

**Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Working Group on Arbitrary Detention; the Special Rapporteur on the human rights of migrants and the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material**

REFERENCE:  
AL MWI 2/2020

21 May 2020

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on trafficking in persons, especially women and children; Working Group on Arbitrary Detention; Special Rapporteur on the human rights of migrants and Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, pursuant to Human Rights Council resolutions 35/5, 42/22, 34/21 and 34/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **human rights abuses currently faced by a group of migrant children who had allegedly been detained at one of the borders and were subsequently deported to a neighbouring country, from where they had entered Malawi, and 2 children who were released from detention and their fate and whereabouts remain unknown.**

According to the information received:

A group of migrant children, from different families, had allegedly been detained at the border by immigration officials for a few days. The children are presumably from the Democratic Republic of Congo and aged between 4 and 17. They allegedly entered Malawi through a third country. Allegedly, these children were brought into the country by an adult, who then disappeared and left the children on their own.

It is reported that international organizations providing assistance to migrants and refugees, were denied access to the children before 11 April 2020. The Malawi Human Rights Commission (MHRC) and one of its staff members visited the children on 12 April 2020. Reportedly, during this visit these children were in poor living condition with little food and in need of medical attention.

These children could have been, and could still be, at high risk of becoming victims of trafficking and exploitation including sexual exploitation. As such under the Malawi Trafficking in Persons Act 2015 and the Child Care, Protection

and Justice Act, 2010, they would have been entitled to protection and care in Malawi.

On 15 April 2020, arrangements were being made to transfer all the children to a safe house in Lilongwe where they could have received urgent care and a determination of the child's best interests in relation to longer-term assistance. However, allegedly, in the evening of 15 April 2020, border authorities released two of the children to persons sent from Dzaleka camp. It is not entirely clear whether it was relatives from that camp who picked up the children or else whether the two children disappeared to an unconfirmed location.

On 16 April, the Minister for Homeland Security reportedly ordered the return of the remaining children to the third country where they entered from, while earlier and following advocacy by international organizations, the same Minister had agreed to bring the children to a safe house.

While we do not wish to prejudge the accuracy of this information, we are concerned at the situation of these children and the potential threat and risk of re trafficking if they are sent to a third country or their country of origin, without the adoption of protective measures. On the one hand, we are deeply concerned about the detention of these children based solely on their immigration status and on the other hand about the deportation of these children to a third country despite the recommendation made by international organizations on protection measures based on the children needs and in the absence of a procedure for identification of indicators of vulnerability, in particular to trafficking. If confirmed these allegations will be a violation of national and international law, in particular non-refoulement obligations.

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 indicate which immediate measures your Excellency's Government plans to undertake to establish the fate and whereabouts of the two children who were released on 15 April 2020.

3. Please provide detailed information on the measures taken by Malawi – in law and in practice - to ensure the effective protection of migrant children and children victims of trafficking, in line with national and international guidelines for the protection of children victims of trafficking, child refugees and unaccompanied migrant children.
4. Please indicate which measures your Excellency's Government is taking to adopt child sensitive processes in all migration related administrative procedures, including avoiding placing migrant children in detention.

We would appreciate receiving a response within 60 days. Thereafter this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we call upon your Excellency's Government to initiate an investigation into the handling of this matter by border authorities, and in the event the investigation support or suggest the allegations to be correct to ensure the accountability of any person and institution 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 prejudice any opinion the Working Group may render. The Government is required to respond separately for the allegation letter procedure and the regular procedure.

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

Maria Grazia Giammarinaro  
Special Rapporteur on trafficking in persons, especially women and children

Leigh Toomey  
Vice-Chair of the Working Group on Arbitrary Detention

Felipe González Morales  
Special Rapporteur on the human rights of migrants

Mama Fatima Singhateh  
Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material

**Annex**  
**Reference to international human rights law**

Without implying in advance, a conclusion on the alleged facts, we would like to outline the international standards and regulations applicable to the matters set forth above.

The State of Malawi is bound by obligations included in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, which was ratified on 17 March 2005. The Protocol defines trafficking in persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by proscribed means for the purpose of exploitation, which includes, inter alia, forced labour or services, or servitude. In addition, we would like to call your Government on the importance to identify children victims of trafficking, as referred to by the Recommended Principles and Guidelines on Human Rights and Human Trafficking (“Recommended Principles and Guidelines”), issued by the Office of the High Commissioner for Human Rights in July 2002. Principle 10 of the Recommended Principles and Guidelines provides that “Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.” Moreover, Guidelines 8 affirms that “(a) child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.”

The Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography, which your State have ratified respectively in 1991 and on 2009 prohibit trafficking in children for any purpose. They call upon States to develop and adopt proactive identification measures for the rapid identification of trafficked children.

In her report to the General Assembly (A/HRC/38/45), the Special Rapporteur on trafficking in persons, especially women and children, explicitly recommended States to “ensure that children, especially unaccompanied and separated children, are promptly identified, registered and referred to the child protection system; and ensure that such identification procedures take into account the age, gender and maturity of the child, as well as the circumstances of his or her journey.”

On the allegation of the children being detained at the border, we wish to refer to the International Covenant on Civil and Political Rights (ICCPR) ratified by Malawi on 22 December 1993, and notably to Article 9. Article 9.1 of the ICCPR stipulates that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. In addition, the Committee on the Rights of the Child and the Committee on Migrant Workers have also

stated “that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice” CMW/C/GC/4-CRC/C/GC/23.

Moreover, Article 12.2 of the ICCPR, which stipulates that "everyone shall be free to leave any country, including his own" and Article 13.2 of the Universal Declaration of Human Rights which stipulates that "everyone has the right to leave any country, including his own, and to return to his country". "The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party "(CCPR/C/21/Rev.1/Add.13, paragraph 10).

Regarding the allegation on the return of the children to a third country, we would like to recall Your Excellency’s Government obligations under the Convention relating to the Status of Refugees of 1951 and its Protocol of 1967, ratified in 1987, which provide additional fundamental rights to refugee children, including the core provision of non-refoulement, and basic standards in respect to welfare. In this regard the Special Rapporteur on trafficking in persons and the Special Rapporteur on the Sale of Children added in their joint report A/72/164 that the “The repatriation of any child can only be decided when it is evidenced on a case-by-case basis that it is in his or her best interests and after ensuring, by means of a procedure with proper safeguards, that the child, upon return, will be safe and provided with proper care and custody”.