

**THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND
WELFARE OF THE CHILD (ACERWC)**

**Communication: No. 004/Com/001/2014
Report on consideration of an amicable settlement under the
auspices of the Committee**

**Institute for Human Right and Development in Africa
Vs
The Government of Malawi**

October 2016

REPORT OF THE ACERWC ON AMICABLE SETTLEMENT UNDER THE AUSPICES OF THE COMMITTEE

1. The ACERWC has received a communication dated 29 October 2014 pursuant to Article 44(1) of the African Charter on the Rights and Welfare of the Child (ACRWC). The Communication is submitted by the Institute for Human Right and Development in Africa (IHRDA) (the Complainant) against the Republic of Malawi (the Responding State). The Complainant submitted that contrary to what is provided in Article 2 of the African Charter on the Rights and Welfare of the Child, which defines a child as a person below the age of 18 years of age, Section 23 (5) of the Constitution of Malawi excludes children in Malawi between the ages of 16 and 18 years from the protections accorded to them under the ACRWC.

2. Section 23 of the Malawian Constitution reads:

23- Rights of Children

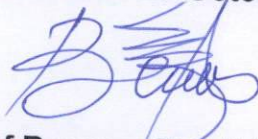
- 1. All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law.*
- 2. All children shall have the right to a given name and a family name and the right to a nationality.*
- 3. Children have the right to know, and to be raised by, their parents.*
- 4. Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to - be hazardous; interfere with their education; or be harmful to their health or to their physical, mental or spiritual or social development.*
- 5. For purposes of this section, children shall be persons under sixteen years of age.*

3. According to the Complainant section 23 (5) of the Constitution contravenes Article 2 of the ACRWC. The Complainant also alleged that this definition permeates the interpretation of other sections of the Malawian constitution such as Section 42 (2) (G), which provides for "treatment consistent with the special needs of children" in criminal procedure, without defining "children". These ambiguities leave the door open for defining the child in contradiction to the ACRWC. Hence, the complainant alleged that the Malawian legislative framework on children's right has a profoundly negative impact including on the administration of juvenile justice. Taking the facts into consideration, according to the complainant, the Republic of Malawi is in violation of Article 1 (obligation of State Parties), Article 2 (definition of a child), and article 3 (non-discrimination) of the ACRWC.
4. The Communication is submitted pursuant to Article 44 of the ACRWC. According to Section IX of the Revised Guidelines, the Committee considered the admissibility of the Communication and set to hear the arguments of both parties on the merit of the matter on 27 October 2016 during its 28th Ordinary Session, held in the Gambia, the Banjul.
5. While the Committee remains seized on the matter, the Parties submitted a request for an amicable settlement of the Communication. The Committee notes that the Amicable Settlement was initially started under Section XIII of the Revised Communication Guidelines, which permits the Parties to a communication to resort in settling their dispute amicably any time before the Committee decides on the merits of the Communication. The amicable settlement was subsequently agreed under the auspices of the ACERWC pursuant to Section XIII (2) of the Revised Guidelines. The amicable settlement agreement is annexed to this report.
6. In considering the amicable settlement, the Committee is guided, among others by the provisions of the Charter and the best interest of the child principle in particular, and notes that the terms and conditions in the agreement are in line with the requirements as outlined in the Revised Communication Guidelines, and that both

Parties, duly represented, have clearly consented before the Committee to be bound by the contents of the agreement. After having deliberated on the details of the terms and conditions of the amicable settlement agreement, the Committee decides to adopt the amicable settlement.

7. The amicable settlement will remain in force provided that the elements of the agreement are upheld, and in particular that:
- i. Both Parties to the agreement remain willing to continue with the amicable settlement;
 - ii. The Committee remains convinced that the Respondent State undertakes to do everything within its power to amend its Constitution and all other relevant laws to be in compliance with article 2 of the African Charter on the Rights and Welfare of the Child by 31 December 2018;
 - iii. The Committee is convinced that the Respondent State takes all possible measures in the interim with a view to ensure the enjoyment of the provisions of the Charter for all children upto the age of 18 years of age;
 - iv. And the Respondent State complies with its reporting obligation as prescribed in the attached agreement.

**Duly signed by the Chairperson of the
ACERWC on 27 October 2016**



Prof Benyam Dawit Mezmur



REPUBLIC OF MALAWI



IHRDA
defend. educate. reform.

INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA

VS

THE REPUBLIC OF MALAWI

No.004/Com/001/2014

COMMUNICATION ON BEHALF OF CHILDREN IN MALAWI

AMICABLE SETTLEMENT OF THE CASE

**BEFORE THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND
WELFARE OF A CHILD**

The Applicant and the Respondent State in this matter:

NOTING their common interest in ensuring the full protection and enjoyment of child rights in the Respondent State;

NOTING the Respondent State's commitment to the protection of children as evidenced by the ratification of key international human rights instruments, in particular the African Charter on the Rights and Welfare of the Child;

NOTING that the Republic of Malawi ratified the African Charter on the Rights and Welfare of the Child on 16th September 1999;

NOTING that article 1 of the African Charter on the Rights and Welfare of the Child places an obligation on the Republic of Malawi to take legislative and other measures to give effect to the rights in the Charter;

NOTING that article 2 of the African Charter on the Rights and Welfare of the Child defines a child as every human being below the age of eighteen years;

NOTING that section 23(6) of the Constitution of the Republic of Malawi currently defines a child as a person under the age of sixteen years;

NOTING the Report on the Review of the Constitution in which the Law Commission of Malawi recommended the amendment of the Constitution to define a child as a person below the age of 18;

NOTING that the recommendation of the Law Commission has already passed through the Cabinet Committee on Legal and Parliamentary Affairs and is to be submitted to full Cabinet;

NOTING that in 2015 during the United Nations Human Rights Council Universal Periodic Review process the Respondent State accepted recommendations to harmonise her laws on the definition of child;

NOTING that the Respondent State's Draft National Human Rights Action Plan has actually set 2018 as the target date for such harmonization of laws on the definition of child;

NOTING that the Marriage, Divorce and Family Relations Act of 2015 provides for 18 as the age for marriage;

DESIROUS of ensuring an amicable settlement of the issues raised in this communication;

RECALLING section XIII of the Guidelines on the Consideration of Communications by the African Committee of Experts on the Rights and Welfare of the Child which allows for amicable settlement of communications;

HEREBY AGREE on the amicable settlement of this matter within the Guidelines on the Consideration of Communications by this Committee as follows:

1. **THAT** the Respondent State undertakes to do everything within its power to amend its Constitution and all other relevant laws to be in compliance with article 2 of the African Charter on the Rights and Welfare of the Child by 31 December 2018.
2. **THAT** the Respondent State shall hold a National Stakeholders Conference before the end of 2016 to build consensus on the necessity of amending section 23(6) of the Constitution without the need for voting in a referendum.
3. **THAT** the Respondent State shall within the same period through the Ministry responsible for child affairs engage Members of Parliament on the urgent need to consider amending section 23(6) as a matter of priority in the spirit of promoting the best interests of the child.
4. **THAT** the Respondent State shall, subject to obtaining a national consensus at the National Stakeholders' Conference, table a Bill to amend its Constitution before its Parliament by 31 December 2017.

5. **THAT** until the agreed amendments have been made, with a view to uphold the best interests of the child, the Respondent State shall take all possible administrative and other measures to ensure that the rights in the African Charter on the Rights and Welfare of the Child are enjoyed by all persons under the age of eighteen in the Republic of Malawi.
6. **THAT** the Respondent State shall submit a report to the African Committee of Experts on the Rights and Welfare of the Child, by 31 January 2017 on the progress it has made to implement this Agreement. Thereafter, the Respondent State shall submit a periodic report every three (3) months to the African Committee of Experts on the Rights and Welfare of the Child on the progress it has made to implement this Agreement. These reports shall be submitted through the formal diplomatic African Union Channel. The Committee shall share the reports with the Applicant.
7. **THAT** the African Committee of Experts on the Rights and Welfare of the Child remains seized of this matter till the Respondent State would have fully implemented this agreement.
8. **THAT** this amicable settlement is agreed under the auspices of the African Committee of Experts on the Rights and Welfare of the Child pursuant to Section XIII (2) of the Committee's

Guidelines on the Consideration of Communications, at the 28th Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child.

IN WITNESS THEREOF, the parties hereby confirm their acceptance of the terms and conditions of the present Agreement as signed by their duly authorised representatives in triplicate in English, this 27th day of October 2016 in Banjul, The Gambia.

For the Republic of Malawi:

Signature:

Name: Janet Banda PhD, SC

Title: Solicitor General, Ministry of Justice, Republic of Malawi

For Institute for Human Rights and Development in Africa:

Signature:

Name: Gaye Sowe (Esq)

Title: Executive Director IHRDA