

Institute for Human Rights and Development in Africa (IHRDA)

MISSION REPORT

LITIGATION AND CASE IDENTIFICATION WORKSHOP: MALAWI

(Socio-economic and Children's Rights)

4th – 6th September, 2012, Golden Peacock Hotel Lilongwe, MALAWI

1.0 INTRODUCTION

From 4th to 6th September, 2012, IHRDA conducted a three-day litigation and case identification workshop at Golden Peacock Hotel in Lilongwe, Malawi. The workshop was conducted in collaboration with of Eye of the Child, a Malawian NGO specializing in children's rights. The Malawi workshop's design and focus were on promoting the use of litigation at domestic and regional levels as an effective advocacy tool, and identifying current strategic issues and cases for litigation relating to ESCR and children's rights. This report covers the proceedings of the workshop; the issues identified for litigation; and draws recommendations for the way forward on the identified issues.

2.0 THE WORKSHOP PROCEEDINGS

2.1 Participants

A total number of 26 participants and resource persons were invited and registered for the workshop. The participants were drawn from the Malawi Human Rights Commission, NGO community generally, the Malawi Law Society, the academia and individual activists. The participants were identified by their thematic focus (ESCR, Children's rights, human rights and environment generally); litigation experience or inclusion of litigation as part of their general advocacy strategy; apparent willingness to share research materials or work in partnership on research, and eventual participation in public interest litigation; and a track record of or willingness to provide *pro bono* services when needed. Most of the participants were from around the venue of the workshop, Lilongwe.

2.2 Resource persons and facilitators

On their part, resources persons/facilitators were identified by their expertise in human rights generally and specializations in litigation, research, publication, teaching and their thematic focus. we can just give a highlight of the composition of the resource persons (I noted their bios below) Two of the resource persons from South Africa¹ who had initially confirmed attendance to make presentations on two separate topics were unable to travel due to circumstances beyond their control. A substitute expert also based in South Africa was identified prior to the workshop and made presentations in place of the two experts who could not to attend.

2.3 The workshop agenda

¹ Professor Michelo Hansungule of the Centre for Human Rights, University of Pretoria, and Dr. Justin Kalima, an independent legal consultant on mining and the environment based in South Africa.

The three-day workshop was constructed around two broad themes: ESCR and Children's rights. The two themes were split into four main parts covered in four main sessions. Together with the opening and case identification sessions at the beginning and the end respectively, the workshop had six sessions. The workshop also focused on a few illustrative issues relating to the two broad themes. The following is a fair reflection of the proceedings for each day and session following the workshop program.

2.2.1 Day One: Tuesday 4th September, 2012

2.2.1.1 Session One: Opening of the workshop

The **Opening Session**, chaired by Bright Theu, commenced with self-introduction by each of the 26 participants and resource persons that had registered. This was followed by **welcome remarks** by Mr. MAXWELL MATEWERE, the Executive Director of Eye of the Child (logistical partner) who thanked both IHRDA for organizing the workshop especially for including children's rights; and the participants for their attendance. Mr. Matewere also highlighted the work done by Eye of the Child on children's rights in Malawi. He ended with a brief summation of topical issues affecting children in Malawi. The issues were eventually discussed during his presentation in one of the sessions which is captured below.

On behalf of IHRDA, Ms MESKEREM GESETTECHANE, the Deputy Executive Director of IHRDA followed with further **welcome remarks** for the participants and expression of gratitude to resource persons for their availability. After briefly introducing the work of IHRDA and highlighting the objectives of the workshop, she extended a special welcome to the **Honourable Justice Esme Chombo**, Judge of the High Court of Malawi, and invited her to deliver the keynote speech for the workshop.



JUSTICE ESME CHOMBO set the tone of the workshop by delivering a motivating **keynote speech** in which she highlighted the following:-

- The indivisibility of all rights and the increasing global, regional and national steps in the enforcement of ESCR through judicial processes;
- The treatment of children coming into conflict with the law;
- The need for innovative means of advocacy for ESCR and Children's rights including well strategized litigation where necessary;
- The issue of *locus standi* and its negative impact on both public interest litigation and development of national human rights jurisprudence in Malawi, while also expressing the hope that the amendment to section 15 of the Constitution of the Republic of Malawi dealing with *locus standi*, would be tested soon to change the existing inhibitive procedural jurisprudence;
- The crucial role played by civil society in the promotion of human rights and a range of other issues through their advocacy work.

More importantly, Justice Chombo stressed the importance of the workshop for enhancing the participants advocacy capacities; affording them a critical moment to reflect on their strategies; and seriously consider the

use of litigation both at domestic and international levels to promote and protect ESRC and Children's rights. She referred to a similarly designed symposium for judges on enforcement of ESCR and use of international law held in 2011 in Malawi. Justice Chombo ended by saying:

“Let me ... mention that you have the laws that guarantee socio-economic rights and children's rights – international and national; you have enforcement mechanisms, domestic and international; and other systems and channels of advocacy for these rights, with all their perfections and imperfections: think outside the boxes, wake up from pedantry and be innovative in crafting your advocacy and intervention strategies.”

