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Human Rights Council Working Group on Arbitrary Detention

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No. 15/2012 (Malawi)

Communication addressed to the Government on 8 February 2012

Concerning: Lenard Odillo, Eliya Kadzombe, Jasten Kameta Chinseche and Madison Namithanje

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in Commission resolution 1997/50. The Human Rights Council assumed that mandate in its decision 2006/102. The mandate was extended for a further three-year period in Council resolution 15/18 of 30 September 2010. In accordance with its working methods, the Working Group transmitted the above-mentioned communication to the Government.
2. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Mr. Lenard Odillo, a Malawi national, usually residing in Chiradzulu, Nkalo, Malawi, is a businessman.

4. On 25 October 2006, at approximately 9.00 a.m., Mr. Odillo was selling potatoes at Kunje market in Chiradzulu, Malawi, when he was approached by three police officers from Mountford Police Station wearing civilian clothes. Upon his arrest, Mr. Odillo was informed that he was being investigated by the Blantyre Police. However, he was not served with an arrest warrant nor was he informed of his right to remain silent and not to disclose anything that might be used as evidence against him.

5. Mr. Odillo was handcuffed and at around 10.00 a.m. he was walked by the policemen to the bus depot at the Nguludi turnoff. There he waited for 30 minutes for the Blantyre Police to arrive. In the meantime, when Mr. Odillo attempted to inquire of the Mountford police officers about the actual reasons for his arrest, the police allegedly started beating him in public with fan belts and a panga knife. The officers from the Mountford police station allegedly stamped on Mr. Odillo's handcuffs, which cut into his wrists and left several scars. The source informs that as a result of this ill-treatment, Mr. Odillo now has a permanently stiff left hand.

6. At around 10.30 a.m., the police officers from the Blantyre Police station arrived and took Mr. Odillo away in a police vehicle. His brother, Mr. Christophe Odillo, was also taken away. Both Lenard and Christophe Odillo were initially taken to Mountford Police Station, where they were allegedly searched. Mr. Odillo was then escorted by the Blantyre police to his house, where they arrived at approximately 1.00 p.m. Mr. Odillo's wife, pregnant at the time, answered the door and the police officers pushed her into the house. The police told Mr. Odillo's wife that he had stolen a car and they wanted to find out whether the money was in the house.

7. The police searched the house and confiscated an amplifier and 15 compact discs. The police asked Mr. Odillo about the compact disc players and speakers, which he disclosed to be at his father's house. At Mr. Odillo father's house, the police officers confiscated a radio, two large speakers and a video-cassette recorder. Mr. Odillo was informed that the property was being confiscated as it might have been purchased with the proceeds of crime.

8. Subsequently, the police officers took away Mr. Odillo, his wife and father in a police vehicle to a separate house belonging to Mr. Odillo's wife. The police officers allegedly informed Mr. Odillo's wife that they would not arrest her unless she visited Mr. Odillo at the police station.

9. At this point, the police officers took Mr. Odillo, his brother and his father to the Blantyre Police Station. It is reported that they reached the Police Station between 2.00 p.m. and 4.00 p.m. Mr. Odillo was allegedly beaten with a leather belt for around half

an hour and repeatedly asked about the whereabouts of the car. Mr. Odillo was then placed in a cell. He later learned that his father was released in the evening.

10. On 26 October 2006, at approximately 7.00 a.m., Mr. Odillo was taken for interrogation in the Motor Investigations Office at the Blantyre Police Station. The two police officers present during the interrogation informed Mr. Odillo that he was being charged with car theft and murder. Mr. Odillo was not given any specific facts regarding the alleged crimes or evidence in the case against him. He told the police that he had no knowledge about the crimes alleged against him. According to the information received, Mr. Odillo was then beaten by the police officers for about 30 minutes with a plastic walking stick and a leather belt, allegedly with a view to extracting a confession. He was then taken to his cell.

11. On 27 October 2006, at around 2.00 p.m., Mr. Odillo was taken back to the Motor Investigations Office. He was allegedly beaten and told to confess. On 28 October 2006, Mr. Odillo was again questioned by a police officer from Zomba. A caution statement was recorded, and Mr. Odillo denied all the accusations and signed the statement.

