

SUBMISSION TO THE UN COMMITTEE AGAINST TORTURE CONCERNING MALAWI'S INITIAL REPORT

75th Session of the UN Committee against Torture, 30 September 2022

INTRODUCTION

1. [REDRESS](#) and the [Centre for the Development of People](#) (CEDEP) make this submission to draw the Committee against Torture's attention to the issue of discriminatory violence affecting individuals identifying or perceived as LGBTIQ+ in Malawi (paragraph 30 LoIPR). This submission is based on our extensive experience working against torture and on LGBTIQ+ issues in Malawi.
2. This submission is divided into three main sections. The first section describes the context and forms of violence suffered by LGBTIQ+ individuals in Malawi and how such violence amounts to torture and other ill-treatment. The second section addresses the State's failure to prohibit, prevent, investigate, and prosecute torture and other ill-treatment against LGBTIQ+ persons. The third section outlines recommendations for legislative and policy reforms, and education initiatives, aimed at strengthening the State's capacity to prevent and respond to discriminatory torture against the LGBTIQ+ community.

THE CONTEXT OF LGBTIQ+ TORTURE IN MALAWI

3. LGBTIQ+ persons in Malawi lack legal and political protection from discrimination and violence. In a hostile environment, members of the LGBTIQ+ community suffer severe acts of violence inflicted by State and non-State actors, which often amount to torture and other ill-treatment.¹
4. Same-sex acts are criminalised by Malawian Law (Sections 153(a), 153(c), 154 and 156 of the Malawi Penal Code Act), which increases the risk of violence by State authorities and encourages violence by non-State actors. LGBTIQ+ persons in Malawi are also stigmatised, and there are numerous instances of hate speech against them on social media and published in traditional media outlets, as well as derogatory remarks made by religious leaders and politicians.²
5. Due to fear of reprisals and further discrimination, LGBTIQ+ victims and survivors often endure the physical and psychological trauma without reporting the case to relevant State authorities. This results in underreporting which, combined with inadequate investigations of cases that are reported, ultimately results in low rates of accountability for such discriminatory torture.³

¹ REDRESS, [UNEQUAL JUSTICE: Accountability for Torture Against LGBTIQ+ Persons in Africa \(Unequal Justice\)](#), May 2022; and cases reported to the Centre for the Development of People (CEDEP). See also: Southern Africa Litigation Centre (SALC), ["We get traumatized in different ways", Key issues related to sexual; orientation, gender identity and expression identified by a community consultation in Malawi \(Key issues related to SOGI in Malawi\)](#), October 2020, p. 24; Human Rights Watch (HRW), [Submission on the Republic of Malawi to the UN Human Rights Committee 131st session \(Submission to HRC 131\)](#), March 2021; Nyasa Rainbow Alliance (NRA) and others, [Civil Society Report on LGBTI Rights \(Contribution to the List of Issues Prior to Reporting\)](#) to Human Rights Committee 131st session (Civil society report to HRC 131), March 2021.

² NRA and others, Civil society report to HRC 131.

³ REDRESS, *Unequal Justice*.

