



Commentary on

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# Malawi's Draft Regulations, 2022

## Introduction

The Centre for Human Rights and Rehabilitation (CHRR) is pleased to share comments on the following proposed draft Regulations, which have been developed by the Ministry of Gender, Community Development and Social Welfare to operationalize the NGO (Amendment) Act, 2022:

- *Non-Governmental Organizations (Registration) Regulations, 2022*
- *Non-Governmental Organizations (Operations of International NGOs) Regulations, 2022*
- *Non-Governmental Organizations (Coordination) Regulations, 2022*
- *Non-Governmental Organizations (Complaint Handling Mechanisms) Regulations, 2022*

The four draft Regulations clarify various procedures pertaining to non-governmental organizations (NGOs) in Malawi, as well as the powers of the Non-Governmental Organizations Regulatory Authority, under the Non-Governmental Organizations Act, 2000, as amended (NGO Act).<sup>1</sup> This commentary highlights various provisions that fall short of international standards protecting the right to freedom of association, or in some instances go beyond what is required under the NGO Act, or both. By addressing these shortcomings, drafters will engender public confidence in the Regulations and ensure the government respects its national and international obligations with respect to NGOs in Malawi.

## International Law

Article 22 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of association. Restrictions on this right must be (1) prescribed by law; (2) necessary in a democratic society; and (3) in furtherance of one of four clearly-defined interests: national security or public safety; public order; the protection of public health or morals; or the protection of the rights and freedoms of others.<sup>2</sup> These

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<sup>1</sup> As amended by the Non-Governmental Organizations (Amendment) Act, 2022.

<sup>2</sup> Malawi ratified the ICCPR in 1993.

limited circumstances must be “construed strictly; only convincing and compelling reasons justify restrictions on...freedom of association.”<sup>3</sup>

To meet the ICCPR’s requirement that a restriction be “prescribed by law,” the restriction must be sufficiently precise to enable an individual or NGO to assess whether their intended conduct would be in breach of the law, and to foresee the likely consequences of any such breach.<sup>4</sup> To meet the requirement that a restriction be “necessary in a democratic society,” the restriction must be proportionate to one of the legitimate aims enumerated above. A restriction is proportionate where it is the least restrictive means required to achieve the purported aim.<sup>5</sup>

Similarly, with reference to Section 10 of the African Charter on Human and Peoples’ Rights (ACHPR) protecting the right to associate, the African Commission on Human and Peoples’ Rights has clarified that any restriction on the right to association must meet the same conditions prescribed under the ICCPR.<sup>6</sup>

### NON-GOVERNMENTAL ORGANIZATIONS (REGISTRATION) REGULATIONS, 2022

Regulation	Issue Identified	Commentary	Recommendation
Regulation 3—Mandatory Registration	Regulation 3(1) states that “An organization shall not operate as an NGO in Malawi unless it is registered under this Act.”	Regulation 3, which re-iterates Section 20 of the NGO Act, requires an NGO to register to legally operate, which would contravene international and regional standards. The freedom of association protects both registered and unregistered organizations, which must be allowed to exist and operate freely. <sup>7</sup> The African Commission explicitly recognizes that “ <i>informal (de facto) associations shall not be punished or criminalized under the law or in practice on the basis of their lack of</i>	Insert language into Regulation 3(1) stating that informal organizations are not required to register.

<sup>3</sup> *Sidirouopoulos v. Greece*, 4 Eur. Ct. H.R. 500 (1998); *United Communist Party v. Turkey*, 4 Eur. Ct. H.R. 1 (1998); *Socialist Party and Others v. Turkey*, Application No. 21237/93 (1998), para. 50. See also *Freedom and Democracy Party v. Turkey*, Application No. 23885/94 (1999); *Refah Partisi (The Welfare Party), Erbakan, Kazan, and Tekdal v. Turkey*, Application Nos. 41340/98, 41342/98, 41343/98, and 41344/98 (2001).

<sup>4</sup> See United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, U.N. Doc. A/HRC/20/27 (2012), para. 16.

<sup>5</sup> *Id.* at para. 17.

<sup>6</sup> See African Commission on Human and Peoples’ Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para. 24. Malawi ratified the ACHPR in 1989.

<sup>7</sup> See, e.g., A/HRC/20/27, *supra* note 4, para. 56 (stating that the right to freedom of association equally protects associations that are not registered.”). See also African Commission, *Guidelines, supra* note 5, para. 11, (prohibiting States from compelling “associations to register in order to be allowed to exist and to operate freely”).

