arrested. He kept beating me with the metal rod all over my legs. The beating lasted for five hours. Until today, I still feel the pain in my legs.

—Eric, 25-year-old transgender man, May 2018, Lilongwe<sup>22</sup>

LGBT individuals and human rights defenders in Malawi told Human Rights Watch that because of the pervasive homophobia and transphobia and the criminalization of same-sex conduct, they live in constant fear of abuse because of their real or perceived sexual orientation and gender identity. The abuse takes many forms, including intimidation, beatings by members of the public and some police officers, arbitrary arrests and detention, lack of access to justice, and discrimination in healthcare settings.

In Eric’s case, the abuse did not stop after the beating he endured. When he finally managed to leave the house after five hours, his friend took him to hospital for treatment. Eric told Human Rights Watch, “At the hospital, I was given panados (pain relief tablets) but no other medication, no x-rays or checking of anything else – in fact the nurses said I should come back the next day dressed like a proper lady and only then will they give me

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<sup>22</sup> Human Rights Watch interview with Eric (pseudonym), Lilongwe, May 2018. While Eric self-identifies as a transgender man, he is perceived as a lesbian and attacked for that reason.

proper treatment.”<sup>23</sup> Eric reported the assault at a police station. He said, his lover’s husband was arrested and detained for two days in police custody before being unconditionally released.

Human Rights Watch heard how LGBT people are often victims of mob attacks, physical assault, arbitrary arrest and detention simply because of their presumed sexual orientation, and discrimination in access to health care on the grounds of sexual orientation or gender identity. Several human rights activists told Human Rights Watch that the combination of the anti-homosexuality laws and the religiously and socially conservative Malawian context contributes to the commission of these abuses and deters many LGBT victims of violence from seeking redress, thereby contributing to a culture of impunity.<sup>24</sup>

Human Rights Watch’s research corroborates the findings of a 2014 report published by CEDEP in partnership with the Centre for Human Rights and Rehabilitation (CHRR), which documented human rights violations on the basis of real or perceived sexual orientation and gender identity in Malawi.<sup>25</sup> The report documented and verified a total of 76 instances of violations of the human rights of sexual minorities in Malawi between January and December 2013, including arbitrary arrest and detention, physical assault, extortion, denial of health services, and evictions because of sexual orientation and gender identity. It also discussed the socio-economic impact of homophobia.

## Police Abuses, Arbitrary Arrests and Detention

Several interviewees told Human Rights Watch that despite the moratorium on arrests and prosecutions for consensual same-sex conduct, they had experienced police abuse, arbitrary arrest and detention. Under international human rights law, besides arbitrary arrests and detentions, also unlawful are arrests and detentions as punishment for the legitimate exercise of human rights, arrests on discriminatory grounds, and those with elements of inappropriateness or injustice, that lack predictability and due process of law, or elements of reasonableness, necessity and proportionality.

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<sup>23</sup> Ibid.

<sup>24</sup> Human Rights Watch interview with human rights activists, Lilongwe, May 2018

<sup>25</sup> CEDEP & CHRR report, Human Rights Violations on the Basis of Real or Perceived Sexual Orientation and Gender Identity IN Malawi, September 2014, available at: [http://iranti-org.co.za/content/Africa\\_by\\_country/Malawi/2014\\_CEDep\\_Human\\_Rights\\_violations\\_report.pdf](http://iranti-org.co.za/content/Africa_by_country/Malawi/2014_CEDep_Human_Rights_violations_report.pdf)

Phillip, a 23-year-old transgender man from Lilongwe, said that three police officers physically assaulted and humiliated him and another transgender male friend in May 2017 as they were leaving a soccer match.

I was walking home with my trans man friend and his cisgender girlfriend. We passed through a school where people were writing exams. There were three police officers in uniform at the gate working as security guards, and as we walked by, they started calling out to my friend's girlfriend to join them and not walk with "lesbians". We ignored them, but they started following us and one of the officers was throwing stones. When they caught up with us one of the officers said: "Don't do anything to the lady, we have to deal with these two lesbians." They beat us for about an hour – punching and slapping us, but the worst part was when they bashed our heads against a wall. We were rescued by our soccer coach who was also walking home through the same alley. They agreed to let us go on the condition that we crawl the rest of the alley on our knees and hands above our heads.<sup>26</sup>

Phillip and his friend immediately reported the assault at a police station in Area 25, Lilongwe, and received medical treatment at Dopa Hospital for their injuries. Phillip told Human Rights Watch that while a senior police officer was eager to investigate the case, his friend did not want to pursue it because family members pressured him to drop the charges or face arrest for engaging in "lesbian activities." He said, "My friend suffered after that incident. His family welcomed the beating, said it was God's punishment for being a 'lesbian.' They also beat him up on the same day and burned all his clothes as further punishment."<sup>27</sup>

Olivia, a transgender woman, said that on November 6, 2017, a mob assaulted her friend, also a transgender woman, in a market in Lilongwe. Rather than arresting the assailants, she said, the police arrested her friend because they suspected she was "gay." Then they came looking for Olivia because they figured out that they were friends through questioning the victim. When they did not find her at home, they arrested her father in her place. Olivia explained:

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<sup>26</sup> Human Rights Watch interview with Phillip (pseudonym), Lilongwe, May 2018

<sup>27</sup> Ibid.

I went to the police station to look for him and when I arrived, three police officers took me into a small office inside the police station to question me. One of the officers said that because of the way I look and dress, I must be gay. They started slapping and punching me, forcing me to confess that I am “gay.” The beating lasted for more than an hour. They told me to come back the next day. When I arrived, they immediately took me into a cell, but did not charge me with any crime. I was detained for five hours, and finally released when my mother paid 5000 MWK [US\$7].<sup>28</sup>

Olivia said that her friend who had been beaten in the market was detained for a month in Maula Prison, in Lilongwe, without any charge.

In June 2015, Justice, a 26-year-old transgender human rights defender, was arrested and detained for several hours while attempting to make bail payment for a friend at a police station in Lilongwe. Justice said, “The police officers at the front desk took one look at me, saw my gender presentation and the clothes I was wearing, concluded that I am a ‘lesbian,’ detained me and only let me go when they realized that my uncle is a politician in the regional government.”<sup>29</sup>

Aaron, a 26-year-old transgender man, told Human Rights Watch that his partner’s mother arranged for the police to arrest both of them. He said that one night in October 2010, three police officers, in uniform and carrying guns, arrived at his house late at night with his girlfriend in the police van. The police took Aaron and his girlfriend to a police station, but did not formally charge them, and they “escaped” the next morning,<sup>30</sup> and fled to a village to live with Aaron’s relatives for one month because they were afraid that they might be re-arrested in Lilongwe.<sup>31</sup>

While transgender individuals are more vulnerable to arbitrary arrests and detention because of their gender identity or presentation, lesbians and gay men are also exposed. Daniel, a 26-year-old gay man from Blantyre, said that police arrested and sexually

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<sup>28</sup> Human Rights Watch interview with Olivia (pseudonym), Lilongwe, May 2018

<sup>29</sup> Human Rights Watch telephone interview with Justice (pseudonym), July 2018

<sup>30</sup> Human Rights Watch interview with Aaron (pseudonym), Lilongwe, May 2018. Aaron told Human Rights Watch that the cell door was not locked, and they managed to walk out of the police station without being questioned.

<sup>31</sup> Ibid.



assaulted him at midnight on November 12, 2013 after a neighbor reported him for being gay.<sup>32</sup> He told Human Rights Watch:

Six police officers in uniform, carrying guns, came to my house at around midnight. My entire family was there, and they woke us all up. Three female officers were touching my private parts – asking me why I sleep with men when there are so many women in Malawi. They took me to Chilomoni sub-station but did not charge me with any crime that night. They put me in a crowded cell. One of the police officers shouted to the inmates, ‘This guy is gay, don’t get close to him, he will want to fuck you up the ass.’

Daniel was not only subject to arbitrary arrest and detention for two nights without being charged, but he told Human Rights Watch that a senior police officer blackmailed him for several months thereafter. According to Daniel, whenever the officer saw him in the streets, the officer would threaten to arrest him and detain him in Chichiri prison unless Daniel paid him a bribe.<sup>33</sup> Daniel told Human Rights Watch that he gave the police officer 5000 MWK [US\$7] on three occasions because of the threats. The extortion stopped only when the officer was transferred to a police station in another town.

Tyrone, a 23-year-old transgender man from Blantyre, told Human Rights Watch that police arrested his lesbian friend and her partner in July 2017 on the basis of their presumed sexual orientation and detained them for several hours at a local police station, but did not formally charge them. CEDEP lawyers assisted them and secured their release.<sup>34</sup>

In 2014, CEDEP, in partnership with The Centre for Human Rights and Rehabilitation (CHRR) published a report documenting human rights violations based on real or perceived sexual orientation and gender identity in Malawi.<sup>35</sup> Human rights defenders may also be victims of arbitrary arrest. CEDEP reported that on March 20, 2012, three CEDEP peer educators who

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<sup>32</sup> Human Rights Watch interview Daniel (pseudonym), Blantyre, May 2018

<sup>33</sup> Ibid.