2.2.1.2 Session Two: The international and domestic (Malawian) frameworks for ESCR

The second session followed after a 30 minutes break and was chaired by MS. SHEILA B. KEETHARUTH, former Executive Director for IHRDA². The session had two expert presentations, each of which ended with a brief plenary during which participants made comments and asked questions for clarification.



MR. REDSON EDWARD KAPINDU³ made the first presentation on ESCR international normative framework. He covered the relevant international and regional human rights instruments on ESCR with special focus on the ACHPR and the range of ESCR it provides for. He also outlined and discussed key obligations undertaken by states under the relevant human rights instruments with regard to ESCR, and demonstrated how states can be held accountable by citing cases which had been decided by the ACmHPR.

Further, there was a detailed discussion with case illustrations on the enforcement mechanisms focusing on the protective mandates of the ACmHPR and the African Court of Human and People's Rights (ACtHPR). Particular emphasis was made on individual access to the ACtHPR after exhaustion of domestic remedies which Malawi has allowed its citizens. The presentation concluded with a call on participants and NGOs generally to be more vigilant in litigating ESCR at both domestic and international levels.

Ms GRACE MALERA⁴ next presented on the domestic legal framework for ESCR, justiciability of ESCR, and took stock of domestic experiences in judicial enforcement of ESCR rights in Malawi. Participants were introduced to a list of ESCR which are both protected under domestic law, and expressly made justiciable at the instance of any affected person, thereby dispelling the general misconception that ESCR are not justiciable. Good examples are rights relating to education, marriage and family, culture and language, economic activity, labour, personal development, property, and the right to a clean and healthy environment, all of which have been expressly made justiciable domestically.



² Ms. Keetharuth attended the workshop on invitation as a resource person, but also gladly helped with chairing a session and offering useful observations during IHRDA's evaluation of the business of each day.

³ Mr. Redson Edward Kapindu is a Deputy Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC); a Ph.D. Candidate at the Oliver Schreiner Law School at the University of the Witwatersrand; and a law lecturer and researcher at University of Johannesburg. He holds an LL.B. (Hon) from the University of Malawi; an LL.M. from the University of Pretoria; a Diploma in International Human Rights from Lund University; and a Diploma in International Refugee Law from the Universidad Internacional Menéndez Pelayo (UIMP)

⁴ Mrs. Grace Tikambenji Malera, LLB (Hon), LL.M, is the Executive Director of the Malawi Human Rights Commission (MHRC), a constitutional body; a member of the Malawi Law Society and practicing attorney; a researcher, and a publisher on a range of human rights issues relating to women, healthy and HIV.

Ms. Malera however observed that despite a wide range of ESCR being justiciable, there has not been serious litigation on ESCR. She attributed this to various reasons such as lack of public awareness of ESCR and their enforceability; judicial conservatism and reticence owing to possible policy and resource implications of the remedies that may be ordered; strict interpretation of *locus standi* which has prevented the Malawi Human Rights Commission (MHRC) and interested NGOs from using public interest litigation in their advocacy⁵; and the uncertainty surrounding certification of a case as a constitutional matter.⁶ As a result, even the MHRC has adopted alternative advocacy such as mediation and negotiation where ESCR issues arise. She cited the example of quarry activities at Njuli Quarry in Chiradzuru District in the Southern Region of Malawi. The quarry activities, which had gone on for decades without a mining license and without any environmental impact assessment or audits, polluted air, water sources, and food crops. The main stream running through the area was blocked and dried up due to silting as a result of sand and rock deposits from the quarry. The blasting of rocks caused a lot of deafening noise and the tremors destroyed houses surrounding the quarry. MHRC negotiated on behalf of the community with the Quarry Company and Government and made recommendations which required the company to take necessary steps that would remedy some of the damage that had been caused to the environment and dwelling houses. The Quarry Company was also required to regularize its operations by obtaining the necessary license, conducting periodic environmental audits, and adopting practices that would mitigate the adverse impact of the quarry activities on the surrounding community. At the time of the workshop, litigation was being contemplated as the quarry company had not implemented most of the recommendations.

Ms. Malera ended her presentation with a call for capacity building such the instant workshop, and robust judicial activism. She also called upon all participants to consider initiating test cases for public interest litigation on issues such as land dispossession and forced evictions by government and private entities; discrimination in government's distribution of social benefits; mining activities and their impact on the environment and health of the people.

The second session ended with a short plenary discussion during which participants asked a few questions for presenters to clarify some issues, and expressed concerns about inhibitive procedural technicalities which prevent people from approaching the courts without legal representation as the latter is prohibitively expensive. Justice Chombo commented that there are a few circumstances where she and other judges have allowed complaints brought through a letter to the court to proceed as legal suits regardless of procedural requirements for commencement of legal proceedings. She however quickly observed that such practice is very rare, exceptional, and depends on particular judges to whom such complaints are directed. As for, *locus standi*, Justice Chombo could not predict change or retention of the current prohibitive jurisprudence, but encouraged participant NGOs to consider cases that would test the new amendment to section 15 of the Constitution dealing with who can bring cases for the protection of human rights.