		<p><i>formal status.</i><sup>8</sup> As such, the government must not unduly restrict the right of unregistered organizations to operate.</p> <p>Regulation 3, which re-iterates Section 20 of the NGO Act, requires an NGO to register to legally operate, which would contravene international and regional standards. As a good practice, Regulation 9(a), which re-iterates Section 5(a) of the NGO Act, states that <b><u>an NGO that is “informal, and does not have a written constitution” is exempt from the requirements of the NGO Act,</u></b> which appears to allow informal (unregistered) NGOs to operate, so long as they do not have a written constitution. The discrepancy between these provisions may confuse stakeholders about whether an NGO is legally required to register. It is recommended to insert language into Regulation 3(1) confirming that informal organizations are permitted to operate without being subject to registration.</p>	
Regulation 5(1)(e) — Excessive Government Discretion over Registration	Under Regulation 5(1)(e), before registering an NGO, the Non-Governmental Organizations Regulatory Authority (the Authority) shall consider “any other requirements which the Authority may determine for each category necessary to enable the NGO to discharge in a satisfactory manner, the obligations which may reasonably be expected of or undertaken by a person belonging	Such open-ended language provides excessive discretion to the Authority to determine grounds to reject an NGO’s registration on an ad hoc basis, rather than rejecting registration only “on the basis of a limited number of clear legal grounds,” as required by international law.	Delete Regulation 5(1)(e).
		The African Commission states that NGO registration	

<sup>8</sup> African Commission, *Guidelines*, supra note 6, para. 11.

	to the category in respect of which registration is sought.”	procedures shall be “without discretionary components. Should the law authorize the registration authorities to reject applications, it must do so on the basis of a limited number of clear legal grounds, in compliance with regional and international human rights law.” <sup>9</sup>	
Regulation 5(2)(a)(iii) — Privacy Concerns	Regulation 5(2)(a)(iii) requires an NGO to submit with its registration application “the personal details of the principal officers of the NGO, including trustees, board members and key executive officers.”	<p>Regulation 5(2)(a)(iii) is concerning because the term “personal details” is vague, which could enable the authorities to seek excessive personal information about an NGO’s officers.</p> <p>Under the African Commission <i>Guidelines</i>, “associations shall not be required to transmit detailed information such as ... lists of their members, or personal information of their members to the authorities.”<sup>10</sup> This good practice helps ensure that governments do not conduct invasive oversight that infringes the privacy rights of NGOs and their members. However, certain basic information, such as a “list of the names of the founding members of an association may form part of the documents necessary in the [registration] procedure.”<sup>11</sup></p> <p>It is <b>recommended</b> that the provision should only require an NGO to submit the names of its officers, which aligns with the African Commission</p>	Revise Regulation 5(2)(a)(iii) to replace “personal details” with “names.”

<sup>9</sup> *Id.*, para. 13.

<sup>10</sup> African Commission, *Guidelines*, *supra* note 6, para. 13(a).

<sup>11</sup> *Id.*, para. 33(a), note 25.

		standard and better protects the right to privacy.	
Regulation 6 – Political Activities	<p>Regulation 6 provides that an NGO or its staff shall not engage in certain political activities, including:</p> <ul style="list-style-type: none"> <li>• “contest in any political position” (Regulation 6(a));</li> <li>• “hold any political position” (Regulation 6(b));</li> <li>• “be a member of a political party” (Regulation 6(c));</li> <li>• “always engaging in one party or candidate” (Regulation 6(h)).</li> </ul>	<p>Under the NGO Act, when an NGO registers it must commit that its management and staff will not to “engage in partisan politics including electioneering and politicking.”<sup>12</sup> Regulation 6 defines activities deemed to be “electioneering and politicking.” Several of its sub-regulations are concerning because they may excessively restrict the right of NGOs and their staff to participate in public affairs.</p> <p>The African Commission <i>Guidelines</i> state that “[a]ssociations shall be able to engage in the political, social and cultural life of their societies, and to be involved in all matters pertaining to public policy and public affairs, including, inter alia, human rights, democratic governance, and economic affairs, at the national, regional and international levels.”<sup>13</sup> At the same time, it is an accepted practice to prohibit NGOs from engaging in certain electoral activities, such as fundraising or campaigning to support political parties or candidates. <b>Regulation 6(h)</b> broadly prohibits “always engaging with one party or candidate.” This vague language could be interpreted to prohibit legitimate advocacy with a</p>	Delete Regulation 6(h). Insert language affirming that individual NGO staff members may engage in the activities listed in Regulation (a)-(c), such as belonging to a political party, in a personal capacity.

