



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND AND WALES

Submission to the Malawi Law Commission

ADDRESSED TO

**THE SPECIAL LAW COMMISSION ESTABLISHED TO REVIEW THE
WITCHCRAFT ACT CAP. 7:02, LAWS OF MALAWI**

OBSERVATIONS OF THE BAR HUMAN RIGHTS COMMITTEE ON THE
RELEVANT INTERNATIONAL LEGAL STANDARDS

June 2011

INTRODUCTION

1. The Bar Human Rights Committee (hereinafter 'BHRC') is the international human rights arm of the Bar of England & Wales. Established in 1991, it is an independent committee of the General Council of the Bar of England & Wales, the regulatory and representative body for barristers in that jurisdiction. The BHRC is primarily concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial. The remit of the BHRC extends to all countries of the world, apart from its own jurisdiction of England & Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its agenda.
2. The BHRC's objectives include upholding the rule of law and internationally recognised human rights norms and standards, and supporting practising lawyers, judges and human rights defenders. To achieve its objectives, the BHRC conducts trial observations, capacity building training, fact-finding investigations, monitors human rights abuses, provides legal resources and conducts strategic litigation. In carrying out this work, the BHRC has secured a reputation for legal expertise in the protection of human rights, and notably the right to a fair trial. In 2009, the BHRC established a Child Right's Unit to specifically focus on projects promoting the rights of children and to enforce established human rights standards in this area. This was followed up in 2011 with the establishment of a Women's Rights Unit to focus on women's human rights and gender discrimination in specific and existing projects to build on the considerable work undertaken by the BHRC in this field. The BHRC's reports provide valuable tools to legal practitioners around the world and are read widely by policy makers within national and international bodies, thereby assisting in the development of the law.
3. The BHRC submits this paper to the Special Law Commission established in 2009 to review the Witchcraft Act Cap. 7:02, Laws of Malawi. As an

independent expert in international law with particular experience in human rights legislation addressing witchcraft issues,¹ the BHRC is well placed to advise on the international legal requirements which must be taken into consideration in the review of the legislation.

4. The BHRC understands that the review of this legislation has not yet been completed and submits these observations to assist the Commission in its deliberations. The BHRC reserves its comments to the applicable international legal standards and will not comment on the substantive issues addressed in the legislation.
5. Together with other international organisations, the BHRC is of the view that a review of the Witchcraft Act is timely, in light of the numerous criticisms surrounding discrimination towards vulnerable members of society, particularly women and children, and the difficulties relating to realising individuals' rights to a fair trial and access to justice evident in the implementation of this legislation. Indeed, the Malawi Government has previously been called on by the international community to reform the Witchcraft Act to remedy the discrimination issues which are bound up in the execution of this legislation.² The Issues Paper published by the Malawi Law Commission in 2009 (hereinafter 'Issues Paper') provides specific detail on the situation in Malawi and in reviewing the legislation, the Government acknowledges that there is a problem with the application of this legislation as it currently stands in Malawi.³ The BHRC welcomes the willingness of the Government of Malawi to review the legislation to ensure it complies with international standards.

¹ For example, the Child Rights Unit of the BHRC has for the past three years been working with the Government, NGOs and international organisations, including UNICEF, to assist in the implementation of the Child Rights Act 2003 which criminalises the stigmatisation of a child as a witch or wizard in Nigeria.

² See, for example, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malawi*, Sixteenth Session, A/HRC/16/4 (4 January 2011) para. 102.5.

³ For a comprehensive review of cases of witchcraft belief as a defence in homicide, see Short, T and Bedford Z, *Witchcraft and homicide defence in Malawi*, Centre for Capital Punishment Studies, Internship Reports (2009) pps. 113-145, available online at: http://www.westminster.ac.uk/__data/assets/pdf_file/0009/75258/CCPSInternshipReports20092-Copy.pdf.

6. Balancing long-held traditional beliefs, as with witchcraft and other popular beliefs, with emerging legal norms can create a friction between the law which is perceived as ‘foreign’ in relation to the societal practices it aims to address. This has been apparent in other African countries, as well as many other parts of the world.⁴ However, in balancing the individual’s rights of freedom of belief, respect must be ensured for the protection of vulnerable groups against discriminatory practices which have a negative effect on society as a whole. When considering amendments to the Witchcraft Act, due process rights must be afforded to all affected individuals so that international fair trial standards are upheld and in order that the rule of law may prevail in Malawi.⁵

NON-DISCRIMINATION OF WOMEN

7. It has been noted that women are the most common targets of witchcraft accusations. While gender-neutral terminology is used with regard to witches and witchcraft, women are twice as likely as men to be accused of witchcraft.⁶ Such discrimination often results in extreme acts of violence against the individual and even death.⁷ Witchcraft-related violence has been identified by the government in South Africa as a serious social and legal problem.⁸ The vulnerable position of women within society compounds this, particularly

⁴ See example given in Dumin J, *Superstition-based injustice in Africa and the United States: the use of provocation as a defense for killing witches and homosexuals*, Wisconsin Women’s Law Journal Vol. 21 145 (2006), available online at: <http://hosted.law.wisc.edu/wjlg/issues/2006-fall/dumin.pdf> (hereinafter “Dumin 2006”) and Diwan, M. A, *Conflict between legal norms and underlying popular beliefs: witchcraft in Africa as a case study*, 14 Duke J. Comp. & Int’l L. 351 (2004).

⁵ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, 11th Session, A/HRC/11/2 (27 May 2009) para. 56 (hereinafter “Special Rapporteur Report 2009”).

