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Ref. No. GEN/HRC/1

3rd September, 2019

The High Commissioner for Human Rights
Office of the United Nations High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10

Attention: Ms. Beatriz Balbin, Chief, Special Procedures Branch;

URGENT APPEAL FROM THE SPECIAL PROCEDURES.

I have the honour to forward to you the responses by Malawi Government on the joint urgent appeal from the Independent Expert on the enjoyment of human rights by persons with albinism; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders that were sent by Ms. Beatriz Balbin, Chief, Special Procedures Branch, Office of the High Commissioner for Human Rights to the Permanent Mission of the Republic of Malawi to the United Nations Office and other international organizations in Geneva for your information and action.

We shall be grateful if you could acknowledge receipt of the attached document (14 pages)

Please accept, Sir, the assurances of my highest consideration.

Robert D. SALAMA
AMBASSADOR/PERMANENT REPRESENTATIVE



REPUBLIC OF MALAWI

**MINISTRY OF JUSTICE AND CONSTITUTIONAL
AFFAIRS**

RESPONSE OF THE MALAWI GOVERNMENT TO

JOINT URGENT APPEAL FROM UNITED

NATIONS SPECIAL PROCEDURES

1.0 **Introduction**

1.1 The Malawi Government acknowledges receipt of two letters from the United Nations Special Procedures Mechanism as follows:

- (a) Joint Urgent Appeal from Special Procedures Ref. No UAMW12/2019 dated 21 May, 2019.
- (b) Joint Urgent Appeal from Special Procedures Ref. No: UAMW13/2019 dated 17 July, 2019.

2.0 **Joint Appeal dated 21 May, 2019 Ref: UA MWI 2/2019, in relation to Mr. Timothy Mtambo**

2.1 Background Information

2.1.1 This Joint urgent appeal was sent by Independent Expert on the enjoyment of human rights by persons with albinism, the Special Rapporteur on the Promotion and Protection of the right to freedom of expression, the Special Rapporteur on the right to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human Rights defenders

2.1.2 In this joint appeal, the Government of Malawi is being informed of the concerns regarding alleged threats, intimidation and defamation against human rights defender Mr. Timothy Mtambo in the context of the tripartite elections of 21 May 2019. These threats, intimidation and defamation can be summarised as follows:

- (a) Threats from [REDACTED] on Monday 13th May, 2019.
- (b) Petrol bomb on Mr. Mtambo's offices in August 2018
- (c) Smear campaign against Mr. Mtambo by state media

2.1.3 The joint appeal has specifically asked Malawi to provide further information on a number of issues arising. We hereby respond to each of the issues as raised.

2.2 *Please provide any additional information and any comment on the allegations*

2.2.1 On 13th May, 2019 [REDACTED] reported an assault case against Mr. Timothy Mtambo at Lilongwe Police Station. A file, LL/MP/22/05/19 was opened and investigations were instituted into the matter.

2.2.2 As part of the investigations, Mr. Timothy Mtambo who was mentioned in the complainant's statement was invited to the station to help tracing the unknown perpetrators of the assault since according to [REDACTED] the two men who assaulted him were friends of Mr. Timothy Mtambo's and left the scene of the crime with Mr. Mtambo. Mr. Mtambo reported at the station with his legal team and submitted his witness statement. The investigations into the assault allegations are still underway.

2.3 *Please provide information on measures taken to ensure the physical and psychological integrity of Mr. Mtambo.*

2.3.1 The investigations into the petrol bombing of Mr. Mtambo's offices have been conclusive. Mr Mtambo did not formally lodge a complaint with the Police or record a statement.

2.3.2 Regardless of this, the Government is aware that like all citizens Mr. Mtambo is entitled to protection and well being in line with our laws. In that regard we reiterate our commitment to ensure that Mr. Mtambo, other human rights defenders and indeed all Malawians are duly protected.

2.4 *Please provide information about the measures taken to ensure that human rights defenders are able to carry out their peaceful and legitimate work in a safe and enabling environment, free from any physical or other harassment.*

2.4.1 Malawi has a robust Constitutional, legal and institutional framework that ensures thriving culture of democracy, rule of law, good governance and human right. In this scheme, the state is the primary human rights defender. As such the Government of Malawi has set up institutions and put in place measures to ensure the safety of all its citizens including the human rights defenders. First and foremost is the establishment of the Malawi Police Service which, among others, is mandated to protect lives, property and fundamental freedoms and rights of individuals as well as investigations and detection of crimes. Through these mandates the Malawi Police Service ensures the safety of all citizens in Malawi including Human rights defenders.

