

Mandates of the Independent Expert on the enjoyment of all human rights by older persons; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the right to food and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

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(Please use this reference in your reply)

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Excellency,

We have the honour to address you in our capacity as Independent Expert on the enjoyment of all human rights by older persons; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the right to food and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, pursuant to Human Rights Council resolutions 51/4, 53/14, 49/13 and 51/21.

In this connection, we would like to bring to the urgent attention of your Excellency's Government information we have received concerning **the ongoing deprivation of liberty of 5 older persons under conditions that threaten their right to health and right to life.**

According to the information received:

Older persons in prisons in Malawi reportedly do not receive differentiated treatment on the basis of their age, health conditions, or disabilities. Older persons are subject to hard labour and corporal punishment on the same basis as other prisoners, and do not receive specialized care and support services. While older persons reside within the same block, they live in severely overcrowded conditions, and most must sleep on their sides on the concrete floor to ensure sufficient space for all inmates. Sometimes, older persons are obliged to sleep in shifts.

Regular medical care is reportedly not available and provided only on an ad-hoc basis upon request and approval by prison officials. Hospital visits are reserved for the most critical conditions, leading to chronic or long-term health issues, including sensory impairments, being untreated. This can create protection risks, as symptoms of certain conditions may be mistaken as uncooperative behaviour by prison officials.

Special Procedures mandate-holders have previously raised concerns regarding the lack of adequate food and water provided to prisoners, MWI 5/2022 and MWI 1/2023 respectively on 23 November 2022 and 7 March 2023, and these dynamics have particular impacts on older prisoners. In MWI 1/2023 mandate-holders asked the Government to provide information on the measures taken to ensure access of prisoners to adequate and nutritious food and water while in detention, in particular for those with medical conditions and requiring medication, as well as details on the measures taken to prevent that prisoners experience medical conditions due to insufficient food and nutrients provided to them. The Government of Malawi acknowledged the receipt of MWI 5/2022 on 23 November 2022, a

substantive reply is still outstanding for both previous letters. Older persons do not receive differentiated meals, and mainly receive meals of maize porridge and beans which are difficult for some older persons to digest and may not meet their full nutritional needs, leading to the development of related health conditions. Prisoners also receive only one meal per day in most instances. The Supreme Court of Malawi has previously ruled that prisons must increase the quantity and diversity of meals provided to prisoners, as well as reduce overcrowding.¹

Presidents in Malawi have established a tradition of clemency, with particular regard given to those who have served long sentences, suffered serious or chronic health conditions, or were at particular risk from COVID-19, situations applicable to many older persons. Additionally, the judiciary has reportedly established a precedent for persons sentenced to life imprisonment that live beyond the national life expectancy to have the custodial portion of their sentences commuted on the basis that they have already served a sentence of life imprisonment.² The national life expectancy in Malawi is currently 63 years old.³

Special Procedures mandate-holders have received a list of older persons who have been deprived of liberty for more than 15 years and are suffering from a variety of chronic health conditions and/or disabilities that put them at imminent risk of death in view of inadequate conditions of detention and constrained access to medical care. All of these persons were initially sentenced to death for homicide, although their sentences were later commuted to life imprisonment. They continue to maintain their innocence, and reportedly, there were irregularities in many of their initial trials. In view of the above, their consideration as priority cases during upcoming clemency rounds would be strongly warranted.

Mr. George Billiati is 61 years old and has reportedly been imprisoned since 2004, and received a death sentence in 2010 for the murder of his two brothers. Both Mr. Billiati and his surviving family members continue to maintain his innocence. Medical and psychiatric doctors have diagnosed him with hypertension, heart failure, peripheral neuropathy, mild schizophrenia, and dementia. He has also suffered from tuberculosis, recurrent bouts of malaria, depression, and suicidal ideation.