⁶ Dumin (2006) *supra*. n., 4 p. 7.

⁷ See UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, Cultural practices in the family that are violent towards women*, E/CN.4/2002/83 (31 January 2002) in relation to practices in India and Nepal; “Kenya mob burns 15 women to death over witchcraft”. AFP, 21 May 2008. Available at http://www.breitbart.com/article.php?id=080521153625.1ijzzvn1&show_article=. See also Special Rapporteur Report 2009 *supra*. n. 5.

⁸ Ludsin, H, *Cultural denial: what South African’s treatment of witchcraft says for the future of its customary law*, 21 Berkeley J. Int’l L. 62 (2003).

- regarding the elderly,⁹ as acknowledged in the Issues Paper, and leads to further inequalities in accessing justice and upholding due process rights.
8. The overwhelming body of research and evidence produced by national and international organisations which documents the targeting and persecution of women in many societies as witches does not bear recounting here.¹⁰
 9. However, the BHRC draws this evidence to the attention of the Malawi Government in its consideration in its review of the Witchcraft Act and particularly the obligations which it is bound by in balancing the need to protect society, to ensure individual rights to freedom of belief, and to uphold the principle of non-discrimination based on sex and age.
 10. Malawi is a party to numerous international conventions which enshrine the protection of women against discrimination. The Universal Declaration of Human Rights 1948 (hereinafter 'UDHR'), the International Covenant on Civil and Political Rights 1966 (hereinafter 'ICCPR')¹¹ and the African Charter on Human and Peoples' Rights 1981 (hereinafter 'ACHPR'),¹² all of which include obligations on State Parties to ensure that individuals are not discriminated against on the basis of sex. It has been established in the courts that the UDHR is part of Malawian law.¹³ Under s. 211(1) of the Constitution of Malawi, Malawi is bound by an international agreement when it is ratified by Parliament. Furthermore, the judiciary must have regard to norms of international law in interpreting the Constitution under s. 11(2)(c).

⁹ See, for example, Duff, O, *Tanzania suffers rise of witchcraft hysteria*, The Independent, 28 November 2005, available online at: <http://www.independent.co.uk/news/world/africa/tanzania%20suffers%20rise%20of%20witchcraft%20hysteria%2017157.html>. See also *S. v. Bhumu* 1981 (2) SA 839 (ZAD) at 841.

¹⁰ See, for example, Special Rapporteur Report 2009 *supra*. n. 5 paras. 43 and 49(c), (l), (m), (n); UNICEF, *Children Accused of Witchcraft: An anthropological study of contemporary practices in Africa*, April 2010 (UNICEF WACRO, Dakar).

¹¹ Malawi acceded to the ICCPR on 22 December 1993. Malawi also signed the first Optional Protocol 1966 to the ICCPR on 11 June 1996.

¹² Malawi ratified the African Charter on 17 November 1989.

¹³ *Chihana v. Republic*, Criminal Appeal No. 9 of 1992 (MSCA).

11. The protections outlined in the UDHR, ICCPR and ACHPR are further strengthened by the Convention for the Elimination of Discrimination Against Women 1979 (hereinafter ‘CEDAW’).¹⁴ The protection of women against discriminatory practices is also enshrined in the Constitution of Malawi.¹⁵ Article 2 of CEDAW sets out the steps by which State Parties undertake to pursue eliminating discrimination against women.¹⁶ Whilst it has been noted that cultural practice may condone measures taken against alleged practices of witchcraft (which can result in extremes of acts of violence), Article 2(d) and (f) specifically obliges States Parties to refrain from engaging in any act or practice of discrimination against women, to ensure public authorities and institutions shall act in conformity with these obligations and to take measures to eliminate such discriminatory practices.¹⁷ These provisions are fortified by the obligation under Article 18(3) of ACHPR which stipulates that:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

12. Special provision is made in relation to the particularly vulnerable position of elderly women under the Protocol on the Rights of Women in Africa, Article 22 of which provides that specific measures commensurate with their physical, economic and social needs must be taken, in addition to a positive obligation to ensure the right of elderly women to freedom of violence, including *inter alia* discrimination based on age and the right to be treated with dignity.

¹⁴ Malawi acceded to CEDAW on 12 March 1987 and became a signatory to the Optional Protocol on 7 September 2000.

¹⁵ Article 20 Constitution of Malawi 1994.

¹⁶ See further Article 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2000, ratified by Malawi 20 May 2005 (hereinafter ‘Protocol on the Rights of Women in Africa’).

¹⁷ See, for example, section 2(2) of the Mpumalanga Witchcraft Suppression Bill 2007 in this context in which emphasis is placed on good relations between neighbours within the community and reference is made within the preamble to the legislation to the human rights enshrined and protected within the constitution. Available online at <http://paganrightsalliance.org/mpumalangawitchcsuppressionbill.pdf>.