2.2.1.3 Session Three: Protection and enforcement of children's rights at domestic and international levels

⁵ The apex court has adopted an interpretation of "sufficient interest" which permits only the person who has directly suffered a violation to approach the court in his or her own right: *The President of Malawi and another v. Kachere and others*, [1995] 2 MLR 616 (SCA); *The Registered Trustees of the Public Affairs Committee v. The Attorney General*, [2002-2003] MLR 333.

⁶ To move the High Court to proceed with a matter as a constitutional case presided over by a panel of three judges, a certificate by the Chief Justice is required. The grant or refusal of a certificate has been held by the Chief Justice to be neither amenable to judicial review nor appeal: *Malawi Human Rights Commission v. The Attorney General*, Civil Case No 79 of 2010, Principal Registry, High Court of Malawi ruling of 8th July, 2011.

The third session of the first day of the workshop followed after lunch break and was chaired by JUSTICE CHARLES MKADANWIRE⁷. It focused on children's rights with two presentations with the same flow as session two on ESCR. The first presentation in the third session dealt with the international framework for the protection and enforcement of children's rights.



Ms. MESKEREM GESET TECHANE⁸ took the participants through the global framework for a range of rights specifically for the protection of children's rights, and zeroed on the African

children's rights system. She highlighted the unique circumstances of an African child and the rights provided for under the African Charter on the Rights and Welfare of the Child. Topical children's rights issues such as compulsory education, child labour and exploitation, child trafficking, child prostitution, child marriages, juvenile justice, corporal punishment, were used to highlight the state's obligations and illustrate issues on which NGOs can intervene with litigation and other advocacy tools. Participants were allowed to intervene with questions and comments throughout which made the presentation interactive. The presentation also introduced participants to the work of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) stressing its protective mandate by which it receives and handles communications brought on behalf of child victims of rights violations. Relevant IHRDA litigation experiences were cited during the presentation to illustrate the utility of the ACERWC in the protection of children's rights.

The last presentation for the first day of the workshop was made once again by MS. GRACE TIKAMBENJI MALERA⁹. Like the one of ESCR, it focused on the municipal legal framework and took stock of domestic experiences in judicial enforcement of children's rights in Malawi. She outlined and discussed all the key domestic laws, covering provisions for children's rights in the Bill of Rights under the Constitution and the most recent and comprehensive Child care, Protection and Justice Act No. 22 of 2010 (CCPJA)¹⁰. She observed however that child rights focused litigating is broadly lacking in Malawi owing to the same factors that account for limited litigation on ESCR. Mrs. Malera also highlighted a few topical issues affecting children in Malawi for which NGOs could engage in public interest litigation to protect and promote children's rights using both the domestic and international legal frameworks. Notable examples were the age of marriage¹¹; child labour and exploitation in tea and tobacco farms; corporal punishment and sexual harassment in private schools and homes; and the definition of a child under the CCPJA as a person under the age of 16 years as a result of which persons between ages 16 – 18 years who come into conflict with the law are trailed through the adult criminal justice system, including imprisonment.

⁷ Justice Charles Mkandawire came to make a presentation on the SADC Tribunal as reported below, but also chaired this session.

⁸ LLB, Addis Ababa University; LLM, UP; Deputy Director, IHRDA; advocate of the Federal Courts of Ethiopia; and consultant and researcher on women and children's rights

⁹ Above n. 4

¹⁰ CCPJA was enacted to consolidate the law relating to children by making provision for child care and protection and for child justice, and for matters of social development of the child and for connected matters: long title of the Act.

¹¹ Section 22(7) of the Constitution allows marriage of person aged between 15 and 18 years with parental consent, and s22(8) provides that that state shall only actively discourage marriage between persons either of whom is below the age of fifteen. Notably, the Constitution does not prohibit marriage between persons either of whom is below 15 years.

The first day's business ended with an overall plenary covering the keynote speech and the presentations in the two subsequent sessions. What featured highly during the closing plenary was the issue of technical procedural law that inhibits access to courts such as *locus standi*, which participants lamented, had almost made public interest litigation extinct in Malawi. The revelation about the amendment to s.15 of the Constitution relating to *locus standi* enthused participants to consider re-engaging in public interest litigation to enforce human rights generally, and ESCR and children's rights specifically. The general consensus was that participant NGOs should each identify relevant issues for litigation and initiate test cases for which IHRDA would provide technical support through research and preparation of briefs.