12. On 3 November 2006, at approximately 7.30 a.m., Mr. Odillo was taken to the Blantyre Magistrates Court. It is reported that at the hearing Mr. Odillo did not have access to a lawyer, did not understand the proceedings and was not given a chance to apply for bail or contest the legality of his arrest and detention before a magistrate. At around 11.00 a.m., Mr. Odillo was taken back to the Blantyre Police Station and then to the Chichiri Prison in Blantyre, where he remains to date.

13. Mr. Odillo was allegedly charged with murder under section 209 of the Malawi Penal Code and remanded to custody in Chichiri Prison by the Magistrate at Dalton Magistrates Court.

14. The source points to a number of procedural infringements in the arrest and detention of Mr. Odillo.

15. First, the source argues that by keeping Mr. Odillo in police custody for at least five days before he was brought to a court, his right under section 42(2)(b) of the Constitution of Malawi was infringed. Moreover, upon his arrest, Mr. Odillo was not informed about the charges against him or the reasons for his detention. It was not until his third day in custody that Mr. Odillo was informed that he was being charged with murder. It is the source's contention that such treatment is in breach of article 9(3) of the International Covenant on Civil and Political Rights and section 42(2)(e) of the Constitution of Malawi.

16. Second, while in police custody, Mr. Odillo was reportedly beaten and forced to confess to an alleged crime. According to the source, this amounts to a violation of article 14(3)(g) of the International Covenant on Civil and Political Rights.

17. Third, the source considers that a period of five years and two months in detention while awaiting trial is in contravention of article 14(2)(c) of the International Covenant on Civil and Political Rights, section 42(2)(f) of the Constitution of Malawi and article 7(d) of the African Charter on Human and Peoples' Rights. During this period Mr. Odillo has only once appeared before the court. He has allegedly not been informed as to when or whether he will be tried.

18. Fourth, Mr. Odillo's remand sheet held at Chichiri prison allegedly indicates that he was remanded to prison on 3 November 2006. Since that date, the remand order has neither been renewed nor reviewed. The source contends that this runs contrary to section 267 of the Malawi Criminal Procedure and Evidence Code, which requires that remand be reviewed or renewed every 15 days. The source therefore maintains that since 15 November 2006, Mr. Odillo has been detained illegally.

19. Fifth, Mr. Odillo has allegedly not had the opportunity to consult any evidence in the case against him. Reportedly, no legal aid lawyer has been assigned to his case. The source sustains that this is in contravention of article 14(3)(b) of the International Covenant on Civil and Political Rights.

20. Finally, the source reports that Mr. Odillo has made no application to a court as he is unable to afford the services of a private lawyer. He had not had access to any legal assistance until November 2011. On that date, he was interviewed in prison by the Southern Africa Litigation Centre and the Centre for Human Rights, Education, Advice and Assistance.

21. For the reasons cited above, the source submits that Mr. Odillo's deprivation of liberty is arbitrary as it implies grave breaches of the minimum guarantees enshrined in his right to a fair trial.

22. Mr. Eliya Kadzombe, a Malawian national, usually residing at Chavala Village, Traditional Authority, Kasisi, Chikwawa in Malawi, is a barber.

23. On 4 December 2008, at approximately 6.00 p.m., Mr. Kadzombe was apprehended near his home in Chavala by members of the local community and taken to a nearby house. He was told that he was to be taken for questioning, but was not given any further details. Mr. Kadzombe was subsequently locked in a store cupboard overnight to be picked up by a police officer the following morning.

24. On 5 December 2008, at approximately 7.00 a.m., Mr. Kadzombe was handcuffed and taken by two police officers to Chimembe Police Station in Chavala Village. According to the source, upon arrival at Chimembe Police Station, Mr. Kadzombe was placed in a cell. He was informed that he was waiting to be collected by Chileka Police. During the one-week period he spent at Chimembe Police Station, Mr. Kadzombe was not formally interviewed and did not leave his cell.

25. In the early morning of 11 December 2008, Mr. Kadzombe was taken from his cell to the station interview room. Six police officers were present in the room and allegedly did not inform Mr. Kadzombe of his right to remain silent or that anything he did say could be used as evidence against him in court. He was reportedly not informed of his right to a lawyer and no lawyer was present during the interrogation.

