



International Disaster Response Law (IDRL) in Malawi

A study on legal preparedness for regulatory issues in
international disaster response

Prepared by



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About this report

This report is commissioned by the Malawi Red Cross Society (MRCS) with support from the International Federation of Red Cross and Red Crescent Societies (IFRC). It analyses the existing legal and policy frameworks for disaster management and response in Malawi focusing on facilitation and regulation of international disaster assistance. The report also provides an assessment of strengths and gaps and provides recommendations for strengthening legal preparedness for disasters in Malawi.

About the Disaster Law Programme

The Disaster Law Programme seeks to reduce human vulnerability by promoting legal preparedness for disasters. The Disaster Law Programme works in three key areas: (1) collaborating with National Red Cross and Red Crescent Societies and other partners to offer technical assistance to governments on disaster law issues; (2) building the capacity of National Societies and other stakeholders in disaster law; and (3) dissemination, advocacy and research.

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Cover photo credit: When floods hit Malawi in January 2015, following weeks of torrential rains, Red Cross staff and volunteers responded, distributing shelter kits and non-food items to some of those hardest hit, Malawi Red Cross, 2015.

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¹ Team members were Mr. Tonda Chinangwa, Mrs. Agnes Sentala and Mr. Isaac Songea.

Executive summary

The present study assesses the legal preparedness for disasters in Malawi in light of the Guidelines for the Domestic Facilitation and Regulation on International Disaster Relief and Initial Recovery (the IDRL Guidelines).² The study was prepared by the Malawi Red Cross Society in collaboration with the International Federation of Red Cross and Red Crescent Societies (IFRC) Disaster Law Programme with the aim of providing guidance to the Government of Malawi (GoM) in its process of reviewing the current legal and regulatory framework pertaining to disaster risk management.

The study is a result of an Action Plan³ concluded at a consultative stakeholders workshop held in Lilongwe in August 2013. It was concluded at this workshop⁴ that Malawi's current legislation and policy on disaster management needs strengthening where it lacks the facilitation and regulation of international humanitarian assistance. A consensus was thus reached for a comprehensive legal research project to be undertaken to review existing laws and regulations relevant to international disaster relief with a view to identifying gaps and making recommendations for consideration by the GoM.

Malawi faces numerous disasters in both rural and urban areas, including floods, earthquakes, fires, epidemics, droughts and landslides. The Malawi National Disaster Profile has shown that from 1979 to 2010, natural disasters have cumulatively affected nearly 21.7 million people and killed about 2,596 people.⁵ Over the years, the GoM has been responding to these disasters, in several cases with support from other foreign actors. The focus of this study is to examine the level of preparedness of the GoM for facilitating and regulating the entry and operation of international actors during disasters that require external support and to provide recommendations on how to strengthen the legal and regulatory framework pertaining to disaster risk management in light of the IDRL Guidelines.

² The IDRL Guidelines are available at [http://ifrc.org/PageFiles/125652/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://ifrc.org/PageFiles/125652/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf)

³ Plan of Action arising of workshop on Law and Disasters in Malawi, Crossroads Hotel, Lilongwe, 29 August 2013.

⁴ Workshop report available at <http://www.ifrc.org/PageFiles/134694/Disasters%20and%20law%20in%20Malawi%20workshop%20report.pdf> See also the Prevention Web report: <http://www.preventionweb.net/english/countries/statistics/?cid=104>

⁵ Malawi National Disaster Profile for 2010

Executive summary

It was noted during consultations with stakeholders and meetings with the Task Force Members that the existing legal and regulatory framework needs to be reviewed to ensure that it addresses the relevant disaster related issues of today. Although the draft Disaster Risk Management Bill (DRM Bill) and draft National Disaster Risk Management Policy (NDRM Policy) contain some important provisions on international assistance, there is still room for improvement to ensure that they meet international standards.

It should be noted that the GoM had commenced, at the time of writing of the report, a thorough revision of its legislative framework pertaining to disaster management. While this research took place, the GoM initiated the drafting of a Disaster Risk Management Bill, which was to replace Malawi's Disaster Preparedness Relief Act (DPR Act) of 1991.⁶ It was also developing a National Disaster Risk Management Policy. This study recommends a number of specific amendments to the draft DRM Bill and NDRM Policy and other relevant laws and regulations, directed at strengthening Malawi's legal preparedness for disasters.

Acronyms and abbreviations

ACPC	Area Civil Protection Committee
AIP	Aeronautical Information Publication
ARSDR	African Regional Strategy for Disaster Reduction
AU	African Union
CCVI	Climate Change Vulnerability Index
CONGOMA	Council for Non-Governmental Organisations for Malawi
DCPC	District Civil Protection Committee
DEC	District Executive Committee
DoDMA	Department of Disaster Management Affairs
DPR Act	Disaster Preparedness and Relief Act of Malawi
DRM Bill	Disaster Risk Management Bill of Malawi
GoM	Government of Malawi
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced Persons
IDRL	Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance
IFRC	International Federation of Red Cross and Red Crescent Societies
INSARAG	International Search and Rescue Advisory Group
IPU	Inter-Parliamentary Union
LARMC	Local Authority Risk Management Committees
MACRA	Malawi Communications Regulatory Authority
MCM	Medical Council of Malawi
MDG	Millennium Development Goals
MRA	Malawi Revenue Authority
MRCS	Malawi Red Cross Society
MRCS Act	Malawi Red Cross Society Act

MVAC	Malawian Vulnerability Assessment Committee
NDPRCM	National Disaster Preparedness and Relief Committee of Malawi
NDPRF	National Disaster Preparedness and Relief Fund
NDPRTC	National Disaster Preparedness and Relief Technical Committee
NDRMP	National Disaster Relief Management Platform
NDRM Policy	National Disaster Risk Management Policy
NGO	Non-Governmental Organisation
NGO Act	Non-Governmental Organisation Act of Malawi
PI Act	Privileges and Immunities Act of Malawi
PS	Principal Secretary of DoDMA
UN	United Nations
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
SADC	Southern African Development Community
SOP	Standard Operating Procedures
VCPC	Village Civil Protection Committee
WV	World Vision

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Chapter 1

Introduction

1.1 What is International Disaster Response Law (IDRL)?

IDRL is the acronym of International Disaster Response Law. IDRL refers to international and national legal instruments that pertain to border-crossing disaster management operations. While there is not one treaty that addresses all aspects of international disaster response cooperation, there are many international instruments that are designed to regulate certain aspects of disaster response. For example, one could think of the Convention on Assistance in Case of a Nuclear Accident, international customs treaties, UN resolutions about humanitarian response and of course the soft law instruments that are developed by the humanitarian community itself, such as the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief.

Despite these international efforts to create a legal environment that both regulates and facilitates international disaster relief and recovery operations, many domestic legal systems are not prepared to deliver an optimally efficient and effective response to those affected by disasters. The IFRC's Disaster Law Programme has focused on strengthening the legal preparedness for disasters since 2001. The IFRC has commissioned more than 50 country and regional studies and contacted Governments, National Societies, NGOs and UN agencies to identify common legal issues. It has found a common set of legal problems arising in international operations, due mainly to a lack of legal preparedness at the national level.

Legal bottlenecks often hinder the entry of emergency goods and personnel at the border, sometimes for days or even weeks on end, increase the cost of operations through import taxation and storage costs at the border and fail to support operations in-country due to cumbersome procedures governing registration, work permits and the like. On the other hand, lack of regulation of coordination mechanisms and quality control may lead to a lack of oversight over foreign actors operating in the country and the nature and quality of the services they deliver.

Between 2006-2007, the IFRC spearheaded a global consultation process to develop the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (IDRL Guidelines), a tool designed to support national authorities in addressing these types of legal issues surrounding international disaster relief and recovery operations. The IDRL Guidelines were drawn from existing international law and standards. They contain recommendations to address common legal bottlenecks or instances of under-regulation that arise during international disaster response operations. The IDRL Guidelines are recognised in several UN General Assembly Resolutions and were unanimously adopted by the state parties to the Geneva Conventions at the 30th International Conference of the Red Cross and Red Crescent in November 2007.

Another tool that this study makes use of is the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (hereinafter referred to as the "Model Act on IDRL"). The Model Act was developed by IFRC, the

Introduction

UN Office for the Coordination of Humanitarian Affairs (UN OCHA) and the Inter-Parliamentary Union (IPU). Among others, the Model Act serves as a concrete drafting tool to countries like Malawi, which are either in the process of drafting or reviewing existing legislation.

1.2 IDRL in Malawi

In 2014, the GoM commissioned a review of the Disaster Preparedness and Relief Act of 1991 through the Department of Disaster Management Affairs (DoDMA). With the financial support of the United Nations Development Programme (UNDP), a draft “Disaster Risk Management Bill” (DRM Bill) and a “National Disaster Risk Management Policy” (NDRM Policy) were drafted. Both these draft instruments were in the process of development at the time of writing of this report.

On 29 August 2013, the Malawi Red Cross Society (MRCS), in conjunction with the IFRC, organised a workshop on disaster law in Malawi. The workshop drew participants from various stakeholders including government departments, UN agencies, NGOs and academic institutions. At the end of the workshop, a plan of action was drawn which, amongst others, recommended the review of current laws on disaster risk management to identify challenges and strengths, while also aiming to harmonize domestic legislations with internationally accepted practices that ensure improved facilitation of international assistance in disaster situations. As a result, in October 2013, the IFRC and MRCS signed an agreement to collaborate in the IDRL Technical Assistance Project intended to advise the GoM on how best to strengthen its legal preparedness for disaster management and response.

1.3 Methodology

The methodology adopted for this study consisted of a desk review of international disaster response instruments, regional agreements, and domestic legislation dealing with disaster response management in Malawi, complemented by consultation interviews with a wide range of stakeholders. The process involved, inter alia, review of customs procedures, immigration law, importation of disaster relief food and non-food items and recognition of foreign professional qualifications of disaster relief personnel.

As part of the consultative process, a task force chaired by DoDMA was established to provide a platform for key stakeholders in disaster risk management to engage in, facilitate and contribute to the review process. Furthermore, the task force provided cross-sectoral advice, information and facilitation necessary to achieve the objectives of the project. This included enhancing the awareness and knowledge of legal problems that commonly arise in situations of disasters requiring international response and discussion regulatory issues in the context of Malawi.

Introduction

The task force comprised of the following members:

- | | |
|------------------------------------|---|
| (i) DoDMA - Chairperson | (viii) National Assembly (Legal Department) |
| (ii) Consultant(s) - Secretariat | (ix) World Vision International (Int. NGO) |
| (iii) Department of Civil Aviation | (x) Action by Churches Together (Local NGO) |
| (iv) Ministry of Health | (xi) Malawi Red Cross Society |
| (v) Ministry of Foreign Affairs | (xii) Malawi Revenue Authority |
| (vi) Ministry of Justice | (xiii) UN Resident Coordinator's Office |
| (vii) Department of Immigration | |

The task force convened four times to discuss drafts of the present report and subjected it to a detailed analysis and feedback on findings. Moreover, a consultative workshop was organized to get feedback on the practical issues faced by key stakeholders representing different government departments and civil society organisations involved in disaster management.

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Chapter 2

Malawi: disaster profile

Malawi: disaster profile

Malawi lies in the south-east of Africa and shares boundaries with Zambia in the west, Mozambique in the east, south and south-west and Tanzania in the north. It occupies an area of 118,484 square kilometres, of which 94,276 square kilometres is land and the remainder is water. The largest water body in the country is Lake Malawi, which has a total surface area of more than 30,000 square km. According to the 2008 Population and Housing Census,⁷ Malawi's population was estimated to be 13.1 million and growing at the rate of 2.8% per annum. Malawi is predominantly an agricultural economy; the agricultural sector accounts for 35% of the gross domestic product and an overwhelming proportion of national employment.

2.1 Disaster scenarios in Malawi

Malawi is exposed to a number of natural and human induced hazards in both rural and urban areas. These include floods, heavy storms, droughts, dry spells, epidemics, fires, landslides, earthquakes and HIV and AIDS.⁸ Being largely an agro-based economy, the country and its population are vulnerable to the frequent occurrence of drought and food insecurity. Environmental degradation, poverty, rapid urbanization, lack of knowledge and limited access to information and technology, harmful cultural beliefs and customs, limited food diversity, weak infrastructure, and absence of effective disaster risk reduction strategy have all contributed to increased vulnerability of the population to hazards. Further exacerbating the frequency and severity of disasters in the country is climate change.⁹

2.1.1 Weather related disasters

Weather-related disasters are the most common form of disasters in Malawi. Their nature and pattern is changing as a result of climate change and becoming more frequent and less predictable, with expected rise in intensity. Globally, the 2012 Climate Change Vulnerability Index (CCVI)¹⁰ ranks Malawi 9th out of 10 countries as 'extremely at risk' to climate change impacts in the world. The list otherwise comprises: Haiti, Bangladesh, Zimbabwe, Sierra Leone, Madagascar, Cambodia, Mozambique, Congo DR, and the Philippines.

Between 1970 and 2006, Malawi experienced 40 weather-related disasters, 16 of which occurred the years after 1990. Worse still is the sharp increase in the geographical coverage of these disasters and the number of people affected by it since 1990.¹¹ Apart from the potential loss of life, the main consequences from floods, for instance, are destruction of houses and crops, loss of livestock, temporary food insecurity, loss of infrastructure, internal displacement and separation of children from caregivers coupled with possible trauma and psychological distress.

⁷ http://unstats.un.org/unsd/demographic/sources/census/2010_PHC/Malawi/Malawi_Report.pdf

⁸ Foreword to the Draft NDRM Policy, 2013, page iv

⁹ Draft NDRM Policy, 2013, page 1

¹⁰ The CCVI features subnational maps and analysis of climate change vulnerability and the adaptive capacity to combat climate change in 193 countries. Among others, the CCVI takes into consideration exposure to climate change, population concentration, development, natural resources, agriculture dependency and conflict.

¹¹ Malawi National Disaster Profile for 2010

Malawi: disaster profile

Before 2001, only 9 districts in Malawi were classified as flood-prone. Following the incident in 2001 when 16 districts were hit by flood, DoDMA classified 15 out of 28 districts as disaster prone based on historical data and climate of the areas. According to DoDMA, the most disaster prone districts are Karonga, Salima, Nkhota-kota, Rumphu, Nkhata-bay, Mangochi, Dedza, Ntcheu, Balaka, Zomba, Phalombe, Machinga, Blantyre, Chikhwawa and Nsanje. Overall, this classification represents 58% of the districts in Malawi.