Mr. Wyson Khululupi is 67 years old and has been imprisoned for nearly 19 years since his first arrest in 2005 for murder. Reportedly, he did not understand his guilty plea due to illiteracy, and the only evidence against him were the testimonies of his estranged former wife and mother-in-law. He reportedly suffers from swollen feet, sore eyes, urinary problems caused by a tumour and elephantiasis, and recurrent dizziness. He has also been diagnosed with cognitive impairments and persistent depressive disorder.

Mr. Chafika Ndege is 73 years old and has been imprisoned since his arrest in October 2008 for murder. He maintains his innocence, and the courts have reportedly lost all records pertaining to his trial, making any appeal nearly

¹ *Gable Masangano v Attorney General and Others*, Constitutional Case No. 15 of 2007

² *Republic v Baison Kaula*, High Court of Malawi, Homicide Case No. 5 of 2015

³ See <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=MW>

impossible due to the lack of information regarding the grounds and evidence upon which he was convicted. He has been diagnosed with serious hypertension, and his doctor has recommended he be permitted monthly visits to a clinic to monitor his hypertension. However, he has reportedly not been allowed regular visits to the clinic, nor does he have consistent access to the medication he requires for this condition, putting him at imminent risk of death due to heart failure. He is also at risk of a stroke, affected by a limp, and has experienced suicidal ideation.

Mr. **Zathyoka Thalipezi** is 65 years old and has been imprisoned since his arrest in October 2008 for murder. He maintains his innocence, and the courts have reportedly lost all records pertaining to his trial, making any appeal nearly impossible due to the lack of information regarding the grounds and evidence upon which he was convicted. He is reportedly underweight due to malnutrition, and suffers from anxiety and depression.

Mr. **Bamusi Bendulo** is 65 years old and has been imprisoned since his arrest in October 2008 for murder. He maintains his innocence, and the courts have reportedly lost all records pertaining to his trial, making any appeal nearly impossible due to the lack of information regarding the grounds and evidence upon which he was convicted. He is reportedly underweight due to malnutrition, and suffers from anxiety and depression. Mr. Bendulo was subjected to child labour on a tobacco farm, which has led to him experience tuberculosis and other respiratory problems, finger clubbing due to chronically low blood oxygen, and malaria. Many of these issues are related to early exposure to nicotine. He also suffers from depression and post-traumatic stress disorder due to having experienced child abuse from his primary caregiver.

While we do not wish to prejudge the accuracy of the information made available to us, we would like to express grave concerns regarding detention conditions for older persons in Malawi, including the situation of Mr. **George Billiati**, Mr. **Wyson Khululupi**, Mr. **Chafika Ndege**, Mr. **Zathyoka Thalipezi**, and Mr. **Bamusi Bendulo**. We are extremely concerned by reports that these individuals have been deprived of liberty for extended period of time in overcrowded conditions without accommodation for age-related conditions or disabilities, and insufficient access to food, as well as by reports that these individuals suffer from chronic health conditions without access to adequate medical care. general comment No. 36 of the Human Rights Committee emphasizes that States have a “heightened duty of care” to protect the lives of people in prisons, especially since people in prisons cannot rely on other financial or logistical means to safeguard their own right to life.

Access to healthcare in detention

Failure by a State party to provide medical treatment and care in detention adequate to the condition of the detainee constitutes a violation of the right to be treated with humanity and with respect for the inherent dignity of the human person under article 10(1) of the International Convention on Civil and Political Rights, ratified by Malawi in 1993 (*Human Rights Committee, Views of 21 March 2017, CCPR/C/119/D/2146/2012, para. 8.7*), whereas lack of medical assistance and refusal of hospitalization of a detainee in critical condition “can be characterized as severe pain and suffering inflicted intentionally by an official,” in violation of articles 1 and 2 of the Convention against Torture (*CAT, Decision of 31 July 2017,*

CAT/C/61/D/661/2015, paras. 8.2, 8.3). Under the revised Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, denial of medical care and treatment should be considered as a potential method of inflicting torture or ill-treatment (*Istanbul Protocol, 2002, para. 372(o)*).