26. During the interrogation session, Mr. Kadzombe was informed that he was suspected of the murder of his mother, Ms. Naswati Kadzombe. Mr. Kadzombe replied that he did not know anything about the circumstances of the death of his mother. The police officers allegedly threatened to beat him and one of them allegedly slapped Mr. Kadzombe on both shins with a panga knife. Mr. Kadzombe still denied any involvement in the death of his mother.

27. During the interview, no caution statement was taken and Mr. Kadzombe was not formally charged.

28. On 11 December 2008, at approximately 12.00 p.m., Mr. Kadzombe was told that he would be taken to court. At 2.00 p.m., Mr. Kadzombe was taken from Chileka Police Station to Chichiri Prison. The prison officers allegedly refused to admit Mr. Kadzombe to Chichiri Prison due to his age and the fact that he had not been taken to a court. Mr. Kadzombe was then taken back to Chileka Police Station.

29. On 12 December 2008, he was taken by the police to Chisenjere Magistrates Court. He was not informed of his right to a lawyer and did not have one present at the court. Nor was he informed of his right to bail. At Chisenjere Magistrates Court, he was charged for the first time with the murder of Ms. Naswati Kadzombe under section 209 of the Penal Code of Malawi. Mr. Kadzombe pleaded not guilty.

30. After the hearing, Mr. Kadzombe was taken to Chichiri Prison, where he reportedly remains.

31. The source submits that Mr. Kadzombe's deprivation of liberty is arbitrary for the following reasons.

(a) He was kept in police custody for eight days without being presented before a judge in alleged violation of section 42(2)(b) of the Constitution of Malawi;

(b) Mr. Kadzombe was not informed of the reasons for his arrest until the eighth day in custody, and the charge was only read to him by the Chisenjere Magistrates Court on his ninth day in custody; according to the source this is in contravention of article 9(3) of the International Covenant on Civil and Political Rights and section 42(2)(e) of the Constitution of Malawi;

(c) While in police custody Mr. Kadzombe was allegedly beaten and forced to confess, which is in contravention of article 14(3)(g) of the International Covenant on Civil and Political Rights;

(d) Mr. Kadzombe was at no point informed of his right to remain silent or the fact that his statements could be used as evidence against him, in alleged breach of section 42(2) of the Constitution of Malawi;

(e) Mr. Kadzombe has been in detention since 12 December 2008 without a trial; this prolonged detention according to the source is in contravention of article 14(2)(c) of the International Covenant on Civil and Political Rights, section 42(2)(f) of the Constitution of Malawi and article 7(d) of the African Charter on Human and Peoples' Rights;

(f) Mr. Kadzombe has not been informed of nor had the opportunity to view any of the evidence in the case against him in contravention of article 14(3)(b) of the International Covenant on Civil and Political Rights;

(g) The original remand sheet at Chichiri prison dated 12 December 2008 shows that his remand was renewed only twice on 6 March 2009 and 29 July 2009. According to the source, this is contrary to section 267 of the Malawi Criminal Procedure and Evidence Code, which requires that remand be reviewed every 15 days. Hence, it is the source's submission that in the periods between 30 December 2008 and 6 March 2009; 29 March 2009 and 29 July 2009; and since 30 September 2009, Mr. Kadzombe has been detained illegally;

(h) The authorities have allegedly given no consideration to Mr. Kadzombe's age and to the fact that he has not yet been tried. Mr. Kadzombe is incarcerated together with convicted prisoners in Chichiri prison, which according to the source is in contravention of section 42(2)(d) of the Constitution of Malawi;

(i) Mr. Kadzombe has only been able to consult with legal representation on two occasions in 2008 but this produced no result. In November 2011, the Southern African Litigation Centre (SALC) and the Centre for Human Rights Education, Advice and Assistance (CHREAA) were able to visit him in prison.

32. Mr. Jasten Kameta Chinseche, a national of Malawi, usually residing in Stepae Village, Traditional Authority Chimalito, Thyolo District, is a watchman and market vendor in BCA Hill, Blantyre, Malawi.

33. On 18 April 2009, Mr. Chinseche was selling bananas in the Goliath Trading Centre, Thyolo District, Malawi. He was approached by a police officer dressed in civilian clothes. The officer identified himself as belonging to the Nansadi Police Unit. The officer questioned Mr. Chinseche about his whereabouts the previous evening. The officer accused

Mr. Chinseche of stabbing his stepfather. Mr. Chinseche promptly denied the accusation but the officer advised him to go to the police station for further questioning.