Forms of LGBTIQ+ violence by State and non-State actors

6. Torture and other ill-treatment against the LGBTIQ+ community in Malawi by State and non-State actors take many forms, including rapes, so-called “corrective” rapes, physical assault, threats of violence, violent arbitrary arrests, among others.
7. Reports of State violence include cases of transgender women stripped naked in police stations to identify their genitalia, lesbian women raped and insulted for their sexual orientation, and transgender men physically assaulted by police officers as a result of their gender identity.⁴ In one particular case, a policeman was blackmailed and detained by his fellow officers for his homosexual orientation. During his detention, he was physically assaulted and repeatedly molested by female police officers through sexual stimulation.⁵
8. Non-State actors also physically, verbally, and sexually assault individuals due to discrimination against their sexual orientation or gender identity, including with the acquiescence of State actors. LGBTIQ+ individuals are often refused medical or police assistance after the attacks, which at times are also followed by verbal aggression from public officers.⁶ In one particular case, a transgender woman was attacked by a mob, physically assaulted and stripped naked, whilst the attackers claimed that she was being punished for being “non-conforming”. The victim requested the aid of the police but was denied assistance and insulted by the officers. The recording of the assault was uploaded to social media, and yet the case has not been prosecuted or investigated.⁷
9. LGBTIQ+ persons often do not report cases of violence to State authorities nor request medical assistance due to fear of further discrimination, harassment, and abuse. For instance, a lesbian woman who was assaulted by her family and burnt with hot iron, decided not to report the episode to the police, fearing detrimental repercussions.⁸ Another case concerns a lesbian woman who was raped by a man with the purpose of “correcting” her sexual orientation. Although she reported the rape to the police, she did not disclose her sexual orientation to avoid discrimination and possible further assault and imprisonment. The attacker was convicted and sentenced to 14 years imprisonment for rape, but the case did not consider the discriminatory motive behind the act.⁹

FAILURE TO PROHIBIT, PREVENT, INVESTIGATE, AND PROSECUTE LGBTIQ+ TORTURE

10. The prevalence of cases of torture and ill-treatment against the LGBTIQ+ community by both State and non-State actors, combined with low rates of accountability, demonstrate the failure of the State to prohibit, prevent, and respond to such violence effectively. This can be attributed to different factors, including the absence of a specific offence of torture, a lack of understanding of LGBTIQ+ rights, the existence of laws and policies that discriminate against this community, and a lack of adequate training on anti-torture standards and LGBTIQ+ rights. Torture prevention and prohibition in general is also hindered by inadequacies in the monitoring of places of detention and the acceptance of evidence obtained by torture in judicial proceedings.¹⁰¹¹

Absence of a specific offence of torture

⁴ Ibid *Unequal Justice*; and cases reported to CEDEP.

⁵ NRA and others, Civil society report to HRC 131.

⁶ Ibid, Civil society report to HRC 131.

⁷ Ibid, Civil society report to HRC 131.

⁸ REDRESS, *Unequal Justice*.

⁹ Ibid, *Unequal Justice*.

¹⁰ Ibid, *Unequal Justice*.

¹¹ CTI & REDRESS, [Anti-Torture Standards in Common Law Africa: Good Practices and Way Forward](#), April 2022.

11. The Constitution of Malawi prohibits “torture of any kind or cruel, inhuman or degrading treatment or punishment” (section 19.3), noting that “there shall be no derogation with regard to the prohibition of torture and cruel, inhuman or degrading treatment or punishment” (section 45.4). It also provides relevant safeguards against torture and other ill-treatment in cases of detention under a state of emergency, including notification of the detention to family members within 48 hours, and regular judicial review of the detention (section 45.7).
12. However, Malawi has not yet criminalised torture as a separate offence under domestic law, which means that acts amounting to torture can only be prosecuted as other ordinary criminal offenses, such as assault, grievous harm, rape, among others.
13. Prosecution of violence against LGBTIQ+ persons as torture – in cases where the requirements of article 1 of UNCAT are met – is essential to alert perpetrators, victims and the general public of the gravity of the crime and to deter further violence. It is also necessary to ensure acts of torture are punished with adequate penalties, proportionate to the gravity of the crime, as torture would be expected to have more severe penalties than other ordinary offences.¹²
14. Additionally, it is important that a ‘gender perspective’ informs the approach to the criminalisation of torture, because this will shed light on the gravity of such violations rooted in discriminatory social norms around gender and sexuality, and ensure these are acknowledged, addressed and remedied.¹³ Such a perspective also provides “a framework for addressing multiple asymmetries of power (deriving from how sex is constructed and operates in societies), including those that feed violence and discrimination against women; and ...[is] also a sharp lens for analysing the root causes of violence and discrimination based on sexual orientation and gender identity and expression.”¹⁴
15. Finally, a gender perspective raises public awareness of LGBTIQ+ violence as torture and the prevalence of such crime, providing grounds for the public to monitor and challenge the State regarding its duty to prevent and respond to torture committed against LGBTIQ+ persons.¹⁵