<sup>34</sup> Human Rights Watch interview with Tyrone (pseudonym), Blantyre, May 2018

<sup>35</sup> The Centre for Human Rights and Rehabilitation (CHRR) and the Centre for the Development of People (CEDEP) Human Rights Violations on the Basis of Real or Perceived Sexual Orientation and Gender Identity in Malawi, September 2014, available at: [http://www.iranti-org.co.za/content/Africa\\_by\\_country/Malawi/2014\\_CEDEP\\_Human\\_Rights\\_violations\\_report.pdf](http://www.iranti-org.co.za/content/Africa_by_country/Malawi/2014_CEDEP_Human_Rights_violations_report.pdf)

work on HIV were arrested while organizing a health and human rights training event at the College of Medicine, University of Malawi and detained for a week without charge.<sup>36</sup>

## Public Violence and Fear of Reporting Crimes

Several LGBT individuals interviewed by Human Rights Watch said the anti-homosexuality laws inhibited them from reporting abuses due to fear of arrest. Those who do report may be further victimized by the police. Justice, a 26-year-old transgender man and human rights defender, told Human Rights Watch that in December 2017 he went to Likuni sub-station in Lilongwe to report a burglary and attempted robbery by a well-known “gangster” in the area. Not only did the police refuse to open a case, according to Justice, they also told him to pay 50000 Kwacha [US\$69] to avoid arrest under homosexuality charges. Justice said, “I did nothing wrong, they knew the man was a criminal, but because of my sexual orientation and gender identity, I had no choice but to pay the money – I cannot risk arrest.”<sup>37</sup>

Kate, a 20-year-old transgender peer educator in Lilongwe, told Human Rights Watch that police discouraged her from reporting a crime because they perceived her as gay. Kate said that on October 2, 2017, she and her friend were beaten up by 12 young men in the street. They managed to escape when two older women intervened, but two of the young men from her area followed Kate home and told her mother that she has to leave the area or else they would deal with her because “gay” people are not allowed in Malawi. Fearing for her life, Kate and her friend reported the incident at a police station. Kate told Human Rights Watch:

[The police] took a statement, opened a case, but the investigating officer asked for 9000 Kwacha [US\$12] to make the arrest. CEDEP gave me the money, I took it to the police station, and the investigating officer said he would call me in three days. Three days later, around 11p.m. the police called me to escort them to make the arrest. I met the police officers, and they arrested the two guys who had come to my house. I knew where they lived because we all live in the same area. The police took the two guys to

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<sup>36</sup> Ibid p11. CEDEP peer educators were assaulted by group of students at a nearby Islamic school for allegedly “recruiting others to be gay.” Police arrived at the scene, but instead of arresting the assailants they arrested three of the peer educators.

<sup>37</sup> Human Rights Watch telephone interview with Justice (pseudonym), July 2018

the police station, and I went home. The next day I went back to the police station. The investigating officer said I should consider withdrawing the charges. He said the police want to release these guys because it is also a gay issue, and that is not allowed in Malawi. A few other police officers joined the conversation, and they were all saying the same thing. I left the police station.<sup>38</sup>

A few days later, Kate heard that the young men had been released after their parents paid 60000 Kwacha [ US\$83] to another police officer.

Human Rights Watch did not document other cases in which police arrested or discriminated against LGBT victims of crime. But several gay and transgender crime victims told Human Rights Watch that they did not file complaints with the police because they feared being outed and arrested. While they were aware of the moratorium, they remained convinced that the police would treat them as criminals simply because of their sexual orientation or gender identity.

Trevor, a 22-year-old gay man in Lilongwe, told Human Rights Watch that in mid-April 2018 he was at a tavern watching a soccer game with a friend when three men approached him in the restroom.<sup>39</sup> Trevor said:

They told me, “We don’t want people like you in our tavern – we don’t want gay people.” They started beating me. One of the men used a stick and the other two were punching and slapping me, beating me all over my body. I must have fainted because I woke up in the hospital. I was in the hospital for three days. I was too scared to report the case to the police, they might just turn around and arrest me for being gay.

In April 2017, in Lilongwe, Jane, a 24-year-old transgender woman, and her partner were attacked in their home by church-goers after their friend, while “manifesting,” disclosed

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<sup>38</sup> Human Rights Watch interview with Kate (pseudonym), Lilongwe, May 2018

<sup>39</sup> Human Rights Watch interview with Trevor (pseudonym), Lilongwe, May 2018

his sexual orientation to the congregation and offered their names and addresses as well.<sup>40</sup> Jane told Human Rights Watch:

About 50 people came to our house. They were at the gate, screaming for us to come out, saying we had demons and we were satanic. Our landlord, who also lives on the property, told them he does not have any problems with us and the congregation should leave. Some of the people started throwing stones at the house. People in the area saw the chaos and joined the congregation. The landlord was afraid they would destroy his house, so he asked us to leave. Since the crowd was outside, we couldn't leave immediately. Four men managed to come into the house. They tried to beat us up, but we fought back. The crowd was outside the house for about five hours. The landlord eventually called the village headman, told him we would leave immediately if the crowd left the property. We waited until dawn and then left with a few personal items.<sup>41</sup>

Jane and her partner did not report the incident to the police out of fear that they would be arrested and prosecuted for living together. Jane and her partner separated for reasons related to the trauma from the mob attack.

In December 2015, Martin, a 21-year-old transgender man from Blantyre and his friend were brutally beaten up by the father of his ex-girlfriend, who lived in his neighbourhood, while walking home one evening. Martin told Human Rights Watch, "I did not report the incident to the police because they might arrest me, and my family would also find out that I reported a neighbour because of LGBT issues and that is not an option – they would disown me." Martin explained that he was not only afraid his family might disown him, but also that they might hand him over to the police. <sup>42</sup>

Gail, a 20-year-old transgender woman, told Human Rights Watch that in November 2016, two visibly intoxicated men beat her up in the street in Lilongwe.<sup>43</sup> Gail recognized the men

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<sup>40</sup> Human Rights Watch interview with Jane (pseudonym), Lilongwe, May 2018

<sup>41</sup> Ibid.

<sup>42</sup> Human Rights Watch interview with Martin (pseudonym), Blantyre, May 2016

<sup>43</sup> Human Rights Watch interview with Gail (pseudonym), Lilongwe, May 2016

from her neighborhood; they had previously harassed her about her perceived sexual orientation. The men hit her multiple times, knocking loose four of her front teeth. She later sought medical treatment at Kawale Health Centre. She told Human Rights Watch that she reported the incident at a police station in Area 23, adding, “I told the police I was beaten by people in the street, but did not mention that it was because they accused me of being gay – the police would arrest me if I told them the gay part.”<sup>44</sup>

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<sup>44</sup> Human Rights Watch interview, Lilongwe, May 2016

## Stigma and Discrimination in Access to Health Care Services

Four years ago, my boyfriend and I went to a clinic at Kamuzu Central Hospital for HIV testing. The nurse asked us why we wanted to get tested together. She said she suspected we were sleeping with each other. We told her that we just want to know our status. She called three other nurses into the room and told them we were gay. They started talking among themselves in English, saying they will not test us or give us any treatment because we choose to have diseases by having anal sex. After about 15 minutes, one of the nurses turned to us, speaking in Chichewa, and said they do not have the materials or tools to run tests that day, we must come back another time. We left the clinic without getting tested.<sup>45</sup>

—Michael, a 32-year-old gay man, Human Rights Watch interview, Lilongwe, May 2018

The unwillingness of Malawian authorities to repeal the anti-homosexuality laws fosters a climate of fear, fuels stigma and discrimination in health care settings, inhibits individuals from seeking services and compromises the right to the highest attainable standard of health for gay men and other men who have sex with men (MSM).

Punitive legal environments constitute a significant barrier to guaranteeing access to sexual health treatment and services for gay and bisexual men and other MSM.<sup>46</sup> The combination of stigma and discrimination based on sexual orientation and gender identity in a criminalized context creates an environment in which these groups of people are deterred from or fearful of seeking prevention, testing, and treatment services.<sup>47</sup> Those whose sexually transmitted infections (STIs) go untreated are at increased risk not only of developing complications, but also of contracting HIV; and those who face barriers accessing HIV testing and treatment due to stigma and discrimination are more likely to die of AIDS.

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<sup>45</sup> Human Rights Watch interview with Michael (pseudonym), Lilongwe, May 2018

<sup>46</sup> African Commission on Human and Peoples' Rights: Study on HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses, December 2017 available at: [http://www.achpr.org/files/news/2017/12/d317/africancommission\\_hiv\\_report\\_full\\_eng.pdf](http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf)

<sup>47</sup> Human Rights Watch interview with Richard (pseudonym), Lilongwe, May 2018

Unfortunately, when gay men or MSM disclose their sexual practices to health care professionals, they are often ridiculed, stigmatized and unable to access the necessary treatment. Several interviewees told Human Rights Watch that health care professionals subjected them to homophobic remarks and discriminatory treatment, particularly in government hospitals. Peer educators who tried to help gay men and other MSM in accessing health care also reported hospitals turning away their clients.

Gary, a peer educator in Blantyre, said that one of his clients died of anal cancer after facing discrimination when attempting to seek treatment at a government hospital:

In May 2013, while working as a peer educator for an organization in Blantyre, I accompanied a young man to a hospital to get treatment for anal warts. The nurses asked him why and how he got anal warts and whether he was sleeping with other men. There were six nurses in the room and they were laughing at him. He eventually told them that he has malaria. He was too ashamed to answer their questions and felt ridiculed. He did not get treatment that day and he was afraid to go to another hospital. The warts became cancerous, and he died a few months later.<sup>48</sup>

Charles, a 29-year-old gay man from Blantyre told Human Rights Watch:

In September 2016 I went to a government hospital to get treatment for an STI. The doctor asked me to come into her office, examined me and found that I had anal warts. Desperate to get treatment, I told her the truth – that I am a gay man and engage in anal sex. She stepped out of the room and returned with five nurses and asked me to repeat my story. I felt my privacy was violated. I had trusted the doctor with this information. They just stood there, laughing at me. I got frustrated and left the hospital without treatment.<sup>49</sup>

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<sup>48</sup> Human Rights Watch interview with Gary (pseudonym), Blantyre, May 2018

<sup>49</sup> Human Rights Watch interview with Charles (pseudonym), Blantyre, May 2018

Charles was able to get treatment at a private hospital but only because he could afford it. Similarly, David, a peer educator from Blantyre told Human Rights Watch that he assisted a young gay man to get treatment for an STI from a private doctor after nurses at a government hospital refused to treat him after they learned of his sexual orientation.<sup>50</sup>

Amos, a 27-year-old gay man from Lilongwe, said that nurses at a district hospital in Lilongwe turned him away in June 2017 after he disclosed his sexual orientation while seeking treatment for an STI.<sup>51</sup> Amos could not afford a private hospital and eventually approached CEDEP and got treatment at their Lilongwe drop-in center.