<sup>12</sup> NGO Act, Section 20(3)(a)(v) requires an NGO to submit “a declaration that management and staff of the NGO shall not engage in partisan politics, including electioneering and politicking.”

<sup>13</sup> *Id.*, para. 25.

		<p>political dimension or engagement perceived as aligned with a particular party or candidate, even if the engagement does not involve direct fundraising or campaigning.</p> <p>Additionally, individuals have the right to participate in public affairs, either directly or through freely chosen representatives.<sup>14</sup> ICCPR Article 25(b) specifically guarantees “the right and the opportunity ... [t]o vote and to be elected at genuine periodic elections.” Any restrictions to this right must be “objective, reasonable, non-discriminatory and provided for by law.”<sup>15</sup> <b>Regulations 6(a)-(c)</b> impose serious restrictions on the right of individual NGO staff members to participate in political activities or to run for elected office solely because they work for an NGO. These restrictions do not advance a “reasonable” or “objective” goal, but instead broadly undermine the ability of individuals who work for NGOs to participate in public affairs.</p>	
Regulation 7 – Registration Rejection	Registration 7(1) provides that after considering an NGO’s registration application, the Authority shall “grant the application; withhold the grant pending a request for further and better particulars; or refuse the application”	As stated by the UN Special Rapporteur on the rights to freedom of peaceful assembly and association (UNSR), “[a]ny decision rejecting the submission or [NGO registration] application must be clearly motivated and duly communicated in writing to	Insert a limited number of clear legal grounds to refuse an application into Regulation 7(1).

<sup>14</sup> ICCPR Article 25; ACHPR 13(1).

<sup>15</sup> United Nations Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/30/26 (2015), para. 14.

	<p>Regulation 7(2) states that “[w]here the Authority refuses to grant the application, the Authority shall, promptly, communicate its decision and the reason for refusing to grant the application.”</p>	<p>the applicant.”<sup>16</sup> Regulation 7(1) provides broad discretion to the Authority to refuse an NGO’s registration application but does not describe the grounds upon which an application may be refused. This poses a risk that the Authority could abuse its registration powers by arbitrarily refusing an NGO’s application. It would be better for Regulation 7(1) to list a limited number of clear legal grounds to refuse an application, in conformance with regional and international law.<sup>17</sup></p> <p>Regulation 7(2) could be improved by requiring the Authority to communicate its decision “in writing” to the applicant. This is already stated in Section 20 of the NGO Act and will help to ensure that both registration officials and applicant NGOs have a record of the reasons for the Authority’s decision and that an NGO can address any deficiencies in its application.</p>	<p>Revise Regulation 7(2) to insert “in writing” after “its decision.”</p>
<p>Regulation 8 — Types of Registration</p>	<p>Regulation 8 states that “[t]he Authority shall register an NGO based on its established laws.”</p>	<p>Regulation 8 is extremely vague, which likely violates ICCPR Article 22’s “prescribed by law” test.<sup>18</sup> Although the title of the Regulation is “Types of Registration,” the Regulation does not describe types of registration (it only states that the Authority “shall register an</p>	<p>Revise Regulation 8 to describe different types of registration, if applicable. Consider deleting Regulation 8 if this information is not applicable.</p>

<sup>16</sup> A/HRC/20/27, *supra* note 4, para. 61.

<sup>17</sup> African Commission, *Guidelines*, *supra* note 6, para. 13.

<sup>18</sup> As noted above, ICCPR Article 22’s “prescribed by law” test requires that any restriction to the freedom of association be sufficiently precise to enable an individual or association to assess whether their intended conduct would be in breach of the law, and to foresee the likely consequences of any such breach. *See* A/HRC/20/27, *supra* note 4, para. 16.