2.2.2 Day Two: Wednesday, 5th September, 2012

The agenda for the second day of the workshop specifically focused on the practice and procedure before the African human rights protection mechanisms for both ESCR and Children's rights; taking stock of litigation experiences at both regional and domestic levels with the use of case studies; and prospecting issues and opportunities for future litigation. There were two sessions on the second day of the workshop.

2.2.2.1 Session One: National development, business, environment and human rights

The morning session was chaired by MR. MARSHAL CHILENGA, a Commissioner at the Malawi Human Rights Commission¹². It broadly dealt with national development, business, environment and human rights, with the following presentations on specific sub-topics.

MR. REDSON EDWARD KAPINDU made a presentation entitled "extractive industry in Malawi: regulation framework, environment and human rights". He started the presentation with a discreet discussion of both the intended benefits, and the profoundly adverse social and environmental impacts of extractive industry. In particular, Mr. Kapindu underscored environmental degradation generally; desecration of sacred religious sites; expropriation of communal lands and the consequent dislocation of communities and disruption of their means of subsistence; permanent damage to topography and destruction of agricultural lands; and disturbance of ecosystems as some of the adverse impacts of extractive industry. He also noted that mining activities such as metal extraction and oil and gas drilling also come with unique risks such as spillage of gas, oil and toxic waste and other substance. As a result of the foregoing factors, the extractive industry constitutes a unique phenomenon in which grotesque violations of ESCR occur, and for which special effort needs to be exerted for the protection of human rights and the environment. This is particularly so for Malawi because there is a boom in extractive industry activities ranging from mining for uranium, rare earths, coal, quarry, and oil and gas drilling.

Further, Mr. Kapindu observed that a proper institutional and legal regulation of the mining industry coupled with vigilant advocacy is essential for the protection of human rights and the environment. In terms of legal framework, he highlighted and discussed a range of provisions in the Constitution and legislation for the protection of human rights and the environment which are justiciable domestically in Malawi and at the regional level. The most notable right that could be instrumental in engaging the extractive industry is the right to a clean and healthy environment which has been expressly made justiciable in Malawi at the instance

¹² Mr. Chilenga has also recently been appointed as a member of the UN Working Group on Business and Human Rights to represent the Malawi Human Rights Commission.

of anyone¹³. There are also a range of other rights under the Constitution which could be used for advocacy relating to the impacts of the extractive industry in Malawi.

Mr. Kapindu ended the presentation with an observation that the existing regulatory framework for extractive industry is substantially outdated and needs to be updated for the protection of the environment and the rights of people. On that account, he invited participants to be more vigilant and explore all possible options for dealing with human rights issues that will inevitably come with the booming extractive industry activities in Malawi.



MR. REINFORD MWANGONDE¹⁴ followed with a case study of domestic litigation experience in Malawi relating to the Kayerekera Uranium Mine to stress the justiciability of ESCR and draw lessons in NGO collaboration for future litigation relating to mining activities. For this purpose, he briefly discussed the incidence of multi-national corporations and the power they wield over countries which are poor and have weak regulatory frameworks for their activities. He then discussed the facts leading to the litigation in Kayerekera Uranium Mine. Broadly, the case related to

executive decisions of the Malawi Government in granting a mining license to Paladin Africa Limited, an Australian mining company, to extract uranium at Kayerekera in Karonga District in the Northern region of Malawi. Six local NGOs commenced the proceedings alleging that the Government and the mining company had not invited input from the public when compiling the EIA as required under the Environmental Management Act (EMA); that the EIM was falsified; and that the Government and the mining company had not disclosed critical information to the people surrounding the mine relating to risks to health and life and the impact on the environment. The case was settled out of court under a deed of settlement executed by some of the NGOs amidst alleged threats, intimidation, fraud and divide and rule tactics at the instance of the mining company with Government complicity at a time when there was increasing political repression and violence. One critical term in the deed of settlement is that all the six applicant NGOs cannot commence any proceedings relating to the mining activities except to enforce the deed of settlement. The NGOs are now contemplating recommencing the case to annul the deed of settlement since it signs away their right to sue.

Mr. Mwangonde noted that the case was a lost grand opportunity and drew the following critical lessons and gaps exposed by the experience of prosecuting the matter as a team of NGOs:-

- That group cases are vulnerable to divide and conquer at the instance of the mining companies with the complicity of Government
- The risks to personal security as such litigation would potentially jeopardise the business interests of the mining companies as strict compliance with human rights and environmental standards increases costs of production;
- That there is need for increased awareness about ESCR both for judicial officers and the legal profession
- That litigation was prohibitively expensive and the threat of being condemned to pay costs was inhibitive for NGOs to engage in public interest litigation

¹³ Section 5 of the Environmental Management Act, No. 23 of 1996 of the Laws of Malawi

¹⁴ MA, *International Relations*; Executive Director for Citizen for Justice (CFJ); and Coordinator for the Mining Network in Malawi

The session on national development, business, environment and human rights wound up with a plenary which was actively participated and highly critical of the manner in which the case had been concluded, while admitting safety concerns at the time of settlement of the case. In particular, more revelations came out about the manner in which the deed of settlement was executed, such as Government obtaining signatures of junior officers of some of the NGOs; alleged bribery; threats to life directed at individuals; while other NGOs claimed that they never signed the deed of settlement. After discussions, it was agreed that the NGOs would explore means of recommencing the case either as a group, or one NGO would be tasked to take up the case, or indeed the possibility of the Malawi Human Rights Commission being the applicant.