2.1.2 Fires

Malawi has in the recent past suffered from fires affecting public places including forests, markets and warehouses. In 2014, several incidents of fire, some of which were suspected to be acts of arson, gutted Mzuzu Market, Malawi Revenue Authority Offices and Malawi Electoral Commission warehouse in Lilongwe causing massive property losses.¹²

2.1.3 Earthquakes

The 2010 World Bank Disaster Risk Management Country Note reported that between 1964 and 2005 over 1,350 earthquake events were recorded in Malawi, most of which (1,268) had magnitudes less than 4.5. According to geologists, Malawi is likely to experience earthquakes of much greater magnitude in the future. Damage that resulted from the two main earthquakes that occurred over the last 30 years (1979-2009) cost about US\$ 28 million in Salima (1989), and about US\$ 13.6 million in Karonga (2009). The Salima earthquake killed 9 people and affected over 50,000 people while the four Karonga earthquakes killed 4 and affected the lives of 145,436 people.¹³

2.1.4 Health related disasters

According to the 2010 Demographic and Health Survey, the general prevalence rate of HIV in Malawi is at 10.6%.¹⁴ While very high, the rate is lower than that of neighbouring countries of Zambia, Zimbabwe and South Africa.

¹² Malawi Voice, 20 July 2014, <http://www.malawivoice.com/2014/07/20/fear-grips-blantyre-vendors-following-fire-incidences/>

¹³ http://www.gfdrr.org/sites/gfdrr.org/files/documents/Malawi_DRM_Program_July-2010.pdf

¹⁴ HIV prevalence rates have been going down through the years from 21% in the 90s to 10.6% currently. According to UNFPA, Malawi is one of the countries that has managed to reduce the rate of new HIV infections especially among young people by over 25% although there are still unacceptably high numbers of new HIV infections annually, as high as 50,000 new cases per annum. Malawi has a generalized epidemic, meaning that each and every person is affected. However, sex workers have the highest prevalence rate at 70%, followed by female police officers at 32% and male police officers at 25.6%, then female primary school teachers at 21% followed by male primary school teachers around 20%, then female secondary school teachers at 17% and male secondary school teachers about 14-15%. As indicated earlier with 10.6% national prevalence rate every Malawian is at risk of contracting HIV.

Malawi: disaster profile

In the 1990s, HIV/AIDS was declared a disaster by the GoM. Since then, many innovations have occurred to address this threat. However, although strides have been made in introducing more favourable and less toxic anti-retroviral drugs (ARVs), about 98%¹⁵ of the funding comes from external sources. In light of this situation, the GoM has mounted an impressive response to the HIV/AIDS epidemic in recent years. This has been reflected by a steady decline in HIV prevalence from 14% in 2003 to 10% in 2011, with new annual HIV infections lowering from 100,000 in 2003 to 46,000 in 2011. This testifies to the commendable efforts being extended by the GoM and international donors to increase access to treatment and improved prevention initiatives.

¹⁵ Information provided by Mr. Humphreys Shumba, HIV/Aids National Programme Officer for UNFPA Malawi.

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Chapter 3

Malawi's domestic legal,
policy and institutional
framework for disaster
risk management

At the domestic level, Malawi adopted the Disaster Preparedness Relief Act in 1991 (DPR Act).¹⁶ The DPR Act mainly deals with the establishment of an institutional framework for disaster management, declaration of a state of disaster and the creation and management of a disaster appeal fund.

According to Article 8 of the IDRL Guidelines, states should adopt comprehensive legal, policy and institutional frameworks that would enable relevant regional and international organisations to devote adequate resources to ensure effectiveness in planning for disaster prevention, mitigation, preparedness, relief and recovery.¹⁷ These frameworks are further expected to designate domestic government entities with responsibility and authority in the coordination of international assistance and in so doing, to give consideration to the establishment of national focal point to liaise between international and government actors at all levels.¹⁸

3.1 Definition of Disaster

Section 2(1) of the IDRL guidelines defines disaster as:

“Serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether developing suddenly or as a result of long-term processes, but excluding armed conflict”

Article 2 of the 1991 DPR Act defines disaster as follows:

“An occurrence (whether natural, accident or otherwise) on a large scale which has caused or is causing or is threatening to cause

- a. *death or disruption of persons, animals or plants*
- b. *disruption, pollution or scarcity of essential supplies*
- c. *disruption of essential services*
- d. *influx of refugees into or out of Malawi*
- e. *plague or epidemic disease that threatens life or wellbeing of the community, and includes the likelihood of such occurrence”*

The definition is broad enough to sufficiently support the establishment of early warning systems across a broad range of events. Conversely, the draft DRM Bill has adopted a more general approach, defining ‘disaster’ as:

“A calamitous event, either slow or rapid onset, triggered by a natural or human-induced hazard resulting in [emphasis added] serious disruption of the functioning of a community or a society causing widespread human, material, economic and/ or environmental losses which exceed the ability of the affected community or society to cope using its own level of resources”¹⁹

¹⁶ Chapter 33:05 of the Laws of Malawi

¹⁷ See Article 8 (1) of IDRL Guidelines

¹⁸ Ibid.

¹⁹ Section 2 of the draft DRM Bill

Malawi's domestic legal, policy and institutional framework for disaster risk management

This definition is similar to the definition applied by the United Nations, as set out in the approved terminology of the UN International Strategy on Disaster Reduction.²⁰

3.2 Institutional framework for disaster risk management

Malawi has a clearly outlined institutional framework for preparedness and response and the applicable instruments clearly set out the mandate of each institution.

3.2.1 Overview of international and regional legal instruments applicable to Malawi

At the global level, Malawi is party to a number of relevant international conventions and agreements. The country has acceded to the Convention on Civil Aviation of 1944 (Chicago Convention), whose application has been specifically provided for and reinforced in the Aviation Act of 1964.²¹ Annex 9 of the Chicago Convention includes specific provisions on international relief. Malawi is also party to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, which set out rights (such as the rights to life, food, housing and health) that can be particularly relevant in disaster settings. Recently, the country acceded²² to the Revised International Convention on the Simplification and Harmonization of Customs Procedures of 1999 (Kyoto Convention), as well as its Special Annex J.5, which specifically covers customs treatment of relief consignments.²³ On the other hand, Malawi is yet to accede to other important global treaties, such as the Istanbul Convention on Temporary Admission of the 1990 (Istanbul Convention), the Tampere Convention on the Provision of Telecommunication Resources for Disaster Migration and Relief Operations of 1998 (Tampere Convention) and the Convention on Facilitation of International Maritime Traffic of 1965.

At the regional level, Malawi is party to the African Union Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) of 2009, also known as the Kampala Convention, which entered into force on December 6, 2012. Under article 3(1) (j), the Kampala Convention requires member states to ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel. Article 5(7) the Kampala Convention requires states Parties to permit rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons by both local and international organizations and humanitarian agencies. The Kampala Convention is the world's first legally binding instrument at a continental level developed to safeguard specifically for the rights of people displaced within their own countries.²⁴ Being a newly ratified Convention, the obligations it creates are yet to be implemented in Malawi.

²¹ Section 2 of the Aviation Act, chapter 70:01 of the Laws of Malawi

²² On 6 September 2013, the Ambassador of the Republic of Malawi, Her Excellency Dr. Brave Ndisale, visited WCO Headquarters to deposit her country's instrument of accession to the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention - RKC). Malawi has thus become the 91st Contracting Party to the Revised Kyoto Convention

²³ <http://www.wcoomd.org/en/media/newsroom/2013/september/malawi-becomes-the-91st-contracting-party-to-the-revised-kyoto-convention.aspx>

²⁴ <http://www.irinnews.org/fr/report/96984/idps-african-idp-convention-comes-into-force>. A similar instrument was adopted at the sub-regional level in 2006 by the member states of the International Conference on the Great Lakes Region, which do not include Malawi.

In terms of Regional Economic Communities (RECs), Malawi is a member of the Southern African Development Community (SADC). While all SADC²⁵ Member states have disaster risk management structures in place, they remain challenged. The displacement of more than a million people in Southern Africa as a result of unexpected heavy floods in 2007 was cause for the initiation of the REC's movement in preparation for future disaster occurrences. Member states of the SADC began to meet annually and later on establish a Disaster Risk Reduction Unit responsible for coordinating regional preparedness and response programmes for trans-boundary hazards and disasters. Following this, the SADC Regional Platform for Disaster Risk Reduction²⁶ was inaugurated in 2011.

Concerning food security, the SADC Regional Indicative Strategic Development Plan emphasises the need for cooperation and alignment in policies for an effective disaster preparedness and management mechanism achieved through the implementation of programmes and projects aimed at early detection, early warning and mitigation of disaster effects.²⁷

While SADC is yet to develop a protocol specific to disaster risk reduction or management, the multi-disciplinary nature of disaster risk management induces reference to several existing SADC protocols when reviewing governing legislations in international relief assistance such as:

- Article 2 of the SADC Protocol on Politics, Defence and Security Cooperation, which states that a specific objective of the Organ on Politics, Defence and Security Cooperation shall be to “enhance regional capacity in respect of disaster management and co-ordination of international humanitarian assistance”
- Article 25 of the SADC Protocol on Health (1999) (Emergency Health Services and Disaster Management) which states: Parties shall:
 - i. *Co-operate and assist each other in the co-ordination and management of disaster and emergency situations*
 - ii. *Collaborate and facilitate regional efforts in developing awareness, risk reduction, preparedness and management plans for natural and man-made disasters and*
 - iii. *Develop mechanisms for co-operation and assistance with emergency services.”*

Accordingly, one of the key recommendations made in the 2012 SADC Regional Disaster Risk Reduction, Preparedness and Response Planning Workshop²⁸ was that Member states should develop MoUs with neighbouring countries and other member states underlining collaboration in disaster risk reduction, including assistance in disaster response.

²⁵ SADC has 15 member states. More information is available on <http://www.sadc.int/>

²⁶ <http://www.sadc.int/themes/disaster-risk-management/>

²⁷ These programmes include: Climate Services Centre (formerly Drought Monitoring Centre) Water Programmes Natural Resources Management Programme Agricultural Information Management System Regional Remote Sensing Unit and Regional Vulnerability Analysis and Assessment Program Management Unit.

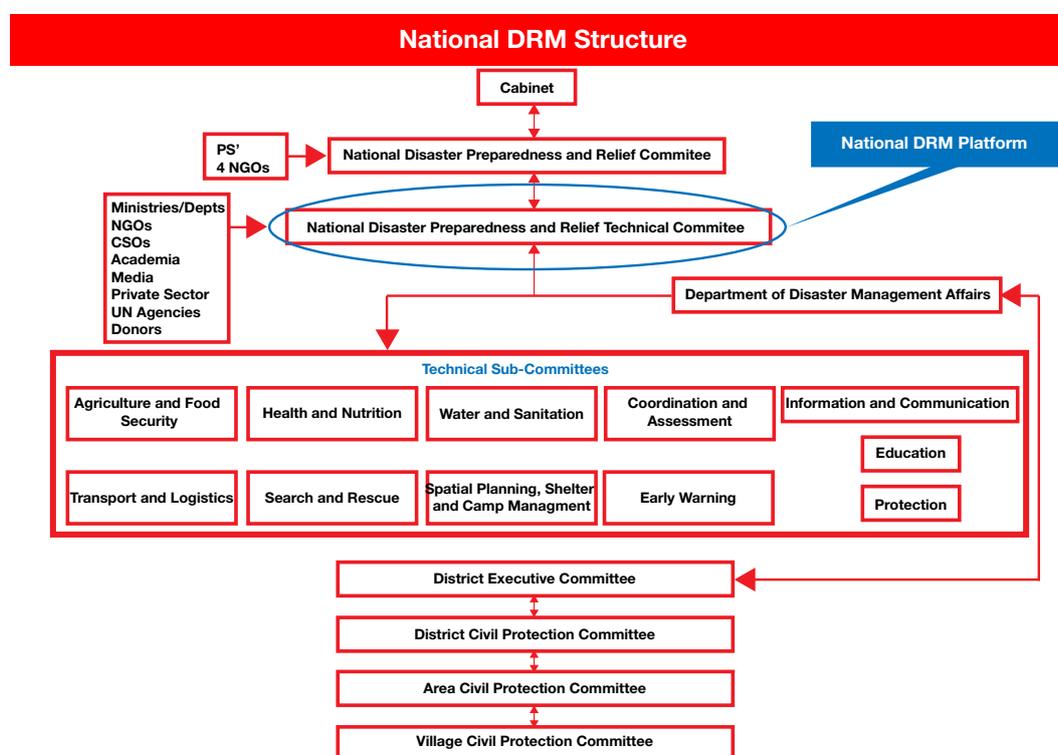
²⁸ Recommendations of the SADC Regional Disaster Risk Reduction, Preparedness and Response Planning Workshop, held in Gaborone, Botswana from 01 - 02 October 2012

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Also worth mention is the SADC Regional Water Policy (1995) which enumerates policy provisions dealing with the protection of people from water related disasters, including personal security, property protection and disaster prediction, management and mitigation.

3.2.2 National level instruments

The DPR Act establishes the office of the Commissioner for Disaster Preparedness and Relief who is also the Principal Secretary in the Department of Disaster and Management Affairs²⁹ mandated to coordinate all disaster preparedness and disaster relief activities in Malawi.



Source: Legal Framework related to disaster and international disaster relief under Malawi law, Stern Kita, August 2013.³⁰

The DPR Act of 1991 also creates the National Disaster Preparedness and Relief Committee (NDPRCM, hereinafter: DRM Committee),³¹ which is composed of a high level committee of Principal Secretaries plus a maximum of five members representing national and international NGOs and appointed by the Minister. The DRM Committee is chaired by the Chief Secretary to the President and Cabinet³², head of civil service in the country. The current members of the DRM Committee from civil society are World Vision International, Malawi Red Cross Society, Action Aid and Council for

²⁹ Section 4 of the DPR Act

³⁰ A paper presented at the workshop on law and disasters in Malawi, Crossroads Hotel, August 2013.

³¹ Section 5 of the DPR Act 32

³² Part III of the DPR Act

Non-Governmental Organisations for Malawi (CONGOMA). The DRM Committee is generally responsible for overseeing the co-ordination and planning of all activities aimed at alleviating disasters in Malawi.³³ It also has the power to establish any sub committees responsible to carry out any special or general functions related to disasters in Malawi.³⁴

Below the DRM Committee is the National Disaster Preparedness and Relief Technical Committee (NDPRTC, hereinafter: the Technical Committee). This is a Committee of Technical Staff at the level of Directors in Government and chaired by the Principal Secretary of DoDMA. The Committee is the national disaster risk management platform (NDRMP, hereinafter: DRM Platform) for Malawi. This is the operational entity on disasters in Malawi and it reports to the DRM Committee. Its members are drawn from Government, NGOs, media, academia, private sector, UN and donor agencies.³⁵

In its role of co-ordination and oversight, the DRM Committee has established planning and civil protection sub-committees responsible for specific areas which are sometimes referred to as clusters. The following are the clusters that have been created so far:

- Agriculture and Food Security
- Health and Nutrition
- Water and Sanitation
- Information and Communication
- Transport and Logistics
- Search and Response
- Special Planning, Shelter and Camp Management,
- Early Warning
- Education and Protection.