13. This must be borne in mind when amending the Witchcraft Act. Women already vulnerable to discrimination based on accusations of witchcraft and are vulnerable to being charged on the basis of this accusation for other offences, which results in the maladministration of justice in breach of their right to a fair trial¹⁸ and undermining the rule of law. This was noted by the Committee on the Elimination of Discrimination Against Women (hereinafter ‘CEDAW Committee’)¹⁹ in which a number of cases where women had been accused as witches, but charged under public order offences were given. In addition to implications for the principle of legality and rule of law in the criminal justice system, this practice of accusations based on a belief in witchcraft made against women also suggests that the presumption of innocence is undermined.²⁰
14. Article 5 of the Protocol on the Rights of Women in Africa stipulates that States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. The provision of support to victims of harmful practices through basic services such as legal and judicial support is stipulated in paragraph (c) of this Article. Furthermore, under Article 8(f), State Parties shall take appropriate measures to reform existing discriminatory laws and practices in order to promote and protect the rights of women in ensuring access to justice and equal protection before the law.
15. The Office of the UN High Commissioner for Refugees has also acknowledged in its guidelines that women are disproportionately identified as witches in some countries, which can result in the accused woman being killed. In this guidance, whilst acknowledging that this practice may be culturally condoned in the claimant’s community of origin, it still amounts to persecution.²¹ It should also

¹⁸ UDHR Article 10; ICCPR Article 14; African Charter Article 7; Protocol on the Rights of Women in Africa Article 8. See below.

¹⁹ Committee on the Elimination of Discrimination against Women, Forty-fifth session, Summary record of 911th meeting, Discrimination, CEDAW/C/SR.911 (31 March 2010) paras. 29-56.

²⁰ See below.

²¹ UNHCR, *Guidelines on Religion-Based Refugee Claims* (HCR/GIP/04/06), para. 24, available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4090f9794&page=search>.

be observed that freedom of belief is not an absolute freedom under international law. It is limited in so far as it does not violate the rights of others. As such, if criminalising witchcraft results in a disproportionate and discriminatory target of women and/or children, this provision would be in breach of international legal standards.

16. The Issues Paper highlights the case of *Nyuzi v. Republic*²² which stated that the Witchcraft Act was intended to protect Malawians from harmful practices by providing a legal mechanism through which the dangerous practice would disappear. It is noted in this regard that many of the mechanisms included in the Act as presently drafted, which make it an offence to accuse a person of witchcraft, are in conformity with regional practice.²³ Such mechanisms directly address the issues relating to discriminatory persecution of women as witches in practice and it is for this reason that it is submitted that the legislation is not in further need of reform in order to ensure that it is compliant with international human rights standards pertaining to women. Strengthening such provisions through education and outreach programmes would be an alternative means in which such protection could be strengthened through non-legislative mechanisms.

NON-DISCRIMINATION OF CHILDREN

17. Children are also increasingly becoming prevalent targets of witchcraft accusations across Africa, including in Malawi. Such children are subjected to psychological and physical violence by family members, their peer group, church pastors, community healers and other members of the community. This violence includes verbal and psychological abuse, torture, abandonment and killing.²⁴ Even if victims survive the physical abuse they receive they are

²² 4 MLR 249.

²³ Witchcraft Act of Zambia, ss.3-4; Criminal Law (Codification and Reform) Act of Zimbabwe, s. 99; Witchcraft Suppression Act No. 3 of 1957 (amended in 1997) s. 1(a). See also *S. v. Mmbengwa & Others* 1988 (3) SA 71 (VSC) and *S. v. Nomgca*, 1980 (2) SA 707 (TkSC) at 708.

²⁴ UNHCR, Witchcraft allegations, refugee protection and human rights: a review of the evidence, January 2009, pages 14-17.

- stigmatised and discriminated against for life and are often abandoned by their parents and forced to live on the street. There they are thus particularly vulnerable to physical and sexual abuse (which often leads to sexually transmitted diseases) as well as addiction to drugs and alcohol.²⁵
18. The reasons for the disproportionate number of children stigmatised as witches or wizards in Africa in recent years are varied but include economic, political and social factors.²⁶ Financial pressures in urban settings, the existence of civil wars and coups leading to widespread loss of life, dysfunctional family relationships, general impoverishment, weak legal systems and inadequate health services in African countries all operate to put pressure on individuals to find a reason why they are suffering – leading many to fall back on African traditions such as belief in witchcraft and the mystical world.²⁷ Certain categories of children are particularly vulnerable to stigmatisation as a witches or wizards, including orphans; children with a physical abnormality or disability; those who have been born in a difficult birth; or albino children.²⁸
 19. The Issues Paper acknowledges that the stigmatisation of children as witches or wizards is an issue of concern in Malawi and commendably, it is for this reason that legislative changes with a view to ensuring the protection of children are being considered.
 20. The BHRC submits that the disproportionate impact of witchcraft allegations on children leads to a need to give child protection issues anxious scrutiny when reviewing the Witchcraft Aft so as to ensure that the rights of children are not compromised when balancing the need to protect society with upholding each individual's right to freedom of belief.

²⁵ UNICEF, *Children Accused of Witchcraft*, April 2010, page 1.

²⁶ UNHCR, *Witchcraft allegations, refugee protection and human rights: a review of the evidence*, January 2009, pages 14-17.

²⁷ UNICEF, *Children Accused of Witchcraft*, April 2010, page 2.

²⁸ UNICEF, *Children Accused of Witchcraft*, April 2010, page 2.

21. Malawi is a party to both international and regional conventions which enshrine the protection of children as paramount. The ICCPR²⁹ and the ACHPR³⁰ both mandate special protections which children ought to be granted by State Parties. More specifically, the United Nations Convention on the Rights of the Child 1989 (hereinafter ‘UNCROC’) protects children’s right to life, right to protection from all forms of violence and abuse, and right to freedom from torture or other cruel, inhuman or degrading treatment.³¹ It also requires state parties to:

*... take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members.*³²

And to:

*... take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.*³³

22. These requirements are particularly relevant in the case of children accused of witchcraft on the basis of traditional beliefs as they are then often discriminated against or punished due to this stigmatisation or are instead tortured in an attempt to cure them of their status as a witch.
23. The African Union Charter on the Rights and Welfare of the Child 1999 (hereinafter ‘African Children’s Charter’) likewise requires State Parties to guarantee the rights in the Charter to all children without discrimination and to ensure that the best interests of the child are the primary consideration in all

²⁹ Article 24.