Human Rights Watch interviewed two gay men who, after disclosing their sexual orientation, were humiliated by a nurse. Brian, a 32-year-old gay man from Lilongwe, went to Area 25 Health Centre for treatment for wounds on his anus.<sup>52</sup> While he was initially terrified to tell the nurse how he had contracted the STI, he was desperate for treatment and disclosed his sexual orientation. Brian told Human Rights Watch, “the nurse made some hurtful remarks - said I was a devil – but she did help me in the end.”<sup>53</sup>

Also, Daniel, a 29-year-old gay man from Blantyre told Human Rights Watch that in February 2017 he went to a government hospital to get treatment for an STI. He said, “I met a nurse – she was supposed to treat me. I undressed, then she started screaming very loud and called other nurses to come and look at the anal warts. Two nurses came to look, they were all laughing at me the whole time.”<sup>54</sup> Luckily for Daniel, a doctor came and treated him.

Malawi, a country with a serious HIV epidemic, is located in Sub-Saharan Africa, a region with one of the world’s highest rates of new infections and HIV prevalence.<sup>55</sup> According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), while there has been a significant reduction in new HIV infections and AIDS-related deaths in Malawi, the HIV

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<sup>50</sup> Human Rights Watch interview with David (pseudonym), Blantyre, May 2018

<sup>51</sup> Human Rights Watch interview with Amos (pseudonym), Lilongwe, May 2018

<sup>52</sup> Human Rights Watch interview with Brian (pseudonym), Lilongwe, May 2018

<sup>53</sup> Ibid

<sup>54</sup> Human Rights Watch interview Daniel (pseudonym), Blantyre, May 2018

<sup>55</sup> “Fact Sheet—July 2018: 2017 Global HIV Statistics,” Joint United Nations Programme on HIV/AIDS UNAIDS, [http://www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_FactSheet\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_FactSheet_en.pdf)



prevalence among gay men is 17.3 percent, compared to adult heterosexual women at 12.8 percent and heterosexual men at 8.2 percent.<sup>56</sup> Recognizing the significant barrier that punitive laws impose on access to HIV services and treatment, UNAIDS filed an *amicus curiae* submission in the constitutional challenge to anti-homosexuality laws before the Malawi High Court in 2013.<sup>57</sup> The UNAIDS submission sets out in detail human rights and public health justifications for repeal of the provisions criminalizing adult consensual same-sex conduct, and concludes with the following recommendation to the Malawi High Court:

Legislators and other government authorities should establish anti-discrimination and protective laws, derived from international human rights standards, in order to eliminate discrimination and violence faced by men who have sex with men and transgender people, and reduce their vulnerability to infection with HIV, and the impacts of HIV and AIDS. Health services should be made inclusive for men who have sex with men and transgender people, based on the principles of medical ethics and the rights to health.<sup>58</sup>

The African Commission on Human and Peoples' Rights released a groundbreaking study in November 2017 titled "HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for rights-based responses" (HIV Study). The study recognizes that key challenges affecting the HIV response in Africa include discrimination, inequality and criminalization of key populations- gay men, other MSM and transgender people.<sup>59</sup> According to the HIV Study:

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<sup>56</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS) Malawi Overview available at: <http://www.unaids.org/en/regionscountries/countries/malawi> [Important to note that the HIV epidemic in Malawi, similar to many countries in Africa, is generalized and feminized]

<sup>57</sup> UNAIDS Amicus Curiae submission on file with Human Rights Watch, Confirmation Case No. 22 of 2011 between The Republic and Mussa Chiwisi, Confirmation Case No. 411 of 2011 between The Republic and Mathew Bellow and Confirmation Case No. 622 of 2011 between the Republic and Amon Champyuni

<sup>58</sup> Ibid para 46

<sup>59</sup> "HIV, The Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses," *African Commission on Human and Peoples' Rights*, December 2017, [http://www.achpr.org/files/news/2017/12/d317/africancommission\\_hiv\\_report\\_full\\_eng.pdf](http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf)

Key populations—who are already marginalized through other forms of stigma, inequality and discrimination—are disproportionately affected by HIV. Evidence from UNAIDS and the World Health Organization (WHO) shows that key populations in the context of HIV include gay men and other men who have sex with men, sex workers, transgender people, people who inject drugs and prisoners. These populations face human rights violations as well as legal and social barriers that make them vulnerable to HIV and limit their access to health and HIV services.<sup>60</sup>

The African Commission noted that in Malawi, more than 80 percent of MSM have not disclosed their same-sex sexual practices to a health practitioner, with serious implications for providing health-care services.<sup>61</sup>

The Malawian authorities have made some efforts to improve the inclusiveness of health services. Malawi’s 2015-2020 National Strategic Plan for HIV and AIDS (NSP) expressly includes MSM, recognizing that criminalization of same-sex conduct and persistent stigma and discrimination against marginalized groups hinder the country’s HIV response.<sup>62</sup> The NSP outlines a series of programs aimed at addressing these challenges and protecting the human rights of key populations, including MSM: “Stigma and discrimination reduction; provision of HIV related legal services; monitoring and reforming laws, regulations and policies relating to HIV; provision of legal literacy (“know your rights”) services; sensitization of law-makers and law enforcement agents; training for health care providers on human rights and medical ethics related to HIV and; reducing discrimination against women in the context of HIV.”<sup>63</sup>

Where friendly services are unavailable in major cities, CEDEP has tried to step into the void. CEDEP has, since 2008, conducted outreach programs for gay men and other MSM, conducted studies, and engaged relevant government agencies and health care providers,

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<sup>60</sup> Ibid para 50

<sup>61</sup> Ibid para 19

<sup>62</sup> “National Strategic Plan for HIV and AIDS: 2015 – 2020,” *National AIDS Commission, Malawi*, 2014, <http://hivstar.lshtm.ac.uk/files/2016/05/Malawi-National-HIV-AIDS-Strategic-Plan-2015-2020.pdf>

<sup>63</sup> Ibid p51

with notable success.<sup>64</sup> With 36 staff members, approximately 300 peer educators in 14 locations across the country, and drop-in centers in Lilongwe and Blantyre, CEDEP can provide services to approximately 100 gay men and other MSM per month.<sup>65</sup>

Nevertheless, in an environment where consensual adult same-sex conduct is still criminalized, despite the moratorium on arrests, access to HIV and other health services remains a challenge. As Gift Trapence of CEDEP noted:

Same-sex relations are criminalized and highly stigmatized in Malawian society, resulting in MSM being forced to remain ‘invisible’ or ‘underground.’ Although HIV prevalence is high amongst MSM, criminal law prevents health services from meeting their particular needs.....MSM are still afraid of the discriminatory laws and this affects their visibility and ability to access the health services. The suspension of the law depends on the good will of the government, and the law can still be applied if that good will is not there.”<sup>66</sup>

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<sup>64</sup> “Centre for the Development of People (CEDEP) – Malawi: Performing advocacy and outreach to improve healthcare and HIV prevention for GMT,” amfAR: Making AIDS History, <http://www.amfar.org/center-for-the-development-of-people-cedep-malawi/>; “In 2008, CEDEP performed a study among 200 MSM in the city of Blantyre. Twenty-one percent of the participants were HIV positive—approximately double the rate among the general population—and 95 percent did not previously know their status. The men also reported low and inconsistent condom use, little knowledge about how to protect themselves from HIV, and a reluctance to reveal their sexual orientation to healthcare staff for fear of discrimination. CEDEP began receiving amfAR funding to develop the country’s first GMT peer education program and its first program to educate healthcare providers about GMT-specific health needs. A follow-up study in 2012 in Blantyre— where CEDEP has performed extensive outreach among both GMT and healthcare providers— reported that the HIV rate in MSM had dropped to 12.5 percent, that 56 percent of the respondents had been tested for HIV, and 24 percent had been tested more than once in the past year.”

<sup>65</sup> Human Rights Watch interview with CEDEP staff member, Lilongwe, May 2018. CEDEP runs programs in Lilongwe, Blantyre, Mzuzu, Zomba, Mangochi, Chikwawa, Mulange, Salima, Dedza, Mchinga, Kasungu,

<sup>66</sup> “Centre for the Development of People (CEDEP) – Malawi: Performing advocacy and outreach to improve healthcare and HIV prevention for GMT,” amfAR: Making AIDS History, <http://www.amfar.org/center-for-the-development-of-people-cedep-malawi/>

### III. Government Initiatives and Pending Legal Challenges

Malawi has recognized the need to rethink its laws and policies on sexual orientation and gender identity. In 2012, the government submitted its initial report on the domestic implementation of the International Covenant on Civil and Political Rights (ICCPR) for consideration by the UN Human Rights Committee.<sup>67</sup> In respect of criminalization of same-sex conduct and the law reform process, the government's report states:

...[T]he vast majority of society has not accepted homosexuality and homosexuality is not practiced in the open. It is therefore very unlikely that cases of discrimination and violence based on sexual orientation would be reported...Despite recent debate over homosexuality in Malawi, the general consensus still remains, that is, the majority of Malawians do not support homosexuality. In order to take the minority views into account, the relevant laws that criminalize such practices have since been referred to the Law Commission for a comprehensive review.<sup>68</sup>

In a February 19, 2018 letter, the Malawi Law Reform Commission informed CEDEP that in 2011 they received a submission from the Ministry of Justice requesting the Law Reform Commission to review section 153 of the Penal Code.<sup>69</sup> The letter stated that the Law Reform Commission has not commenced with the review program due to lack of financial support from independent donors.