3.2.3 Local level instruments

At the local level, the DRM Committee is decentralised through District Executive Committees (DEC), District Civil Protection Committees (DCPC) Area Civil Protection Committees (ACPC) and Village Civil Protection Committees (VCPC) in its engagement with disaster management.

The DPR Act further provides for organisation of civil protection,³⁶ the role of volunteers and the emergency powers of the Minister.³⁷ In the respective provisions, the DPR Act has provided in great detail the roles and responsibilities of different actors in disaster management.

³³ Section 13 of the DPR Act

³⁴ Section 14 of the DPR Act

³⁵ Under section 14 of the DPR Act 36

³⁶ Parts V and VI of the DPR Act

³⁷ Part XI of the DPR Act

3.3 Coordination of disaster response

The above structure generally works in the way that the DRM coordinates all disaster risk management activities, whilst the Technical Committee functions as the entity that effectively implements the various policies and the district, area and village protection committees feed into the activities of the Technical Committee. The draft DRM Bill proposes to improve the above structure by among others, replacing the current civil protection arrangement with Local Authority Risk Management Committees, but also outlining their specific roles.

In a bid to strengthen the disaster preparedness system for effective response and recovery at all levels, the draft NDRM Policy has decentralised disaster risk management structures by creating Civil Protection Committees which would be responsible for coordinating the implementation of the policy at city, municipal, district, area and village levels. In this regard, the draft DRM Bill establishes Area and Village Disaster Risk Management Committees.

The composition of the said committees does not specifically include the Malawi Red Cross Society (MRCS). The draft DRM Bill however, proposes that local representatives of community based and humanitarian organisations sit in these committees. The role of the local communities is considered key in disaster risk management. To this extent, DoDMA is required to consult with, among others, the local communities in the development, consolidation, implementation and maintenance of disaster risk management plans. DoDMA's effective performance in this regard rests on its capacity to sensitize the local communities on the disaster risks, impacts and appropriate responses and strengthen their ability to reduce, prepare for and respond to disasters as well as build on their resilience. Although the draft NDRM policy emphasises the need to coordinate with other stakeholders, the Malawi Red Cross Society is not mentioned as one. In fact, the policy does not recognize Malawi Red Cross Society as part of the coordination mechanisms in international relief response although this would make sense, considering its being part of the international Red Cross and Red Crescent Movement.

3.4 Mechanism for compliance and enforcement of laws

Concerning the institutional arrangements³⁸, procedures³⁹ and funding mechanisms⁴⁰ involved in disaster management and response, it can be concluded that the existing the DPR Act provides adequate coverage, which should be replicated in the draft DRM Bill.

The current draft NDRM policy puts into perspective broad policy objectives aimed at the creation of an enabling legal and regulatory framework for the establishment of a comprehensive disaster risk management system in Malawi.⁴¹ This is a welcome attempt to integrate and mainstream disaster management issues in all sectoral and development programmes of the country⁴² and ensure effective implementation and coordination of disaster risk management issues.⁴³

³⁸ Parts II to IV of the DPR Act

³⁹ Parts V to VIII of the DPR Act

⁴⁰ Part X of the DPR Act

⁴¹ Foreword of the draft NDRM Policy

⁴² See also the Preface of the NDRM Policy

⁴³ Paragraph 2.4 of the NDRM Policy

The 1991 DPR Act does not accurately reflect relevant international standards as provided in various international documents, unlike the draft NDRM Policy, which to a certain extent, incorporates principles of international law and practice, as enshrined in the Hyogo Framework for Action (2005-2015) which was adopted by the United Nations World Conference on Disaster Reduction in 2005, the Millennium Development Goals (MDGs), the United Nations Framework Convention on Climate Change, the Africa Regional Strategy for Disaster Risk Reduction and the SADC Disaster Risk Reduction Strategy.⁴⁴ The drafters of the draft NDRM Policy and draft DRM Bill are advised to revisit these documents to ensure reflection of relevant provisions in Malawi's national legal and regulatory framework.

Under section 46 of the DPR Act on enforcement, it is an offence for a person not to comply with an order,⁴⁵ directions⁴⁶ and notices⁴⁷ issued under the law. Furthermore, the Minister may promulgate regulations necessary or expedient to give effect to the DPR Act through the exercise of his powers.⁴⁸ Non-compliance with the DPR Act, or orders, instructions or directions there under also attracts a fine of K5, 000 or imprisonment up to three years⁴⁹ which the draft DRM Bill proposes to adjust upwards to K500, 000 or two years imprisonment or both. It further proposes to outline offences under the proposed law.⁵⁰

3.5 Role of the Malawi Red Cross Society in disaster response

The Malawi Red Cross Society (MRCS) is established under the Malawi Red Cross Society Act of 1968 (MRCS Act).⁵¹ It is recognised as a voluntary aid society auxiliary to the public authorities. It outlines MRCS's objects, one of which is: "...in the case of catastrophes or public disasters, to provide the victims thereof with relief".⁵² The law also confirms MRCS's independence and voluntary nature. In other words, although there is a mandate for independent and voluntary disaster response, the meaning of auxiliary in this respect is not elaborated on. In addition, it does not expressly include a mandate for disaster preparedness, risk reduction and early recovery, and the principle of neutrality is lacking. Thus the nature and practice of MRCS activities in support to its government are not fully reflected.

⁴⁴ Preface of the draft NDRM Policy

⁴⁵ For instance, order can be issued under section 18 (1) (establishment, revocation or variation of civil protection regions), section 22 (1) (establishment, revocation and variation of civil protection areas) and section 30 (1) (orders by civil protection officers).

⁴⁶ For instance, ministerial directions under section 43

⁴⁷ For instance, civil protection officer's notice under section 31 of the DPR Act

⁴⁸ Section 47 of the DPR Act

⁴⁹ It should be noted that in the draft DRM Bill it is proposed that the organizational civil protection regime should be replaced by Local Authority Risk Management Committees and that the powers to make orders should be abolished. See sections 18 to 22 of the draft DRM Bill. However, under section 60 of the draft DRM Bill it is being proposed that the Local Authorities should have powers to make by-laws to give effect to provisions of the DPR Act by way of notices in the Gazette.

⁵⁰ Section 58 (2) of the draft DRM Bill

⁵¹ Chapter 18:09 of the Laws of Malawi

⁵² Act 51 of Parliament of 1968, section 5.

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It should be noted in this context that the DPR Act does not make specific reference to role of the Malawi Red Cross Society in disaster risk management structures. For instance, in section 6 of the DPR Act - establishing the National Disaster Preparedness and Relief Committee, the MRCS is not expressly mentioned in the composition of the Committee. MRCS, as the National Red Cross Society of Malawi, is an auxiliary to the public authorities, which role is recognised under the Geneva Conventions of 1949 and their additional protocols. The Minister however has powers to appoint up to five other members representing the non-governmental sector.⁵³ The MRCS may therefore be incorporated in the Committee, in the exercise of these powers.

The draft DRM Bill⁵⁴, on the other hand, incorporates the Malawi Red Cross Society in the National Committee on Disaster Risk Management, which is a welcome development as this will enable it to better exercise its role as auxiliary to the public authorities.

As for the Planning Sub-Committee, again the MRCS is not specifically mentioned in the DPR Act as its member. Section 16 (2) of the DPR Act states that:

“A planning sub-committee shall consist of persons from the public service, local authorities, statutory bodies and such non-governmental organisations as the Committee⁵⁵ after consultation with the Minister [may deem necessary]”

As a statutory body that is auxiliary to the domestic authorities in humanitarian matters, it would be fortunate if the MRCS was incorporated in the Planning Sub-Committee. Through consultations, the MRCS confirmed the need of its inclusion in the planning sub-committees since it will be difficult for its to make meaningful contribution to the national plans and implementation strategies without an active involvement and participation right from the planning stage. Moreover, the nationwide programmes of MRCS (i.e. having relief staff in 16 districts and volunteers in all districts of the country) gives it a vantage point to provide up to date information and statistics regarding disasters even from remote areas of the country.⁵⁶

3.6 Other civil society organisations

The institutional framework is also inclusive of domestic civil society actors. The DPR Act makes reference to non-governmental organisations being involved in the planning sub-committee.⁵⁷ In practice, key civil society organisations have been incorporated into both the DRM Committee and the National Platform for Disaster Risk Management (NPDRM). Through consultations, it has been identified that the key civil society organisations that are involved in disaster management in Malawi include World Vision International, Malawi Red Cross Society, Action Aid and Council for Non-Governmental Organizations for Malawi (CONGOMA).

⁵³ Under section 6(1) (b) of the DPR Act

⁵⁴ Section 11 (2) of the Disaster Risk Management Bill

⁵⁵ Section 5.5 of the DPR Act establishes the National Disaster Preparedness and Relief Committee also known as the NDPRCM Committee

⁵⁶ Consultations with Ms. Patricia Phiri, District Project Officer, Lilongwe

⁵⁷ Section 16(2) of the DPR Act

The draft DRM Bill fully incorporates the civil society in the National Platform for Disaster Risk Management (NPDRM). Moreover, the draft DRM Bill recommends that plans and policies of civil society organisations are considered by Cabinet for purposes of harmonisation.⁵⁸ Similarly, the draft NDRM policy stipulates that civil society organisations should sit on both the DRM Committee and the Technical Committee. This is a positive development as it will enhance and formalize active participation of civil society organisations at the policy making level.

3.6.1 Recommendations

- i. *The role of the MRCS in disaster management, and in particular in disaster response, should be specifically spelled out in the DRM Bill*
- ii. *The MRCS should have a formalised role in key disaster risk management committees including the National DM Committee, the National Platform, and the Civil Protection Committees.*

3.7 Early warning systems

Section 7 (1) of the IDRL Guidelines recommends that all states should have procedures in place to facilitate the expeditious sharing of information about disasters including emerging hazards likely to cause disasters. In Malawi, the DPR Act, the draft DRM Bill and the draft DRM Policy do not provide for such procedures. Compared with the other two documents, the DPR Act provides the least guidance as to how to inform other governments of ensuing disasters.

However, the draft DRM Bill does make some reference to early warning. Section 2 of the draft DRM Bill defines early warning as “the provision of timely and effective information, through identified institutions, that allows individuals exposed to a hazard to take action to avoid or reduce their risk and prepare for effective response.” It would however be important for the draft DRM Bill to have explicit provisions aimed at addressing procedures for efficient early warning.

3.7.1 Recommendations

- i. *The draft DRM Bill should put in place procedures for expeditious sharing of information concerning hazards and other threats, both on the community level and with regard to neighbouring states that may be affected. The procedure must spell out which ministries or departments may be responsible for determining the need for communication and making of the actual communication. However not many actors should be involved since this may delay the communication process. The draft DRM Bill must outline specific timelines within which the communication must be made.*

⁵⁸ Section 8 of the draft DRM Bill. In Section 9 (2) the Minister is expected to approve plans of the civil society organizations in matters of disaster risk management.

3.8 Declaration of a state of disaster

According to the 1991 DPR Act the power to declare a state of disaster in any area within Malawi is vested in the President.⁵⁹ This provision empowers the President to declare a state of disaster if it appears to the President that any disaster is of such magnitude that requires extraordinary measures to be addressed. Once such a declaration has been made, it is published in a Government Gazette. Upon such declaration by the President, the Minister responsible for disasters is supposed to communicate such declaration to the National Assembly.⁶⁰ In practice, once the President has made such a declaration, there are no further processes that are done to seek and provide for international assistance. The notices declaring the disaster are accordingly published in the local media for any international actors to learn about the situation.⁶¹

In the new draft DRM Bill, two scenarios for declaring a disaster in Malawi are provided for. Under section 17(3) (i) of the draft DRM Bill, it is the Commissioner, through the Minister who is supposed to make a recommendation to the President for declaration of a disaster, whereas under section 28(1) it is proposed that the National Committee should recommend to Cabinet that a state of national disaster be declared.

3.9 Request for international disaster relief and initial recovery assistance

Section 3(2) of the IDRL Guidelines provides that where a national disaster has been declared and the affected state determines that the situation exceeds national capacity, the affected states should seek international and or regional assistance to address the needs of affected persons. Section 10 of the IDRL Guidelines recommends that procedures for requesting and initiating international disaster relief and initial recovery assistance are established, most importantly that the state affected by a disaster should request, in a specific manner, international disaster relief and establish a system whereby the receiving state accepts or declines the incoming offers of assistance.

IDRL Guidelines section 10: Initiation

1. Disaster relief or initial recovery assistance should be initiated only with the consent of the affected state and in principle, on the basis of an appeal. The affected state should decide in a timely manner whether or not to request disaster relief or initial recovery assistance and communicate its decision promptly. In order to make this decision, the affected state should promptly assess needs. Consideration should be given to undertaking joint needs assessments with the United Nations and other assisting humanitarian organisations.
2. Requests and offers for assistance should be as specific as possible as to the types and amounts of goods as well as the services and expertise available or required, respectively. Affected states may also wish to indicate particular types of goods and services likely to be offered that are not needed.
3. Affected states should make available to assisting actors adequate information about domestic laws and regulations of particular relevance to the entry and operation of disaster relief or initial recovery assistance.

⁵⁹ Section 32 of the DPR Act

⁶⁰ Section 33 of the DPR Act

⁶¹ Consultations with Mr. James Chiusiwa, Director of Disaster Risk Reduction, DoDMA

Although the DPR Act 1991 recognizes that part of the funds constituting the National Disaster Preparedness and Relief Fund (NDPRF) may be such sums and assets as may be donated by any foreign government, international agency or foreign institution or body⁶², the 1991 DPR Act does not contain any specific provisions related to regulation and facilitation of international humanitarian assistance, or coordination of such. While the DPR Act entrusts the Commissioner with responsibilities of controlling and directing personnel, materials and services for the purposes of the DPR Act, it is not clear whether this can be understood to empower the Commissioner or the Department to coordinate, facilitate and monitor both international and domestic relief mobilisation. It seems that the drafters of the DPR Act did not intend to provide for facilitation or monitoring of international assistance.

As a result of the lacuna in the DPR Act, expediting entrance of humanitarian relief services appears in practice to have been occurring on an ad hoc basis in Malawi.⁶³ Current practice regarding the entry of relief aid, requires humanitarian actors to make requests for entry through DoDMA, which is the government body that formally submits an application to the Treasury Department in the Ministry of Finance. The Ministry of Finance in turn submits the application to the Malawi Revenue Authority (MRA) to clear the relief items.

