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Access Now Submission to the United Nations Human Rights Council, on the Universal Periodic Review 2020 Third Cycle for Malawi

About Access Now

1. Access Now (www.accessnow.org) is an international organisation that works to defend and extend digital rights of users globally. Through representation in 10 countries around the world, including engagement with stakeholders and policymakers in Africa, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the continued openness of the internet and the protection of fundamental rights. We engage with an action focused global community, and our Technology Arm operates a 24/7 digital security helpline that provides real time direct technical assistance to users around the world.
2. Access Now advocates an approach to digital security that promotes good security policies that protect user rights, including privacy and freedom of expression. Access Now has worked extensively on digital rights including on free expression and web blocking, regulation of Net Neutrality, and data protection.

Introduction

3. The Universal Periodic Review (UPR) is an important United Nations (U.N.) process aimed at addressing human rights issues all across the globe. Access Now welcomes this opportunity to contribute to Malawi's third review cycle. This submission examines the following human rights priorities, particularly as they relate to the digital age:
 - Freedom of expression
 - Access to information, and
 - The right to privacy.
4. Malawi was last reviewed in May 2015. In May 2015 the Malawi government received 199 recommendations in the area of human rights of which 154 of the recommendations were accepted and 45 others noted.

International and domestic human rights obligations

5. Malawi has signed onto and ratified various international human rights instruments, including: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).¹

¹ [Status of Ratification Interactive Dashboard Malawi](#) OHCHR.

6. Chapter 4 of the Constitution of Malawi provides for judicially enforceable fundamental rights. Of these, Articles 34 and 35 of the Constitution of Malawi establish a fundamental right to freedom of speech and expression and Article 37 establishes the right to information and right to know. Article 20 establishes the right to equality, and Articles 16 and 18 provide for the right to life and liberty. Article 21 establishes the right to privacy.
7. In 2016, the Malawi Parliament passed the Electronic Transactions and Cyber Security Act to regulate e-commerce and outline cyber crimes. The law, however, contains some concerning provisions such as restrictions on online communications in order to protect “public order and national security” and the criminalization of “offensive communication” via ICTs with penalties of fines or up to 12 months in prison.²

The state of digital rights in Malawi

8. There has been a growing trend of governments resorting to shutting off, or disrupting, the internet in periods of unusual political activity or turmoil; Malawi is no exception. On the evening of May 21st, 2019, election day in Malawi, the country experienced a disruption in internet connectivity, dropping abruptly to 80% of normal connection levels for a few hours as election results were coming in.³ By and large, the telecom companies that were affected were state-owned, while access via privately-owned internet providers remained generally available.⁴
9. Reports suggest that the disruption was an intentional act of the leadership of the ruling party to disrupt information flows and keep citizens uninformed during the election.⁵ The internet disruption during the 2019 election therefore exposes government officials leveraging their power over internet service providers to interfere with the human rights of Malawi’s citizens, including their freedom of expression and right to know.⁶

Access to Information and Freedom of Expression

10. In February 2017, Malawi implemented the Access to Information Act. For many citizens living in Malawi, the internet is hard to come by. According to Alliance for Affordable Internet (A4AI) in 2018 only a mere 11.47% of individuals use the internet in Malawi. Moreover, A4AI further confirms that 34.15 (out of 100 people) have mobile broadband connections in Malawi.⁷ Further, the internet remains too expensive and unaffordable to most.⁸ Though the rate has been steadily improving over the past decade, providing access to rural populations and through mobile availability will allow this to grow much faster.

² [Freedom on the Net 2017: Malawi](#), Freedom House.

³ [Internet disrupted in Malawi on election day](#), Netblocks, 2019.

⁴ *Id.*

⁵ [Malawi: Macra Plans to Shutdown Phones, Whatsapp on Elections Days](#), AllAfrica, 2019

⁶ *Id.*

⁷ [Alliance for Affordable Internet Malawi 2018](#)

⁸ [Freedom of the Net 2018 Malawi](#) Freedom House, 2018.