		<p>NGO based on its established laws”). Further, it is unclear what constitutes “its established laws” for purposes of this provision. This vagueness could make it difficult for an NGO to understand how to comply with the provision, which violates the “prescribed by law” test. It also contravenes the international standard noted above that registration procedures be simple and clear.<sup>19</sup> On a practical level, Regulation 8’s vague language could permit the authorities to apply a subjective test to each organization and to arbitrarily deny a registration application on that basis.</p>	
<p>Regulation 9 — Exempted Organizations</p>	<p>Regulation 9 lists categories of NGO that the Authority may exempt from the NGO Act’s requirements, including an NGO that is “specially exempted, so that the Regulator has determined in its discretion that such organization is to be exempted from all or some of the requirements of this Act” (Regulation 9(d)).</p>	<p>Regulation 9(d) grants broad discretion to the Authority to exempt an NGO from the NGO Act’s requirements without describing criteria for this determination. The African Commission <i>Guidelines</i> provide that the “administrative authority in charge of registration shall make sure that the procedure and its decisions are accessible and transparent.”<sup>20</sup> Regulation 9(d)’s broad language provides excessive discretion to the Authorities to exempt an organization from the NGO Act’s requirements, which contravenes the duty of the authorities to be “accessible and transparent” in their decisions. It also raises the risk that the authorities could arbitrarily exempt NGOs</p>	<p>Revise Regulation 9(d) to describe clear and specific grounds upon which an NGO may be “specially exempted” from the NGO Act’s requirements.</p>

<sup>19</sup> A/HRC/20/27, *supra* note 4, para. 61.

<sup>20</sup> African Commission *Guidelines*, *supra* note 6, para. 22.



		perceived as aligned with the government, which would discriminate against other NGOs.	
Regulation 10 — Renewal Requirement	Under Regulation 10(2), an NGO’s registration certificate is valid for five years from the date of registration. Regulation 10(3) requires an NGO apply to renew its registration certificate three months prior to its date of expiration. Regulation 10(4) states that the Authority shall consider if an NGO was “[c]ompliant for the last 3 years” in considering a renewal application.	Under the African Commission <i>Guidelines</i> , organizations “shall not be required to ... renew their registration.” <sup>21</sup> Requiring renewal every five years could provide the authorities the opportunity to “de-register” controversial or politically outspoken NGOs by denying their renewal applications, thereby restricting their freedom of association. Regulation 10(2)-(4) violates this standard by requiring an NGO to renew its registration every five years. At a minimum, the government should not subject an NGO’s registration renewal to any conditions, which are specified in Regulation 10(4).	Delete Regulation 10(2)-(4), which removes the renewal requirement. If the renewal requirement is maintained, delete Regulation 10(4) to ensure that renewal is not subject to undue conditions.
Regulation 12 — Suspension and Cancellation	Regulation 12 states “[w]here an NGO, fails or refuses to comply with the Act or any rules or regulations made under the authority of the Act, the Authority may withhold, suspend or cancel the registration of the NGO.”	Under international standards, suspension and involuntary dissolution of an NGO should only be applied when there has been a serious violation of national law, and as a matter of last resort. <sup>22</sup> The grounds included in Regulation 12 for suspension or cancellation of NGO registration, which reiterates Section 23(1)(b) of the NGO Act, do not meet this strict test, since it is likely that even minor infractions could count as failure or refusal to comply with the provisions of the NGO Act. Moreover, Regulation 12 fails to include procedural safeguards recommended	Explicitly state in Regulation 12 that suspension and cancellation of registration can only be applied where there are serious violations of national law, and only by a court order (suspension) or a full judicial hearing (for a cancellation).

<sup>21</sup> *Id.*, para. 17.

<sup>22</sup> A/HRC/20/27, *supra* note 4, paras. 75-76.

		under international law – namely suspension only after court order, and dissolution after a full judicial procedure and exhaustion of appeal mechanisms, although a separate provision of the NGO Act (Section 23(4)) provides that an NGO aggrieved by a decision of the Authority may appeal to the High Court. <sup>23</sup> No dissolution should occur without a court order.	
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### Non-Governmental Organizations (Operations of International NGOs) Regulations, 2022

Regulation	Issue Identified	Commentary	Recommendation
Regulation 7— Mandatory Local Partnership	Regulation 7 states that an international NGO operating in Malawi “shall implement its projects in partnership with a local NGO” except – (a) working in specialized areas that require specialized skills not available in local NGOs; <i>provided that it has a service agreement with government of Malawi</i> ; and (b) is delivering on a state of disaster.”	Although promoting collaboration between international NGOs and local NGOs is a worthy goal towards ensuring local capacity development, legally requiring international NGOs to form partnerships with local NGOs as proposed constitutes an excessive interference in the internal governance of an organization guaranteed under freedom of association standards. This requirement potentially infringes the right of international NGOs to “determine their purposes and activities freely,” as required under regional and international standards. <sup>24</sup> Partnering with another NGO – whether local or international – may require significant resources and time, as well as	Revise the language in the provision so that instead of ‘shall’ the provision states that international organizations ‘are encouraged’ to establish partnerships in the implementation of projects.