Monitoring mechanisms

16. Systematic and regular monitoring of all places of detention is crucial to protect the rights of persons deprived of their liberty, including LGBTIQ+ persons, due to the inherent vulnerability and power imbalance associated with such places and in particular this community. It is essential to assess compliance with legal and procedural safeguards and facilitate the examination of conditions of detention, the routine for detainees and the activities they can undertake. Access to services and facilities, with special attention to vulnerable groups, including LGBTIQ+ persons must also be monitored.
17. As noted by the former Special Rapporteur on Torture on his report on conditions of detention, “within detention facilities, there is usually a strict hierarchy, and those at the bottom of this hierarchy, such as children, the elderly, persons with disabilities and diseases, gay, lesbian, bisexual and trans-gender persons, suffer double or triple

¹² REDRESS, [Legal Frameworks to Prevent Torture in Africa: Best Practices, Shortcomings and Options Going Forward \(Legal Frameworks to Prevent Torture in Africa\)](#), March 2016.

¹³ UN Human Rights Council (UNHRC), [Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment \(SRT Report 2016\)](#), 5 January 2016, UN Doc. A/HRC/31/57, para. 6.

¹⁴ UNHRC, [Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity \(IE SOGI Report 2021\)](#), 3 June 2021, UN Doc. A/HRC/47/27, para. 7.

¹⁵ CAT, [General Comment N°3: Implementation of Article 14 by States Parties \(General Comment No. 3\)](#), 13 December 2012, UN Doc. CAT/C/GC/3.

discrimination”.¹⁶ A global report released by the Association for the Prevention of Torture notes that, where data is available, LGBTIQ+ persons in detention “are reported to be among the groups most exposed to violence, in particular sexual violence”.¹⁷

18. Malawi has not ratified the OPCAT – despite having supported such a recommendation in the latest Universal Periodic Review in 2020¹⁸ – and it has not implemented a specific National Preventive Mechanism, which are important steps to comply with monitoring obligations under UNCAT. Nonetheless, Malawi has an Inspectorate of Prisons which is mandated by the Constitution to monitor “conditions, administration, and general functioning in penal institutions taking due account of applicable international standards” (section 169). The Inspectorate is formed by the Chief Commissioner of Prisons, a member of the Prison Service Commission, a justice of appeal, a magistrate, and the Ombudsman. The Inspectorate produces reports with recommendations, which are presented to Parliament and meant to become public, though there are limited records of such reports being published.
19. Since 2014, NGOs have pointed out numerous issues related to the operation of the Inspectorate, related to its limited capacity, independence, and the fact that its recommendations are not taken seriously by Parliament.¹⁹ Indeed, in December 2021, members of the Inspectorate expressed concern regarding conditions of detention and with the fact that, despite the submission of reports, Parliament had not discussed their recommendations for the previous seven years.²⁰
20. The Malawi Human Rights Commission has a general duty to monitor the human rights situation in the country, including “to study the status and effect of legislation, judicial decisions and administrative provisions for the protection and promotion of human rights”.²¹ It prepares reports with specific recommendations or observations to be considered by the authorities concerned or to any other appropriate authorities. In practice, the Commission has identified various obstacles which affect its ability to function properly, including a general lack of respect for its recommendations and human rights standards by both duty bearers and rights holders.²²

Complaints and investigations into LGBTIQ+ torture

21. Under UNCAT, the State of Malawi has the obligation to ensure victims have the right to complain, to protect victims and witnesses against ill-treatment or intimidation as a consequence of their complaint or any evidence presented, and to effectively investigate all instances of torture and other ill-treatment. Also, as ruled by international human rights courts, cases of violence based on discrimination impose a reinforced duty to investigate and should not be treated on an equal footing with ‘ordinary cases’.²³ Cases of violence

¹⁶ Human Rights Council, [Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment \(SRT Nowak Report Add 5\)](#), Manfred Nowak, Addendum, 5 February 2010, UN Doc. A/HRC/13/39/Add.5.