According to DoDMA and other stakeholders, this process has in many cases been lengthy and tedious. For example, during consultations, World Vision International⁶⁴ recalled a situation in which a consignment of clothes had been sitting at the Malawi Revenue Authority for more than six months awaiting special clearance through DoDMA by the Ministry of Finance. DoDMA itself confirmed that the current practice of importation of humanitarian equipment comes with a lot of challenges, including loss of communication or indeed failure to take actions as the process involves many players, i.e. the humanitarian actor that is seeking clearance, DoDMA, Ministry of Finance and the Malawi Revenue Authority. Another example relates to a request made by DoDMA on behalf of a disaster project run by the Department of Parks and Wild Life for waiver from customs on a search and rescue boat. DoDMA explained that despite the fact that the boat was meant to be used in a government project, it had been awaiting clearance for more than seven months.⁶⁵ As explained above, the process would generally be more complicated for NGOs since they would have to deal with both Ministry of Finance and the Revenue authority, rather than only with DoDMA which currently facilitates their request. That said, during the floods of January 2015, which prompted the President to officially declare a disaster, the MRA released a public notice waiving the requirement to apply for a duty free application for relief items for a limited period of time, so as to facilitate speedy delivery of aid. This arrangement seems to be of an *ad hoc* nature and hence does not establish a consistent solution during future request.

⁶² Section 34 (1)(d) of the DPR Act

⁶³ This was confirmed during consultations with Mr. James Chiusiwa, Director Disaster Risk Reduction, DoDMA

⁶⁴ Consultations with Mr. Dingiswayo Jere, Humanitarian Emergency Affairs Manager for World Vision International - Malawi

⁶⁵ Information provided by a senior official from the Department of Disaster and Management Affairs

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Given these procedural challenges, the GoM initiated a review of the disaster management legislation and policy in 2009. One of the aims of this review, which is currently ongoing through the development of the draft DRM Bill and the draft NDRM Policy, aim was to ensure that both the law and policy are comprehensive enough to cover emerging trends and scenarios of disasters but also that they should adequately cover the various processes of dealing with international assistance during disasters.

Policy priority area 6 of the draft NDRM policy has incorporated the element of facilitation of international assistance. Paragraph 3.6.1.6 of the draft policy states that,

“Government will ensure that mechanisms are put in place for the receipt and accounting of international assistance during disasters”.

Section 62 of the draft DRM Bill reinforces the above policy statement by providing that:

1. *The Government of Malawi shall cooperate with other governments in the exercise of its disaster risk management powers and duties.*
2. *The Minister may by order published in the Gazette, specify the measures for the proper implementation of international humanitarian assistance.⁶⁶*
3. *The Minister on recommendation from the National Technical Committee and in consultation with the Minister of Finance shall determine-*
 - a. *such incentives as may be necessary to facilitate the importation of food, clothing, medicine, equipment and other recovery and relief related supplies.*
4. *The Department shall collaborate with regional and international disaster management agencies to exchange information and to access international expertise in and assistance in respect of disaster risk management.*

Once enacted into law, the proposed provision is intended to facilitate the entry of international disaster assistance.

However, it can be argued that in spite of this broadly phrased effort to facilitate international assistance, as will be set out in the forthcoming chapters, the draft DRM Bill is silent on a number of important areas that would be crucial to facilitate and regulate the request and receipt of international assistance. Major gaps identified in the Bill are provisions on the granting of legal facilities for humanitarian actors and their personnel, use of radio frequencies and facilitation of transportation for relief items. It is therefore recommended that the above-mentioned areas and others highlighted in the IDRL Guidelines should be incorporated in both the draft NDRM policy and draft DRM Bill during the ongoing review process. The following chapters will provide more analysis and recommendations in this regard.

⁶⁶ Once promulgated, such regulations are quite forceful and binding. They remain in force until they are revoked or amended.

However, the new draft DRM Bill proposes to bestow the task of specifying measures for the proper implementation of international humanitarian assistance on the Minister.⁶⁷ Furthermore, Section 29(j) of the draft DRM Bill empowers the Commissioner to take steps to facilitate international assistance although it does not elaborate the steps of such a process. Thus, it is proposed that the Minister would do this by order published in a Gazette.⁶⁸ Whether the Minister is best suited to undertake this role has been identified as a question of controversy during the study. For instance, a valid point of argument is that the power is better vested in the Commissioner who would have more time to attend to these types of issues rather than the Minister. Therefore, there seems to be a need for the new law to adequately address this issue.

Under section 47 of the DPR Act, the Minister⁶⁹ responsible for disasters can pass regulations that are, in his opinion, necessary or will expedite giving effect to the DPR Act.⁷⁰ Similarly, it is interesting to note that under the draft DRM Bill, it is specifically proposed that the Minister should be authorized to make regulations providing for the involvement and participation of the public and other organisations or entities in disaster risk management.⁷¹ It is also proposed that regulations be established to enable ministries, industries and organisations to attain minimum level of standards in terms of disaster preparedness.⁷²

Although this power is vested in the Minister, and not the Commissioner, who is in effect the focal point in disaster management, in practice it is the Commissioner through DoDMA who is expected to champion the promulgation of the regulations. Therefore, it can be concluded that the Commissioner, executing his role as the focal point in disaster management, can in practice influence promulgation of regulations, rules and procedures related to international assistance under the DPR Act.

It can also be noted that the draft DRM Bill proposes that local authorities should have powers to make by-laws that give effect to the provisions of the DRM Act. However, these powers are restricted to the passing of governing rules defining the powers and functions of the local authorities themselves, rather than coordinating, regulating and monitoring international assistance.

Under the current law, it is not clear whether the Commissioner can intervene with other ministries to raise issues of facilitation and regulations of international assistance. However, it is clear that the Commissioner can intervene in the affairs of civil protection whose officers are subordinate to him.⁷³ Under the draft DRM Bill, however, it is proposed that such power should be vested in the National Committee on Disaster Risk Management. Section 11(1)(f) of the draft DRM bill states that the Committee

⁶⁷ Section 62 of the draft DRM Bill

⁶⁸ Ibid

⁶⁹ The Department of Disaster and Management Affairs falls under the Office of the Vice President. This means that the Minister responsible for Disasters is the Vice President.

⁷⁰ Section 47 of the DPR Act

⁷¹ Section 59 (2)(b) of the draft DRM Bill

⁷² Section 59 (2) (e) of the draft DRM Bill

⁷³ Section 19 (2) of the DPR Act

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should be responsible for providing guidance to the Minister and line Ministries and Departments on issues relating to the integration of disaster risk management into sectoral work plans and programmes⁷⁴ as well as ensuring that each line Ministry takes primary responsibility for those aspects of the disaster risk management applicable to its sector'.⁷⁵

The draft NDRM Policy recognises as a policy statement the need for the government to put in place mechanisms not only for the receipt but also accounting of international assistance during disasters. This is in line with section 6 of the IDRL Guidelines which encourages states and assisting humanitarian organisations to cooperate to avoid diversion, misappropriation and fraud of relief items. Among others, such policy statements have the benefit of strengthening the confidence of international actors in the use of relief items by parties involved in disaster alleviation.

3.9.1 Recommendations

In order to achieve the objective set out in the draft NDRM Policy of ensuring that mechanisms are put in place for the receipt and accounting of international assistance during disasters:

- i. *Specific rules should be adopted, potentially as part of the draft DRM Bill or an implementing regulation, providing a clear procedure for requesting, accepting and declining offers of international assistance. The rules should call for requests and offers of international disaster relief to be as specific as possible, in line with the IDRL Guideline 10 (2).*

3.10 Coordination of international efforts

The current DPR Act does not give detailed clarity on the coordination of international assistance and there has never been any regulation passed under the law that addresses coordination of international relief operations, although, the Minister has powers to make regulations providing for such procedures.⁷⁶ Through consultations, it was made clear that UN OCHA would be expected to have a supporting role to the Government of Malawi in this respect.

With regard to termination of assistance activities, the IDRL Guidelines recommend that appropriate advance notification should be provided, whether it is the authorities who wish to see activities concluded or the assisting actor itself. However, the issue of notification of termination of disaster relief or initial recovery assistance to international actors does not arise anywhere in the law. For the same reasons, the issue of impact of termination of international assistance on beneficiaries does not arise in the DPR Act, as well. This can be considered to be a gap in the existing legislation that is recommended to be addressed in the draft DRM Bill.

⁷⁴ Section 11 (1)(f) of the draft DRM Bill

⁷⁵ Section 11 (1)(g) of the draft DRM Bill

⁷⁶ Section 47 of the DPR Act

The draft DRM Bill is more specific on the need for regulations coordinating implementation of international humanitarian assistance. It proposes that the Minister be mandated to pass regulations dealing with measures facilitating the proper implementation of international humanitarian assistance.⁷⁷ Although this seemed to be the most preferred method by stakeholders during consultations,⁷⁸ it may not be easy to implement. The most preferred method therefore would be for the rules and regulations to be made in advance and not during disasters.

In addition, Section 4 of the IDRL Guidelines recommends that the relief actor should abide by applicable international law, coordinate with domestic authorities and respect the human dignity of disaster affected persons at all times. The DPR Act does not impose any such obligations on the assisting actors. Section 26 of the draft DRM Bill however empowers the Minister to come up with regulations for the guidance of personnel carrying out disaster relief and response functions. Such regulations should include provisions for ensuring that the distribution of supplies and other relief and assistance activities are accomplished in an equitable and impartial manner, without discrimination on grounds of race, colour, gender, economic status, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.⁷⁹ This is also mentioned as a precondition for participation in the provision of assistance or distribution of supplies under the draft DRM Bill.⁸⁰

3.10.1 Recommendations

- i. *Clear procedures for ensuring coordination of national and international disaster response efforts should also be included in the new DRM Bill or elsewhere in the legal and regulatory framework pertaining to disasters.*

⁷⁷ Section 62(2) of the draft DRM Bill

⁷⁸ Consultations with Ms. Ivy Mpina, state Advocate, Ministry of Justice

⁷⁹ S.26(1) of the draft Disaster Risk Management Bill

⁸⁰ S.26(2) of the draft Disaster Risk Management Bill

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Chapter 4

Legal status of foreign entities providing assistance

4. 1 Privileges and immunities

Section 3(3) of the IDRL guidelines encourages states to coordinate international assistance in accordance with international law. Malawi is a member of the Vienna Convention on Diplomatic Relations of 1961,⁸¹ the Convention on the Privileges and Immunities of the United Nations of 1946⁸² and the United Nations Convention on the Privileges and Immunities of the Specialized Agencies of 1947⁸³. The latter Convention was domesticated through the Treaties and Publication Act making its provisions part and parcel of the domestic law of the country.

There are no provisions that deal with privileges and immunities in all the domestic (draft) instruments: i.e. the DPR Act, the draft DRM Bill and the draft NDRM Policy. In this section, therefore, reference will be made to other general laws that are applicable.

(a) Recognition of privileges and immunities of Diplomatic and Consular Officials

Malawi's Privileges and Immunities Act⁸⁴ (PI Act) is issued with the objective of determining

“The extent of immunity of foreign states from the jurisdiction of the courts of Malawi to provide for diplomatic and consular privileges and immunities by giving effect to certain international conventions and ... for privileges and immunities of international organizations”.

The PI Act provides for specific procedures for recognizing the international privileges and immunities of diplomatic and consular officials.⁸⁵ It is clear that immunities and privileges are generally not applicable to humanitarian aid workers unless they are diplomats.

(b) Privileges and immunities of international organizations

Under section 24 (1) (a) of the PI Act, the Minister of Foreign Affairs may by order grant international organizations (specified in the Fourth Schedule) certain immunities and privileges and also legal capacity as a body corporate. Subsection (b) of the same provision authorizes the Minister to confer such immunities and privileges as he may specify (laid out in Part II of the Fifth Schedule) on representatives, officers and such persons employed on missions on behalf of international organizations. In addition, section 26 of the PI Act recognizes the Minister's mandate to grant by order external agencies which provide cooperation or co-assistance or persons in its service such immunities and privileges as he may deem fit (set out in Part III of the Fifth Schedule).

⁸¹ Acceded to on 19 May 1965

⁸² acceded on 17 May 1966

⁸³ Acceded to on 17 May 1966

⁸⁴ Chapter 16:01 of the Laws of Malawi

⁸⁵ Section 20 of the PI Act domesticates the Vienna Convention on Diplomatic Relations and makes it part of the laws of Malawi. The key articles of the Convention are set out as First Schedule to the PI Act, and they include:

(a) inviolability of mission premises; (b) exemption from dues and taxes on the premises and levied fees for services; (c) inviolability of archives, documents and communication; and (d) inviolability of diplomatic agents. Under section 21, the PI Act also domesticates the Vienna Convention on Consular Relations and makes it part of the laws of Malawi. The key articles of the Convention are set out as Second Schedule to the PI Act, and they include: (a) on inviolability of premises (b) exemption from duties and taxes on the premises (c) inviolability of archives, documents and communication; (d) freedom of movement and communication; and (e) exemptions from residence and work permits.

Legal status of foreign entities providing assistance

As party to the UN Convention on the Privileges and Immunities of the Specialized Agencies, the GoM is obligated to ensure that UN agencies, including those providing humanitarian assistance, enjoy the immunities as stipulated under the Convention. Other International organizations may be granted privileges and immunities by the Minister including immunity from suit and legal process, inviolability of premises occupied as offices, exemptions from taxes and duties for goods imported for official use.⁸⁶ The following organizations have been recognized as such:⁸⁷

1. The United Nations
2. The International Court of Justice
3. The International Labour Organization
4. The Food and Agriculture Organization
5. The International Civil Aviation Organization
6. The United Nations Educational, Scientific and Cultural Organization
7. The World Health Organization
8. The United Nations International Children's Emergency Fund
9. The Inter-Governmental Maritime Consultative Organization
10. The International Atomic Energy Agency
11. The International Refugee Organization
12. The International Telecommunication Union
13. The Universal Postal Union
14. The World Meteorological Organization
15. The Organization of African Unity (now known as African Union)
16. The Commonwealth Secretariat
17. The International Red Locust Control Organization for Central and Southern Africa
18. The Regional Testing Resource and Training Centre
19. The Southern African Regional Tourism Council
20. The Delegation of the Commission of the European Economic Community in Malawi (E.E.C. Commission Delegation)
21. The African Development Fund
22. The International Bank for Reconstruction and Development (otherwise known as the World Bank)

⁸⁶ Section 24 of the PI Act

⁸⁷ Fourth and Fifth Schedules of the PI Act

Legal status of foreign entities providing assistance

23. The United States Agency for International Development (otherwise referred to as “USAID”)
24. The Multi-Country Posts and Telecommunications Training Centre
25. The International Council for Research in Agroforestry (otherwise referred to as “ICRAF”)
26. The Southern African Development Coordination Conference (otherwise referred to as “SADCC”)
27. The Eastern and Southern African Trade and Development Bank (otherwise referred to as “PTA Bank”)
28. The Centro Internacional De Agricultura Tropical (otherwise referred to as “CIAT”)
29. The African Foundation for Research and Development (otherwise referred to as “AFRAND”)
30. The Malawi-Canada Programme Support Unit
31. Guidance, Counselling and Youth Development Centre for Africa
32. Southern African Development Parliamentary Forum (otherwise referred to as SADC Parliamentary Forum)
33. African Union Centre for Ticks and Tick-Borne Diseases (otherwise referred to as the “Centre”)

It should be noted that the IFRC is not yet included on this list. While not an inter-governmental organization, the IFRC is considered to be an entity with international legal personality (with observer status at the UN). It has status agreements in 80 countries providing it with privileges and immunities equivalent to those of UN agencies. The lack of such a status in Malawi might make it more difficult both for the IFRC secretariat and external National Red Cross and Red Crescent Societies (who generally act through the IFRC in operations) to lend their aid to the Malawi Red Cross in a future disaster in Malawi.