As per article 12 of the International Covenant on Economic Social and Cultural Rights, ratified by Malawi in 1993, States parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and take steps to achieve the full realization of this right, including those necessary for improvement of all aspects of environmental hygiene and the creation of conditions which would assure to all medical service and medical attention in the event of sickness. In particular, States are under the obligation to respect the right to health by refraining from denying or limiting equal access for all persons, including prisoners (*CESCR, general comment no. 14 (2000), para. 34*). The CESCR interprets the right to health as “an inclusive with extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food [and] nutrition” among others (*CESCR, general comment No. 14, para. 11*).

Furthermore, the Convention on the Rights of Persons with Disabilities ratified by Malawi, on 27 August 2009, provides for the right to health in article 25, where State Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

Access to food

Article 25 of the Universal Declaration of Human Rights that recognizes the right of everyone to a standard of living adequate for the health and well-being of themselves and of their family, including food. Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by your Excellency’s Government in 1993, recognizes the right of everyone to an adequate standard of living for themselves and their family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. In interpreting this provision, the Committee on Economic Social and Cultural Rights (CESCR) stressed in its general comment No. 12 that a violation of the right to food occurs when the state fails to provide the “minimum essential level required to be free from hunger”.

General comment No. 15 of the CESCR holds that States must give special attention to ensure that prisoners and detainees are provided with sufficient and safe water for their daily individual requirements.

The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) apply to all detainees, regardless of the charges against them, in particular rules 18, 22, 42 and 43, concerning the provision of safe drinking water, food of adequate nutritional value for health and strength, and sanitation to detainees. Rule 22 states that every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served and that drinking water shall be available to every prisoner whenever he or she needs it.

Older persons in detention

We would like to recall that under rule 2(2) of the Nelson Mandela Rules, in order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.

We would like to stress that older persons may be disproportionately affected by inhumane conditions of detention. According to the United Nations Principles for Older Persons, adopted by the General Assembly resolution 46/91 on 16 December 1991, older persons should be able to live in dignity and security and should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well being and to prevent or delay the onset of illness (paras. 11 and 17). Article 15 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa obliges States Parties to guarantee the rights of older persons to access health services that meet their specific needs and take reasonable measures to facilitate access to health services for older persons.

In her report on older persons deprived of liberty, the Independent Expert on the enjoyment of all human rights by older persons calls on paying special attention to applying the principles of necessity and proportionality when the deprivation of liberty is decided against older persons in the context of criminal justice, considering the severity of the offence, and whether the dignity of older persons is being protected based on their age and intersectional factors (A/HRC/51/27, para. 17). States must treat older persons with dignity during the entire duration of their detention and must take into consideration their specific needs with respect to their age, health and disability status. Those considerations are especially critical at every stage of the criminal justice process (especially pretrial, trial, sentencing, appeal and postsentencing detention) (para. 15). The Expert warned that older persons face heightened risk of discrimination, abuse and violence at all stages of their incarceration (para. 41).

The report of the Independent Expert further notes that when older persons are detained in the criminal justice system, States have the obligation to uphold and protect their human rights and ensure their safety. As is done in some countries, it is good practice to adopt constitutional and legal age-related provisions ensuring the realization of the special needs of older persons lawfully deprived of liberty, in accordance with international human rights standards (para. 70). States have a positive obligation to protect the liberty of all individuals under their jurisdiction and should take measures to prevent the deprivation of their liberty.