¹⁷ Association for the Prevention of Torture (APT), [Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide \(LGBTIQ Persons Deprived of Liberty\)](#), December 2018.

¹⁸ Human Rights Council, [Report of the Working Group on the Universal Periodic Review, Malawi, Addendum](#), 18 February 2021, UN Doc. A/HRC/46/7/Add.1.

¹⁹ Centre for Human Rights and Rehabilitation (CHRR) and others, [Civil Society Report on the Implementation of the ICCPR](#) (Replies to the List of Issues CCPR/C/MWI/Q/1/Add.1) (**Civil society report to HRC Add.1**), 13 June 2014.

²⁰ AllAfrica, Malawi: [Prison Inspectorate Decries Slow Pace of Prison Reforms](#), 28 December 2021.

²¹ Malawi Human Rights Commission, [Strategic Plan 2018-2022](#), June 2018.

²² Ibid.

²³ For instance, the European Court of Human Rights noted that “Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with

against LGBTIQ+ persons also require special care, due to the inherent vulnerability of this group.

22. As mentioned above, in Malawi, LGBTIQ+ victims and survivors of violence, including violence amounting to torture and ill-treatment, often do not report it to the authorities due to fear of further discrimination and abuse. As noted by the Southern Africa Litigation Centre (SALC) in relation to the LGBTIQ+ community in Malawi in 2020, a “community consultation and other studies confirm the lack of trust in and access to complaints mechanisms” and recommended that such mechanisms “should guarantee confidentiality and immunity from prosecution for persons reporting rights violations”.²⁴
23. In terms of investigations, cases of LGBTIQ+ torture and other ill-treatment in Malawi are often not adequately investigated, not least because the discriminatory nature of the act is not taken into account. The High Court of Malawi has recognised an urgent need to improve investigations into officer misconduct, including torture and other ill-treatment, having ruled that State authorities failed to investigate incidents of sexual and gender-based violence which breached the victims’ rights to dignity, and amounted to inhuman and degrading treatment and punishment:

Such failure to promptly and effectively investigate the sexual violence, contributes to the impunity of perpetrators of such crimes and reduces the number of women who report such cases because they lack confidence in the state security institutions (...). Effective access to justice is an essential human right and it starts with effective investigation of violation of the human rights.²⁵

24. Although no similar decisions were identified in relation to torture and ill-treatment against LGBTIQ+ persons, the standards can be equally applicable, and the lack of prosecution and accountability for discriminatory acts of violence against the LGBTIQ+ community can also be attributed to a lack of adequate investigations. This issue could be addressed, for example, by the development and adoption of a Protocol on the effective investigation of LGBTIQ+ violence (including torture) and training on anti-torture standards and issues affecting LGBTIQ+ persons to relevant State authorities, among other initiatives. However, for as long as same-sex activities are criminalised in Malawi this is unlikely to happen, as addressed below.

Criminalisation of same-sex activities

25. The Malawian Penal Code Act criminalises consensual same-sex activities, punishable with up to 14 years of imprisonment (sections 153(a), 153(c) and 156 of the Malawi Penal Code Act). Criminalisation of same-sex activities can be detrimental to the prevention, investigation, and prosecution of torture and other crimes motivated by discrimination on grounds of sexual orientation and gender identity. It tends to legitimise the use of violence against LGBTIQ+ individuals, and increases the chance of physical and mental assault of victims upon arrest.²⁶

Article 14 of the Convention” (non-discrimination). It added that “without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes”: European Court of Human Rights (ECtHR), *Identoba and others v. Georgia*, Application no. 73235/12, 12 May 2015, paras. 67 and 77; ECtHR, *M.C. and A.C. v. Romania*, Application no. 12060/12, 12 April 2016, paras. 113 and 124.