<sup>23</sup> African Commission *Guidelines*, supra note 6, para. 58.

<sup>24</sup> *Id.*, para. 23.

		<p>goodwill and interest from a partner NGO. This may in some cases effectively preclude an international NGO from pursuing activities that may not be considered as essential by local NGOs.</p> <p>Individuals and organizations have a right not to associate.<sup>25</sup> The requirement that NGOs collaborate effectively forces their members to associate with other individuals and groups, which undermines their right to freely associate.</p> <p>Additionally, there is no provision in the Act requiring such stringent regulation of INGOs that would justify this provision in the Regulations.</p> <p>Regulation 7 likely fails ICCPR Article 22's "necessary in a democratic society test," which requires any restriction on the freedom of association to be the least restrictive means to achieve a permissible goal.<sup>26</sup> The partnership requirement cannot be the least restrictive means to achieve a permissible goal, as governments routinely achieve a full range of regulatory objectives, including facilitating cooperation between local and international NGOs, without legally requiring every international NGO to partner with a local NGO.</p> <p><b>Recommendation</b> – As a good practice, it is reasonable to encourage collaboration between local and</p>	
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<sup>25</sup> A/HRC/20/27, *supra* note 4, para. 55

<sup>26</sup> *Id.*, para. 17.

		international organizations including providing policy incentives for organizations to do so, but this should not be mandatory.	
Regulation 8— Contractual Relationship	Regulation 8 states that “[a]n international NGO shall enter into a contractual relationship with a compliant local NGO.” Such partnership must be governed by a partnership agreement “prescribed in Form 1.” This partnership agreement must be filed with and monitored by the Authority.	As noted above, legally requiring every international NGO to form a partnership with a local NGO contravenes international standards. Regulation 8 worsens this problem by obligating each international NGO to enter into a contractual relationship with a local partner NGO. Although international and local NGOs often form contracts to govern project collaboration, they should not be required to do so, especially as in some cases it may not be appropriate or feasible to pursue a partnership arrangement in the first place. This measure also likely fails ICCPR Article 22’s “necessary in a democratic society test,” <sup>27</sup> as broadly requiring international NGOs to enter into contracts with local NGOs and to assume legal obligations is disproportionate to any legitimate government interest: governments routinely foster collaboration between international and local NGOs without this legal requirement.  Additionally, Regulation 8 states that the contract must use the partnership agreement prescribed in “Form 1.” However, the Regulations do not include Form 1, so it is	Revise Regulation 8(1) to replace “shall” with “may” and Regulation 8(2) to replace “A partnership made under these Regulations” with “This contractual relationship.”  These updates will clarify that forming a contractual relationship with a local NGO is not mandatory for all international NGOs.

<sup>27</sup> *Id.*, para. 16.

		difficult to assess the content of the required partnership agreement and any impact it has on the freedom of association.	
Regulation 9— Scope of Partnership	Regulation 9(2) states that “the international NGO partnering with Local NGO shall avail a minimum of thirty percent of project portfolio.”	<p>As noted above, requiring an international NGO to partner and form a contract with a local NGO raises serious concerns about the ability of international NGOs to freely operate in Malawi. Regulation 9(2) worsens this problem by requiring an international NGO to “avail a minimum of thirty percent of [a] project portfolio” to the local NGO in the partnership agreement. While increasing the proportion of project activities controlled by local NGOs is a worthy goal, imposing a strict percentage is too rigid and permits arbitrary interference in the internal governance of an organization that violates its right to freedom of association.</p> <p>NGOs include a wide range of different types of organizational structures that reflect the variety of their objectives and activities. Imposing a uniform cap on budget allocation of thirty percent fails to take into account the differences among organizations. For instance, a local NGO may be suited to undertake a specific function that constitutes less than thirty percent of a project portfolio that would in effect violate Regulation 9. Organizations of all types should have the ability to tailor their budget allocations appropriately to meet their capacity needs</p>	Delete Regulation 9(2).

		rather than make a broad determination under the Regulations.	
Regulation 13— Offences	Regulation 13 states that any person who interferes or fails to cooperate with the Authority or a person in service of the Authority commits an offence and is liable upon conviction to a fine up to K1,000,000 or imprisonment for twelve months.	The sanctions provided In Regulation 13 are excessive and disproportionate. The African Commission <i>Guidelines</i> provide that “States shall not impose criminal sanctions in the context of laws governing not-for-profit association.” <sup>28</sup> Further, sanctions “shall be strictly proportionate to the gravity of the misconduct in question.” <sup>29</sup> Imposing a twelve month prison sentence for non-compliance with the NGO Act is an excessive and disproportionate penalty that unduly restricts the freedom of association.	Remove criminal penalties from Regulation 13.