34. Mr. Chinseche was escorted directly to a police car and taken to Nansadi Police Unit. Upon arrival at the police station, Mr. Chinseche was placed in a cell. He was shown no warrant nor informed of the reasons for his arrest. Mr. Chinseche was not informed of his right to remain silent.

35. After two days in custody at Nansadi Police Unit, Mr. Chinseche was taken for an interview and a statement. Mr. Chinseche was allegedly taken to a room where he was questioned by two officers about his whereabouts the previous evening. They accused him of having been with the deceased on the night of the murder. When denying the charges, Mr. Chinseche was threatened with a panga knife and wooden rods. It is reported that Mr. Chinseche was then beaten for five to ten minutes with the wooden rods. He was allegedly struck on his back, ribs and knees. Mr. Chinseche still refused to admit to the charges. Mr. Chinseche was subsequently taken to a cell at the Police Unit where he was kept for two months.

36. On 15 June 2009, Mr. Chinseche was taken to Midima Magistrates Court in Limbe for a preliminary hearing. At this point, he was charged with murder under section 209 of the Malawi Penal Code. Mr. Chinseche pleaded not guilty. He was reportedly not informed of his right to bail or his right to consult a lawyer. No lawyer was present in court and the applicant has never applied for bail.

37. After the hearing, Mr. Chinseche was taken to Chichiri Prison in Blantyre, where he remains. He has never been brought before another hearing and no date for his trial has been set.

38. As in the previous cases, the source points to a set of similar violations of the minimum due process guarantees as enshrined in the right to a fair trial and access to justice. These include alleged violations of section 42(1) and (2)(a) of the Constitution of Malawi (information on the rights to remain silent and on the consequences of making any statement); articles 9(2) and 14(3)(a) of the International Covenant on Civil and Political Rights and section 42(1)(a) (the right to be promptly informed of the charges or reasons for arrest and detention); section 42(2)(b) of the Constitution of Malawi (prolonged police custody); article 10(2)(a) of the Covenant and section 42(2)(d) of the Constitution (Mr. Chinseche has been held in a cell together with convicted prisoners); articles 9(3) and 14(3)(c) of the Covenant, article 7(1) of the African Charter on Human and Peoples' Rights (Mr. Chinseche has not been tried within a reasonable time); article 14(3)(d) of the Covenant and article 7(1) of the African Charter on Human and Peoples' Rights as well as sections 42(1)(c) and 42(2)(f) of the Constitution of Malawi (Mr. Chinseche has never been informed of his rights to consult with and be represented by a lawyer).

39. Mr. Chinseche's remand document has been renewed twice since 15 June 2009, first on 29 June 2009 and later on 29 July 2009, the latter valid until 29 September 2009. His remand has not been renewed since, which, in the source's view, contravenes the established custody time limits under domestic and international law. It is thus the source's submission that Mr. Chinseche has been unlawfully detained since November 2009.

40. Mr. Chinseche has made no application to a court as he is unable to afford the services of a private lawyer and has received no support from the legal aid system in Malawi. He was unable to consult with any legal representation prior to representatives from CHREAA and SALC visiting him in prison in June 2011.

41. Mr. Madison Namithanje, a Malawi national, usually resides at Machokola Village, Traditional Authority Mabuka, Mulange District, Malawi.

42. On 30 June 2009 at approximately 11.00 p.m., Mr. Namithanje was arrested at his temporary home address in Mchilamwera, Thyolo, Malawi, by police officers from Thyolo Police Station. The police officers were all dressed in civilian clothes and carrying weapons.

43. The officers informed Mr. Namithanje that he was implicated in a given case without providing him with any specific information. Mr. Namithanje was handcuffed and taken to Thyolo Police Station. He was not served with a warrant, nor was he informed about the exact charges and his right to remain silent.

44. Upon his arrival at the station, he was placed in a cell. Mr. Namithanje was interviewed three days after the arrest. The subject of interrogation concerned a murder at Mr. Namithanje's workplace. Mr. Namithanje informed the police officers that he had heard about the murder but did not know any specifics. Mr. Namithanje was given a caution statement to sign in which he denied the allegation of murder.