Immediately before breaking for lunch, Bright Theu introduced IHRDA's Case Law Analyser to the participants and demonstrated how to conduct research on the site.

2.2.2.2 Session Two: Litigating human rights at the regional and sub-regional levels

The second session in the afternoon focused on the practice and procedure for litigating human rights issues before the African human rights bodies and the SADC Tribunal. The session had three expert presentations, two of which dealt with the practice and procedure for bringing communications before the African Human Rights protection bodies and the SADC Tribunal. The last presentation during the second session dealt with topical children's rights issues in Malawi and prospects for intervention through litigation. This session was chaired by Mr. BENEDICTO KONDOWE, a Commissioner at the Malawi Human Rights Commission.

Ms. SHEILA B. KEETHARUTH¹⁵ took the participants through the procedural steps and requirements for prosecuting a communication (case) before the ACmHPR, ACtHPR and ACERWC. For each of the three bodies and with use of decided communications she outlined and discussed:-

- who the parties can be;
- requirements that qualify a case to be brought before each of the bodies;
- the three steps of seizure, admissibility, and merits and the necessary documents at each of these stages;
- circumstances in which provisional measures can be sought;
- the type of evidence required in support of a communication;
- amicable settlement;
- determination of a communication on the merits and implementation/execution of recommendations/judgment.

Ms. Keetharuth also highlighted some of the challenges of prosecuting communications before the regional bodies such as delay in conclusion of communications, while also stressing that the regional framework offers a further opportunity for seeking remedies for violations of human rights which cannot be remedied at domestic level. She also observed that communications served to expound the rights under the ACHPR, develop African human rights jurisprudence, and the recommendations/judgments can be crucial tools of advocacy for states to comply with international standards. She ended by specifically noting that Malawi is

¹⁵ Former Executive Director, IHRDA; individual human rights activist and advocate of the Courts of Mauritius

among the only five countries that have made a declaration allowing individuals and NGOs to bring cases before the ACtHPR directly, without going through the ACmHPR. She therefore invited the participants to consider taking cases to the Court where domestic remedies have been exhausted.

To expose participants to a complete range of alternatives for seeking remedies beyond the domestic arena,



Justice CHARLES MKANDAWIRE¹⁶ made a presentation introducing and discussing the SADC Tribunal: its legal framework and mandate; practice and procedure for handling human rights cases; and experiences so far. Regarding the legal framework, he outlines and discussed provisions relevant for the

protection of human rights and the environment under the SADC Treaty and all the protocols. Through 18 decided cases of the 23 filed so far, he also demonstrated to the participants that contrary to the initial belief that the Tribunal could not handle individual applications, the Tribunal had handled a number of cases filed by individuals, the first case having been filed by a Malawian alleging violation of employment rights. He however noted that currently the Tribunal's operations have been suspended pending the on-going review of its jurisdiction to handle complaints filed by parties other than states following complaints by some states which argue that the Tribunal's jurisdiction should be restricted to inter-state cases.

The last presentation of the second day of the workshop related to topical children's rights in Malawi. Mr. MAXWELL MATEWERE¹⁷ discussed relevant and current issues that affect children in Malawi. Among the various issues, he highlighted the following issues/cases which could be subject of intervention through litigation at domestic and/or international levels:-



- the sentencing and detention of children at the pleasure of the president. A case in point is that of Evance Moyo, who was arrested at 16 years of age on allegations of murder; was tried, convicted and sentenced to a term of custody at the pleasure of the president when he was 20 years old in 2010. An appeal is since pending determination to date.
- Child justice. Under the new Child Care, Protection and Justice Act No 22 of 2010, a child is a person under the age of 16 years. The result is that all persons aged 16 years and below 18 years are tried through the adult justice system and sentenced to terms of custody at adult prisons. There are numerous persons aged between 16 and below 18 years who are currently being dealt with through the adult justice system and detained in adult prisons¹⁸.
- Wide spread acceptance of corporal punishment as a means of disciplining children in homes and private schools, while corporal punishment is actively prohibited in public schools.