³⁰ Article 18(3).

³¹ Articles 6, 19 and 37 of UNCROC which Malawi acceded to on 2 January 1991.

³² Article 2, UNCROC.

³³ Article 2, UNCROC.

matters affecting children.³⁴ The African Children's Charter also mandates that State Parties have an obligation to legally ensure children's right to life and to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment. Finally, the African Children's Charter places State Parties under an obligation to take all appropriate measures to eliminate harmful social and cultural practices affecting the health or life of the child.³⁵

24. As outlined above, these provisions are binding on the Malawian Government, and Malawian Courts must have regard to norms of international law in interpreting the Constitution.³⁶ As such, these international and regional legal obligations with respect to the protection of children must be borne in mind when considering any amendment of the Witchcraft Act. This same point has also been made by the United Nations Committee on the Rights of the Child (hereinafter 'the UNCROC Committee') which, in its Concluding Observations on Malawi in 2009, recommended that the Malawian Government '*undertake all necessary steps to harmonise existing legislation, including the Constitution with the Convention on the Rights of the Child*'.³⁷ The UNCROC Committee additionally specifically recommended that Malawi:

Ensure the integration of the principle of the best interests of the child in the Constitution. The Committee further recommends that the State party continue and strengthen its efforts to ensure that the general principle of the best interests of the child is appropriately integrated in all legal provisions as well as in judicial and administrative decisions

³⁴ Articles 3 & 4 of the African Union Charter on the Rights and Welfare of the Child 1999 which Malawi ratified on 17 November 1999.

³⁵ Articles 5, 16 and 21 of African Children's Charter.

³⁶ *Chihana v. Republic*, Criminal Appeal No. 9 of 1992 (MSCA); see also sections 11(2)(c) and 211(1) of the Constitution

³⁷ United Nations Committee on the Rights of the Child, Concluding Report on Malawi, CRC/C/MWI/CO/2, 27 March 2009, para 9.

*and in projects, programmes and services that have an impact on children.*³⁸

25. In relation to harmful traditional practices, the UNCROC Committee has urged the Malawian Government to:

- (a) Adopt legislative and other measures to prohibit harmful traditional practices affecting children;*
- (b) Ensure that legislation prohibiting harmful traditional practices provide for appropriate penal sanctions, and that perpetrators of such acts are brought to justice;*
- (c) Strengthen awareness-raising and sensitization activities for practitioners, families, traditional or religious leaders and the general public adopts a child rights approach in order to encourage the dissemination of a culture of respect for the child;*
- (d) Take concrete measures to eliminate harmful customs, cultural and traditional practices, among others, by engaging with community leaders;*
- (e) Take appropriate measures to eradicate female genital mutilation and other traditional practices harmful to the health, survival and development of children, especially girls;*
- (f) Put in place reporting and complaints mechanisms that are freely accessible to all children without any discrimination and ensure the rehabilitation of victims.*³⁹

³⁸ United Nations Committee on the Rights of the Child, Concluding Report on Malawi, CRC/C/MWI/CO/2, 27 March 2009, para 31.

³⁹ United Nations Committee on the Rights of the Child, Concluding Report on Malawi, CRC/C/MWI/CO/2, 27 March 2009, para 57.

26. Other UN organs, such as the United Nations High Commissioner for Refugees, has highlighted its growing concern about accusations of witchcraft against children and the direct violations of children's rights which such accusations cause.⁴⁰ Likewise, the UNCROC Committee has explicitly denounced the harmful traditional practice of witchcraft allegations being made against children in Angola (2004),⁴¹ the Democratic Republic of the Congo (2009)⁴² and in Nigeria (2010) among other countries.⁴³ The guidance issued by the UNCROC Committee to these countries is instructive in considering the approach which ought to be adopted by the Malawi Law Commission in its review of the Witchcraft Act.

27. The UNCROC Committee recommended that Angola:

*... take immediate action to eliminate the mistreatment of children accused of witchcraft, including by prosecuting the perpetrators of this mistreatment and intensive education campaigns that involve local leaders.*⁴⁴

28. The UNCROC Committee recommended that the DRC:

... take effective measures to prevent children from being accused of witchcraft, including through continuing and strengthening public awareness-raising activities, particularly directed at parents and religious leaders and by addressing the root causes, inter alia, poverty.

⁴⁰ UNHCR, 'Breaking the Spell: responding to witchcraft accusations against children', Research Paper No 197, January 2011, page 1.

⁴¹ UNCROC Committee, Concluding Observations Angola, CRC/C/15/Add.246, 3 November 2004, para 31.

⁴² UNCROC Committee, Concluding Observations on DRC, CRC/C/COD/CO/2, 10 February 2009, para 79.

⁴³ UNCROC Committee, Concluding Observations on Nigeria, CRC/C/NGA/CO/3-4, 11 June 2010, para 68.

⁴⁴ UNCROC Committee, Concluding Observations on Angola, CRC/C/15/Add.246, 3 November 2004, para 31.