11. Access to the internet is access to information, emergency services, and economic mobility; citizens of Malawi deserve more connectivity. Increasing access is especially important because populations that are more vulnerable are often most affected by lack of connectivity. ITU-D reports further illuminate the state of internet access in Malawi by demonstrating a gender gap in access. In 2016, Malawi's internet penetration rate was 11.5 percent overall, while the internet penetration rate for male citizens was 17.5 percent and for women, it was 5.5 percent.
12. As more connections are made, and more citizens come online, these new internet users would benefit from education, training, and capacity-building opportunities to learn how to securely and effectively exercise their human rights via information and communications technologies.
13. For its part, the government must ensure human rights are protected online, and implement open, transparent, and accountable internet governance processes. All stakeholders must be given a meaningful opportunity to input into regulatory and policy decisions that impact human rights online.

The Right to Privacy

14. As the ICT penetration rates slowly climb in Malawi, the Malawi government has not been adequately vigilant to the threats upon digital rights. Increased mandatory data collection, such as SIM card registration and biometric data collection through the Malawi national ID program directly threaten the safety of users' data as well as violates their right to privacy.⁹
15. Digital identity programmes often intend to make the delivery of services, including welfare benefits, more efficient and accurate, and reduce corruption by using technology to assist in clear identification and secure authentication. The national ID program in Malawi offers functionality incorporating voter identity, business registration, health identity and social protection. However, these digital identity programmes can themselves become impediments to governance and harm the provision of welfare services and the wider inclusion of citizens. In 2017 there were concerns surrounding the exclusion of citizens in Malawi, including outstanding "registration of refugees, asylum-seekers and Malawians of Indian origin" and the National Registration Bureaus cameras, which were unable to capture faces of certain citizens.¹⁰
16. Access Now recently examined national digital identity programmes from a human rights perspective, discussing the context for the debate about such initiatives globally and proposing safeguards and policy recommendations in our 2018 publication National Digital Identity Programmes: What's Next?¹¹ It is imperative that digital identity systems, particularly those

⁹ [Malawi: Digital Rights, Internet Accessibility, and Affordability in Malawi - Part 1](#), AllAfrica, 2019

¹⁰ [National ID program in Malawi raises questions, fears](#) AA, Moses Michael-Phiri, 11 June 2017.

¹¹ [Access Now Digital Identity Paper](#) May 2018.

backed by the state's resources and legal powers, are designed around sound principles of governance, data protection, privacy and security.

17. An effective policy framework for national ID programs must be supported by an equally strong technology and cybersecurity framework. The collection of large amounts of personal information pertaining to identities – including biometrics – often form tempting targets for criminals and other actors for malicious hacking and cyber intrusion. Additional challenges related to the secure communication of data during authentication must be met through proper encryption. We note grave concern over the use and collection of biometric data in the new digital identification cards. The aggregation and use of biometric data should be sharply limited, even if such processing is aimed at increasing convenience or justified as a way to enhance security.

Recommendations

Malawi should improve its human rights record and treatment of digital rights in several areas. We accordingly recommend that the Malawi government:

18. Investigate the incidents of internet shutdowns, and hold the perpetrators accountable, while also reviewing relevant laws and regulations to prevent future disruptions;
19. Work to improve internet access and extend affordable, open and secure connectivity for all its citizens. Malawi should particularly address the inequalities in women's access to the internet in accordance with its human rights obligations under CEDAW;
20. Fulfill its human rights obligations to respect the equal rights of all persons without distinctions made on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
21. Reform the Electronic Transactions and Cyber Security law to bring it into conformity with Malawi's international and domestic human rights law obligations, particularly regarding protections of freedom of expression and the right to privacy;
22. Reform its national ID program around sound principles of governance, data protection and privacy, and cybersecurity. Malawi should specifically:
 - a. Enact a specific and comprehensive data protection law to protect the right to privacy and adequately fund and support its implementation;
 - b. Minimise the amount of and type of data the government and associated service providers collect through the national ID program;
 - c. Restrict lawful interception and monitoring of national ID use and implement measures for accountability;

- d. Ensure that the national ID programs is based on models for secure communications, including providing end-to-end encrypted traffic as far as possible;
 - e. Develop legal procedures and evidentiary standards for biometrics with care to protect human rights and due process.
23. The UPR is an important U.N. process aimed at addressing human rights issues all across the globe. It is a rare mechanism through which citizens around the world get to work with governments to improve human rights and hold them accountable to international law. Access Now is grateful to make this submission.
24. For additional information, please contact Access Now General Counsel Peter Micek (peter@accessnow.org).