(c) Liability protections

The law does not make specific provisions for liability protection for foreign personnel in emergencies. The general immunities and privileges are the only applicable liability protection for foreign personnel in disasters or emergencies, which ordinarily apply only to diplomats and international organization staff.

Legal status of foreign entities providing assistance

4. 2 Eligibility and Registration

Section 13(1) of the IDRL Guidelines recommends that transit and affected states grant, at a minimum, legal facilities, such as visas and permits to humanitarian aid workers, temporary authorisation to legally operate an organisation and waivers on customs and duties on special goods and equipment, to enable assisting actors to provide disaster relief. This does not however impact on the prerogative of the affected state to determine which assisting organisations will be eligible to receive legal facilities.⁸⁸ The guidelines further recommend that factors to be considered for eligibility should be determined in advance and within a reasonable period and that applicable procedures should be as simple and expeditious as possible.⁸⁹

Failure for an organization to establish recognition under the laws of Malawi will result in it not being recognised as a body corporate with powers to make business transactions or pursue its humanitarian objectives. The organisation may also be found liable and fined if found acting in contravention of the law⁹⁰.

An unregistered organization would not be permitted to open bank accounts with any of the registered commercial banks since the showing of a certificate of registration/incorporation is one of the prerequisites to benefit from such rights. This would definitely be a big obstacle to the assisting organization. However, they are not prohibited from signing contracts and entering into lease agreements although these will be unenforceable in case of breach as they were entered in the absence of the legal capacity. In addition, the entity cannot sue or be sued nor own immovable property.

The Employment Act⁹¹ defines an employer as any person, body corporate, undertaking, public authority or bodies of persons who or which employs an employee and includes heirs, successors and assignees of the employer⁹². Based on this definition, though there are no legal barriers for an unregistered organization to legally hire local personnel, it may still face challenges in paying benefits as it would not have an operating bank account.

Concerning the engagement of non-nationals, the Immigration Act does not specifically prohibit unregistered organizations from sponsoring entry visa for its foreign employees. However in practice, the Immigration Department would require a sponsoring letter from a registered organization. Unregistered organization would therefore be prevented from obtaining a permit for its employees as one of the required supporting documents is proof of registration⁹³.

⁸⁸ Section 14(1) of the IDRL guidelines

⁸⁹ Section 14(4) of the IDRL guidelines

⁹⁰ Section 34 of the Non-governmental Organizations Act

⁹¹ Chapter 55:01 of the laws of Malawi

⁹² section 3

⁹³ Form No. 21 made under regulation 25(1)

It should be noted that there are no disaster-specific procedures facilitating the registration of international assistance organizations and this is considered to be a gap. The processes for ordinary registration are lengthy (it reportedly takes more than six months for NGOs, as discussed further below) and quite restrictive. Alternately, registration under section 24(1) of the Immunities and Privileges Act is possible only if your organisation is listed in the applicable schedule. It would therefore be important to put in place a mechanism that would facilitate easy and speedy registration of entities coming into the country for disaster relief.

The draft DRM Bill and draft NDRM Policy do not specifically set out how international disaster relief organizations should be made eligible for legal facilities relevant to their relief and recovery work. Such organizations would therefore acquire eligibility and registration through the general laws applicable to charitable organizations.

4.3 Domestic legal status of foreign organisations

Foreign humanitarian organizations can establish their legal identity in Malawi through registration as a trust (charity or association) under the Trustees Incorporation Act, or as a company limited by guarantee under the Companies Act.

Where the objectives/purposes of the applying organization qualify it as having charitable purposes or where, in the opinion of the Minister of Justice, it is deemed to be for the benefit or welfare of the inhabitants of Malawi, or if its purpose of establishment is addressing religious or social concerns, then it may apply for incorporation as a corporate body through trustees.⁹⁴ Depending on the organization's intention to be register either as an association or a charity, the application forms (Form A⁹⁵ and Form B⁹⁶ respectively), set out procedures to follow and documents to submit are specifically provided in the schedule.

The applications are made through the office of the Registrar General. If the application meets the requirements⁹⁷, it is forwarded to the Minister of Justice (as the responsible Minister) for approval and issuance of the certificate of incorporation⁹⁸. In practice, the process may take up to 6 months to complete.

If the applying organization is classified as an international non-governmental organization⁹⁹, it will be an affiliate to the Council for Non-Governmental Organizations in Malawi (CONGOMA) and be required to apply for registration as an NGO with the Non-Governmental Organization Board, pursuant to the Non-Governmental Organizations Act¹⁰⁰. Applications are supposed to be processed within ninety days.

⁹⁴ Section 3 of the Trustees Incorporation Act

⁹⁵ Section 2(1) of the Trustees Incorporation Act

⁹⁶ Section 2(2) of the Trustees Incorporation Act

⁹⁷ Section 3 of the Trustees Incorporation Act

⁹⁸ Section 4 of the Trustees Incorporation Act

⁹⁹ Under section 2 of the NGO Act, this would refer to non-governmental organizations which are for public benefit purposes, established under the laws of a country other than Malawi, or established under a treaty or convention and conducting some or all of its activities in Malawi

¹⁰⁰ Sections 20 and 21 of the NGO Act

Legal status of foreign entities providing assistance

As one of the conditions for registration with the Board, the organisation must also obtain approval from the line ministry responsible for the oversight of activities to be undertaken, either in the form of an agreement or memorandum of understanding. Failure to fulfil the provisions of the NGO Act is an offence punishable by a fine of K 50,000 or the equivalent amount of the financial gain generated by the offence¹⁰¹.

A foreign humanitarian organization may also establish its legal entity through registration as a company limited by guarantee under the Companies Act¹⁰² provided that its objects are not to make profit for its members, promoters or management. This process establishes the organization as a company having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of its winding up¹⁰³. The procedure requires the application for registration to be submitted at the Registrar General in the form of Memorandum of Association¹⁰⁴ (in accordance with the form in Table C in the First Schedule) or Articles of Association¹⁰⁵ (in accordance with the form in Table C in the First Schedule)¹⁰⁶ in line with the prescribed form thus providing details of the sponsors, directors and secretary. This registration process would take an estimated period of about three months.

There is also a possibility for a humanitarian organization to establish its legal entity through an agreement entered into with the Malawi government. Pursuant to this agreement, the responsible Minister, under section 24 (1) (a) of the Immunities and Privileges Act, may by order grant only to organizations that are specified in the Fourth Schedule legal capacity as a body corporate. This process is handled through the Ministry of Foreign Affairs and has no time frame or fees attached to the recognition process. It was observed during consultations with the Ministry of Foreign Affairs that only organisations that are properly established in their countries of origin may be recognised, including organisations affiliated to Diplomatic Missions,¹⁰⁷ the UN, Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC)¹⁰⁸.

4.4 Requirement to register with multiple agencies

If the organization is deemed as an international Non-Governmental Organization,¹⁰⁹ in addition to formal registration, it will be required to (a) register with the Council for Non-Governmental Organisations in Malawi, (b) obtain approval from the line Ministry responsible for the activities to be undertaken by the organization and (c) register with the Board of the Non-governmental Organization.

¹⁰¹ Section 34 of the NGO Act

¹⁰² Sections 14 and 23 of the Companies Act

¹⁰³ Section 5 of the Companies Act

¹⁰⁴ Section 6(2) of the Companies Act

¹⁰⁵ Section 11 of the Companies Act

¹⁰⁶ Section 14 of the Companies Act

¹⁰⁷ United States Aid Agency (USAID), Department for International Development (DFID)

¹⁰⁸ Consultations with Mr. Suzgo Lungu, Chief Legal Officer, Ministry of Foreign Affairs, Lilongwe

¹⁰⁹ Under section 2, this would refer to Non-governmental Organizations which are for public benefit purposes, established under the laws of a country other than Malawi, or established under a treaty or convention and conducting some or all of its activities in Malawi

4.5 Assistance from the private sector and individuals

The DPR Act and the draft NDRM Policy do not specifically provide for means to facilitate and regulate assistance from private sector or individual sources.

4.6 Recommendations

- i. *The appropriate legislation should create clarity on the privileges and immunities of disaster relief personnel*
- ii. *The GoM should adapt the draft DRM Bill, to include a process or procedure for simplified temporary system for the registration of assisting actors to accord them eligibility for use of necessary legal facilities that enable them perform their relief and recovery work. One suggestion would be to establish a temporary registration that could be issued by the Secretary to the DoDMA upon request of the international organization and fulfilment of minimum requirements. Moreover, registration should be at no cost and issued within a short time, e.g. within 24 hours. The certificate would confer temporary legal status to the organization as a body corporate that could be used for the duration of the disaster, or up to the time the organisation acquires formal registration.*
- iii. *This framework should also consider the inclusion of facilitation and regulation of foreign assistance from private sector or individual sources and also for profit interventions.*

International Disaster Response Law (IDRL) in Malawi
A study on legal preparedness for regulatory issues in
international disaster response

Chapter 5

Border control arrangements
for emergency relief
goods and equipment

5.1 General customs arrangements

Section 17 (1) of the IDRL Guidelines recommend that with regard to disaster relief and initial recovery, goods and equipment exported or imported by, or on behalf of, assisting states and eligible assisting humanitarian organisations, originating, transit and affected states should:

- a. Exempt them from all customs, duties, taxes, tariffs or government fees
- b. Exempt them from all export, transit, and import restrictions
- c. Simplify and minimise documentation requirements for export, transit and import
- d. Permit re-exportation of any equipment or unused goods which the assisting state or assisting organisation own and wishes to retain.

The IDRL guidelines further recommend simplified paperwork requirements for emergencies, waivers of duties, tariffs and fees (including storage fees pending clearance) reduction of import, transit, or export restrictions in disaster settings priority clearance for relief goods and equipment pre-clearance procedures for relief goods and equipment or reduction of inspection requirements clearance outside normal business hours and at outside of customs offices, if necessary re-exportation of equipment and unused goods and disposition of unused humanitarian goods.¹¹⁰

The 1991 DPR Act also does not make any reference to customs issues, hence all relevant laws of the country dealing with customs are applicable to the entry and regulation of disaster relief and initial recovery goods and equipment, notwithstanding exemption under the customs laws themselves. The Customs and Excise Act¹¹¹, one of the oldest Malawian laws, enacted on 1st June 1969, is the main customs law in Malawi. This act does not provide for any exemptions for humanitarian goods. However, Under Section 79 of the Customs and Excise Regulations, the Controller of Customs may exempt from the requirements of [Part VII on Carriage Coastwise] such aircraft or vessel or such classes of aircraft or vessel as he considers expedient. In particular, the Controller of Customs is authorised in special cases to:

“Permit any goods to be entered, and the report of clearance of any conveyance to be made, in such form and manner, and by such person, as he may either generally or in any particular case direct.”¹¹²

While this clause may provide for some flexibility in the case of an emergency, it cannot be considered a holistic and consistent solution during disaster relief operations.

The draft DRM Bill, on the other hand, attempts to address the problem by empowering the Minister responsible for disasters to determine and put in place measures for facilitation of the importation of relief supplies and to provide for exemption of custom requirements on items imported into Malawi for the use of DoDMA or its agents in the performance of its functions under the DPR Act, but leaves the details of this construction open.¹¹³

¹¹⁰ Section 17(3) & (4) of IDRL Guidelines

¹¹¹ Chapter 42:01 of the Laws of Malawi

¹¹² Customs and Excise Act (Chapter 42:01) of the Laws of Malawi

¹¹³ Section 64 of the draft DRM Bill

Border control arrangements for emergency relief goods and equipment

The draft DRM Bill proposes the inclusion of a clause to the effect that no customs or any other similar tax under the Customs and Exercise Act should be payable upon any item imported into Malawi for the use of DoDMA, its agents or eligible humanitarian actors in the performance of their functions under the DPR Act.¹¹⁴ Compared with the existing practice, this is a commendable development. However, it is not clear from the wording whether all disaster response actors, whether local or international, would be considered “agents of the Commissioner” as the language of the Act would seem to require. In addition to the above wording, the draft DRM Bill should have a clear mechanism for determining if the assisting actors are eligible for legal facilities¹¹⁵ which would provide an entitlement to the organizations to benefit from the above provision and other facilitative entry and operation regulations personnel, transport, domestic legal status, etc.

In addition, it is strongly recommended that the draft DRM Bill should establish measures aimed at simplifying and expediting clearance of disaster management and initial recovery goods and equipment. For instance, clearance outside normal hours, which normally attracts charges under the Customs and Excise Act, should be allowed without cost to eligible relief providers.¹¹⁶

5.2 Communications equipment

The IDRL Guidelines advise that affected states should waive or expedite the granting of applicable licenses and reduce barriers to the use, import or export of telecommunications and information technology equipment, including software.¹¹⁷ In case of an emergency, eligible actors should be allowed to import telecommunication equipment without restrictions save for security concerns.¹¹⁸

Under the Communications Act (1998) of Malawi, it is a requirement for a person to hold a licence before engaging in the provision of telecommunication services and failure to do so will be an offence under section 97 of the Act.¹¹⁹ The Minister responsible for telecommunications may through a regulation exempt the requirement for license for certain kinds of telecommunication.¹²⁰ No such regulation has been developed up to now for telecommunication services of an emergency disaster response nature. For this reason, it is recommended that should such a waiver is provided for by the relevant authorities in Malawi to avoid delays.

5.3 Emergency food items

Section 18(4) of the IDRL Guidelines recommends that, to the extent consistent with considerations of public health, originating, transit and affected states should consider modification or reduction of requirements regarding fumigation, prohibitions and restrictions on food imports and exports by assisting states and humanitarian organisations.