*The Committee further urges the State party to implement legislative and other measures to criminalize making accusations against children of witchcraft and bring to justice persons responsible for violence and ill-treatment of children accused of witchcraft. Finally, the Committee recommends that the State party provide recovery and reintegration measures for children who have been victims of such practices.*⁴⁵

29. Finally, the UNCROC Committee recommended that Nigeria:

(a) Criminalize making accusations against children of witchcraft and related abuse at national and state level and ensure that authors of crimes on the basis of witchcraft are prosecuted;

(b) Ensure training to law enforcement agencies and prosecutors on existing relevant penal provisions criminalizing such acts;

(c) Undertake appropriate sensitization and awareness-raising programs, including in cooperation with civil society organizations and with the media, to address the belief in child witchcraft, for the general public as well as for religious leaders;

(d) Regulate those religious institutions found to engage in such practices and request them to adopt child protection policies;

*(e) Undertake a comprehensive research study on the causes and effects of the phenomenon.*⁴⁶

30. It is notable that nowhere in these recommendations is there a recommendation that witchcraft be criminalised as is proposed by the Malawi Law Commission Issues Paper. It is submitted that such a move would be contrary to international standards and could lead to increasing rather than decreasing the persecution of

⁴⁵ UNCROC Committee, Concluding Observations on DRC, CRC/C/COD/CO/2, 10 February 2009, para 79.

⁴⁶ UNCROC Committee, Concluding Observations on Nigeria, CRC/C/NGA/CO/3-4, 11 June 2010, para 68.

children which is carried out in the name of witchcraft due to the difficulties in proving such allegations and the risk that children could be found guilty of the offence of practicing witchcraft on the basis of strict liability. Although it is arguable the criminalising witchcraft *per se* (and therefore acknowledging its existence) would better respect the right to freedom of belief, the right to freedom of belief cannot be used to justify violating either the criminal law or the rights of others.

31. It is abundantly clear that the common threads running through the recommendations of the UNCROC Committee are the prosecution of persons harming children (including by stigmatising them as a witches or wizards) and the provision of special child protection measures for when children come into contact with the law.
32. The Witchcraft Act as presently drafted criminalises the stigmatisation of persons as witches (section 4) and criminalises the practice of mistreating persons to get rid of the inner witch, so-called 'trials by ordeal' (section 3). These provisions therefore are already consistent with international standards in trying to prevent harm being caused to children by means of witchcraft allegations. Likewise, the Malawi Penal Code as is currently in force criminalises the various other forms of ill-treatment which are often occasioned as a result of witchcraft - including assault, wrongful imprisonment, rape, murder, the eating of human flesh etc. There is accordingly no need for further law reform in order to comply with international standards demanding the prosecution of persons harming children in the name of witchcraft.
33. Other law reform measures which may be of some further benefit however include a legislative commitment to upholding the provisions of the various international and regional treaties protecting children's rights in addition to special protective measures for children when they are being dealt with by the criminal justice system which are legislatively enshrined. The Child Rights Act

which was enacted in 2008 in the Akwa Ibom province of Nigeria provides an excellent example of such legislative measures to protect children.

34. Legal responses can only provide a partial solution at best to the problem of child witchcraft and accordingly it is recommended that non-legislative measures, such as the education and outreach programmes suggested by the UNCROC Committee, also be considered by the Malawi Law Commission when making its final recommendations.

INTERNATIONAL FAIR TRIAL STANDARDS

35. As noted above, fair trial rights are an essential component of the rule of law in any democratic nation:

*The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.*⁴⁷

36. That is no doubt why the Malawian Constitution provides for detailed due process protections, as do the key international conventions to which Malawi is a party. The UDHR, ICCPR and ACHPR all afford great prominence to these protections. Notably, general reservations to the right to a fair trial in the ICCPR are impermissible, being ‘*incompatible with the object and purpose of the Covenant*’⁴⁸. Similarly, Article 7 ACHPR is considered “*non-derogable*”⁴⁹ for general purposes.
37. Significant issues are likely to arise from a due process perspective from changes to the Witchcraft Act, as the Issues Paper recognises.⁵⁰ In particular, the

⁴⁷ Human Rights Committee (hereinafter ‘HRC’) General Comment 32, at I.2

⁴⁸ General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 8.

⁴⁹ African Commission decision 218/98 Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria at 27

⁵⁰ We address here in particular the question there posed, “in case witchcraft is criminalised, how would the law deal with the issue of evidence?”

key proposal there mooted, that the Act be amended to state that witchcraft exists and to introduce an offence of practicing witchcraft, raises several serious concerns. Questions of policy and cultural practice and preference, including whether witchcraft should be considered to exist, what acts should constitute witchcraft, and whether it should be criminalised, are for the Malawian people. Those same people, however, must remain protected by the Constitutional and international legal framework securing the rule of law, whatever legislative changes are introduced.

38. The 1994 Constitution makes clear that no law may be made which ‘*abolishes or abridges the fundamental rights and freedoms*’ it confers (section 11(4)). It is the ‘*ultimate source of authority*’ (section 10(2)). Fair trial rights are an integral part of the constitutional Bill of Rights. Specifically, this provides that

[42] (2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right--

(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent⁵¹ and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her;

⁵¹ Underlining added

(d) save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;

(e) to be released from detention, with or without bail unless the interests of justice require otherwise;

(f) as an accused person, to a fair trial, which shall include the right--

(i) to public trial before an independent and impartial court of law within a reasonable time after having been charged;

(ii) to be informed with sufficient particularity of the charge;

(iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(iv) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

(v) to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;

(vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;

(vii) not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;

(viii) to have recourse by way of appeal or review to a higher court than the court of first instance;

(ix) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and

(x) to be sentenced within a reasonable time after conviction;

[...]