²⁴ SALC, Key issues related to SOGI in Malawi, p. 31.

²⁵ Malawi High Court General Division, *S v IG of Police*, Clerk of the National Assembly & Minister of Finance ex-parte MM & Ors. (Judicial Review 7 of 2020) [2021] MWHC 28 (09 March 2021), paras 112 and 117.

²⁶ The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), [State Sponsored Homophobia 2019](#), March 2019.

26. Criminalisation also discourages LGBTIQ+ victims from reporting crimes and disclosing their sexual orientation or gender identity when they seek help from the authorities. This prevents investigative officers and prosecutors from exposing the discriminatory motive behind crimes, hindering the examination of the gravity and prevalence of torture perpetrated with discriminatory purposes on grounds of sexual orientation and gender identity. Ultimately, it contributes to low rates of accountability for torture and other ill-treatment perpetrated against the LGBTIQ+ community and it contributes to the perpetuation of such violence.
27. It is relevant to note that a moratorium on arrests and prosecutions for consensual same-sex conduct was issued in Malawi in 2012 and confirmed in 2015. However, there is still uncertainty as to the status of the moratorium, as one year later “following successful litigation initiated by Christian religious leaders, the Mzuzu High Court issued an order suspending the moratorium, pending judicial review” by the Constitutional Court.²⁷ This uncertainty continues to prevent LGBTIQ+ persons from seeking aid of law enforcement and health workers due to the fear of further violence and discrimination.²⁸ Moreover, the law still stands and LGBTIQ+ persons continue to be stigmatised and targeted, suffering from violence that amounts to torture or ill-treatment by both State and non-State actors.
28. Importantly, in the latest UPR cycle in 2020, Malawi has noted but not supported numerous recommendations to decriminalise consensual same-sex relations, to protect LGBTIQ+ persons and fight discrimination based on sexual orientation and gender identity.²⁹ This recent position contradicts and hinders the implementation of recommendations supported by Malawi in the 2015 UPR cycle, particularly to take “effective measures to protect lesbian, gay, bisexual and intersex persons from violence and prosecute the perpetrators of violent attacks” and to guarantee that LGBTIQ+ persons “have effective access to health services, including treatment for HIV/AIDS”.³⁰ The fact that those recommendations were not adopted in 2020 also demonstrates the Government’s unwillingness to address the issues stressed in this submission and to effectively protect LGBTIQ+ persons from torture and other forms of violence.

Exclusion of torture-tainted evidence

29. Although under UNCAT torture-tainted evidence shall not be admissible in judicial and administrative proceedings, the Criminal Procedure and Evidence Code in Malawi does not expressly prohibit the use of confession evidence obtained by torture. In fact, it notes that “evidence of a confession admitted under subsection (1) [not freely and voluntarily] may be taken into account by a court, or jury, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true” (Section 176(3)).
30. According to the State’s initial report to this Committee, domestic courts have interpreted this provision to mean that evidence obtained by torture violates the constitutional right not to self-incriminate, albeit they have not examined the link between admissibility of evidence and the absolute prohibition of torture (see *Republic v. Chinthiti Criminal case No. 17 of 1997*, High Court of Malawi).³¹ However, the Malawi Supreme Court of Appeal

²⁷ HRW, “[Let Posterity Judge](#)”, Violence and Discrimination against LGBT people in Malawi, October 2018.

²⁸ HRW, Submission to HRC 131.

²⁹ Human Rights Council, [Report of the Working Group on the Universal Periodic Review, Malawi](#), 23 December 2020, UN Doc. A/HRC/46/7, paras 124.12 -124.25.

³⁰ Human Rights Council, [Report of the Working Group on the Universal Periodic Review, Malawi](#)<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/160/43/PDF/G1516043.pdf?OpenElement>, 20 July 2015, A/HRC/30/5, paras 110.93 and 110.26.