In addition to establishing a moratorium on arrests and prosecutions for consensual same-sex conduct, described in Section I above, there are several cases pending before Malawi courts. But based on Human Rights Watch's interviews with LGBT people and organizations promoting the rights of LGBT people, it appears that so far, none of the cases have been decided.

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<sup>67</sup> Malawi Initial State party report available at:

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2f1&Lang=en)

<sup>68</sup> Ibid para 105 & 110

<sup>69</sup> The letter is on file with Human Rights Watch

## The Decriminalization Case

In September 2013, the Malawi High Court, exercising its jurisdiction under section 108(2) of the Constitution of the Republic of Malawi, issued a notice that it would review the 2011 conviction of three individuals of unnatural offenses under section 153(a) of the Penal Code, based on the constitutionality of this provision.<sup>70</sup> The case has the potential to decriminalize consensual same-sex conduct through the judiciary, if the judiciary determines the laws against same-sex conduct to be unconstitutional. Similar cases are currently before the courts in a number of African countries, including Botswana and Kenya. South Africa's sodomy laws were amended in 1998 following a court ruling that found them unconstitutional. However, it is unique in that the Malawi case is the only such case in Africa that has been initiated by a state institution itself, namely, the judiciary.

The court invited several national and international organizations to intervene as *amicus curiae*—friends of the court—to assist the court in deciding on the constitutionality of section 153(a). Several organizations, including the Malawi Law Society and UNAIDS, filed written submissions calling for the repeal of the anti-homosexuality laws. The UNAIDS submission sets out in extensive detail the human rights and public health justifications for repeal of the provisions criminalizing adult consensual same-sex conduct. The Malawi Law Society argues that the anti-homosexuality laws violate the right to dignity under section 19(1), the right to non-discrimination under section 20(1) and the right to personal privacy under section 21 of the Constitution.<sup>71</sup>

The Attorney-General objected to the constitutional review on procedural grounds, arguing that since it raises constitutional matters, the case required certification from the Chief Justice before being filed. The matter has been pending before the Appeals Court since

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<sup>70</sup> Pleadings on file with Human Rights Watch. In the High Court of Malawi, confirmation case nos. 22, 411 and 662 of 2011, *The Republic v Mussa Chiwisi, Mathew Bello and Amon Champyuni*. Human Rights Watch is mindful of the fact that the criminal cases were initiated on the basis that these were acts of non-consensual sexual intercourse and is of the view that cases of non-consensual sexual acts should be prosecuted, but as rape or sexual assault, as appropriate on the facts under clearly articulated gender-neutral sexual assault laws.

<sup>71</sup> *Malawi Law Society, amicus curiae* submission on file with Human Rights Watch in the High Court of Malawi in Confirmation Case No. 22 of 2011 between The Republic and Mussa Chiwisi, Confirmation Case No. 411 of 2011 between The Republic and Mathew Bellow and Confirmation Case No. 622 of 2011 between the Republic and Amon Champyuni

2014<sup>72</sup> The constitutionality of section 153(a) cannot be determined until the appeal on procedural issues is concluded.

### *The Human Rights Commission's Ambivalent Role*

The High Court had expressly invited the Malawi Human Rights Commission to intervene as amicus curiae in accordance with its mandate as set out in the Malawi Human Rights Commission Act, No. 27 of 1998.<sup>73</sup> In particular, section 14 of the Human Rights Commission Act sets out the responsibilities of the Human Rights Commission, including:

- a) to submit to a competent authority, 'its opinions, recommendations, proposals or reports on any matters concerning the protection and promotion of human rights';
- b) to examine any legislation and make recommendations as it considers appropriate in order to ensure conformity to the fundamental principles of human rights;
- c) where necessary, to recommend the adoption of new legislation or administrative provisions, or the repeal, replacement or amendment of legislation or administrative provisions in force and relating to human rights;
- d) to comment publicly or as it sees fit on any general or specific situation of violation of human rights and to recommend initiatives or measures to put an end to such situation.

The Commission opted not to intervene as amicus in the constitutional matter before the High Court. In a January 21, 2014 letter to the Executive Secretary of the Human Rights Commission, CEDEP, CHRR and Malawi Network of Religious Leaders Living with HIV (MANERELA+), expressed grave concern regarding the Commission's decision and its silence on the human rights issues affecting lesbian, gay, bisexual and transgender people in Malawi.<sup>74</sup> They saw the decision not to engage in the case as particularly problematic in light of the 2014 concluding observations of the UN Human Rights Committee, which had

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<sup>72</sup> Notice of Appeal and supporting affidavits of the Attorney-General of Malawi on file with Human Rights Watch – Supreme Court of Appeal – Confirmation Case No. 22 of 2011 between The Republic and Mussa Chiwisi, Confirmation Case No. 411 of 2011 between The Republic and Mathew Bellow and Confirmation Case No. 622 of 2011 between the Republic and Amon Champyuni

<sup>73</sup> Malawi Human Rights Commission Act, No. 27 of 1998 available at: [http://www.rwi.lu.se/NHRIDB/Africa/Malawi/Malawi\\_NHRI\\_Act\\_1998.pdf](http://www.rwi.lu.se/NHRIDB/Africa/Malawi/Malawi_NHRI_Act_1998.pdf)

<sup>74</sup> CEDEP, CHRR and MANERELA+ letter on file with Human Rights Watch

expressed concern regarding the “reluctance of the Commission to engage in issues related to the rights of lesbian, gay, bisexual, transgender and intersex persons.”<sup>75</sup>

## The Human Rights Commission Study

In May 2017, the Minister of Justice, in an official statement delivered at the 60th ordinary session of the African Commission on Human and Peoples’ Rights, stated that the government had instructed the Malawi Human Rights Commission to convene a “public inquiry” into LGBT issues “in order to inform the government’s position.”<sup>76</sup> *Malawi News* reported in August 2017 that the Human Rights Commission would be calling for “public input on the roadmap for implementing a public inquiry into LGBT in Malawi.”

In letters to the Executive Secretary of the Human Rights Commission, Human Rights Watch and several human rights organizations in Southern Africa expressed grave concern about the framing of the objective of the public inquiry: “to get the views from the public that would be used to inform the national position on the controversial issue of LGBTI.” Human Rights Watch further raised concern that the inquiry could in fact be an attempt to hold a referendum to reaffirm the criminalization of consensual adult same-sex conduct. CEDEP’s executive director Gift Trapence told the media: “Cedep will not support a process that will subject LGBT issues to a referendum. Cedep will not support a process that can reinforce discrimination.”<sup>77</sup>

In a positive development, Human Rights Watch received confirmation in September 2017 that the Human Rights Commission had abandoned the public inquiry and would instead conduct a national study on the rights of LGBTI persons in Malawi. In March 2017, the Human Rights Commission participated in a training program on sexual orientation, gender identity and human rights hosted by the Network of African National Human Rights Institutions (NANHRI) in Nairobi, Kenya.<sup>78</sup> At the end of the training program, the Human

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<sup>75</sup> CCPR/C/MWI/CO/1/Add.1 para 6

<sup>76</sup> Official statement delivered by Malawi Minister of Justice at the 60th ordinary session of the African Commission on Human and Peoples’ Rights, held in Niger, May 8 – 22, 2017.

<sup>77</sup> Moses Chitsulo, “Homosexual survey rolls out in July, says MHRC,” *The Times*, June 4, 2017, <https://www.times.mw/homosexual-survey-rolls-out-in-july-says-mhrc/>

<sup>78</sup> Network of African National Human Rights Institutions Sexual Orientation, Gender Identity and Expression Project available at : <http://www.nanhri.org/our-work/thematic-areas/sogie-project/>. Other participating national human rights institutions are those in South Africa, Ghana, Kenya and Uganda.

Rights Commission undertook to implement the several projects and activities to address violence and discrimination based on sexual orientation and gender identity, including co-facilitating training for law enforcement officials and conducting a public inquiry or research into LGBT issues in Malawi.<sup>79</sup>

Despite several attempts to establish progress on these projects, the Malawi Human Rights Commission has not responded to Human Rights Watch's enquiries.

## Other Pending LGBT-Related Court Cases

The decriminalization case and the pending judicial review of the government's moratorium on arrests are not the only cases before the courts that could have significant impact on the rights of lesbian, gay, bisexual and transgender people. Other pending cases raise important issues regarding the right to freedom of association regardless of sexual orientation and gender identity, and the right to recourse for incitation to violence.