2.4.2 The Judiciary as an independent arm of Government provides effective remedies on legal disputes brought about by all citizens of Malawi including human rights defenders. A case in point is where the Attorney General applied to court for an injunction intending to restrain human rights defenders from holding demonstrations across the country that the Human Rights Defenders Coalition (HRDC) have been holding in Malawi following the disputed 21 May, 2019 elections. The High Court dismissed the application holding that the right to demonstrate is a constitutional right that has to be enjoyed by Malawian citizens. Similarly, courts have on several occasions granted injunctions against city councils in Malawi that attempted to block the human rights defenders from exercising their rights to demonstrate. The human rights defenders have been organising demonstrations in Malawi calling upon the resignation of Malawi Electoral Commission (MEC) chairperson after Malawi held her tripartite

general elections on 21st May, 2019. This goes to demonstrate the freedom with which human rights defenders operate.

2.4.3 The Malawi Human Rights Commission is mandated to investigate human rights violations in Malawi, as well as advise government on human rights issues. Through the Commission, human rights violations are investigated and the Commission makes appropriate recommendations. Recently, the Human Rights Commission instituted a commission of enquiry to investigate the death of [REDACTED] who died in the custody of the police following his arrest on allegations of killing a person with albinism.

2.4.4 Human rights defenders operate freely in Malawi and that includes working with various Ministries, Departments and Agencies. In terms of state party reporting process, human rights defenders are part and parcel of various national taskforces constituted by the Government to develop state party reports. For instance, the Centre for Human Rights and Rehabilitation which Mr. Mtambo heads sits on the following state party National Task Forces:

- (a) African Charter and Maputo Protocol ;
- (b) Universal Periodic Review;
- (c) International Covenant On Civil and Political Rights;
- (d) Convention Against Torture;
- (e) Convention on the Elimination of all Forms of Racial Discrimination;
- (f) International Covenant On Economic, Social and Cultural Rights;

2.4.5 Human rights defenders also voice out their opinions freely on issues that they feel duty bound to address by holding press conferences, or participating in panel discussions, radio programs and television programmes of their choice. In some cases human rights defenders have

been granted space in some major print media in Malawi where they express their views on various human rights topics by writing human rights articles. A case in point is newspaper column jointly run by Mr. Gift Trapence and Mr. Timothy Mtambo which comes out every Saturday in Weekend Nation Newspaper known as **Minority Rights Forum**. This demonstrate that the prevailing constitutional, legal and human rights framework in Malawi provides a good atmosphere for the operations of human rights defenders. It is not surprising therefore that Malawi has a thriving and very vocal civil society and human rights defenders community.

2.5 *Please provide information about measures taken-specifically in the lead-up to elections-to ensure the security and safety of all persons living in Malawi, including persons with albinism?*

2.5.1 A number of measures were put in place by the Government of Malawi to deal with attacks against persons with albinism prior to May, 21 general elections. The following are some of the initiatives that were undertaken to ensure the safety of persons with albinism:

- (a) In order to improve prosecution competence, the Director of Public Prosecutions (DPP) directed that all case dockets from Police Prosecutors be submitted to her office for purposes of perusal, directions and prosecutions by her officers; which has significantly improved the quality of prosecutions in these cases;
- (b) In order to clear a backlog of these cases, especially those relating to more serious criminal charges like murder, the Government through Ministries of Justice, and Gender as well as the Judiciary have made a commitment to prioritize prosecution of all serious

cases involving persons with albinism. The Government through Ministry of Finance has started funding these cases in order to kick start and expedite these trials. The High Court in Malawi at varied instances and trials since 2016 has convicted 10 individuals on various albinism related offences including homicide. In some of them there has been a plea of guilty. Heavy sentences have followed these convictions.

- (c) The Ministry of Gender, Children, Disability and Social Welfare engaged the National Statistics Office for inclusion of issues of disability in the 2018 Population and Housing Census. The final report contains disaggregated data of persons with disabilities and through this initiative the population of persons with albinism and their geographical locations is now known;
- (d) Government is now constructing secure houses for people with albinism as one of the main themes within the National Action Plan;
- (e) Malawi Police Services ensured that community policing structures across the country were strengthened and well supported by providing requisite trainings and provision of adequate working equipment. Furthermore, the Government of Malawi started procuring security alarms specifically for persons with albinism which are being distributed by the Malawi Police Service.
- (f) The Ministry of Education, Science and Technology had been placing learners with albinism in schools with boarding facilities, especially those learners that stopped or were failing to go to school for fear of being attacked. Through a circular released on 21st February, 2019 the Principal Secretary reminded Education

Managers from all Divisions to adhere to the directive that was made 4 years ago. Over forty three students with albinism had already been placed in boarding secondary schools with proper security features like fences. Further to this, the Ministry of Education directed boarding schools to accommodate students with albinism when the need arises. As such the Police will continue to provide security in such schools to ensure safety of the learners.