¹¹⁴ Section 64 of the draft DRM Bill

¹¹⁵ Part IV of the IDRL Guidelines and Articles 13 & 14 of the Model Act

¹¹⁶ Article 34 of the Model Act

¹¹⁷ Section 18(2) of the IDRL guidelines

¹¹⁸ Article 37 of the Model Act

¹¹⁹ Section 17 of Communications Act

¹²⁰ Section 17 (2) of the Communications Act

Under Malawi legislation, emergency food supplies would be subject to several instruments prescribing minimum standard requirements, including the following:

a) Malawi Bureau of Standards Act¹²¹

This Act aims to, inter alia, promote standardization of commodities and of the manufacturing, production, processing or treatment of the commodities.¹²² The Act also establishes the Malawi Bureau of Standards¹²³ as a body corporate whose objectives include ‘providing for the testing of locally manufactured or imported commodities with the view to determining whether such commodities comply with the provisions of this Act, the Merchandise Marks Act or any other law relating to standards of quality’. The Malawi Bureau of Standards Act does not provide for any special procedures in emergency disaster response settings but would apply wholly.

b) Biosafety Act (2002)¹²⁴

Under this Act, importation or exportation and supply of genetically modified organisms (GMO) without a licence is prohibited.¹²⁵ The Act provides a list of matters to be considered before a licence is granted for importers or exporters of such items.¹²⁶ This would obviously be an obstacle to aid providers.¹²⁷ However, the Act provides for an exemption that disaster response agencies may benefit from. Firstly, the Minister may grant permit for a person to engage in prohibited activities in this area without GMO licence under special arrangements,¹²⁸ though these are not disaster specific. Accordingly, with this arrangement, a person, including disaster response actors, might be allowed to import into Malawi GMO products meant for emergency supply of food for human beings.¹²⁹

While it should be stressed that public health remains a perfectly valid concern at all times – including emergencies -- , it is nevertheless noted that, since these instruments do not specifically cater for the import of emergency food aid, these laws should facilitate efficient import procedures for emergency food aid as recommended in Section 18 (4) of IDRL Guidelines.

5.4 Medicines

According to section 18(4) of the IDRL Guidelines, Malawi as a transit, affected or originating state is recommended to reduce legal and administrative barriers to exportation, importation and re-exportation of medication and medical supplies by assisting states or eligible humanitarian organisations to the extent consistent with public safety and international law.

¹²¹ Chapter 51:02 of the Laws of Malawi

¹²² See the Long Title of the DPR Act

¹²³ Section 3 of Malawi Bureau of Standards Act

¹²⁴ Chapter 60:03 of the Laws of Malawi

¹²⁵ See section 17 of Biosafety Act, Chapter. 60:03 of the Laws of Malawi

¹²⁶ Section 22 of Biosafety Act

¹²⁷ For instance, they have to show possession of expertise in handling GMO products.

¹²⁸ Section 18 of Biosafety Act

¹²⁹ Section 18 (1)(b) of Biosafety Act

Border control arrangements for emergency relief goods and equipment

According to the Pharmacy, Medicines and Poisons Act of Malawi,¹³⁰ the following activities are prohibited without a ‘product licence’¹³¹:

- selling, supplying, exporting or importing of any medicinal product or
- procuring for sale, supply or exportation of any medicinal product and
- the manufacture or assembly of any medicinal product for sale, supply or export.

The product licence is obtained by submitting applications to the Pharmacy, Medicines and Poisons Board. The process takes a minimum of 2 months. While there are certain exemptions under the law¹³², they do not apply to medications and medical equipment meant for disaster relief.

The draft DRM Bill does not address the facilitation and regulation of emergency medicines either. It was noted during consultations that it has been relatively easy to obtain waivers in the past, albeit after long processes as highlighted above.¹³³ These delays can be attributed to the fact that the existing law regulating medications does not have special rules to facilitate and monitor the importation and exportation of emergency medical supplies and equipment.

5.5 Importation of vehicles

With respect to vehicles imported for disaster response by assisting states and eligible assisting humanitarian organisations, section 18(1) of the IDRL Guidelines stipulates that the affected states should grant temporary recognition of foreign registration and plates.

Under the Road Traffic Act of 1997¹³⁴, no person is allowed to operate a motor vehicle that is not registered under the Act on the public roads in Malawi.¹³⁵ However, subsidiary legislation provides for temporary recognition of foreign registrations and plates through a ‘short-term Service Permit’ issued in respect of foreign registered vehicles at prescribed fees.¹³⁶ The current fee for registration of number plates is K40,000.

It is concluded therefore that although motor vehicle law does not provide for any special provisions for the importation and registration of foreign vehicles for relief and recovery work, recognition of foreign motor vehicle registration and plates could in principle use the temporary recognition procedure. This process will take a minimum of one week. It was confirmed during consultations with Road Traffic authorities that the above provision could be used for disaster relief vehicles as well.¹³⁷ It was clear however that timeliness and waiver of registration fees¹³⁸ could be a challenge.

¹³⁰ Chapter 31:05 of the Laws of Malawi

¹³¹ Section 35 of Pharmacy, Medicines and Poisons Act, Chapter, 31:05 of Laws of Malawi

¹³² Section 36 of Pharmacy, Medicines and Poisons Act, Chapter, 31:05 of Laws of Malawi

¹³³ Consultations with World Vision International and Church and Malawi Red Cross Society

¹³⁴ Chapter 69:01 of the Laws of Malawi

¹³⁵ Section 11 (2) of the Road Traffic Act, Chapter 69:01 of the Laws of Malawi

¹³⁶ See the Road Traffic (Miscellaneous Fees) Regulations.

¹³⁷ Consultations with Mr. Mariko, Deputy Regional Traffic Manager for the Centre

¹³⁸ See section 64 of the draft DRM Bill

5.6 Animals – in particular rescue dogs

Although the IDRL Guidelines are silent on the issue of search and rescue dogs, Article 41 of the Model Act recommends that the entry of dogs should be regulated, drawing inspiration from the International Search and Rescue Advisory Group (INSARAG) Guidelines.¹³⁹

The law on animals in Malawi provides that any animals imported may be placed in quarantine stations for such period as the minister responsible for agriculture may determine.¹⁴⁰ The animals may be placed in the quarantine stations in such manner, at such time, and subject to such supervision and be subjected to such tests, as the Minister shall direct, and shall be housed in sheds or other receptacles prepared by the Government or by the owners or consignees of the animals. All expenses incurred in connection with the detention of such animals in quarantine shall be defrayed by the owners or consignees.¹⁴¹ Furthermore, it is a requirement to have an import permit for any animal or animal product into Malawi.¹⁴² It is not known how long it would take to obtain such a permit. The legal regime on animals does not have any exceptional provisions for rescue dogs. It would be good if relevant legislation or policy, and where appropriate the draft DRM Bill, would provide for regulations relevant to rescue dogs in times of disaster.

5.7 Taxation of Disaster Relief Items

Section 21 of the IDRL Guidelines recommends that affected states should provide exemptions to assisting states and eligible humanitarian organisations from value-added and other taxes or duties directly associated with disaster relief and initial recovery assistance.

The DPR Act does not provide for exemptions from VAT, income tax, corporate tax and other tax for humanitarian organizations and personnel providing disaster relief. Nevertheless, after the floods of January 2015, the MRA issued a public notice expediting the process for a duty free import of relief items. This arrangements appears to be an ad hoc one and hence does not provide a consistent solution for future emergency situations. However, the draft DRM Bill has a specific provision on exemption from custom duty. It provides that:

*“No custom duty or similar tax under the Customs and Exercise Act shall be payable upon any article which is imported into Malawi and shown to the satisfaction of the Controller of Customs and Exercise to be required for the use by the Department or its agents in the performance of its functions under this Act”.*¹⁴³

The Bill also proposes to empower the Minister of Finance, upon recommendation of the National Technical Committee, to determine “such incentives as may be necessary to facilitate the importation of food, clothing, medicine, equipment and other recovery

¹³⁹ (Chapter D, D1, D2-1 and 4.3)

¹⁴⁰ Section 7 of Control and Diseases of Animals Act, Cap, 66:02 of Laws of Malawi

¹⁴¹ Ibid

¹⁴² Section 64

¹⁴³ Section 62(3) of the DRM Bill

¹⁴⁴ See Rule 3 of Animal (Imports) Rules under subsidiary legislation of Control and Diseases of Animals Act.

Border control arrangements for emergency relief goods and equipment

and relief related supplies.”¹⁴⁴ Tax waivers on international assistance may therefore be generally considered under this provision, but this crucial matter should be made explicit in the legal and regulatory framework.

Regarding specific tax laws, Section 4 of the Third Schedule of Value Added Tax Act¹⁴⁵ states that goods for the use of international agencies or technical assistance schemes would be exempted where the terms of the Agreement made with the Malawi Government include such exemption from taxes. This therefore means that international humanitarian organisations would need to enter into an Agreement with the GoM for exemption of VAT.

As for income tax, the First Schedule to the Taxation Act¹⁴⁶ provides for an exemption that may apply to international disaster response actors. The Schedule stipulates that income payable to any person pursuant to any arrangement agreed to be exempted is excluded from the application of the Taxation Act. The nature of such an arrangement is defined in the same section to mean ‘any arrangement between the Government and any other Government, or any international organisation, institution or body, or any person.’ Any assisting actor would therefore need to enter into an arrangement with the GoM for exemption of income tax on its employees. This is somehow in line with the recommendation in part IV and V of the IDRL Guidelines which recommend that affected states can enter into agreements with assisting states but also, upon request, to some private assisting companies providing charitable relief¹⁴⁷, on how to process and clear relief items.¹⁴⁸

It is clear from the foregoing taxation laws that some provisions can be invoked by the assisting actors to obtain waivers on payment of tax. However considering the need for efficiency and speed that response to national disasters require, it remains crucial to adopt an explicit provision on waiver of payment of taxes for eligible disaster relief actors in section 64 of the draft DRM Bill.

5.8 Currency control

Section 20 of IDRL Guidelines provides that assisting states and eligible humanitarian organisations should be granted the right to freely bring necessary funds and currencies in or out of the country through legal means and to obtain legal exchange rates in connection with their disaster relief or initial recovery assistance.

In Malawi, it is not permissible for any person (including humanitarian organisations) to take currencies in and out of Malawi without the authority of the central government bank. Although the SADC Protocol¹⁴⁹ advocates for exchange control liberalisation, Malawi maintains strict exchange controls. Regulation 11 of the Exchange Control Regulations states that only a Bank can take or send foreign currency out of Malawi. A person who is not a Bank, can only take or send or attempt to take or send out of Malawi an amount of foreign exchange which is not in excess of the amount of foreign exchange brought or sent by him into Malawi. Banks in this regard require all persons (natural and legal) bringing foreign currency into Malawi to declare how much they have brought in. This surely works to the advantage of the person concerned at the time

¹⁴⁵ Value Added Tax No 7 of 2005.

¹⁴⁶ Taxation Act, Cap. 41:01.

¹⁴⁷ Section 15 of the IDRL Guidelines

¹⁴⁸ Section 17 & 18 of the IDRL Guidelines

¹⁴⁹ SADC Protocol on Finance and Investment (2006)

of repatriation of the foreign currency. Once foreign currency is brought into Malawi, it can only be changed at a Bank or an authorised foreign exchange bureau where the rates are regulated. It is therefore not possible for international humanitarian organisations to have access to preferential exchange rates.

5.9 Recommendations

- i. *The proposed position under section 64 of the draft DRM Bill that all supplies and assets meant for use by DoDMA or its agents – which encompasses international disaster relief - should be exempted from customs and taxes, should be changed make it clear that it would also apply to supplies and assets belonging to or in possession of eligible actors providing international assistance.*
- ii. *Although the draft DRM Bill provides for the creating of a tax waivers on international assistance in a general sense, responsibility to grant import, VAT and other tax waivers should be made more explicit in the legal and regulatory framework to avoid misunderstandings and ensure clarity.*
- iii. *The law should provide for measures expediting the process of registering and clearing goods and equipment being imported into Malawi by assisting states and eligible actors in disaster management. The following institutional bodies should be approached on the issue:*
 - a. *Malawi Revenue Authority (MRA) on expedited clearance procedures for goods and equipment for disaster management*
 - b. *Malawi Communications Regulatory Authority (MACRA) on the possible waiver of licence requirement and reduction of barriers use, importation and exportation of telecommunications and information technology equipment*
 - c. *The Medical Council of Malawi (MCM) for a possible introduction and expedited issuance of a temporary licence to import or export medications and medical supplies for use in disaster management*
 - d. *The Road Traffic Directorate for a possible expedited procedure for registration of foreign motor vehicles in form of recognition of their foreign registration and plates and possible waiver of attendant permit fees and*
 - e. *Department of Veterinary Sciences (Chief Veterinary Officer) on expedient clearance of rescue dogs.*
- iv. *Provide for extended office hours for state operated offices and services, whenever necessary*
- v. *Provide for a possibility of free or reduced priced infrastructural facilities.*

Border control arrangements for emergency relief goods and equipment

5.10 Extended hours for facilitation entry of international assistance

Sections 23 and 24 of the IDRL Guidelines recommend that affected states should endeavour to ensure, where necessary, that state operated offices and services essential to the timely delivery of international disaster relief, operate outside normal business hours.

In Malawi, no such facility has been provided for under the Customs and Excise Act, DPR Act, DRM Bill or the NDRM Policy. Neither do they provide for free or reduced price facilities for relief providers such as use of buildings and land. Section 14 of the Customs and Excise Regulation, however, allows for extended hours of business only on prior application by the person so requesting for extra attendance. Assisting actors would need to lodge an application for customs officers to work outside their normal business hours. It is not clear how long one has to wait before the approval is granted, and this might become a barrier to speedy relief.

5.11 Recommendations

The appropriate laws and regulations should:

- i. *Provide for extended office hours for state operated offices and services, whenever necessary*
- ii. *Provide for a possibility of free or reduced priced infrastructural facilities.*

International Disaster Response Law (IDRL) in Malawi

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Chapter 6

Foreign disaster relief personnel

Foreign disaster relief personnel

6.1 Visas for international disaster relief personnel

Section 16(1) of the IDRL Guidelines recommends that affected states should grant visas and work permits, ideally without cost, for the time necessary to carry out disaster work and expedite the issuance of such visas and permits.

The issuance of visa, visitors permits, temporary residence permits and work permits is regulated by the Immigration Act¹⁵⁰ and the Immigration Regulations. The Immigration Regulations provide for four types of visas, namely: a tourist visa, a transit visa, an official visa, a courtesy visa and a diplomatic visa (for persons holding diplomatic passports).¹⁵¹ The Immigration Act and Immigration Regulations do not make provision for a mechanism to issue special visas for relief workers.