### *The Freedom of Association Case*

In July 2016, the Nyasa Rainbow Alliance, an organization based in Blantyre that works on LGBT rights, filed an application for registration as a non-governmental organization with the Registrar General's Department. In a May 18, 2017 letter, the Registrar and the Ministry of Justice, which certifies registration of NGOs, informed the organization's Board of Trustees that the organization cannot be registered under Malawi laws "on the ground that the 'membership practices' are recognized as an offence under the Laws of Malawi."<sup>80</sup>

In July 2017, Eric Sambisa and Sulom Mtogolo, members of Nyasa Rainbow Alliance, filed judicial review proceedings, and on September 12, 2017, the High Court in Blantyre granted leave to commence judicial review. The respondents' stated justification for refusing to register the organization was that because same-sex conduct remains illegal in Malawi in spite of the moratorium, therefore registration of the organization would be unlawful. The state further argued that the right to freedom of association is not absolute and can be

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<sup>79</sup> Ibid

<sup>80</sup> In the matter between the State, Ministry of Justice and Constitutional Affairs and Registrar General (Respondents) and Sulom Mtogolo and Eric Sambisa (Applicants), Judicial Review Case Np. 43 of 2017, High Court of Malawi. [Applicants skeletal arguments on file with Human Rights Watch]



limited in accordance with the Malawi constitution.<sup>81</sup> In May 2018, the court ruled that since the application raises constitutional issues, it must be heard by a panel of three judges as required by section 9 of the Courts Act, 2003. The judges are yet to be appointed and a court date issued for the hearing.

### *The Criminal Case against Ken Msonda*

In response to Ken Msonda's Facebook post calling for gays and lesbians to be killed, two activists, Gift Trapence and Timothy Pagonachi, filed a complaint with the Resident Magistrate in Blantyre alleging violation of section 124(1)(b) of the Penal Code in that Msonda "did intend to, and did encourage or endeavor to persuade any person in Malawi to murder persons of actual or perceived homosexual sexual orientation and...such encouragement and endeavoring to persuade was that the natural and reasonable effect of the statement to published."<sup>82</sup>

On January 8, 2016, the Blantyre Magistrates Court issued a summons requiring Msonda to appear in court. However, on January 20, the Director of Public Prosecutions (DPP) took over the criminal proceedings and issued a notice of discontinuance on the Resident Magistrate in Blantyre, thereby withdrawing criminal charges against Msonda. In February 2016, the applicants asked the DPP to provide written justification for discontinuing the criminal prosecution. In April 2016, they filed an application for judicial review challenging the DPP's decision. Following several court hearings and adjournments regarding certification by the Chief Justice,<sup>83</sup> the matter was finally set down in the Malawi High Court, Zomba District. At the time of writing, the matter was still pending.

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<sup>81</sup> Ibid

<sup>82</sup> Ex Parte Application, Gift Trapence, 1st Applicant and Timothy Pagonachi, 2nd Applicant Skeletal Arguments – The State and Director of Public Prosecutions, Respondents, Constitutional Case No. 1 of 2017, Malawi High Court [on file with Human Rights Watch]

<sup>83</sup> Originally under Section 9 of the Courts Act, all proceedings in the High Court were heard and disposed of by or before a single judge. However, in 2003, section 9 of the Courts Act was amended, whereupon the original section 9 became section 9(1) and new sections 9(2) and 9(3) were introduced, providing that: 9(2) Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges. 9(3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact. <http://www.nyulawglobal.org/globalex/Malawi1.html#d>

## IV. Malawi's Obligations Under National and International Law

The Constitution of Malawi, as amended in 2010, protects a range of fundamental human rights and freedoms, including the right to personal liberty, human dignity, privacy, freedom and security of the person and the right to equality and prohibition of discrimination based on sex, amongst other enumerated grounds.<sup>84</sup> Section 32 protects the right to freedom of association, including the right to form an association. Section 15 of the Constitution reads: "The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter."<sup>85</sup>

While sexual orientation and gender identity are not enumerated as prohibited grounds for discrimination in the constitution, United Nations treaty bodies have stated that non-discrimination references to sex must be understood to include sexual orientation.<sup>86</sup> The anti-homosexuality provisions of the Penal Code are inconsistent with basic tenets of the Malawi Constitution and violate provisions of regional and international human rights treaties that it has ratified.

Malawi has ratified several regional and international human rights treaties that oblige the state to ensure that LGBT people enjoy human rights on an equal basis as everyone else and are protected against discrimination. This includes ensuring that LGBT people are not

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<sup>84</sup> The Constitution of the Republic of Malawi, Act 11, 2010, <http://www.wipo.int/edocs/lexdocs/laws/en/mw/mw03oen.pdf> (accessed July 20, 2018).

<sup>85</sup> Ibid section 15

<sup>86</sup> See e.g. UN Human Rights Committee decision in *Toonen v Australia*, (Dec. April 4, 1994, CCPR/C/50/D/488/1992) where in reference to the International Covenant on Civil and Political Rights it noted "...that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation." (para. 8.7). The Committee on Economic, Social and Cultural Rights in its General Comment No. 22 on sexual health states "... the right to sexual and reproductive health, combined with [other rights under the Covenant]... including the right to non-discrimination and equality between men and women, also requires States to ensure employment with ... protection from sexual harassment in the workplace and prohibition of discrimination based on ... sexual orientation, gender identity or intersex status." (E/C.12/GC/22, May 2, 2016, para 9)

subject to arrests and detention on discriminatory grounds, such as their sexual orientation. Furthermore, the state bears legal obligations to exercise due diligence in protecting LGBT individuals from all forms of violence, whether perpetrated by state or non-state actors. These treaties include the African Charter on Human and Peoples' Rights<sup>87</sup> (African Charter), the International Covenant on Civil and Political Rights<sup>88</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.<sup>89</sup>

As a state party to the African Charter, Malawi is obligated to comply with its provisions, including ending all forms of violence against LGBT people, whether perpetrated by state or non-state actors, and punishing all forms of violence targeting persons based on their real or perceived sexual orientation and gender identity.<sup>90</sup> Article 2 of the African Charter prohibits discrimination on various grounds, including sex, article 3 guarantees the right to equality before the law and equal protection of the law and article 6 protects the right to liberty and security of the person.<sup>91</sup>

In May 2014, the African Commission on Human and Peoples' Rights<sup>92</sup> (African Commission) adopted Resolution 275 on "Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation and Gender Identity," re-affirming the right to freedom from discrimination; equality before the law and equal protection of the law; the right to life; and the right to dignity and prohibition of torture and cruel, inhuman, and degrading treatment.<sup>93</sup> Through this resolution, the African Commission expressly condemns "violence and other human rights abuses including, rape, assault, arbitrary imprisonment and other forms of persecution and the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity" and urges all states parties to:

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<sup>87</sup> African Charter on Human and Peoples' Rights, available at: <http://www.achpr.org/instruments/achpr/>

<sup>88</sup> International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>89</sup> International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

<sup>90</sup> Malawi ratified the African Charter in 1989

<sup>91</sup> African Charter (n 75)

<sup>92</sup> African Commission on Human and Peoples' Rights, <http://www.achpr.org/about/>

<sup>93</sup> ACHPR Resolution 275 <http://www.achpr.org/sessions/55th/resolutions/275>

... end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.<sup>94</sup>

In November 2015, following review of Malawi’s initial and combined periodic report, the African Commission issued its concluding observations acknowledging the government’s “efforts to investigate claims of violation of access to health rights by sexual minorities.”<sup>95</sup>

In May 2014, the African Commission adopted the “Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa” (Luanda Guidelines).<sup>96</sup> Regarding arrests, defined as “the act of apprehending a person for the alleged commission of an offence, or to the action of a competent authority to arrest and detain a person as otherwise authorized by law,” the Guidelines expressly state as follows in respect of non-discrimination:

2(a): Persons shall only be deprived of their liberty on ground and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect for the rights of the individual;

2(b): Arrests must not be carried out on the basis of discrimination of any kind, including on the basis of sex or other status.<sup>97</sup>

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<sup>94</sup> Ibid.

<sup>95</sup> Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples’ Rights (1995 – 2013) para 28  
[http://www.achpr.org/files/sessions/57th/conc-obs/1-1995-2013/concluding\\_observations\\_\\_initial\\_\\_combined\\_state\\_report\\_malawi.pdf](http://www.achpr.org/files/sessions/57th/conc-obs/1-1995-2013/concluding_observations__initial__combined_state_report_malawi.pdf)

<sup>96</sup> ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa available at:  
[http://www.achpr.org/files/instruments/guidelines\\_arrest\\_detention/guidelines\\_on\\_arrest\\_police\\_custody\\_detention.pdf](http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf)

<sup>97</sup> Ibid, Part 1 : Arrests, Principle 2: Grounds for Arrest, p10

Having ratified the ICCPR, Malawi bears legal obligations to ensure that all persons, including LGBT people, have access to enjoy the rights protected thereunder. Article 17 of the ICCPR prohibits arbitrary and unlawful interference with privacy.<sup>98</sup> The United Nations Human Rights Committee (HRC) has observed that the “obligations imposed by article 17 require the state to adopt legislative and other measures to give effect to the protection against [arbitrary or unlawful] interference and attacks, as well as to the protection of this right.”<sup>99</sup> Furthermore, the HRC has found that the criminalization of “adult consensual sex in private,” including “private homosexual conduct,” constitutes an arbitrary interference with the right to privacy.<sup>100</sup>

Article 12 of the ICESCR guarantees the right to health. Article 12(1) provides: “States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>101</sup> In its General Comment on article 12, the Committee on Economic, Social and Cultural Rights stated that “the right to health is closely related to and dependent upon the realization of other human rights,” including the rights to human dignity, access to information, and the freedoms of association and assembly.”<sup>102</sup> Emphasizing that the right to health contains both freedoms and entitlements, the Committee stated the Covenant “proscribes any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlements for the procurement, on the grounds of....sexual orientation.”<sup>103</sup>

By prohibiting the registration of LGBT organizations, Malawi authorities are in violation of the right to freedom of association which is protected under article 22(1) of the ICCPR. In 2014, following review of the country’s compliance the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee recommended that the government of Malawi repeal provisions criminalizing adult consensual same-sex conduct

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<sup>98</sup> ICCPR Article 17(1). No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 17(2) Everyone has the right to the protection of the law against such interference or attacks.