3.0 Joint Appeal dated 17 July, 2019 Ref: UA MWI 2/2019, in relation to Mr. Charles Kajoloweka, Timothy Mtambo, Mr. Gift Trapence, Mr. Madalitso Banda

3.1 Background Information

3.1.1 This Joint appeal is building on the one dated 21st May 2019 and brings in new information regarding events that have occurred since the elections. In this Joint appeal the Special Procedures raise the following issues:

- (a) The Supreme Court Order against Mr. Kajoloweka to pay approximately 35,000 USD in legal costs
- (b) Threats against Mr. Timothy Mtambo, Mr. Gift Trapence and Mr. Madalitso Banda
 - (i) On 26th June 2019, facebook posts by alleged Democratic Progressive Party cadets called Mr. Mtambo a “Foreigner”
 - (ii) On 3rd July 2019 further facebook posts called on people to hunt Mr. Mtambo and Mr. Trapence in places the two frequently visit
 - (iii) On 4th July Mr. Trapence received a death threat via a text message from a South African number.

- (iv) On 4th July Mr Madalitso Banda received threats from unknown people who said they will deal with him
- (v) On 5th July individuals attempted to petrol bomb Mr. Banda's house and they were chased by dogs.
- (vi) On 9th July FDH Bank served an injunction on Human Rights Defenders Coalition
- (vii) On 9th July Mr Trapence was arrested on allegations of misuse of funds from UNAIDS

Malawi hereby responds to the issues raised as requested.

3.2 *Please provide information on steps that have been taken to ensure that the costs of legal proceedings in matters of public interest do not impede the right to an effective remedy as established in article 2.3 of the ICCPR*

3.2.1 The Constitution of Malawi provides for the right to effect remedy in Sections 15, 40 and 46. This right is exercised within laws and procedures that govern judicial proceedings. For example, courts in Malawi have the discretion to award costs to litigants incurred during legal proceedings. Section 30 of the Courts Act (Chapter 3:02 of the Laws of Malawi) mandates the High Court to award costs to proceedings providing that the issue of costs is within the discretion of the High Court. Thus, where one party commences legal proceedings in the High Court but eventually fails to succeed with his/her case, the party is enjoined to reimburse the costs incurred by the other party in the proceedings in the event that the other party to the proceedings prays for costs and the court subsequently grants

the prayer. It has to be highlighted that the courts can order both natural and legal persons to pay the costs incurred in proceedings.

3.2.2 In, **Ex parte Charles Kajoloweka and others, MSCA Civil Appeal Number 05 of 2017**, the Malawi Supreme Court of Appeal, after vacating the grant of leave for judicial review made an order that the costs of the proceedings both in the Malawi Supreme Court of Appeal and the High Court be paid by Mr. Kajoloweka personally. In arriving at this decision the Malawi Supreme Court of Appeal noted that Mr. Kajoloweka personally commenced the judicial review proceedings after observing, among others, that there was no general or specific resolution of the Board of Trustees of Youth and Society (YAS) to commence the proceedings nor was there mandates of various trusts of the other respondents to take up this matter following resolutions of their Boards or following specific mandate of trustees on this issue. The Court further noted that the documentation from Mr. Kajoloweka were poorly drafted not clearly indicating whether he instituted the proceedings on his behalf or on behalf of Youth and Society as well as the other organizations eventually putting Mr. Kajoloweka on the spot light instead of Youth and Society (YAS) as claimed by him.

3.2.3 In light of the above, the condemnation of the costs to be personally borne by Mr. Kajoloweka was a result of the sloppiness of Mr. Kajoloweka and his legal counsel for poorly drafting his documents as such it is inappropriate to shift the blame on the courts nor the Government since it was the fault of their own.

3.2.4 The condemnation of costs to be personally borne by a litigant by the Malawi Supreme Court of Appeal is not unique with the Ex-parte Kajoloweka case and not meant to punish him and in the process

suffocating public interest litigation cases that are advanced by human rights activists in Malawi. This is not an isolated case as there have been other instances where the Malawi Supreme Court of Appeal have also ordered litigants to pay costs personally. A case in point is **Ex Parte ██████████ and Youth and Society MSCA Civil Appeal Number 59 of 2017**, where the Malawi Supreme Court of Appeal condemned ██████████ to personally legal costs to the proceedings for personally advancing an issue that was legally untenable.