¹⁶ Judge of the High Court of Malawi, currently serving as Registrar of the SADC Tribunal

¹⁷ Executive Director, Eye of the Child in Malawi heading the Child Protection Department; Vice President of the Southern Africa Network Against abuse and trafficking of Children [SANTAC] a regional Network that covers 13 African Countries. Board member and Vice Chairperson for the NGO Gender Coordinating Network in Malawi; and a Commissioner for the Malawi Special Law Commissioner for the development of Trafficking in Persons Bill in Malawi

¹⁸ See below for further details under issues identified for litigation

Mr. Matewere also briefly discussed child marriages, lack of compulsory education, and child exploitation in the labour market, especially in tea and tobacco farms. The foregoing issues became subject of further analysis during the break out groups which came up with a list of issues for litigation and related advocacy. In essence, this marked the end of expert presentations for the workshop. What followed on day three were mainly a recap of the foregoing proceedings and a break out session for identification of issues for litigation.

2.2.3 Day Three: Thursday 6th September, 2012 – Break out into thematic groups for issue/case identification

There were three main activities on the third and final day of the workshop facilitated by Bright Theu. The agenda of the day started with a holistic recap of the presentations for the past two days, briefing for and constitution of break out thematic groups for case identification. There were three thematic groups on children's rights issues (7 participants); extractive industry (7 participants); and ESC and other rights generally (6 participants). The instructions to the groups were: to identify issues raising violations of rights within their respective themes; narrate the known facts, identifying victims where possible; highlight the rights violated; and establish whether the issue has already been subject of litigation at domestic level, and if so, the current status of the proceedings.

Suffice to mention that prior to the workshop, case identification forms designed by IHRDA were distributed to participants for filling with information relating to a case of their choice. A few participants returned the forms filled up. The following issues were identified and reported during the plenary by each of the three thematic groups.

2.2.3.1 Children's rights group

(a) Child justice case

It was reported that persons suspected of being in conflict with the law aged between 16 and below 18 years who are widely recognized as children for various purposes under international human rights law and practice are being tried through the adult criminal justice system in Malawi. The practice follows after the fairly recently enacted Child Care, Protection and Justice Act No. 22 of 2010 which defines a child as a person below the age of 16 years. Among such cases are the following:-

- (i) Aron Gute, a 17years old boy was prosecuted and convicted of theft by the Blantyre Magistrate Court under File Number BT/CR/217/06/12. He was sentenced to 12 months imprisonment with hard labour which he is currently serving at Chichiri Prison.
- (ii) John Bizi is also a 17 year old boy who was convicted of indecent sexual assault on a girl aged 7 years by the Blantyre First Grade Magistrate Court under Criminal Case No. 21 of 2012. He was sentenced on 10th April, 2012 to 12 months imprisonment with hard labour without an option for a fine.
- (iii) On 8th August, 2012 the Thyolo Magistrate Court convicted a 16 year old blind boy, Stamford Kashuga, together with a 20 year old of burglary and theft and sentenced both of them on each offence to 48 months (3 years) and 12 months (1 year) respectively to run concurrently. This case has since become subject of judicial review challenging the jurisdiction of the court in constituting itself as child justice court and convicting Stamford Kashuga. He has since been released from prison and placed under the charge of a social welfare officer pending determination of the judicial review.

Apart from the judicial review in respect of Stamford Kashuga, the definition of the child under the Act, and the practice of prosecuting persons aged between 16 and below 18 years have not been challenged before a court of law in Malawi in light of relevant Constitutional and international children's rights provisions. It was agreed that Eye of the Child would provide case studies which could be used for possible litigation at domestic or regional level.

(b) Corporal punishment

It was generally reported that corporal punishment is still wide spread in homes and some private schools which even have it in their codes of discipline. Whereas participants generally mentioned some examples, a specific case with sufficient facts was not readily available. The group agreed that interested NGOs or individuals should follow-up on the instances of corporal punishment they have come across and identify a suitable case relating to corporal punishment in school.

(c) Special needs students at an inclusive secondary school

There are five deaf students at Blantyre Secondary School which is an inclusive school in that it takes pupils of all categories including gender and special needs. The five deaf students were previously at a primary school that is exclusively for deaf pupils. Upon their selection to Blantyre Secondary School, they are not provided with special teachers, but included in the inclusive classes as a result of which they do not understand anything during lessons. There is an arrangement to provide them with special classes in the evening but the attendance of teachers for such classes is very scanty. As a result, they perform poorly compared to other students. Some are repeating classes, while others are contemplating quitting school altogether. The issue has since not been subject of any litigation. Meanwhile, the Law Faculty's Legal Clinic at Chancellor College of the University of Malawi is considering litigating the issue on the possible grounds of discrimination in access to and denial of the right to education. The litigation will seek to secure an order that will compel Government to provide effective special needs staff for the students in the short term, and built or designate an exclusively deaf students' secondary school in the medium to long term.

(d) Children living with their mothers in prison

The group reported that at Zomba Maximum Prison and other prisons across the country, there are a number of children living with their mothers who have been sentenced to terms of imprisonment. The situation was noted to constitute possible risks to children's moral, physical, and social development, and adversely affect their access to education if the same is not provided to such children. Details of the number of children and their exact living circumstances at Zomba and other prisons were not readily available. Eye of the Child was tasked to investigate the issue further and gather concrete facts on the basis of which an assessment can be made as to whether the issue could be subject of litigation or other forms of advocacy/interventions.