<sup>99</sup> UN Human Rights Committee, General Comment No. 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation).

<sup>100</sup> Ibid para 11

<sup>101</sup> ICESCR Article 12(1)

<sup>102</sup> E/C.12/2000/4 General Comment No. 14

<sup>103</sup> Ibid para 18

and review its legislation in order to explicitly include sexual orientation and gender identity as prohibited grounds of discrimination and ensure access to health services, including HIV/AIDS treatment.<sup>104</sup>

Finally, in November 2015, the Committee on the Elimination of Discrimination against Women issued concluding observations to Malawi urging the government to “envisage decriminalizing sexual relationships between women” and expressing concern that the Penal Code amendment of 2011 criminalizes same-sex relationships between women.<sup>105</sup>

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<sup>104</sup> Ibid para 10

<sup>105</sup> CEDAW/C/MWI/CO/7 Para 11(d). Para 10(c) the CEDAW Committee expressed concern that the Penal Code Amendment of 2011 criminalizes same-sex relationships between women

# Recommendations

## To the President

- Publicly condemn all threats and acts of violence against lesbian, gay, bisexual and transgender (LGBT) people, including threats by senior political and religious leaders.
- Direct relevant government ministries and the Human Rights Commission to adopt measures and take the necessary steps to raise public awareness of the harm of homophobia and the need to combat it. In particular, hold accountable any public official or civil servant who makes homophobic statements.
- Propose comprehensive legislation that prohibits all forms of discrimination, including on the grounds of sexual orientation and gender identity.
- Invite the African Commission on Human and Peoples' Rights to conduct an official visit in order to engage in constructive dialogue with the government and all stakeholders on the progress and challenges to effective domestic implementation of the African Charter on Human and Peoples' Rights, and other relevant regional human rights treaties that Malawi has ratified.

## To Parliament

- Repeal sections 153, 156, 157 and 137A of the Penal Code that criminalize adult consensual same sex conduct.
- Repeal section 132 of the Penal Code and replace it with a gender-neutral definition of sexual assault including rape.
- Follow up on the various recommendations from human rights treaty bodies in order to ensure improved protection from violence and discrimination on the basis of sexual orientation and gender identity, in particular, the recommendations contained in the concluding observations adopted by the United Nations Human Rights Committee in August 2014 urging the government to:
  - Review its legislation to explicitly include sexual orientation and gender identity among the prohibited grounds of discrimination and repeal the provisions that criminalize homosexuality and other consensual sexual activities among adults (arts. 137 (A), 153, 154 and 156 of the Penal Code);

- Introduce a mechanism to monitor cases of violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons and undertake all necessary measures to prevent those cases, prosecute the perpetrators and compensate the victims;
- Ensure that public officials refrain from using language that may encourage violence and raise awareness to eliminate stereotyping and discrimination.

### **To the Ministry of Internal Affairs and Public Security: Malawi Police Service**

- Issue clear directives to all police officers instructing them to respect the moratorium pending repeal of the relevant provisions of the Penal Code and end arbitrary arrests and detention of LGBT individuals.
- Establish Human Rights Desks at Police Stations to provide a safe environment for LGBT persons to report police abuses and for complaints to be processed and investigated without delay.
- Investigate in a prompt and thorough manner all law enforcement officials implicated in arbitrary arrests and other human rights abuses of persons on the basis of their sexual orientation and gender identity.
- In collaboration with civil society organizations, implement rigorous training programs for police officers particularly on transgender issues.
- Ensure that police officers comply with the Malawian constitution, specifically with respect the rights to privacy, human dignity and liberty in their dealings with LGBT individuals.

### **To the Ministry of Health**

- Ensure that training for all medical professionals and health care workers includes a component on discrimination and HIV issues affecting LGBT people.
- Ensure the effective implementation of and compliance with national legislation that makes it unlawful to discriminate against people based on their HIV status.
- Establish sensitization programs for health care providers at all government hospitals and a complaints mechanism for individuals subjected to discrimination while seeking HIV services and treatment.



## To the Human Rights Commission

- Monitor, investigate and publicly report on incidents of violence based on sexual orientation and gender identity.
- Effectively implement the actions adopted at the March 2017 workshop hosted by the Network of African Regional Human Rights Institutions in Nairobi, Kenya for staff of national human rights institutions on sexual orientation, gender identity and human rights, in particular:
  - Support strategic litigation efforts to uphold the rights of lesbian, gay, bisexual and transgender people.
  - Conduct internal training on sexual orientation and gender identity issues for all staff.

## To the Judiciary

- Expedite cases related to fundamental human rights of LGBT persons, including the judicial review case against Ken Msondo and judicial review case against the Registrar General and Ministry of Justice and Constitutional Affairs.
- In order to finally resolve the question of legality of the moratorium and constitutional invalidity of section 153 of the Penal Code, expediate the Supreme Court Cases No. 22 of 2011, No. 411 of 2011 and No. 622 of 2011.

## To the African Commission on Human and Peoples' Rights

- Ensure the Malawian government's compliance with obligations set out in the African Charter on Human and Peoples' Rights and with recommendations set out in ACHPR Resolution 275: Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity by:
  - Raising specific questions regarding progress, obstacles, plans and other measures that have been adopted to ending violence and discrimination on the grounds of sexual orientation and gender identity during the next country review.
  - Conducting a country visit to assess the government's compliance with regional human rights norms and standards, in accordance with article 45(1) of the African Charter on Human and Peoples' Rights.

## To Malawi's International Partners

- Increase financial and technical assistance to civil society organizations providing services to LGBT people who have suffered violence and discrimination on the basis of their sexual orientation and gender identity.
- Specifically, increase funding for community organizing, advocacy, and direct services, legal aid, counseling, medical assistance, and job training to lesbians, bisexual women, gay men and transgender people.

## Acknowledgments

This report was researched and written by Wendy Isaack, researcher at Human Rights Watch.

It was reviewed by Neela Ghoshal, senior researcher in the LGBT Rights Program; Megan McLemore, senior researcher in the Health and Human Rights Program; Dewa Mavhinga, director for Southern Africa; and Graeme Reid, LGBT Rights Program director. Aisling Reidy, senior legal advisor; and Babatunde Olugboji, deputy program director, provided legal and programmatic reviews. Production assistance was provided by MJ Movahedi, LGBT Rights Program Coordinator, Fitzroy Hepkins, administrative managers; and Jose Martinez, senior coordinator.

Human Rights Watch would like to thank the numerous organizations and individuals that contributed to the research that went into this report. We are grateful to the LGBT people and human rights organizations in Malawi, including Centre for the Development of the People (CEDEP), Ivy Foundation, and Lesbian, Intersex, Transgender and other Extensions (LITE) Foundation who took time to share their experiences with us and helped to introduce us to other with information relevant to the issues addressed in this report.

## Annex 1: African Commission on Human and Peoples’ Rights Resolution 275<sup>106</sup>

275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity

*The African Commission on Human and Peoples’ Rights (the African Commission), meeting at its 55<sup>th</sup> Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014:*

**Recalling** that Article 2 of the African Charter on Human and Peoples’ Rights (the African Charter) prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;

**Further recalling** that Article 3 of the African Charter entitles every individual to equal protection of the law;

**Noting** that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment;

**Alarmed** that acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity;

**Noting** that such violence includes ‘corrective’ rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail;

**Further alarmed** at the incidence of violence and human rights violations and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity in Africa;

**Deeply disturbed** by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

- 1) **Condemns** the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
- 2) **Specifically condemns** the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;
- 3) **Calls on** State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and
- 4) **Strongly urges** States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

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<sup>106</sup> ACHPR Resolution 275 <http://www.achpr.org/sessions/55th/resolutions/275>

Adopted at the 55<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014

# Annex 2: Letter to Malawi Human Rights Commission, June 16, 2017

Kenneth Roth, *Executive Director*

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Peter Visser  
Marie Warburg  
Catherine Zennström

June 16, 2017

Malawi Human Rights Commission  
Off Paul Kagame Road  
Private Bag 378 Private  
Lilongwe 3  
Malawi

Tel: [REDACTED]

To: **Mr. Harry Migochi**  
**Director of Economic Social and Cultural Rights**  
**Mr. Peter Chisi**  
**Director of Civil and Political Rights**

Via e-mail: [REDACTED]

**Re: Request for information regarding national survey on lesbian, gay, bisexual and transgender persons**

Dear Sirs,

Please allow us to take this opportunity to commend the Malawi Human Rights Commission for participating in the training programme hosted by the Network of African National Human Rights Institutions (NANHRI) on sexual orientation, gender identity and human rights in March 2017 in Kenya. We anticipate that your engagement in the NANHRI project will contribute to the protection of human rights of lesbian, gay, bisexual and transgender (LGBT) persons in Malawi.

Human Rights Watch is an international human rights organization that conducts research and advocacy on human rights issues in over 90 countries worldwide, including in Malawi, where we [documented](#) the human rights impact of the mining industry on rural communities in 2016. Human Rights Watch has since 2009 monitored legal developments regarding LGBT issues in Malawi, including the



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moratorium on prosecuting consensual same-sex conduct reaffirmed by the government in December 2015.