A tourist visa¹⁵² is issued to enable the holder to enter Malawi for visit, residence or business purposes. The requirements for issuance of such a visa are that applicants have a return ticket or proof of alternative transport, financial means for the duration of the stay, an invitation letter from a sponsor or proof of accommodation. The application has to be made before travel at the nearest Malawi foreign mission. It might be argued that relief work could qualify as business. However during consultations with immigration authorities¹⁵³ it was observed that this could be problematic as the visa is normally perceived to be for tourists only. For relief workers the above procedures could also pose a challenge in two ways: 1) the time it would take to process the application, and 2) the fact that the visa needs to be obtained before arrival, from the Malawi embassy, which may be problematic considering that Malawi has a limited number of embassies abroad.

A courtesy visa can be issued to a person visiting Malawi following an invitation by the Government, but who is not entitled to a diplomatic visa, enabling him to enter Malawi for purposes of paying a courtesy call.¹⁵⁴ This visa is issued gratis (for free). It is unlikely that such a visa could be used by relief workers, since it is applicable to those specifically invited by the Government.

An official visa is issued to a person holding an official or service passport who is coming to Malawi for purposes of carrying out official duties.¹⁵⁵ Again, this visa may not easily be used by relief workers unless they are holders of service passports.

While there is no specific regulation to facilitate the entry of disaster relief personnel, there are options available for them in an emergency situation. It was observed during consultations¹⁵⁶ that in emergency situations the Department of Immigration issues 'facilitation letters'¹⁵⁷ for persons to travel to a port of entry in Malawi for the issuance of the visa on entry. In addition, the Minister of Home Affairs and Internal Security has powers under section 40 (1) of the Immigration Act, Immigration Regulation 3 and through the Second Schedule of the Immigration Regulations, to waive the issuance of

¹⁵⁰ Chapter 15:03 of the laws of Malawi

¹⁵¹ Immigration Regulation 3(2)

¹⁵² Immigration Regulation 3(2)(a)

¹⁵³ Consultations with Mr. Bendala, Chief Permits Officer, Immigration Headquarters, Blantyre.

¹⁵⁴ Immigration Regulation 3(2)(d)

¹⁵⁵ Immigration Regulation 3(2)(c)

¹⁵⁶ Consultations with Mr. Bendala, Chief Permits Officer, Immigration Headquarters, Blantyre.

¹⁵⁷ These are letters issued by the Chief Immigration Officer authorizing a foreign national to travel and obtain a visa at a port of entry.

Foreign disaster relief personnel

visa and visa fees to certain nationalities or classes of persons. This could be applied to exempt relief personnel in disaster situations from obtaining visa. However, this can only be applicable to relief workers from countries listed under those provisions. Arguably, there is a need for a specific regulation to support the speedy immigration of emergency disaster relief personnel.

6.2 Work permits for international disaster relief personnel

The Immigration Act does not provide for a special work permit for relief personnel. An ordinary permit would still be required under the Immigration Act¹⁵⁸. For relief work requiring a stay not exceeding six months, a Temporary Residence Permit would be required under section 25 of the Immigration Act as read with Immigration Regulation section 25. This permit can be used for work if, at the time of application the applicant specifically indicated intention to work temporarily.¹⁵⁹ This permit is valid for a period of six months and is renewable within Malawi for a further period of six months. The issuance fee is MK 30,000.00 upon approval of the application. This would under ordinary circumstances, take between 3-4 working days. It was confirmed during consultations that the process takes this long because all applications are processed and cleared by the Ministry of Home Affairs and Internal Security which is based in Lilongwe whilst applications are submitted at Immigration Headquarters in Blantyre.¹⁶⁰

For relief work requiring a stay exceeding six months and up to two years, a Temporary Employment Permit would be required under section 24 of the Immigration Act Immigration Regulation 24. This permit is renewable within Malawi. The application fee is Mk 10,000 and the issuance fee for non-governmental organizations is MK 60,000.00. However, this would take between 2-4 months to obtain and would therefore not be useful in practice for relief workers who are under considerable time pressure.

Considering the above, it would be important for the GoM to include in its legal and regulatory framework pertaining to disaster management the granting of visas and work permits to disaster management personnel, ideally without cost to emergency.

6.3 Recognition of professional qualifications of foreign personnel

6.3.1 Regulation of recognition of medical qualifications

Section 16(1) of the IDRL Guidelines recommends that affected states should arrange for expedited procedures for recognition of foreign professional qualifications (including medical qualifications, certificates and driver's licences) and facilitate freedom of movement within the affected areas.

¹⁵⁸ Section 21 of the Immigration Act prohibits residence in Malawi without an appropriate permit or exemption

¹⁵⁹ Consultations with Mr. Sankhulani, Officer in Charge, Dedza Immigration Office

¹⁶⁰ Consultations with Mrs. Mwangolera, Permits Officer, Immigration Headquarters, Blantyre

Foreign disaster relief personnel

The medical profession in Malawi is regulated by the Medical Practitioners and Dentist Act¹⁶¹ and the Nurses and Midwives Act¹⁶². The recognition of medical qualifications for doctors is regulated at the national level¹⁶³ by the Medical Council of Malawi, which is established under the Medical Practitioners and Dentist Act. For nurses, the recognition of medical qualifications is regulated at the national level by the Nurses and Midwives Council of Malawi established under the Nurses and Midwives Act.

6.3.2 Emergency review of foreign qualifications

The Medical Practitioners and Dentist Act does not have any specific provisions for expedited review of foreign qualifications for the purpose of providing assistance in a situation of emergency. All applicants for registration are to meet the requirements of review by the Council, including a residential requirement. However, section 62 of the Medical Practitioners and Dentist Act exempts, with the consent of the Chairman of the Council, a delegate of the International Committee of the Red Cross who has entered Malawi with the consent or upon invitation of the Government, from the requirements of the Act. This is very a very good practice that could be replicated to cover health professionals from selected other organisations. Under section 33 of the Medical Practitioners and Dentists Act, the law provides for temporary registration of medical practitioners or dentists who have been temporarily employed and do not intend to reside in Malawi for a period exceeding twelve months.

For nurses, the Nurses and Midwives Act does not have specific provisions for emergency review of foreign qualifications. All applicants for registration are required to meet the requirement of normal review by the Council. However, the Nurses and Midwives Act under section 80(d) (iii) likewise exempts, with the consent of the Chairman of the Council, a delegate of the International Committee of the Red Cross who has entered Malawi at the consent or invitation of the Government. As stated above, this could also be replicated for personnel from other selected organisations.

¹⁶¹ Chapter 36:02 of the laws of Malawi

¹⁶² Chapter 36:02 of the laws of Malawi

¹⁶³ see section 11(f)

6.4 Recommendations

- i. *The applicable laws and regulations, and where appropriate the draft DRM Bill, should be adapted to specifically provide for:*
- ii. *Granting of gratis visa at port of entry for emergency disaster management personnel in times of disaster*
- iii. *Waiving visa requirements for eligible relief personnel in times of disaster or introducing a so-called “disaster visa”*
- iv. *Issuing gratis and in an expedited manner Temporary Residence Permits and work permits for relief personnel in times of disaster for the time necessary to carry out disaster relief or initial recovery work*
- v. *Emergency or expedited temporary recognition of foreign professional qualifications of foreign relief workers who have been certified as qualified by the assisting recognised humanitarian organization or state. For example by empowering the Registrar of the Council to recognize such medical qualifications of relief workers upon receipt of a recommendation from the assisting actor through the DoDMA. The registration or recognition process should be done within 48 hours of receipt of application.*

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Chapter 7

Transport during disaster

Transport during disaster

Section 19(1) of the IDRL Guidelines recommends that permission should be granted, without undue delay, for speedy passage of land, marine and air vehicles operated by an assisting state or eligible humanitarian actor or on its behalf, for the purpose of transporting disaster relief or initial recovery assistance and, ideally, waive applicable fees. Section 19(2) further recommends that permission should be granted for over-flight, landing and departure of aircraft and that any applicable exit, transit and entry visas for operating personnel of such transport vehicles should be promptly issued.

7.1 Air Transport

The Aviation Act¹⁶⁴ regulates all air transport services. The Aviation Act also confirms the application of the Convention on International Civil Aviation (Chicago Convention)¹⁶⁵ in Malawian law by its notification of 11 September 1964. The Aviation Act is quite brief and only has 19 substantive sections. The Minister has been given extensive powers to formulate regulations and policies, including waiving fees as he deems fit. There are 8 such regulations that have been made so far, including on navigation services, air security, fees, aircraft performance, licensing, investigation of accidents and also rules of the air and air traffic control.

It is a requirement under regulations 5 and 6 of the Air Transport Licensing Regulations for every aircraft carrying passengers, mail or cargo by air for hire or reward on any scheduled journeys, to obtain a licence or provisional licence granted by the Minister.

Regulation 5 states that:

“Subject to the provisions of these Regulations, it shall not be lawful for any person to use any aircraft in Malawi for the carriage of passengers, mail or cargo for hire or reward upon any scheduled journey between two places of which at least one is in Malawi except under, and in accordance with the provisions of, a licence or provisional licence granted by the Minister”

Regulation 3 of the same instrument provides for exemptions to the above general rule, where rescue and ambulance services, but also aircrafts carrying emergency food or emergency medical supplies, are specifically provided for. The regulation states as follows:

“Nothing in these Regulations shall apply to any flight—

- a. *by a civil aircraft operating on a scheduled journey as a result of and under the terms of an air services agreement entered into by the Government*
- b. *solely for the purpose of providing ambulance or rescue facilities*
- c. *solely for the purpose of the carriage of emergency food or emergency medical supplies*

It was noted during consultations that in practice although there are no set procedures, such permission would be provided by the Department of Disaster which would in turn liaise with the Department of Civil Aviation.¹⁶⁶ Just as was noted for customs clearance,

¹⁶⁴ Chapter 70:01 of the Laws of Malawi

¹⁶⁵ Convention of 7 December 1944

¹⁶⁶ Consultations with Airport Commandant at Kamuzu International Airport, Lilongwe

Transport during disaster

the above process is merely *ad hoc* and without any express statutory basis, there will no clarity and certainty in terms of procedures to be followed. It would be important to have a clear and concise provision in the Aviation Act or draft DRM Bill that aircrafts carrying relief goods should be prioritised and be processed with speed.

The Aviation law further requires non-scheduled aircrafts to obtain other clearances and pay some fees as explained below:

(i) Flight Clearance

Aviation Regulations require that any non-scheduled flight should obtain a flight clearance in advance to be allowed to land in Malawi. The clearance is to be sought by submitting an application to the Department of Civil Aviation providing all details of the aircraft, crew members, cargo and passengers being carried¹⁶⁷. The flight clearance is granted at no fee.

(ii) Landing Fees

Regulation 3A of the Aviation (Fees) Regulations require that any aircraft landing on a government airport should pay landing fees. The rates vary depending on weight of the aircraft and are specified in the schedule. The regulations provide for exemptions. The following categories are exempted from paying landing fees: test flights, Malawi government and presidential unchartered flights, an aircraft making a touch and go landing, and aircraft used solely for diplomatic purposes.

The law does not specifically exempt, for no- payment of landing fees, aircrafts carrying relief items.

(iii) Parking Fees

Regulation 9 of Aviation (Fees) Regulations requires that any aircraft that uses an airport facility for more than six hours shall be charged parking fees. The exemptions which are similar to those on landing fees do not necessarily exclude aircrafts carrying relief items.

(iv) Air Navigation Charges

Regulation 3 of the Aviation (Air Navigation Charges) Regulations as read with its schedule requires that any aircraft flying over Malawian space should pay air navigation charges to the Government of US\$ 60. Regulation 5 provides for exemptions for non-payment of such charges, but transporting relief items is not one of them.

¹⁶⁷ According to Mr. Chimtengo, the Airport Commandant at Kamuzu International Airport, the clearance is supposed to be applied for at least 48 hours before the aircraft lands.

7.2 Land Transport

Road transport is regulated by the Road Traffic Act.¹⁶⁸ Requirements for international vehicles and permits are provided for under the Road Traffic (International Circulation) Regulations. Regulation 7 of this instrument allows the use of an international driving permit for non-residents as if it were issued under the Road Traffic Act.¹⁶⁹ Regulation 8 provides that any foreign motor vehicle brought under the authority of an international certificate issued outside Malawi may be used in Malawi on the condition that: it is brought in by a resident for a period of 30 days, it is brought in by a non-resident for a period of 365 days. Although not specifically provided for, it is clear that the above provision could be used by international staff including relief workers to drive on the roads of Malawi.

Section 141 of the Road Traffic Act criminalises any person who drives an uninsured vehicle, punishable by a fine of K10, 000 or imprisonment of up to 2 years. This means that any vehicles, including internationally registered vehicles must obtain at least a third party insurance. There is no special consideration under the Road Traffic Act for vehicles bearing relief goods.

7.3 Recommendations

- i. *It would be important to have a clear and concise provision in the Aviation Act or disaster law that aircrafts carrying relief goods should be prioritised and be processed with speed.*
- ii. *As provided for in article 45 of the Model Act, the Aviation Act or an appropriate regulation should make provisions for exemption to aircrafts carrying relief items on:*
 - a. *Navigation charges*
 - b. *Landing fees and*
 - c. *Parking fees*
- i. *The Aviation Act is being reviewed and its draft is currently with the Ministry of Justice. DoDMA should liaise with the Department of Civil Aviation and Ministry of Justice to ensure that issues of disaster management are included.*
- ii. *The disaster management law should specifically provide for recognition of vehicles bearing relief goods to enable them be processed at entry points with speed.*

¹⁶⁸ Chapter 69:01 of the Laws of Malawi

¹⁶⁹ Section 24 of the Road Traffic Act provides for the process of issuing licenses to residents in Malawi.

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Chapter 8

Freedom of movement, access and security

8.1 Freedom of movement during disaster

Section 16(1)(d) of the IDRL Guidelines recommends that affected states facilitate freedom of movement in and from the disaster affected area, bearing in mind the safety of disaster relief and initial recovery personnel.

The current legal and regulatory framework does not contain specific provisions for eligible international disaster relief providers to have freedom of access to disaster-affected persons or areas. The current legal and regulatory framework only sets out the roles of the DoDMA as secretariat, National Disaster Preparedness and Relief Committee and Protection Officers, among others.

The Immigration Act, Immigration Regulations and the Penal Code¹⁷⁰ do not prohibit international disaster response actors from assisting affected persons or any other group in times of disaster. It was noted during consultations that this is not a problem in Malawi. Most actors have easy access to the affected areas. It would however be helpful to clearly provide for such right and freedom in the draft DRM Bill or an appropriate regulation as recommended by the IDRL Guidelines.