³¹ Committee against Torture (CAT), [Initial report submitted by Malawi under article 19 of the Convention pursuant to the simplified reporting procedure, due in 1997 \(State initial report\)](#), UN Doc. CAT/C/MWI/1.

disagreed, having ruled that “evidence is admissible regardless of allegations of torture, and upon admission of such evidence, if the Judge is convinced beyond reasonable doubt that the confession is materially true” (see *Thomson Fulaye Bokhobokho and Another v. The Republic Malawi, Criminal Appeal No. 10 of 2000*).³²

31. According to a report by NGOs to the UN Human Rights Committee in 2021, High Court judgments usually follow the *Thomson* judgment. The report also noted that “[t]orture-tainted confessions are frequently used as the only evidence to secure a conviction against a person” and that “[c]ourts have admitted torture-tainted evidence, nearly all of which included forced confessions, in every recent capital case in which a death sentence was handed down”.³³

RECOMMENDATIONS

32. In light of the previous considerations, the following recommendations could strengthen Malawi’s anti-torture framework, particularly to prevent and respond to discriminatory torture on grounds of sexual orientation and gender identity:

Legislative reforms

- a) Introduce or amend national legislation to criminalise torture, as defined in article 1 of UNCAT, as a separate offence subject to punishment commensurate with the gravity of the crime (6 to 20 years).³⁴
- b) Repeal all discriminatory laws and provisions, particularly decriminalising consensual same-sex activities.
- c) Amend relevant provisions to criminalise sexual offences regardless of the sexuality and gender identity and expression of the victim and perpetrator.
- d) Amend national law to provide for the exclusion or non-admission of evidence obtained by torture or other forms of ill-treatment, including derivative evidence obtained as a result.

Policy reforms

- e) Develop effective methods to collate disaggregated data on LGBTIQ+ violence and document reports of violence against the LGBTIQ+ community by State and non-State actors through national human rights institutions and/ or law enforcement agencies. .
- f) Develop and adopt a best practices protocol and/or guidelines into the effective investigation of allegations of LGBTIQ+ violence, based on international standards and following consultation with relevant stakeholders, including civil society organisations.
- g) Encourage State officials, including those working in national justice systems, to develop an understanding of LGBTIQ+ violence as a form of torture based on international human rights standards, with a view to consider the gravity of the violence suffered by members of the LGBTIQ+ community and develop appropriate measures to respond to it.
- h) Ensure investigations into violence against the LGBTIQ+ community are carried out promptly and impartially by independent bodies.

³² Ibid, CAT, State Initial report.

³³ Reprieve, SALC, and others, [Joint Stakeholder Submission to the UN Human Rights Committee for the LOIPR to be considered in relation to Malawi 131st session](#), March 2021.

³⁴ CAT, [Summary record of the 93rd Meeting of the Committee](#), held at the Palais des Nations, Geneva, on Thursday, 14 November 1991: CAT, 7th session, 19 November 1991, UN Doc. CAT/C/SR.93.

- i) Encourage State representatives and officials to issue public statements in support of the protection of LGBTIQ+ persons and publicly condemn violence based on sexual orientation and gender identity perpetrated by State and non-State actors.

Educational reforms

- j) Provide an ongoing and rolling program of obligatory training on LGBTIQ+ issues and anti-torture standards (including in relation to LGBTIQ+ violence) for law enforcement officials and other State institutions, including national human rights institutions, police and prison officers, border guards, immigration officers, medical personnel, prosecutors, and members of the judiciary.
- k) Incorporate comprehensive education on issues regarding sexual orientation and gender identity in school curricula, in line with Principle 16 of the Yogyakarta Principles, covering non-discrimination, equality and gender roles, and sexual diversity, to raise awareness and promote cultural change and acceptance, and eradicate practices that may legitimise or exacerbate violence and discrimination against LGBTIQ+ persons.
- l) Conduct public information campaigns on the human rights of LGBTIQ+ persons.