We are writing today to request further information regarding an article published in the *Sunday Times* on June 4, 2017, “Homosexual survey rolls out in July, says MHRC.” According to this news report, the survey “aims at getting the views of Malawians for the country’s firm position on lesbians, gays, bisexuals, and transgender” persons. The Human Rights Commission has reportedly finalized the data collection methodology, will convene a stakeholders meeting on June 19, 2017 for validation, and will submit a final report to the Ministry of Justice by the end of October 2017.

Human Rights Watch has consulted with Malawian activists and representatives of human rights organizations, including the Centre for the Development of People (CEDEP), which expressed concern that the hearings and survey may be an attempt to hold a referendum-style survey to decide on the criminalization of consensual adult same-sex conduct. The fundamental human rights of a minority should never be subject to the views of a majority. Recognizing that the protection of human rights of LGBT persons in Malawi remains highly contentious, we respectfully request further information regarding:

1. the purpose of the survey;
2. the basic data collection methodology;
3. the extent to which international and regional human rights norms and standards were considered in developing the survey and data collection methodology; and
4. whether the survey is a component of the strategy adopted by the Malawi Human Rights Commission following the NANHRI training in Nairobi.

We look forward to receiving your response.

Kindly reply to our Researcher, Ms. Wendy Isaack, at +1 212 216 1271 / [isaackw@hrw.org](mailto:isaackw@hrw.org).

Sincerely,



Graeme Reid  
Director, LGBT Rights Program  
Human Rights Watch

# Annex 3: Letter to Malawi Human Rights Commission, July 5, 2017

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Kenneth Roth, Executive Director

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Catherine Zennaro

June 16, 2017

Malawi Human Rights Commission  
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Private Bag 378 Private  
Lilongwe 3  
Malawi

Tel: +265 1750 900958

To: **Mr. Harry Migochi**  
Director of Economic Social and Cultural Rights

**Mr. Peter Chisi**  
Director of Civil and Political Rights

Via e-mail:



Re: Request for information regarding national survey on lesbian, gay, bisexual and transgender persons

Dear Sirs,

Please allow us to take this opportunity to commend the Malawi Human Rights Commission for participating in the training programme hosted by the Network of African National Human Rights Institutions (NANHRI) on sexual orientation, gender identity and human rights in March 2017 in Kenya. We anticipate that your engagement in the NANHRI project will contribute to the protection of human rights of lesbian, gay, bisexual and transgender (LGBT) persons in Malawi.

Human Rights Watch is an international human rights organization that conducts research and advocacy on human rights issues in over 90 countries worldwide, including in Malawi, where we documented the human rights impact of the mining industry on rural communities in 2016. Human Rights Watch has since 2009 monitored legal developments regarding LGBT issues in Malawi, including the moratorium on prosecuting consensual same-sex conduct reaffirmed by the government in December 2015.

We are writing today to request further information regarding an article published in the *Sunday Times* on June 4, 2017, "Homosexual survey



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rolls out in July, says MHRC. " According to this news report, the survey "aims at getting the views of Malawians for the country's firm position on lesbians, gays, bisexuals, and transgender" persons. The Human Rights Commission has reportedly finalized the data collection methodology, will convene a stakeholders meeting on June 19, 2017 for validation, and will submit a final report to the Ministry of Justice by the end of October 2017.

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3. the extent to which international and regional human rights norms and standards were considered in developing the survey and data collection methodology; and
4. whether the survey is a component of the strategy adopted by the Malawi Human Rights Commission following the NANHRI training in Nairobi

We look forward to receiving your response.

Kindly reply to our Researcher, Ms. Wendy Isaack, at +1 212 216 1271 / [isaackw@hrw.org](mailto:isaackw@hrw.org).

Sincerely,



Graeme Reid  
Director, LGBT Rights Program  
Human Rights Watch

# Annex 4: Letter to Malawi Human Rights Commission, August 17, 2017

Kenneth Roth, *Executive Director*

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Catherine Zennström

August 17, 2017

Malawi Human Rights Commission  
Off Paul Kagame Road  
Private Bag 378 Private  
Lilongwe 3, Malawi

Tel: [REDACTED]

To: Mr. David Nungu  
Executive Secretary

CC: Mr. Pacharo Kayira  
Human Rights Section  
Malawi Ministry of Justice  
[REDACTED]

**Re: Roadmap for implementing a public inquiry into LGBTI rights**

Dear Mr. Nungu,

Human Rights Watch is writing regarding the “call for public input on the roadmap for implementing a public inquiry into LGBTI in Malawi,” published in *Malawi News* on July 29-August 4, 2017. We wish to register our concerns about the objectives of the public inquiry.

Human Rights Watch is an independent, international nongovernmental research and advocacy organization that works in more than 90 countries.

We note that the Malawi Human Rights Commission (the “Commission”) is planning to convene the public inquiry as requested by the government, through the Office of the Solicitor General, on November 7, 2016. Furthermore, we note that section 11(d) of the Malawi Human Rights Commission Act, No. 27, 1998,



empowers the Commission to make recommendations regarding human rights issues upon request by the government.

Everyone is entitled to respect of their basic human rights, regardless of sexual orientation or gender identity. Section 20 of the 1996 Constitution of the Republic of Malawi, as amended, prohibits discrimination in any form and guarantees all persons equality before the law and equal and effective protection under the law. The rights of a minority should not be granted or withheld based on the views of the majority.

Following consideration of Malawi's initial periodic report on domestic implementation of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee (the "Committee"), in its concluding observations expressed concern about reports of violence against LGBTI people and the impact of stigma on access to healthcare services. The Committee recommended that the Malawi government establish a mechanism to monitor cases of violence and to act with due diligence to protect lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals from violence.<sup>107</sup>

Following consultations with Malawian activists and representatives of human rights organizations in Malawi, including the Centre for the Development of People (CEDEP), Human Rights Watch is of the view that a public inquiry, as formulated in the call for input, risks exposing an already vulnerable minority to abuse and will inevitably lead to further violations of the human rights of LGBTI individuals. Recognizing that the protection of human rights of LGBTI persons in Malawi remains highly contentious, we urge the Commission to abandon the public inquiry. We are particularly concerned that the objectives of the public inquiry are framed in these terms: "to get views from the public that would be used to inform the national position on the controversial issue of LGBTI." It is critical that Malawi's national position on human rights not be determined by public opinion but by its legal obligations under the constitution and regional and international law.

In addition to responding to government requests, the Commission has a range of other duties, including (a) to act as a source of human rights information; (b) to assist in educating the public on, and promoting awareness and respect for, human rights; and (c) to promote more particularly the human rights of vulnerable groups. The Commission could comply with the government's request and achieve its overall objective by conducting an inquiry focused specifically on violence, abuse and discrimination faced by LGBTI individuals in Malawi. We draw your attention to Resolution 275 of the African Commission on Human and Peoples' Rights urging all African countries to:

---

<sup>107</sup> Human Rights Committee, concluding observations on the initial report of Malawi CCPR/C/MWI/CO/1/Add.1 para 10

end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.<sup>108</sup>

We urge the Commission to be guided by international human rights norms and standards, including the above-stated resolution of the African Commission on Human and Peoples' Rights, in its work on LGBTI issues in Malawi. Should the Commission wish to create public awareness and deepen an understanding of LGBTI issues, we do not believe that a public inquiry, as presently structured, is the appropriate platform for doing so. The Commission should instead consider other processes, for instance, establishing a Committee in accordance with section 8 of the Human Rights Commission Act to increase public education and awareness premised on human rights standards.

You can reach us with your response, comments or questions through our researcher, Ms. Wendy Isaack, at +1 212 216 1271 or [jsaackw@hrw.org](mailto:jsaackw@hrw.org).

Sincerely,



Graeme Reid  
Director, LGBT Rights Program  
Human Rights Watch

---

<sup>108</sup> Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity: <http://www.achpr.org/sessions/55th/resolutions/275/>

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Peter Bouckaert, *Emergencies*

Zama Coursen-Neff, *Children's Rights*

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Bill Frelick, *Refugees' Rights*

Arvind Ganesan, *Business and Human Rights*

Liesl Gertholtz, *Women's Rights*

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Diederik Lohman, *acting, Health and Human Rights*

Graeme Reid, *Lesbian, Gay, Bisexual, and Transgender Rights*

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Catherine Zennström

## Annex 5: Letter to Minister of Justice and Constitutional Affairs

September 26, 2018

Honorable Minister Samuel B. Tembenu SC.  
Minister of Justice and Constitutional Affairs

Private Bag 333,

Capital City,

Lilongwe 3,

Malawi

Telephone: +265 1 788 411

Fax: +265 1 788 332

CC: DR. Janet L. Banda SC.  
Solicitor General

Via email: [justice@justice.gov.mw](mailto:justice@justice.gov.mw)

Re: Human Rights Watch LGBT report

Dear Honorable Minister Tembenu

I hope this letter finds you well.

I am writing to present an advance and embargoed draft copy of our report on violence and discrimination against lesbian, gay, bisexual and transgender (LGBT) people in Malawi to be released in mid-October 2018, to provide the Ministry of Justice and Constitutional Development an opportunity to respond to our findings.

Our established practice is to submit our findings to authorities and institutions whose record is the subject of the report for their response and point of view to be reflected in the reports we publish. Human Rights Watch conducted in-depth research in Malawi in May 2018. The report, based on interviews with 45 LGBT individuals in Lilongwe and Blantyre, documents the human rights impact of criminalizing same-sex conduct in Malawi. Our research indicates that LGBT individuals face routine violence and discrimination in almost all aspects of their daily lives. Police often arbitrarily arrest and detain LGBT people and, in some cases, physically assault them. The government has also used the law to justify restrictions on freedom of association. Private individuals take advantage of the uncertain legal status of LGBT people to attack them with impunity, and health providers frequently discriminate on the grounds of sexual orientation.