39. These provisions mirror in important respects the protections of the international conventions to which Malawi is a party. Under the Constitution, as we understand it, international agreements ratified by an Act of Parliament are considered part of the law of the Republic ‘*if so provided in the act*’ of ratification (section 211 (1)). If, however, they were entered into before the commencement of the Constitution, they remain part of the law of the Republic unless Parliament subsequently provides otherwise (section 211(2)). Those norms which form part of the body of customary international law have ‘*continued application*’ unless inconsistent with the constitution or an Act of Parliament (section 211(3)). Moreover, courts are obliged to have regard to have regard to ‘*current norms of public international law and comparable foreign case law*’ when interpreting the Constitution itself (section 11(2)(c)), and in determining whether a limitation on the human rights guaranteed in the Constitution is permissible, the Courts must determine whether the limitation proposed is ‘*recognised by international human rights standards*’ (section 44(2)) as well as necessary in an open and democratic society. It is therefore essential not only that any amendments to the Witchcraft Act take appropriate notice of potential clashes with the Constitution, but also with binding treaty norms and provisions of customary international law. Even if due process guarantees were not an integral part of the Constitution, Malawi would be bound to observe or have regard to the principles there laid out.

40. This submission does not attempt to address every aspect of fair trial rights,⁵² but simply flags those of particular concern in this context to assist the Commission, and asks that the Commission bear in mind in making its decisions that these obligations will remain binding on Malawi in all witchcraft related trials. The *'critical factor is whether the process is fair, just and impartial'*.⁵³
41. Every criminal trial is founded, as the Malawian constitution recognises, upon the belief that the accused is to be presumed innocent. Anyone charged with a criminal offence, including witchcraft, must be afforded a fair trial in which they have every opportunity to understand and meet the case against them. That is *'a requirement of customary international law'*.⁵⁴ The question of what is a 'fair' trial in any particular case is fact-sensitive. In each of the relevant conventions and the Constitution, the core guarantee is therefore phrased in general terms. Minimum standards are usually - but not always - then made explicit. These are not aspirations, or guidelines, but a description of absolute minimum protections without which there cannot be a fair trial, but even with which, more may be needed in any given situation.
42. The most relevant provisions of international conventions relevant in the Malawian legal framework appear to be the following:

UDHR:

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*⁵⁵

[...]

⁵² For example, length of pre-trial detention, the right to be present during one's trial, to have access to a lawyer and other areas while of enormous importance, are not likely to be directly engaged by the proposed changes any more than existing offences under the Act.

⁵³ African Commission decision 218/98 Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria at 27.

⁵⁴ ICTY *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, at 104, 113 (Mar. 24, 2000)

⁵⁵ Article 10, UDHR

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

*(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.*⁵⁶

ICCPR:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

⁵⁶ Article 11, UDHR

- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
- (c) To be tried without undue delay;*
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
- (g) Not to be compelled to testify against himself or to confess guilt.⁵⁷*

ACHPR:

- 1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;*
 - (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.**

⁵⁷ Article 14, ICCPR

2. *No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.*⁵⁸

43. As the African Commission has explained, Article 7 ACHPR (like the UDHR and ICCPR) provides an overarching guarantee, with ‘*inter-linked*’⁵⁹ and ‘*mutually dependent*’⁶⁰ sub rules that are elaborated upon in various Communications. Where an individual is charged with a criminal offence, all state parties must ‘*initiate proceedings that [...] comply with fair trial standards as stipulated by the African Commission in its Resolution on the Right to Recourse and Fair Trial*’ (hereinafter ‘the resolution’, adopted 1992 in Tunis). Those standards are ‘*elaborated upon*’ in its Guidelines on the Right to Fair Trial and Legal Assistance in Africa (hereinafter ‘the guidelines’, adopted in Niger in 2003).⁶¹ The ‘*spirit*’ of Article 7 is as important as the letter in judging any particular proceedings.⁶² That approach is taken consistently across conventions on fair trial rights, with the European Court of Human Rights holding that ‘*in a democratic society... the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision*’.⁶³
44. The African Commission has frequently drawn ‘*inspiration*’ in considering the content of the ACHPR’s fair trial rights from ‘*international law on human and people’s rights*’ and thus taken into consideration other conventions, customs and general principles of law, including the UDHR and ICCPR⁶⁴. Articles 60

⁵⁸ Article 7, ACHPR

⁵⁹ 222/98 and 229/99 - *Law Office of Ghazi Suleiman/Sudan* at 52

⁶⁰ 48/90 *Amnesty international/Sudan & Ors* at 62

⁶¹ These are extremely important in drawing out the African perspective. They are not reproduced in full here, but referred to where adding relevantly to the picture.

⁶² 199/97 *Odjoriby Cossi Paul/Benin* at 28

⁶³ *Delcourt v Belgium* Application No. 2689/65, judgment of 17 January 1970, para 25

⁶⁴ See 224/98 *Media Rights Agenda/Nigeria*

and 61 of the Convention specifically empower it to do so. Any domestic measures or practices in Malawi must thus be reviewed against the full panoply of conventions to ensure consistency.