### NON-GOVERNMENTAL ORGANIZATIONS (COORDINATION) REGULATIONS, 2022

Regulation	Issue Identified	Commentary	Recommendation
Regulation 2— Interpretation	Regulation 2 provides that “[i]n these Regulations, unless the context otherwise requires, ‘coordinator’ means the designated NGO Coordinating body under the Act.”	Regulation 2 is vague, which makes it difficult to understand what the NGO coordinator is. The NGO Act (Section 24) designates the Council for Non-Governmental Organisations in Malawi (CONGOMA) as the NGO coordinating body. <sup>30</sup> However, this is not explicitly stated in the Regulations. Instead, Regulation 2 only states that “‘coordinator’ means the designated NGO Coordinating body under the	Revise Regulation 2 to clearly indicate which body is the “coordinator.” If accurate, Regulation 2 should state that the “coordinator” means the Council for Non-Governmental Organisations in

<sup>28</sup> African Commission *Guidelines*, *supra* note 6, para. 55 (citing Malawi African Association and others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), paras. 106-7).

<sup>29</sup> *Id.*, para. 56.

<sup>30</sup> The NGO (Amendment) Act, 2022 preserves this designation, although it deletes Section 25 of the NGO Act, which described CONGOMA’s functions.

		Act.” It may be unclear to NGOs and other stakeholders whether the “coordinator” for purposes of the Regulations is CONGOMA or a new mechanism.	Malawi (CONGOMA).
Regulation 5— NGO Coordinating Body Guiding Principles	Regulation 5 states that the NGO Coordinating Body shall be guided by the principles of “patriotism” and “national unity,” among others.	<p>As noted above, any restriction on the right to freedom of association must be “prescribed by law.” To meet this test, the restriction must be sufficiently precise to enable an individual or association to assess whether their intended conduct would be in breach of the law, and to foresee the likely consequences of any such breach.<sup>31</sup> The terms “patriotism” and “national unity” are broad and vague terms, which undermines the ability of stakeholders to understand how to comply with the law, thus violating the international standard. The NGO coordinating body may not know if activities supporting NGOs that advocate for minority rights will be deemed as harming “national unity.”<sup>32</sup></p> <p>Similarly, there is a risk that any criticism of official policy by the NGO coordinating body will be deemed “unpatriotic.” The NGO coordinating body is a membership umbrella organization for NGOs in Malawi. Its purpose is to strengthen the capacity of the NGO sector and to advocate for</p>	Delete Regulation 5(b) and (c).

<sup>31</sup> A/HRC/20/27, *supra* note 4, para. 17.

<sup>32</sup> The European Court of Human Rights has held that “the existence of minorities and different cultures in a country was a historical fact that a ‘democratic society’ had to tolerate and even protect and support according to the principles of international law.” See *Sidiropoulos v. Greece*, *supra* note 3, para. 41.

		NGOs’ interests. Regulation 5(b) and (c) could be interpreted by officials as requiring the NGO coordinating body to align itself with government policies in order to support “patriotism” and “national unity.”	
Regulation 6— Complaint Mechanism	Regulation 6(2) provides that the “coordinator shall receive any complaint by any NGO against the Regulator or Government or any authority; for remediation of the complaint.”	This provision appears to go beyond what is provided in the NGO Act. The Regulations are meant to provide more detail about procedures for implementing the NGO Act, rather than adding to the substance of the NGO Act. With respect to the mandate of the NGO coordinating body, <sup>33</sup> the NGO Act merely states that this body “shall represent and promote the collective interest and concerns of NGOs in Malawi.” <sup>34</sup> The NGO Act does not provide that the NGO coordinating body should serve a complaint handling function.  Under international and regional standards, an NGO is entitled to the right to remedy for certain government misconduct. <sup>35</sup> For instance, the African Commission <i>Guidelines</i> provide that an NGO should be	Insert language into Regulation 6(2) affirming that an NGO may seek review from the High Court or other competent judicial body of a complaint against regulatory bodies, the Government, or other authorities. The revised provision should reference the list of remedies available to an aggrieved NGO listed in the African Commission <i>Guidelines</i> (para. 62).