(e) The need for compulsory education

The group noted that education in Malawi for children is not compulsory as is the growing practice in most countries, and as recommended by the Committee on the Rights of the Child and other UN Agencies. It was noted that the compulsory education is crucial for the right of children to personal

development. However, the group merely marked the issue for further research and analysis to determine whether it can be subject of litigation or other forms of advocacy.

2.2.3.2 ESCR and other rights group

(a) Eviction of supposed squatters at Area 49 in the City of Lilongwe

The group reported that earlier this year, 2012 the Malawi Housing Corporation which has a lease over a piece of land for housing estate development recently evicted and demolished dwelling houses for hundreds of people who had settled on the land for several decades. There was neither compensation for the demolished houses nor consideration for relocation thereby rendering some people homeless. However, the actual details of the victims were not readily available, but it was noted that they could be easily identified for a possible case for compensation based on violation of their rights to housing and property, among others. It was agreed that IHRDA would liaise with the MHRC and other interested NGOs for the latter to be tasked to trace the victims and establish further facts.

(b) Eviction of an entire village at Thondwe in Zomba District

The group reported that there is a village at Thondwe in Zomba District which was evicted under a court case commenced by a third holder of a lease over their land. The known facts were that the land on which the village had lived for close to a century had been acquired and leased out without the knowledge of the villagers and without compensation sometime in the 1950s. They continued living on the land unaware of the lease which passed on to a third hold by sale. In or about 2009 the third leaseholder sought to remove them from the land which they resisted leading into a long court battle that saw some of the villagers imprisoned for contempt of court 2012. Eventually, the villagers were evicted from what they have hitherto considered their ancestral land. They were made to demolish their own houses and construct alternative shelter on another small piece of land that is not sufficient for their subsistence needs. They left behind fruit crops on the land which the third leaseholder has since requested them to cut down.

The group identified the rights to property and housing; cultural heritage; and the right to have their legitimate expectations protected, among others, as having been violated. At the close of the contempt proceedings they will seek legal assistance to help them recover their land or compensation in lieu thereof. It is yet to be established how far, it at all, they have gone with their quest for justice.

(c) Systematic torture by police: the case of Martin Ulemu Nkhata

The group reported the case of Martin Ulemu Nkhata, a former Malawi Army Officer who was arrested upon presenting himself voluntarily at Zomba Police Station upon spurious allegations of being in possession of a Malawi Defence Forces gun. Whilst in custody, he was brutally clobbered and sustained multiple cuts, soft tissue damage and a fracture on the metatarsals. As a result of the beating, he was unable to move himself let alone any of his limbs, and was glued to between a bed and a wheelchair whilst in custody for about 5 days. During that period, neither his family, nor any one else was allowed to see him. He was only allowed to see even a lawyer on his 5th day in detention when the state of his body had improved.

He was eventually released from remand unconditionally. No prosecution for the alleged charges for which he was arrested have been brought to date. He has since issued a notice of suit to the Attorney

General and will be filing a suit claiming damages for the violation of his multiple rights as a result of the treatment meted on him by the police. The case is currently in the hands of a private legal practitioner in Lilongwe who is seeking technical assistance on preparation of documents and research.

The MHRC reported that it has identified and documented several cases of torture in police custody which show a systematic practice by the police of torturing suspects who are in their custody on remand. A list of the cases and their dockets is available with the MHRC.

The group reported that the case of Martin Ulemu Nkhata was strategic in advancing the domestic jurisprudence on torture generally, but also for securing a judgment that expressly buttresses the states duty to investigate allegations of torture and prosecute offending officers as part of an effective remedy to a victim of torture by the police. During the plenary, it was agreed that IHRDA should liaise with the MHRC and other interested NGOs to strategise on tackling systematic torture using the Martin Ulemu Nkhata and similar cases.

2.2.3.3 Extractive Industry Group

(a) Kayerekera Uranium Mine Case

This is the case that was subject of presentation by Mr. Reinford Mwangonde during the first session of the second day of the workshop¹⁹. It was considered by the group to be highly emblematic of the mining experiences in Malawi which could be used to set best practices and groundbreaking domestic jurisprudence.

The group observed that the a lot, if not all, of the issues that led to the litigation are still outstanding as follows:-

- Risk of contamination of both surface and ground water as a result of discharge of tailings and waster into the nearby river which eventually drains in the lake a few kilometers down the hilly location of the mine. It was also feared that waste water contaminated with high level or radioactive elements could either sip through the storage dams, or the dams could break and over flood due to rain water as the area receives heavy rains. The area is also an earthquake prone zone which could also result into dams breaking and releasing toxic and radioactive waste into water systems.
- Related to the risks enumerated above is that fact that there is no independent monitoring of the impact of the mining activities as Government claims that it does not have capacity. Apparently, the requirement of periodic environmental audits was one of the terms under the deed of settlement which has not been complied with.
- Further, the surrounding community is has not, and is not being provided with information relating to the risk posed by the mine to their environment, their health and lives. It is reported that the communities surrounding the mine site were not engaged during the compilation of the EIA as a result the communities have very scanty information about the mine. The government

¹⁹ Reported above

has also not disclosed the development agreement with the mining company and people are unaware of the benefits the mining project and what exemptions the company has been given. In short, their rights to a clean and healthy environment, to information, to development, to freely dispose of and benefit from natural resource are highly compromised in the circumstances.