As a heterogenous group with complex needs, alternatives to deprivation of liberty for older persons should be prioritized and encouraged through State actions (para. 71). In the criminal justice context, several promising practices have emerged offering alternative solutions for older persons, such as prioritizing house arrest for persons aged 70 or above during pre-trial and for minor offense convictions; prison sentences carried out (partially or fully) in hospitals, family care, in-home or in institutional care based on various criteria, including age; overruling life imprisonment for persons over age 65 and affording amnesty, parole, compassionate or early conditional release for older persons, based on their age, the time served in prison and health status (chronic and/or life-threatening illnesses); temporary release;

pardon or amnesty; or electronic monitoring to track and supervise older persons convicted of minor offenses. Studies show that older persons are far less likely to reoffend following release from prison (para. 72). During the ongoing COVID-19 pandemic and due to the overcrowding in some detention settings, several States privileged non-custodial measures and allowed for the early release of older prisoners to ensure their protection and safety, as older age represents a significant risk for contracting the virus (para. 73).

In the context of criminal detention, the Independent Expert makes the following recommendations:

- (a) States must adopt age-sensitive policies and strategies in the criminal justice context to ensure respect for and protection of the human rights of older persons, in line with international and regional human rights standards regulating the deprivation of liberty;
- (b) Age-friendly detention environments, including appropriate infrastructure, accommodations and living conditions, and age-sensitive training for custodial staff to foster respectful communication and informed decision-making should be ensured; older persons should have access to age-appropriate services and activities, including opportunities for lifelong learning and vocational training;
- (c) Appropriate health-care services for older persons should be provided to meet their individual needs, according to the principle of equality in health care; screening upon admission, transition and throughout the period of detention must be in place to identify the risks and specific needs of older detainees;
- (d) States should ensure that, when released, older persons have benefited from individualized pre-release programmes designed for their specific needs and wishes, including access to medical and mental health care for longstanding, undertreated health conditions, housing solutions, access to pensions and financial support;
- (e) Intersectional factors should be given due consideration throughout all stages of the criminal justice process, especially when older persons have other intersecting bases for discrimination, such as gender, disability, indigenous or ethnic identities; individual care plans should be created to ensure that older persons at higher risk of violence, ill-treatment and persecution are provided with security in detention, including older women, older lesbian, gay, bisexual, transgender and intersex persons and older persons belonging to ethnic, religious or indigenous groups;
- (f) States, through their judicial systems, should consider the necessity and proportionality of detaining older persons with complex health conditions and in need of palliative care; States should also examine the possibility of non-custodial alternatives at all stages of detention, including serving sentences in facilities where the needs of older persons would be addressed through or benefit from humanitarian or compassionate release (para. 88).

We welcome passage of the Older Persons' Bill by the National Assembly in Malawi on 5 April 2024 and the decision by President to assent to this legislation on 7 June 2024, clearing the way for its entry into law. We would like to encourage your Excellency's Government to ensure in its implementation that all relevant rights and protections are applied without discrimination to older persons in detention, including the aforementioned cases.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned persons in compliance with international instruments.

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 your observations 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 measures taken or envisaged to ensure that Mr. George Billiati, Mr. Wyson Khululupi, Mr. Chafika Ndege, Mr. Zathyoka Thalipezi, and Mr. Bamusi Bendulo and other older persons deprived of liberty have prompt access to adequate physical and medical care related to their age, specific health conditions, or disabilities.
3. Please provide details on the measures taken or envisaged to ensure access of older prisoners to adequate and nutritious food, including a diversified diet, in particular for those with medical conditions and requiring medication.
4. Please provide details on the measures taken or envisaged to ensure accommodations for older prisoners are accessible and suitable for their age, health conditions, and disabilities.
5. In light of their age and health, please strongly consider granting Mr. George Billiati, Mr. Wyson Khululupi, Mr. Chafika Ndege, Mr. Zathyoka Thalipezi, and Mr. Bamusi Bendulo pardon or remission of sentence in accordance with the United Nations Standard Minimum Rules for Noncustodial Measures (Tokyo Rules) and in line with the Presidential practice.

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 responsible of the alleged violations.

We would appreciate receiving a response within 60 days. Past this delay, 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.

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

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