The constituent elements of concern

45. The presumption of innocence is the cornerstone of a fair trial. It is therefore for the prosecution to discharge the burden of proving beyond reasonable doubt that the accused did in fact commit the offence, as the Issues Paper explains. The first question to be considered before any steps are taken to criminalise witchcraft must therefore be: how would allegations or practising witchcraft or its use in other offences be proven? As the Issues Paper recognises, proving allegations would be ‘*very difficult*’, because believers allege that it involves supernatural powers. By their nature, these are insubstantial and ephemeral, loosely defined concepts. It is difficult to see how the existence of powers, or prior use of them by a specific individual, could be safely tested in a court of law. Hence the possibility was raised of making witchcraft offences ones of strict liability (Issues Paper page 9). This is a concerning proposal. As Judge Chikopa stated, ‘*evidence of intention*’ must be insisted upon.⁶⁵ It would, in the authors’ views, be incompatible with the fundamental right to be presumed innocent to introduce strict liability in this area. While removing the need to evidence practice might assist the prosecution in overcoming what must otherwise be very significant evidential hurdles, the absence of any clear incontrovertible fact evidence (such as the age of a child who has been raped) in witchcraft scenarios on which to base the liability in question makes this area wholly unsuitable. Such a change would mean that individuals would indeed, be required to ‘*prove themselves not guilty*’. While the prosecution could be expected to struggle to bring forward sufficient evidence to substantiate a charge of practicing witchcraft, it is even more troubling to consider the difficulties which an accused would face in refuting it.

⁶⁵ *Republic v Cuthbert Hara*, Conformation Case No. 492 of 2007

46. Certainty is a further essential component of the rule of law. The need for that certainty (to avoid arbitrariness in criminal justice) is a key reason for the further requirement that persons charged with an offence be informed of the nature and cause of the criminal charges brought against them (see, for example, ICCPR 14(3)(a)). It also underlies the guarantee that no person shall be charged with an offence that was not one at the time the act was committed. This raises obvious concerns for any legislation outlawing witchcraft ‘practices’ or similar. These would have to be very carefully defined. There are real concerns arising from the example of Cameroon, where section 251 of the Penal Code 1967 criminalises witchcraft practice. Witchcraft trials since the 1980s have ‘*led the way, often convicting witnesses on the uncorroborated expert testimony of a single traditional healer*’.⁶⁶ This looseness and uncertainty inherent in the offence itself would present similarly concerning issues in any Malawian legislative changes.
47. Equality of arms must be secured in any trial between the prosecution and the defence. An application of this is that the accused must have adequate time and facilities to prepare their defence (see for example ICCPR 14(3)(b)). ‘*Adequate facilities*’ includes access to all documents, materials and other evidence on which the prosecution intends to rely.⁶⁷ It also includes all potentially exculpatory material. Simple awareness of the existence of such material would thus be insufficient – the defence must have the opportunity to access, assess and prepare effectively to challenge all evidence against him before and in the courtroom. The Guidelines express this as an entitlement to the ‘*opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence*’ [section 2(e)]. They explain that essential to the right to adequate preparation of a defence is the right to ‘*all relevant information held by the prosecution that could help the accused exonerate him or herself*’ [section 3], and to ‘*know and challenge all the evidence which may be used to support*’ [section 6]. A duty is thus laid upon the authorities to ensure

⁶⁶ Tebbe, N. *Witchcraft and Statecraft: Liberal Democracy in Africa*, The Georgetown Law Journal Vol. 96 pps. 183-236 (2007), p. 232.

⁶⁷ HRC concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

defence lawyers have ‘*access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients*’ [s.4]. It is difficult to see how ‘*supernatural evidence*’ could be accessed or challenged in this way. This is no doubt in part why the Issues Paper highlights what is termed the ‘*taxing issue of evidence*’ (page 9).

48. Similarly, another application of the principle is the right of the accused to have examined the witnesses against them, and to compel them to attend court in the same manner as the prosecution (for example ICCPR 14(3)(e)). The Guidelines note that during the hearing itself, ‘*the accused has a right to examine, or have examined, witnesses against him or her*’ whose testimony is relevant and ‘*likely to assist in ascertaining the truth*’. The maximum possible opportunity for the evidence to be ‘*tested and contested*’ is needed.⁶⁸ Should the Act be amended to criminalise witchcraft, appropriate safeguards for ensuring attendance of and proper examination of witnesses will be very important as it is likely that oral testimony will be significantly relied upon. Similarly, it will be particularly important to ensure a fair and sensible approach to hearsay evidence, whose use might be expected to rise. Such evidence is necessarily extremely difficult to challenge and thus raises concerns for the safety of trials in which it features prominently.
49. The Constitution, and conventions, specifically guarantee the right not to be compelled to testify against oneself or to confess guilt (see ICCPR 14(3)(g) and also Article 7(1)(b) ACHPR⁶⁹). While it is axiomatic that there must be no direct or indirect physical or psychological pressure on the accused to confess,⁷⁰ it is of obvious concern that the pressure upon the prosecution and investigating authorities to obtain a confession is likely to be extremely high in witchcraft

⁶⁸ See, for example, ICCPR, The Netherlands A/56/40.1 (2001)76 at 82(12)

⁶⁹ in which the rule against confessions made under duress is implicit, see African Commission decision 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria* at 40.

