

Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders

REFERENCE:
AL MWI 1/2020

31 March 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 41/12, 42/22, 34/18 and 34/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged arbitrary detention of human rights defenders, Messrs. **Macdonald Sembereka**, **Gift Trapence** and **Timothy Mtambo** for having issued a call to the public to assemble on 25 March 2020.

Mr. Macdonald Sembereka is the coordinator of the Human Rights Consultative Committee (HRCC). HRCC is network of civil society organisations that promote civil and political rights in Malawi, in particular, it advocates for the political accountability of Government officials.

Mr. Gift Trapence is deputy chairperson at the Human Rights Defenders Coalition (HRDC). HRDC is an organisation that promotes civic engagement. He is also head of the Centre for the Development of People (CEPDEP) the country's leading LGBTI rights organisation.

Mr. Timothy Mtambo is the chairperson of the HRDC and Executive Director of the Centre for Human Rights and Rehabilitation (CHRR) in Lilongwe. The CHRR is a non-governmental organisation that promotes the protection and consolidation of good governance in Malawi, particularly through awareness campaigns in rural and urban communities.

These individuals were also the subject of previous communications by Special Procedures sent on 17 July 2019 (case MWI 3/2019), 21 May 2019 (case MWI 2/2019), 9 February 2015 (case MWI 2/2015), 10 October 2011 (case MWI 4/2011). We thank you Excellency's Government for the responses received to some of these communications and the assurances provided with regard to the enabling environment to exercise fundamental freedoms in Malawi. We regret to bring to your attention new allegations of threats and intimidations of human rights defenders.

According to the new information received:

On Sunday evening 8 March 2020, Mr. Macdonald Sembereka and Mr. Gift Trapence were arrested in Lilongwe, outside a hotel/restaurant where they had been meeting. Upon arrest, they were placed in two separate cars with 8-10 armed officers. They were first brought to Area 3 police station and later that night driven to a Blantyre police station, approximately 350km away. Mr. Sembereka was allegedly transferred from there to Nyambadwe police station in the same city. They were arrested by the Malawi Police Service for “inciting another to contravene the law”. However, no arrest warrant was presented to them until arrival in Blantyre.

The arrest warrant allegedly included a third HRDC leader, Mr. Timothy Mtambo, who was not found by the police on Sunday evening and could not be arrested at the same time. However, he turned himself in to the central Lilongwe Police station on Tuesday 10 March 2020 where he was detained until he was brought to court on 12 March 2020.

The arrests allegedly came hours after the incumbent President Mutharika made comments at a political rally warning that the actions of HRDC leaders would no longer be tolerated. At the same rally, the Minister of Homeland Security, Nicholas Dausi, allegedly said he would order the Malawi Defence Force and Malawi Police Service to use maximum force if the demonstrators held a protest at the State House.

According to a press statement issued by the Police on 9 March 2020, the HRDC leaders were arrested and charged following remarks they made at a press briefing on 6 March when they allegedly called upon members of the general public to “seal the State Residences” as part of a demonstration due to be held on 25 March. On this day, HRDC had allegedly planned to hold a “citizens’ electoral justice march” following delays in the dismissal of Commissioners of the Malawi Electoral Commission (MEC) further to recommendations of the Parliament of Malawi Public Appointments Committee. Police have stated that the HRDC comments constituted an offence under section 124 of the Malawi Penal code which prohibits any person to incite or solicit another to break any law: “Soliciting, etc., to break the law (1) Any person who, whether in writing or by words or by his behaviour or otherwise—(a)solicits or incites any other person to fail to comply with or to contravene any law in force in Malawi or in any part thereof; or(b)indicates or implies to any person that it would be incumbent or desirable to fail to comply with or to contravene any such law,shall be liable to imprisonment for five years. (2) It shall be no defence to a charge under this section that the solicitation, incitement, indication or implication, as the case may be, neither has had nor could have had any effect.”

Upon arrest and during the long drive, both Macdonald Sembereka and Gift Trapence were allegedly tightly handcuffed, which caused them severe pain and bruises. Upon arrival at Blantyre police station, they were not given any food and blankets for the night, and were refused the right to inform their families of their

whereabouts. Macdonald Sembereka was also allegedly denied asthma medication.

On Tuesday 10 March 2020, Macdonald Sembereka and Gift Trapence were driven back to Lilongwe and placed in detention in Lilongwe.

All three detainees were brought to court on Tuesday 12 March and were subsequently released on bail on the same day. Since then, they have been required to report to Lilongwe police station every Friday.

Macdonald Sembereka and Gift Trapence are allegedly still on bail from previous charges brought against them in 2019 for activities related to their participation in public life and allegations of operating an “illegal” NGO. In late 2019, the Director of Public Prosecutions reportedly requested the police to drop these unfounded charges; however, this has yet to be done.

These arrests and detentions take place in the context of a pattern of restrictions to the right of peaceful assembly. In 2019, a demonstration planned by HRDC reportedly did not obtain the necessary approval. However, the Supreme Court of Malawi later upheld the right to freedom of assembly as enshrined in Article 38 of the Constitution.