8.2 Ensuring the safety and security of assistance

Under section 4 of the Police Act,¹⁷¹ section 4, the Police has the obligation, among others, to preserve law and order, to provide protection of property and facilitate enforcement of all laws and regulations. Under section 10, the Police may be employed during concurrencies of grave emergency of any kind. Apart from the Police there are no other domestic institutions specifically charged with ensuring the safety of relief personnel, premises, transport, equipment and goods.

Neither the Police Act, nor the Preservation of Public Security Act¹⁷² nor the DPR Act address specific measures such as restrictions on travel to affected areas or the use of military or armed escorts. The Protected Places and Areas Act,¹⁷³ though not specific on disaster, empowers the Minister to declare certain areas as protected areas where movement of persons is controlled. This law could be used to implement specific security measures, including restrictions on travel to affected areas or the use of military or armed escorts. As the laws are not specific on disaster security restrictions, they therefore do not mention respect of humanitarian principles.

8.3 Recommendations

The GoM should consider for relevant laws and policies, and where appropriate the draft DRM Bill to:

- i. *Make specific provisions and measures for facilitating access and freedom of movement in the disaster affected areas*
- ii. *Emphasize the role of the police to provide protection to relief personnel, disaster relief, goods, equipment, facilities, means of transport and premises*

¹⁷⁰ Chapter 7:01 of the Laws of Malawi

¹⁷¹ Chapter 13:01 of the Laws of Malawi

¹⁷² Chapter 14:02 of the Laws of Malawi

¹⁷³ Chapter 14:04 of the laws of Malawi

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Chapter 9

Accountability and transparency

9.1 Accountability and transparency of the Government

According to section 6 of IDRL Guidelines, affected states and assisting humanitarian organisations that wish to provide international assistance should cooperate to prevent unlawful diversion, misappropriation or fraud concerning initial recovery goods, equipment or resources. In the same vein, affected states are expected to use the funds and disaster relief resources in a manner consistent with the intent with which they were given.

The DPR Act does not have provisions governing the funds and resources of international actors, but does provide for regulations for the domestically available funds. The DPR Act recognises that part of the funds constituting the National Disaster Preparedness and Relief Fund may be 'such sums and assets as may be donated by any foreign government, international agency or foreign institution or body'.¹⁷⁴ This means that those relief funds and assets that are donated to DoDMA or the Commissioner will be part of the National Disaster Preparedness and Relief Fund. The Fund itself is subject to audit by the Auditor General in accordance with Part VI of the Finance and Audit Act.¹⁷⁵

Further, an annual report is laid before the National Assembly as a way of ensuring accountability.¹⁷⁶ It is to be supposed that funds and assets that would not form part of the National Disaster Preparedness and Relief Fund, such as international donations, would be subject to audit depending on the agreement between the parties concerned. On the other hand, the law does not provide for clear legal authority for a particular ministry or department to receive and disburse international donations made to the government. It has been pointed out in the draft NDRM Policy that ministries and departments do not have specific budget line for disaster management. The draft NDRM Policy aims to influence integration and mainstreaming of disaster management into the core activity plans for ministries and departments. There are no provisions for maintaining donated funds in interest-bearing accounts.

The draft DRM Bill proposes to address these concerns through an outline of offences in the field of transparency and misappropriation of funds. The draft DRM Bill, for example, proposes to establish offences of unlawful diversion, misappropriation or fraud concerning relief goods, equipment or other aid commodities which are intended for distribution to disaster victims.¹⁷⁷ Therefore, although there are no specific procedures or institutions in place to guard against diversion, misappropriation or fraud concerning foreign disaster relief and recovery goods or funds under the current law, the draft Bill proposes to address this issue for international aid providers.

¹⁷⁴ Section 34 (1)(d) of the DPR Act.

¹⁷⁵ Section 39 (2) of the DPR Act

¹⁷⁶ Section 39 (4) of the DPR Act

¹⁷⁷ Section 58 (2) (d), (e), (f), (g) and (h) of the draft DRM Bill

Accountability and transparency

9.2 Accountability of assisting organisations

Section 4 of IDRL Guidelines recommend that assisting actors should abide by the laws of the affected states and international law.¹⁷⁸ They are further obliged to coordinate with domestic authorities, and respect human dignity of the disaster affected persons at all times.¹⁷⁹ Further, assisting actors are expected to ensure that their activities are undertaken in accordance with the principles of humanity, neutrality and impartiality.¹⁸⁰

The DPR Act does not have similar provisions. However, the draft Bill proposes that GoM would be executing memoranda of understanding with implementing partners (assisting actors) which would detail some of these principles.¹⁸¹ Further, the Minister is mandated to promulgate regulations on such other issues as observance of the non-discrimination principle in execution of disaster management activities.¹⁸² So, although the current law does not provide for any minimum standards in disaster relief or recovery, efforts have been made to address these concerns in the draft Bill. However, it is conceded that the efforts in the draft bill do not extensively exhaust the measure under section 4 of IDRL Guidelines. It leaves the details to be addressed in specific memoranda of understanding between the Government of Malawi and assisting actors. It is submitted that the ideal position would be for the law to provide for these measures so that there is consistency in the minimum expectations of all international partners.

9.3 Recommendations

The draft DRM Bill should:

- i. *Provide for clear procedures for accountability of international donations by particular ministries or departments that may receive and disburse international donations to the government and*
- ii. *Provide for minimum standards to be met by assisting actors in disaster relief and recovery.*

¹⁷⁸ Article 4 (1) of IDRL Guidelines

¹⁷⁹ Ibid

¹⁸⁰ Article 4 (2) of IDRL Guidelines

¹⁸¹ Section 25 (7) ff of the draft DRM Bill

¹⁸² Section 26 of the draft DRM Bill

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Chapter 10

Malawi as a transit or
sending state for international
assistance

Malawi as a transit or sending state for international assistance

10.1 Transit for relief personnel

Transit of persons through Malawi is regulated by the Immigration Act and Immigration Regulations. The Immigration Act requires transiting person who requires a visa to obtain a transit visa under regulation 3 (2) (b) which is valid for seven days. The Immigration Act does not provide for reduction of any restrictions on visa or transit permit on the transit for relief personnel.

10.2 Reduction of transit restrictions

The Aviation Act¹⁸³ in section 6 provides for emergency powers of the Minister in times of national emergencies. The Aviation Act however does not provide for reduction of transit requirements for relief flights over or through Malawi. The Road Traffic Act¹⁸⁴ does not provide for reduction of transit requirement for relief trucks travelling through Malawi. The Inland Waters Shipping Act¹⁸⁵ does not provide for reduction of transit requirement for ships involved in relief operations travelling in Malawi inland waters.

10.3 Sending of international assistance from Malawi

Neither the current DPR Act nor the proposed DRM Bill provide for procedures for sending international assistance from Malawi. Despite this lacuna in the law, Malawi has in the past provided food assistance to other states.¹⁸⁶ Under section 3 of the Agriculture (General Purposes) Act, the Minister of Agriculture has the power to formulate rules that regulate importation and exportation of food stuffs.¹⁸⁷ It is likely that the government would rely on powers like this to provide such type of donations. As provided for in the IDRL Guidelines (sections 61(2), 17(1)(b) and 19), it would however be helpful for specific rules, potentially in the draft DRM Bill, to be developed to set out procedures for sending relief assistance to other countries. The law should exempt all export and transit restrictions on relief items.

10.4 Recommendations

The relevant laws and regulations should be adapted to allow for:

- a. *the expedited granting of permission for passage and transit disaster relief and initial recovery assistance*
- b. *permission of overflight, landing and departure of relief flight*
- c. *expedited issuance of transit visa for transiting relief personnel*
- d. *exemption from export, transit and import restriction of relief goods and equipment*
- e. *expedited processing and clearance of transiting trucks or ships carrying relief goods and equipment or involved in relief operations.*

¹⁸³ Chapter 70:01 of the laws of Malawi

¹⁸⁴ Chapter 69:01 of the laws of Malawi

¹⁸⁵ Chapter 69:01 of the laws of Malawi

¹⁸⁶ Malawi provided food stuffs to the victims of a disaster in Haiti.

¹⁸⁷ Chapter 65:05 of the Laws of Malawi

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Chapter 11

Conclusion

Conclusion

Malawi's current legal and regulatory framework addresses certain aspects of border-crossing disaster response operations. Nevertheless, the system as a whole leaves many aspects unregulated, such as expedited import of relief items, (work) permits for disaster response personnel and matters of legal personality for emergency relief providers. The GoM is aware of many of these issues and is already utilising the momentum of the drafting process of the DRM Bill and the NDRM Policy, which was ongoing at the time of writing of this report, to address these gaps. For example, policy priority area 6 of the draft NDRM policy incorporates a general clause on the facilitation of international assistance. Paragraph 3.6.1.6 of the draft policy states that:

“Government will ensure that mechanisms are put in place for the receipt and accounting of international assistance during disasters”.

Similarly, the draft DRM Bill contained, at the time of writing, a clause that refers in broad terms to the facilitation of international humanitarian assistance, indicating the GoM's awareness and recognition of the issues at hand.

While this recognition is a crucial step towards better legal preparedness for disasters, it is recommended that the drafters consider including more detailed facilitation and regulation of international disaster response operations in both the DRM Bill and the NDRM Policy. However, it is not just these draft instruments that call for adaptation: some of the recommendations should ideally be included as a separate 'emergency' clause in other laws or regulations.

The draft DRM Bill and a number of other existing laws could benefit from going into further detail to ensure efficient and effective facilitation of international disaster response actors that wish to support DoDMA in times of emergency, while at the same time regulating the actions and aid that these actors bring to Malawi. For example, more clarity should be created on issues of the initiation of international assistance, quality control of the relief items and actions of international disaster response actors, import and taxation facilities for humanitarian relief goods, equipment en personnel and a framework should be set up to determine which actors are eligible for such facilities and monitor the quality of the support offered by them. Ideally, the draft DRM Bill would address these issues, where appropriate drawing inspiration from the IFRC's Model Act on IDRL.¹⁸⁸ In addition, the amendments to the draft DRM Bill and draft NDRM Policy are recommended to address specifically the role of the Malawi Red Cross Society in the whole disaster management cycle, from planning and preparedness to response and recovery.

In some cases, such as when it comes to customs clearance and taxation, adaptations may be needed in the laws and regulations pertaining to those particular fields. For example, At the time of preparing this report¹⁸⁹, the GoM was also in the process of reviewing other related laws including the Aviation Act.¹⁹⁰ Accordingly, it is recommended that the DoDMA should take advantage of the ongoing review process and

¹⁸⁸ Model Act on IDRL, available at <http://www.ifrc.org/en/what-we-do/idrl/model-act-on-idrl/>.

¹⁸⁹ January 2014

¹⁹⁰ Chapter 70:01 of the Laws of Malawi

Conclusion

liaise with relevant ministries for the inclusion of facilitating provisions on disaster management into the Aviation Act.

It is further recommended that GoM should consider the drafting and adoption of regulations, bylaws and SOPs to accommodate all other areas raised in this report that may not be addressed by the actual legislative process. The SOPs will also serve as a guide to all players in the implementation of disaster management affairs.

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Chapter 12

Annex

Annex 1

International Instruments

African Union Convention for the Protection and Assistance of internally Displaced Persons in Africa of 2009, (Kampala Convention)

Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, 1986

Convention on Civil Aviation of 1944 (Chicago Convention)

Revised International Convention on the Simplification and Harmonization of Customs Procedures of 1999 (Kyoto Convention)

Istanbul Convention on Temporary Admission of the 1990 (Istanbul Convention)

Tampere Convention on the Provision of Telecommunication Resources for Disaster Migration and Relief Operations of 1998 (Tampere Convention)

Convention on Facilitation of International Maritime Traffic of 1965

Convention on Climate Change, the Africa Regional Strategy for Disaster Risk Reduction and the SADC Disaster Risk Reduction Strategy of 2012

Geneva Conventions of 1949

Vienna Convention on Diplomatic Relations of 1961

Convention on the Privileges and Immunities of the United Nations of 1946

United Nations Convention on the Privileges and Immunities of the Specialized Agencies of 1947

SADC Protocol on Finance and Investment of 2006

Policies

National Disaster Risk Management Policy, 2013 (draft)

Bills

Disaster Risk Management Bill, 2014 (draft)

Acts of Parliament

Disaster Preparedness Relief Act (DPR Act), Chapter 33:05 of the Laws of Malawi

Aviation Act, Chapter 70:01 of the Laws of Malawi

Malawi Red Cross Society Act, Chapter 18:09 of the Laws of Malawi

Immunities and Privileges Act, Chapter 16:01 of the Laws of Malawi

Companies Act, Chapter 46:01 of the Laws of Malawi

Trustees Incorporation Act, Chapter 5:03 of the Laws of Malawi

Non-Governmental Organisations Act, Chapter 5:05 of the Laws of Malawi

Employment Act, Chapter 55:01 of the laws of Malawi

Customs and Exercise Act, Chapter 42:01 of the Laws of Malawi

Malawi Bureau of Standards Act, Chapter 51:02 of the Laws of Malawi

Consumer Protection Act, Act No 14 of 2003

Communications Act, Act No. 41 of 1998

Biosafety Act, Chapter 60:03 of the Laws of Malawi

Pharmacy, Medicines and Poisons Act, Chapter, 31:05 of Laws of Malawi

Road Traffic Act, Chapter 69:01 of the Laws of Malawi

Control and Diseases of Animals Act, Cap, 66:02 of Laws of Malawi

Immigration Act, Chapter 15:03 of the laws of Malawi

Medical Practitioners and Dentist Act, Chapter 36:02 of the laws of Malawi

Penal Code, Chapter 7:01 of the Laws of Malawi

Police Act, Chapter 13:01 of the Laws of Malawi

Public Security Act, Chapter 14:02 of the Laws of Malawi

Protected Places and Areas Act, Chapter 14:04 of the laws of Malawi

Taxation Act, Chapter 41:01 of the laws of Malawi

Agriculture (General Purposes) Act, Chapter 65:05 of the Laws of Malawi

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SADC Regional Disaster Risk Reduction, Preparedness and Response Planning Workshop Report, Gaborone, Botswana from 01 - 02 October 2012, <http://www.humanitarianresponse.info/fr/system/files/documents/files/SADC%202012%20Workshop%20Report.pdf>

The Fundamental Principles of the International Red Cross and Red Crescent Movement

Humanity / The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.

Impartiality / It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

Neutrality / In order to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence / The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

Voluntary service / It is a voluntary relief movement not prompted in any manner by desire for gain.

Unity / There can be only one Red Cross or Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality / The International Red Cross and Red Crescent Movement, in which all societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.



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