⁷⁰ To ill treat the accused or force them to sign a confession under duress violates not only article 14(3)(g) ICCPR but also article 7.

related proceedings precisely because of the evidential hurdles presented. Safeguards would need to be strictly observed to ensure that any statements made by the accused have been given of their own free will. The burden will remain on the state to prove that there has been such voluntary self-incrimination where there is evidence of abuse.⁷¹

50. Also of concern, is the special stigma attached to allegations of practising witchcraft, and the possible effects of this on the right to a defence. Great care would need to be taken to ensure that the presiding judge in such trials is alive to this risk, and not seen to condone any public hostility. As the HRC has made clear, a hearing will not be fair where the Defendant is faced with the expression of a hostile public attitude in Court which is tolerated by the judge, or is exposed to any other manifestation of hostility which affects his or her freedom to put his or her defence.⁷² The Guidelines further note that the accused is entitled to ‘*a decision based solely on evidence presented to the judicial body*’ [section 2(h)]. No other countervailing factors (including public fear or opprobrium) can be allowed to affect the outcome. Hearings must, however, necessarily remain in public, other than in certain exceptional circumstances⁷³ (see ICCPR 14(1)). The African Commission has previously noted that the exceptional circumstances that might justify exceptions to this rule as described in Article 14(1) ICCPR are ‘*exhaustive*’.⁷⁴
51. Finally, the Guidelines refer specifically to the importance of ‘*equality of access by women and men to judicial bodies and equality before the law in any legal*

⁷¹ HRC Communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 253/1987, *Kelly v. Jamaica*, para. 7.4. For comparative purposes, the concerns of the UK High Court as to incentives to secure confessions and the suggested link to abuse should be noted *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) (Divisional Court) at 291. It should also be noted, relevantly to concerns as to the rise of confession evidence, that under English law, an accused cannot “confess” to the acts of others which he has not seen and which he can only have knowledge of by hearsay (*Surujpaul v R*, 42 CrAppR 266 at 273, PC).

⁷² HRC Communication No. 770/1997, *Gridin v. Russian Federation*, para. 8.2, General Comment No.32 at 25.

⁷³ General Comment 32 at 29.

⁷⁴ *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98 at 52.

proceedings’ [section 2(c)] and ‘*respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused*’ [section 2(d)]. Given the concerns above as to the disproportionate effect of witchcraft allegations on women, these will be of particular importance in any criminal trials.

52. There are therefore several areas in which an amendment to recognise and criminalise witchcraft would raise significant concerns from a fair trial perspective. Consideration of the fundamental due process guarantee of customary international law and the minimum standards elaborated in numerous binding international conventions (as well as the Malawian Constitution) makes clear how difficult it would be to protect the accused adequately in such trials. The particular challenges posed by an offence whose elements are necessarily metaphysical are clear. It is difficult to see how the prosecution could discharge its evidential burden without compromising the basic requirements of fairness and justice when the evidence is likely to be insubstantial and invisible. It is for the Malawian people to determine how they wish to deal with acts believed to constitute witchcraft, harmful or otherwise, but the harm that would be done to the rule of law from any dilution of existing procedural guarantees is likely to be significant.

CONCLUSION

53. Legislation trying to regulate what people believe (or disbelieve) is wrought with difficulties, due to the fundamentally individualised nature of belief and the generalised mechanism which legislation embodies. However, when considering any amendment to legislation regulating the use of witchcraft, the harm which can be done to women and children accused of being witches and the difficulties which an accused may face in accessing justice are imperative considerations. The issues underpinning the modern day resurgence of belief in witchcraft, such as poverty, inadequate health care, and poor social welfare and economic opportunities, should also be taken into account when considering the potential

consequences of amending the Witchcraft Act. Measures to strengthen the justice system to ensure better outcomes for all, and compliance with internationally recognised fair trial standards should also be incorporated in any legislative reform program.

54. Traditional beliefs can be incorporated and provided for within a legal system without infringing on the rights of others. For example, the Constitution of Ghana recognises that the common law, as one of the listed sources of law, includes the rules of customary law *'applicable to particular communities in Ghana.'*⁷⁵ Moreover, in countries such as South African and Zimbabwe, which have adopted legislation recognising and regulating the practice of traditional healers, this has served to promote traditional beliefs in a positive way, in part aimed to remedy past discrimination,⁷⁶ whilst regulating practices that may be perceived as potentially dangerous and open to abuse in society.⁷⁷ But such regulations must be comprehensive in order to ensure that the rule of law and international human rights obligations are upheld.
55. It is imperative that all the potential consequences of criminalising witchcraft be considered by the Commission in its review of the Witchcraft Act. Any change in legislation which results in increased discrimination against women, children and other vulnerable groups, as well as a move away from established fair trial standards, would result in Malawi being in breach of its international legal obligations. The wealth of data which establishes that women (particularly the elderly) and children are disproportionately targeted by witchcraft allegations and beliefs and the potential decline in access to justice rights weighs heavily in favour of suggesting that criminalisation of witchcraft would have adverse consequences for the rule of law in Malawi. The Special Rapporteur on Extrajudicial Killings has recommended against criminalisation of witchcraft and has encouraged Governments to play their part in ending discriminatory and

⁷⁵ Ghana Constitution ch. 4, arts. 11(2)-(3) (1992), WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW p. 488

⁷⁶ Witchcraft and political pressure, The Georgetown Law Journal p.222

⁷⁷ Ibid, p.224

vigilante practices by taking all available steps to prevent crimes against alleged witches and prosecute and punish perpetrators.⁷⁸ It is submitted that these recommendations are highly relevant to the work of the Malawi Law Commission when conducting its review of the Witchcraft Act and ought to be weight when reaching conclusions as to potential legislative amendments.

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⁷⁸ Special Rapporteur Report 2009 *supra*. n. 5 paras. 55 and 56.