45. Mr. Namithanje was held in police custody for two more days before being taken to Thyolo Magistrates Court for a preliminary hearing. At the hearing, he was charged with murder under section 209 of the Malawi Penal Code. Mr. Namithanje pleaded not guilty. He was not informed of his right to bail and failed to request this. No lawyer was present at the hearing.

46. It is reported that, at the hearing, the Magistrate asked Mr. Namithanje if he had any witnesses or alibis, to which the defendant responded in the affirmative. The Magistrate advised the defendant to obtain the services of a lawyer. When the defendant replied that he could not afford a private lawyer, the Magistrate reportedly ordered Mr. Namithanje to be held on remand until the legal aid system in Malawi was able to assist him.

47. At the closure of the hearing, Mr. Namithanje was taken to Thyolo Prison, where he remained until July 2010. He was then transferred to Chichiri Prison in Blantyre due to alleged overcrowding in Thyolo Prison in July 2010. He has not been brought before a court since his initial hearing and no date for his trial has been set. The applicant had no access to any legal assistance until a meeting with CHREAA and SALC on 30 June 2011.

48. The source alleges the violation of the same basic guarantees as referred to in the case of Mr. Chinseche.

Response from the Government

49. The Working Group transmitted the above allegations to the Government of Malawi requesting it to provide, in its reply, detailed information about the current situation of Mr. Odillo, Mr. Kadzombe, Mr. Chinseche and Mr. Namithanje and to clarify the legal provisions justifying their continued detention. It is regretted that the Working Group has not received a response from the Government.

Discussion

50. In the absence of a response from the Government and pursuant to paragraph 16 of its revised methods of work, the Working Group is able to render an opinion in light of the information submitted to it.

51. The four detainees forming the subject of the present opinion are all unable to access the justice system in their country, arrange for private lawyers or expect legal aid services to provide them with access to justice. While the Working Group is not able to ascertain their innocence or otherwise of the actual offences with which they have been charged, it notes its concern regarding the lack of procedural guarantees of a fair trial for them.

52. Mr. Odillo, Mr. Kadzombe, Mr. Chinseche and Mr. Namithanje have been in detention since 26 October 2006, 4 December 2008, 18 April 2009 and 30 June 2009 respectively. They have been charged with serious offences ranging from theft to murder. However they have been kept in detention without trial for long periods of time and without minimum due process guarantees as required by article 14 of the International Covenant on Civil and Political Rights. These include being promptly informed of the charges by means of an arrest warrant, a caution against self-incrimination, the right to access a legal counsel, the right to be presented before a judge and the right to be tried within a reasonable period of time.

53. Likewise, the Working Group notes that in all four cases, the safeguards under article 42 of the constitution of Malawi and article 7 of the African Charter on Human and Peoples' Rights have been disregarded.

54. With respect to the detention of Mr. Kadzombe, a minor, the Working Group recalls that article 37(b) of the Convention on the Rights of the Child provides that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". Article 37(d) of the Convention clarifies that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action". Mr. Kadzombe has been deprived of these rights for more than three years in detention.

55. Moreover, the Working Group embraces the position of the Committee on the Rights of the Child, whereby States parties shall "develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40(4))" and general comment No. 10 (2007) on the rights of the child in juvenile justice, para. 23). The Working Group notes with concern the failure of the competent authorities to seek to apply any such measures in the case of Mr. Kadzombe.

Disposition

56. In light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The detention of Mr. Odillo, Mr. Kadzombe, Mr. Chinseche and Mr. Namithanje is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights and falling under category III of the methods of work of the Working Group.

57. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situations of Mr. Odillo, Mr. Kadzombe, Mr. Chinseche and Mr. Namithanje and bring them into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

58. The Working Group believes that taking into account all the circumstances of the case, adequate remedy would be immediate trial taking into account all safeguards enshrined in article 14 of the International Covenant on Civil and Political Rights and enforceable right to compensation in accordance with article 9(5) of the Covenant.

59. In the case of Mr. Kadzombe, the Working Group requests the Government of Malawi to proceed to his immediate release in accordance with its obligations under the Convention on the Rights of the Child.

60. Given the allegation of torture and other ill-treatment, the Working Group forwards the Opinion to the attention of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

[Adopted on 4 May 2012]