- The group also raised concerns about the treatment and labour rights of employees of the mining company. They cited instances of mine workers who are discharged after contracting illnesses allegedly related to exposure to radioactive substance. This was subject of the mini mission and a report has been prepared separately.

The group however pointed out that a proper strategy needed to be designed dealing with among others, whether a fresh action should be commenced or the deed of settlement should be made subject of further litigation to properly exhaust domestic remedies. There would also be need to gather more concrete facts as the bulk of information so far is largely unsubstantiated. More particularly, it was agreed that a robust scientific study was necessary. It was agreed for this purpose that IHRDA would work with the MHRC, CFJ and other interested NGOs to map the way forward. Meanwhile, Citizen for Justice is carrying out quarterly water testing to detect the level of radioactive substance in the water around the mine area. CFJ has also distributed hand devices for monitoring radiation levels in the atmosphere in the surrounding communities.

(b) Mudi river pollution

Mudi River is the main water way running through the middle of the commercial city of Blantyre in the Southern Region of Malawi and used by many poor city residents for washing clothes, utensils and bathing. The river's water is highly polluted throughout the year producing a stench in the immediate neighborhood. The group reported that there are various studies and audits conducted by different environmental organizations and the Blantyre City Assembly which establish that manufacturing companies discharge toxic waste into the river. The information can also be supported by testimonies of city residents. Two particular major companies were named as the major polluters. These are Carlsberg Limited and Lafarge Limited.

The group identified the right to clean and healthy environment as violated in the circumstances. The right to a clean and healthy environment is justiciable in Malawi and any person can seek the assistance of the court to enforce the right. CFJ and Blantyre City residents were identified as potential applicants. It was agreed that IHRDA would liaise further with CFJ and map the way forward.

(c) Oil exploration on Lake Malawi by Surestream Petroleum Company

The group reported that Surestream Petroleum Company, based in the United Kingdom has been granted prospecting license by the Government of Malawi and an EIA compilation was underway at the time of the workshop. There are reports of resistance from communities along the lake as they fear for possible pollution of the lake that would destroy fish and jeopardise their means of subsistence. The prospecting exercises have since been put on hold owing to dispute over ownership of the lake between Malawi and Tanzania. Generally, the issue was considered as pre mature for litigation.

However it was the general consensus that there should be vigilant engagement with Government over the issue to avoid repetition of the Kayerekera Uranium Mine experiences.

2.2.3.4 Closing remarks

Ms. Meskerem Geset Techane closed the entire workshop by thanking the participants for sparing their time and actively participating in the workshop. She also specially recognized the logistical facilitation by Eye of the Child, and the resources persons for the expert presentations. She indicated to the participants that there will be follow-ups and strategizing with specific interested partners to take the issues identified forward.

3.0 EVALUATION AND CONCLUSION

3.1 Evaluation

Towards the end of the workshop, evaluation forms were distributed requiring participants to rate the proceedings of the workshop on a number of factors on an ascending scale of 1 to 5. Ten filled up evaluation forms were collected. Broadly, almost all the participants who had submitted the evaluation forms rated the experts and their presentations on a score range between 4 and 5 on breadth and depth of coverage of the topics, preparedness, and in making the sessions interactive. The major concerns raised by the participants related to inadequacy of time allocated for each session. Further, all participants indicated that the workshop came at the right time and was very important to the work they were currently engaged in.

Other than the foregoing, it was noted that the number of participants kept on fluctuating throughout the three days of the workshop, with the lowest turnout being on the second day. Some participants observed that the venue of the workshop being proximate to the participants' regular bases might have substantially contributed to the fluctuating numbers as participants repeatedly gave excuse to attend to urgent matters. For the same reason, some session started very late as a good number of participants were not on time especially at the beginning of the first session of a day and after lunch break.

3.2 Conclusion

From the foregoing, the mission to Malawi for the workshop was a success. The issues identified during the case identification exercise will need to be followed up. It should be noted that almost all the issues identified during the workshop are justiciable in Malawi. Further, some issues clearly require further research to gather more facts and evidence before they can be made subject of litigation. IHRDA's participation will be determined on a case by case basis, ranging from assisting with legal research; preparation of legal briefs and related court documents; submission of *amicus curiae* briefs; and other related matters as may be agreed. For these purposes necessary bilateral or multilateral collaboration with respective local partners will have to be developed further and possibly established under working memoranda of understanding based on issues of common interest.