<sup>33</sup> Section 24 of the NGO Act specifies that the Council for Non-Governmental Organisations in Malawi (CONGOMA) is the designated NGO coordinating body, or coordinator.

<sup>34</sup> NGO Act, Section 24. The NGO (Amendment) Act, 2022 repealed Section 25 of the NGO Act, which had listed the functions of the NGO coordinating body. Notably, receiving complaints from NGOs against the government or regulators was not among CONGOMA’s functions listed in the repealed provision.

<sup>35</sup> See, e.g., African Commission *Guidelines*, *supra* note 6, para. 62 (stating that “[w]here the right to association has been infringed, the association as well as its members shall have due access to a remedy.

a. In addition to restitution remedying the specific harms inflicted, associations shall have the right to compensation for any and all damages that may have occurred.

b. Where the authorities pursue warrantless sanctions, or have pursued sanctions with the aim of harassing particular associations, those responsible for prosecuting the cases in question shall be held liable for violating the right to freedom of association.

c. The right to a remedy also requires other measures, such as satisfaction and guarantees of non-repetition, as and where appropriate.”



		<p>able to seek a remedy through a <b>court of law</b> if the government conducts an unjustified inspection, denies access to public funding, or unduly suspends or dissolves the NGO.<sup>36</sup> Indeed, the NGO Act itself provides that an NGO may apply to the High Court to review a suspension or cancellation order.<sup>37</sup></p> <p>Regulation 6(2) does not affirm that an NGO may seek legal redress for government misconduct through the court system. Instead, the Regulation states that the NGO coordinating body “shall receive” NGOs’ complaints regarding government conduct. Regulation 6(2) does not describe a procedure for this function. It is also unclear whether government is subject to the NGO coordinating body’s authority or what types of remedies the coordinating body can provide. An NGO may also be confused about whether to approach the NGO coordinating body with certain complaints or to use the appeal process specified in the NGO Act.<sup>38</sup> This lack of clarity undermines NGOs’ right to seek remedies through the court system, thus contravening international and regional standards.</p>	
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<sup>36</sup> African Commission, *Guidelines*, *supra* note 6, paras. 34(f), 46, 56, and 58.

<sup>37</sup> NGO Act, Section 23(4).

<sup>38</sup> As noted above, the NGO Act, Section 23(4), provides that an NGO may apply to the High Court to review a suspension or cancellation order.

Regulation 7— Functions and Powers of the Coordinator	Regulation 7(1)(i) requires the NGO coordinator to report to the Authority on the implementation of the Regulations in a prescribed manner.	Regulation 7(1)(i) requires the NGO Coordinator to report on the “implementation of the Regulations,” which raises the risk of intrusive government oversight of the NGO sector. The African Commission <i>Guidelines</i> provide that “[t]he oversight powers of the authorities shall be carefully delimited, so as not to infringe on the right to freedom of association.” <sup>39</sup> Further, “reporting requirements shall be constructed on the basis of the presumed lawfulness of associations and their activities, and shall not interfere with the internal management or activities of associations.” <sup>40</sup> Regulation 7(1)(i) could be interpreted to require the coordinator to report on NGOs’ compliance with the Regulations or to provide other information on their activities, thus contravening the above standards. The NGO coordinator is a membership umbrella organization for NGOs in Malawi. As such, its functions should be determined by its own members and not defined in government regulations. <sup>41</sup>	Delete Regulation 7(1)(i).
Regulation 9— Certain Reporting Functions	Regulation 9(1)(a) requires the NGO coordinator to report an NGO for failing to attend a	As noted above, the African Commission <i>Guidelines</i> provide that “[t]he oversight powers of the authorities shall be carefully delimited, so as not to infringe on the right to	Delete Regulation 9(1)(a).

<sup>39</sup> African Commission *Guidelines*, *supra* note 6, para. 33.

<sup>40</sup> *Id.*, para. 47.