Without prejudice to the accuracy of the information made available to us, we express our concern in relation to the alleged arbitrary arrest and detention of the three human rights defenders mentioned above which seem to be directly linked to their call for peaceful demonstrations on 25 March. We express concern that these alleged acts have a chilling effect on civic space and people’s participation in the conduct of public life since the arrests may be an attempt to delegitimise and criminalise human rights defenders for the exercise of their rights to freedom of peaceful assembly and of association and freedom of expression in the electoral context. The actions taken by the authorities seem to be in contravention of the rights of every individual to liberty and security, the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment, to a fair trial, to freedom of opinion and expression, and to freedom of peaceful assembly and of association.

On a more general note, we would like to express our concern in relation to the strict authorization regime for public assemblies in place in Malawi, where approval must be acquired in advance, otherwise any demonstration would be deemed illegal.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for the observations of your Excellency’s Government on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on the reasons and legal basis for the arrests of Messrs. Macdonald Sembereka, Gift Trapence and Timothy Mtambo and how these arrests are in conformity with the international obligations of Malawi under the ICCPR.
3. Please provide information on the reasons as to the transfer of Mr. Sembereka and Mr. Trapence from the capital to Blantyre and the measures taken to ensure that the transfer was compatible with international human rights norms.
4. Please provide information on what measures are being taken to ensure the fair trial guarantees of individuals faced with a criminal charge for the planning and participation in a non-authorized assembly, including their right to access legal counsel, as well as other due process measures.
5. Please explain how the call by the HRDC to demonstrate on 25 March falls under section 124 of the penal code, and how this would be consistent with international human rights law.
6. Please explain how the authorization regime for the exercise of the right to peaceful assembly and of association is in alignment Malawi's obligations under international law and on measures taken to ensure this alignment.
7. Please indicate what measures have been taken to ensure that human rights defenders and other civil society actors in Malawi are able to carry out their legitimate work in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any sort.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We would like to inform your Excellency's Government that after having transmitted an allegation letter to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an

opinion on whether the deprivation of liberty was arbitrary or not. Such letters in no way prejudge any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

Please accept, Excellency, the assurances of our highest consideration.

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

José Antonio Guevara Bermúdez
Chair-Rapporteur
Working Group on Arbitrary Detention

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Michel Forst
Special Rapporteur on the situation of human rights defenders

Annex
Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to refer your Excellency's Government to the International Covenant on Civil and Political Rights (ICCPR), ratified by Malawi on 22 December 1993.

Freedom of peaceful assembly

We recall that according to Article 21 of the ICCPR, "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." The 'provided by law' requirement means that any restriction 'must be made accessible to the public' and 'formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly' (CCPR/C/GC/34). Moreover, it 'must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution'. The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions 'target a specific objective and do not unduly intrude upon the rights of targeted persons. The ensuing interference with third parties' rights must also be limited and justified in the interest supported by the intrusion. Finally, the restriction must be 'the least intrusive instrument among those which might achieve the desired result'.

We would like to refer to Human Rights Council resolution 24/5 (operative paragraph 2), in which the Council "reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law."

We would also like to recall that the Special Rapporteur on the rights to freedom of peaceful assembly and of association previously stated that "States do not only have a negative obligation to abstain from unduly interfering with the rights of peaceful assembly and of association but also have a positive obligation to facilitate and protect these rights in accordance with international human rights standards" (A/HRC/41/41).

With regards to the authorization regime, the Special Rapporteur on the right to freedom of assembly and of association has already indicated that "the right to freedom of peaceful assembly does not require the issuance of a permit to hold an assembly. If necessary, a mere prior notification, intended for large assemblies or for assemblies at which some degree of disruption is anticipated, may be required". In addition, the Special Rapporteur

considers laws establishing authorization procedures to be even more problematic in the context of elections, as authorization may be arbitrarily denied, especially when demonstrators intend to criticize Government policies¹.

Human Rights Defenders

We would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

Furthermore, we would like to bring to the attention of your Excellency's Government to provisions 5(a), 6 (a-c), and 12 of the UN Declaration on Human Rights Defenders.

Human Rights Council Resolution 22/6 calls upon States to ensure that defenders can perform their important role in the context of peaceful assemblies, in accordance with national legislation consistent with the Charter of the United Nations and international human rights law. States should ensure that no one is subject to excessive or indiscriminate use of force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance, abuse of criminal and civil proceedings or threats of such acts.

Access to lawyers

We would also like to draw your attention to article 14 of the ICCPR, which provides a set of procedural guarantees that must be made available to persons charged with a criminal offence, including the right of accused persons to communicate with counsel of their own choosing.

In its General Comment No. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3) (b) requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. S/he should also be able "to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter" (CCPR/C/GC/32, para. 34).

¹ See: A/68/299

We would also like to refer your Excellency's Government to the UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990, in particular principles 1, 2, 7, and 16.

In addition, Principle 9 of the UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court states that those "deprived of their liberty shall have the right to legal assistance (...) at any time during their detention, including immediately after the moment of apprehension." Moreover, Guideline 8 stresses that such access to legal counsel shall be provided "at the latest prior to any questioning by an authority." (A/HRC/30/37)

Freedom of expression

Article 19 of the ICCPR provides for the right to freedom of opinion and expression. Paragraph 3 of article 19 sets out the requirement that any restrictions to the right to freedom of expression must be necessary, proportionate and prescribed by law. The Human Rights Committee also clarified that "any restrictions on freedom of expression that a State may seek to institute under article 19(3), must not infringe upon the freedom to hold open political debate". (CCPR/C/GC/34, para. 28).