In order to incorporate your response into our report, we would need to receive your written response by October 9, 2018. Please note that the report is under embargo until a release date (to be announced) in October 2018.

We look forward to receiving your response and maintaining a constructive dialogue with the Ministry of Justice and Constitutional Affairs on the recommendations set out in the report.

Sincerely,

A handwritten signature in blue ink that reads "Graeme Reid".

Graeme Reid  
Director  
Lesbian, Gay, Bisexual and Transgender Rights Program  
Human Rights Watch

# Annex 6: Letter to Minister of Health and Population

Kenneth Roth, *Executive Director*

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Peter Bouckaert, *Emergencies*  
Zama Coursen-Neff, *Children's Rights*  
Richard Dicker, *International Justice*  
Bill Frelick, *Refugees' Rights*  
Arvind Ganesan, *Business and Human Rights*  
Liesel Gertholtz, *Women's Rights*  
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Diederik Lohman, *acting, Health and Human Rights*  
Graeme Reid, *Lesbian, Gay, Bisexual, and Transgender Rights*

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Kanae Doi, *Japan*  
John Fisher, *United Nations, Geneva*  
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Bénédictine Jeannerod, *France*  
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John R. Taylor  
Amy Towers  
Peter Visser  
Marie Warburg  
Catherine Zennström

September 26, 2018

Honorable Atupele Austin Muluzi  
Minister of Health and Population  
Private Bag 331,  
Lilongwe 3  
Malawi  
Telephone:

Via email:

**Re: Human Rights Watch LGBT report**

Dear Honorable Minister Muluzi

I hope this letter finds you well.

I am writing to present an advance and embargoed draft copy of our report on violence and discrimination against lesbian, gay, bisexual and transgender (LGBT) people in Malawi to be released in mid-October 2018, to provide the Ministry of Justice and Constitutional Development an opportunity to respond to our findings.

Our established practice is to submit our findings to authorities and institutions whose record is the subject of the report for their response and point of view to be reflected in the reports we publish. Human Rights Watch conducted in-depth research in Malawi in May 2018. The report, based on interviews with 45 LGBT individuals in Lilongwe and Blantyre, documents the human rights impact of criminalizing same-sex conduct in Malawi. Our research indicates that LGBT individuals face routine violence and discrimination in almost all aspects of their daily lives. Police often

arbitrarily arrest and detain LGBT people and, in some cases, physically assault them. The government has also used the law to justify restrictions on freedom of association. Private individuals take advantage of the uncertain legal status of LGBT people to attack them with impunity, and health providers frequently discriminate on the grounds of sexual orientation.

In order to incorporate your response into our report, we would need to receive your written response by October 9, 2018. Please note that the report is under embargo until a release date (to be announced) in October 2018.

We look forward to receiving your response and maintaining a constructive dialogue with the Ministry of Health and Population on the recommendations set out in the report.

Sincerely,

A handwritten signature in blue ink that reads "Graeme Reid".

Graeme Reid  
Director  
Lesbian, Gay, Bisexual and Transgender Rights Program  
Human Rights Watch



# Annex 7: Letter to Minister of Home Affairs and Internal Security

Kenneth Roth, *Executive Director*

## Deputy Executive Directors

Michele Alexander, *Development and Global Initiatives*  
Nicholas Dawes, *Media*  
Iain Levine, *Program*  
Chuck Lustig, *Operations*  
Bruno Stagno Ugarte, *Advocacy*  
Emma Daly, *Communications Director*  
Dinah PoKempner, *General Counsel*  
James Ross, *Legal and Policy Director*

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Sarah Leah Whitson, *Middle East and North Africa*  
Hugh Williamson, *Europe and Central Asia*  
Shantha Rau Barriga, *Disability Rights*  
Peter Bouckaert, *Emergencies*  
Zama Coursen-Neff, *Children's Rights*  
Richard Dicker, *International Justice*  
Bill Frelick, *Refugees' Rights*  
Arvind Ganesan, *Business and Human Rights*  
Liesel Gertholtz, *Women's Rights*  
Steve Goose, *Arms*  
Diederik Lohman, *acting, Health and Human Rights*  
Graeme Reid, *Lesbian, Gay, Bisexual, and Transgender Rights*

## Advocacy Directors

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Kanae Doi, *Japan*  
John Fisher, *United Nations, Geneva*  
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Bénédictine Jeannerod, *France*  
Lotte Leicht, *European Union*  
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David Mepham, *United Kingdom*  
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John R. Taylor  
Amy Towers  
Peter Visser  
Marie Warburg  
Catherine Zennström

September 26, 2018

Honorable Cecilia Chazama  
Minister of Home Affairs and Internal Security  
Private Bag 331,  
Lilongwe 3  
Malawi  
Telephone: +265 1 789177

Via email:

**Re: Human Rights Watch LGBT report**

Dear Honorable Minister Cecilia Chazama

I hope this letter finds you well.

I am writing to present an advance and embargoed draft copy of our report on violence and discrimination against lesbian, gay, bisexual and transgender (LGBT) people in Malawi to be released in mid-October 2018, to provide the Ministry of Justice and Constitutional Development an opportunity to respond to our findings.

Our established practice is to submit our findings to authorities and institutions whose record is the subject of the report for their response and point of view to be reflected in the reports we publish. Human Rights Watch conducted in-depth research in Malawi in May 2018. The report, based on interviews with 45 LGBT individuals in Lilongwe and Blantyre, documents the human rights impact of criminalizing same-sex conduct in Malawi. Our research indicates that LGBT individuals face routine violence and discrimination in almost all aspects of their daily lives. Police often

arbitrarily arrest and detain LGBT people and, in some cases, physically assault them. The government has also used the law to justify restrictions on freedom of association. Private individuals take advantage of the uncertain legal status of LGBT people to attack them with impunity, and health providers frequently discriminate on the grounds of sexual orientation.

In order to incorporate your response into our report, we would need to receive your written response by October 9, 2018. Please note that the report is under embargo until a release date (to be announced) in October 2018.

We look forward to receiving your response and maintaining a constructive dialogue with the Ministry of Home Affairs and Internal Security on the recommendations set out in the report.

Sincerely,

A handwritten signature in blue ink that reads "Graeme Reid". The signature is written in a cursive, slightly slanted style.

Graeme Reid  
Director  
Lesbian, Gay, Bisexual and Transgender Rights Program  
Human Rights Watch

# Annex 8: Letter to Malawi Human Rights Commission

Kenneth Roth, *Executive Director*

## Deputy Executive Directors

Michele Alexander, *Development and Global Initiatives*  
Nicholas Dawes, *Media*  
Iain Levine, *Program*  
Chuck Lustig, *Operations*  
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Graeme Reid, *Lesbian, Gay, Bisexual, and Transgender Rights*

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David Mepham, *United Kingdom*  
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Darian W. Swig  
Makoto Takano  
John R. Taylor  
Amy Towers  
Peter Visser  
Marie Warburg  
Catherine Zennström

September 26, 2018

Mr. David Nungu  
Executive Director  
Malawi Human Rights Commission  
Off Paul Kagame Road  
Private Bag 378  
Lilongwe 3,  
Malawi.  
Telephone: +265 1750 900958

Via email: 

**Re: Human Rights Watch LGBT report**

Dear Mr. Nungu,

I hope this letter finds you well.

I am writing to present an advance and embargoed draft copy of our report on violence and discrimination against lesbian, gay, bisexual and transgender (LGBT) people in Malawi to be released in mid-October 2018, to provide the Ministry of Justice and Constitutional Development an opportunity to respond to our findings.

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discrimination in almost all aspects of their daily lives. Police often arbitrarily arrest and detain LGBT people and, in some cases, physically assault them. The government has also used the law to justify restrictions on freedom of association. Private individuals take advantage of the uncertain legal status of LGBT people to attack them with impunity, and health providers frequently discriminate on the grounds of sexual orientation.

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Sincerely,

A handwritten signature in blue ink that reads "Graeme Reid".

Graeme Reid  
Director  
Lesbian, Gay, Bisexual and Transgender Rights Program  
Human Rights Watch

# “Let Posterity Judge”

## Violence and Discrimination against LGBT people in Malawi

Criminalization of consensual same-sex conduct in Malawi contributes to an environment in which lesbian, gay, bisexual and transgender (LGBT) individuals in Malawi face routine violence and discrimination in almost all aspects of their lives. The government pledged in 2012 to decriminalize same-sex conduct, but has not yet done so. The challenges facing LGBT people in the country have been further exacerbated by the lack of clarity and divergent opinions regarding the legality of a moratorium on arrests and prosecutions for consensual homosexual acts, issued in 2012 by the Ministry of Justice and Constitutional Affairs.

Based on interviews with 45 LGBT individuals in Lilongwe and Blantyre, “*Let Posterity Judge*,” documents the human rights impact of criminalization of adult consensual same-sex conduct on the lives of LGBT people in Malawi and finds that police often arbitrarily arrest and detain transgender people, and in some cases, physically assault them. Private individuals take advantage of the uncertain legal status of LGBT people to attack them with impunity, while health care providers frequently discriminate against them on the grounds of sexual orientation.

Human Rights Watch calls on the government of Malawi to abide by its 2012 commitment to decriminalize consensual same-sex conduct, and on parliament to repeal all the anti-homosexuality provisions in the penal code.



*A young transgender woman at a friend's house seeking temporary shelter in Lilongwe, Malawi.*

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