<sup>41</sup> The NGO (Amendment) Act, 2022 amended Section 24 of the NGO Act to specify that the Minister shall designate the NGO coordinating body. As noted above, the NGO coordinating body seeks to represent the collective interests and concerns of the sector and should therefore be independent from the government and not designated by the Minister.

	scheduled meeting <sup>42</sup> without good cause.	freedom of association.” <sup>43</sup> Requiring the NGO coordinator to report on NGOs’ activities, including failure to attend meetings, constitute excessive oversight that in effect turns an independent NGO umbrella body into an agent of government oversight. Removing this provision would help to ensure that government oversight powers are appropriately delimited, which complies with the African Commission standard.	
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### NON-GOVERNMENTAL ORGANIZATIONS (COMPLAINT HANDLING MECHANISM) REGULATIONS, 2022

Regulation	Issue Identified	Commentary	Recommendation
Regulation 6— Designation of Mediator	Regulations 6(1)-(2) designate “the Registrar of the Authority as mediator for purposes of handling of complaints ... by any person against an NGO.”	The NGO (Complaint Handling Mechanism) Regulations designate the NGO Authority to receive a complaint by any person against an NGO (Regulation 4). Regulation 6(1) further specifies that the Registrar shall serve as the mediator to handle these complaints. In other words, Regulation 5 designates a government official, rather than an independent body, to review complaints. It is recommended that the Regulations establish an independent body for this purpose.  Under international and regional standards, complaints pertaining to NGOs’ conduct	Revise Regulation 6 to establish an independent body including individuals from outside of government, especially from the NGO sector, to mediate complaints by individuals against NGOs.

<sup>42</sup> Regulation 6(1)(c) states that the NGO coordinator shall “[h]old Annual General Meeting, sector meeting, regional meeting or any other meeting.”

<sup>43</sup> African Commission *Guidelines*, *supra* note 6, para. 33.

		<p>should be resolved through an impartial process that includes adequate safeguards, such as notice, a hearing before an impartial body, and the right to appeal.<sup>44</sup> One way to achieve this is through the creation of a specialized body through separate regulations that provide clear rules of procedure. For instance, Ethiopia’s <i>Proclamation No. 1113/2019</i> requires the country’s Civil Society Organizations Board to create an independent complaint review committee and issue rules of procedure for this committee.<sup>45</sup></p>	
<p>Regulation 9— Grounds for Investigations</p>	<p>Regulation 9 empowers the Authority to investigate NGOs and their employees for “abuse of power” and “unfair practices.”</p>	<p>The African Commission <i>Guidelines</i> provide that “the oversight powers of the authorities shall be carefully delimited, so as not to infringe on the right to freedom of association.”<sup>46</sup> To accomplish this, “Regulations on inspections shall clearly define the powers of inspecting officers, ensure respect for privacy, and provide redress for any violations committed through the inspection process.”<sup>47</sup> Further, “[i]nspections shall only take place where there is a well-founded evidence based allegation of a serious legal violation.”<sup>48</sup> Regulation 9 is concerning because it provides broad investigatory powers to</p>	<p>Revise Regulation 9 to clearly define the investigatory powers of the Authority and provide procedural protections specified in the African Commission <i>Guidelines</i> (para. 34). This should include redress for any violations committed by state authorities through the investigation process.</p>

<sup>44</sup> African Commission, *Guidelines*, *supra* note 6, paras. 31 and 62.

<sup>45</sup> Ethiopia Proclamation No. 1113/2019, Section 9.

<sup>46</sup> African Commission, *Guidelines supra* note 6, para. 33.

<sup>47</sup> *Id.*, para. 34(c).

<sup>48</sup> *Id.*, para. 34(b).

	<p>Regulation 9(b) defines “unfair practices” as “collecting money from the public promising them charity development.”</p>	<p>the Authority and does not include procedural safeguards, such as providing redress for violations committed through the investigation process.</p> <p>As noted above, ICCPR Article 22’s “prescribed by law” test requires any restriction to freedom of association to be sufficiently precise to enable an individual or NGO to assess whether their intended conduct would be in breach of the law, and to foresee the likely consequences of any such breach.<sup>49</sup> Regulation 9(b) is concerning because the term “unfair practices” is vaguely defined, which could undermine the ability of NGOs and their employees to understand the Regulation’s requirements. “Unfair practices” is defined as “collecting money from the public promising charity development.” As written, this appears to subject an NGO to investigation if it collects funds from the public and promises to engage in charitable work. NGOs should not be investigated for these routine activities.</p>	<p>Clarify the definition of “unfair practices” in Regulation 9(b). Consider requiring an element of fraud or misrepresentation in the definition, rather than merely “collecting money from the public promising them charity development.”</p>
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## Conclusion

CHRR appreciates the opportunity to comment on the draft Regulations and stands ready to provide additional comments on various issues upon request.

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<sup>49</sup> A/HRC/20/27, *supra* note 4, para. 16.