- 3.2.5 Additionally, the Constitution of Malawi accords every citizen the right to work with a legal practitioner of his choice who can help him to make informed decisions on the merits and demerits of any legal proceedings that the client chooses to commence. In this particular case Mr. Kajoloweka was represented by legal practitioners both at the High court and the Malawi Supreme Court of Appeal as such if he was dissatisfied with the amount of costs that the Registrar ordered him to pay personally to the other parties, through his lawyers, he would have appealed against such an order to have the amount reduced.
- 3.2.6 To sum it up, the condemning of costs to be borne by Mr. Kajoloweka personally was made in good faith by the Malawi Supreme Court of Appeal after taking into account facts of the case before arriving at such a decision. The decision was not in any way targeted at Mr. Kajoloweka as an activist to frustrate public interest litigation as there have been numerous cases where arrived at a similar verdict.
- 3.2.7 NGO'S like everyone else have to abide by the law. While we fully subscribe to the ideals of free association, any such association has to be duly registered.

3.3 *Please provide detailed information on how the requirement for civil society organisations to be registered with the NGO Board is compatible with the right to freedom of association as established in article 22 of the ICCPR, and the legal provisions that formed the basis for the arrest and detention of Mr. Trapence;*

3.3.1 Section 21(1) of the Non-Governmental Organisations Act (Chapter 5:05 of the Laws of Malawi) provides that every NGO established or operating in Malawi which is recognised as a legal person under the laws of Malawi shall register with the Board. The NGO Board of Malawi is responsible for monitoring activities of NGOs on behalf of Government under the NGO Act. The objects of the Act as stipulated in section 3 include promoting the development of a strong independent civil society in Malawi and to facilitate the formation and effective functioning of NGOs for public benefit purposes; to create a conducive environment for NGO development through Government provision incentives; to promote donor and public confidence in the NGO sector, and to encourage the development of an NGO code of conduct, incorporating principles of fiduciary integrity, public accountability, democratic decision making, development synergy, non-discrimination and beneficiary equity; to facilitate the relationship between NGOs and the Government involving constructive collaboration and partnership in furtherance of public interest; and to affirm the human rights enshrined in the constitution of Malawi. It is therefore imperative that NGOs constituted for public benefit purposes in tandem with section 4 of the NGO Act to get registered with the NGO Board to, among others, enhance public accountability, principles of fiduciary integrity.

3.4 *Please provide detailed information on the steps taken to address the acts of intimidation and threats against Mr. Mtambo, Mr. Trapence and Mr. Banda, including to investigate and bring to justice the alleged perpetrators in accordance with international human rights law, and to ensure their physical and psychological integrity;*

3.4.1 The Malawi Government reiterates its commitment in ensuring that human rights defenders are free to operate in this country in accordance with the laws. In that regard, it is regrettable that there have been allegations of threats and intimidation against the three human rights defenders. However the Malawi Police Service has not received any formal complaints from the three regarding these allegations. We would urge the three human rights defender to use domestic institutions to deal with their complaints.

3.5 *Please provide detailed information on the status of investigations into and the prosecution of the offences allegedly committed by Mr. Trapence and [REDACTED]*

3.5.1 The Malawi Police Service through its Fiscal Department received a complaint from the [REDACTED] alleging that [REDACTED] and Mr. Gift Trapence acting as Executive Director and Trustee respectively, of [REDACTED] [REDACTED] had fraudulently misappropriated seven million, nine hundred and thirty three thousand five hundred Malawi Kwacha (7, 933, 500.00) meant for security trainings of key populations in Lilongwe, Blantyre and Mzuzu.

3.5.2 The two were then arrested and later granted court bail. The matter is still before the Chief Resident Magistrate and the next date of hearing is the

11th of September, 2019 in Lilongwe. UNAIDS has since withdrawn the complaint lodged with the Police.

3.6 *Kindly indicate what measures have been taken to ensure that human rights defenders in Malawi are able to carry out their legitimate work in an enabling environment without fear of threats or intimidation of any kind;*

3.6.1 We reiterate our response under paragraph 2.4 above.

4.0 **CONCLUSION**

4.1 The Malawi Government firmly restates her commitment to the cause of democracy, rule of law, good governance and human rights. The threats and attacks on human rights defenders herein are regrettable. As demonstrated in this response, the Government has taken measures and continues to take measures to ensure that all Malawians including human rights defenders live freely without fear and fully enjoy their God given rights. We urge the Human Rights Defenders to continue engaging key government institutions such as the Malawi Police, Malawi Human Rights Commission, the Ministry of Justice and Constitutional Affairs.

4.2 The Special Procedures Mandate holders are also urged to continuously engage the Government of Malawi and where necessary seek clarification on some alleged cases of human rights violations.

Dated 22nd August 2019.

HUMAN RIGHTS SECTION

MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS, MALAWI

