

## **Opinion No. 11/2009 (Malawi)**

**Communication addressed to the Government on 1 April 2009**

**Concerning Messrs. Paul Newiri, Boxtan Kudziwe and Lawrence Ndele**

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

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group regrets that the Government has not presented its observations on the allegations submitted by the source, despite several invitations to do so.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The cases summarized hereafter have been reported to the Working Group on Arbitrary Detention as set out below.
5. Mr. Paul Newiri, a Malawi citizen, usually residing at M'gunda village, was arrested without a warrant at his home on 22 July 2004 at 11 p.m. by officers of the Thyolo police. At the time of his arrest he was 26 years old. According to remand warrants, the High Court of Blantyre recorded that the incident of the same day forming the basis of his arrest took place in February 2004, i.e. months before his arrest. It is unclear whether this is a mistake on the part of the Thyolo police or of the High Court or whether Mr. Newiri had even been the person intended to be arrested.
6. Mr. Newiri was held at Thyolo police station between 22 and 28 July 2004, when he was transferred to Thyolo Prison, where he remained until November 2004. He is currently being detained at Chichiri Prison of Blantyre, together with the general prison population including convicts. Mr. Newiri was brought before the Thyolo Magistrate Court on 28 July 2004 at which time he was informed that he was being charged with homicide under Section 209 of the Penal Code of Malawi. Mr. Newiri does not have any prior criminal record and had never been arrested before this incident.
7. During the court hearing Mr. Newiri was not provided with legal counsel and the Magistrate Court neither informed him of this right, nor of the right to be presumed innocent until proven guilty nor of his right to apply for release on bail. To date, Mr. Newiri has not been tried for any crime. He was scheduled to appear before the High Court in Blantyre on 29 July 2008, but was brought before this Court only on 31 August 2008 where he was informed that he would be tried before the Thyolo High Court on 1 September 2008. It is unclear whether any investigation into the crime has ever taken place.
8. Mr. Newiri remains in limbo indefinitely waiting for a trial date and has been unable to provide for his wife and three young children. His family has been able to afford to travel to Blantyre to visit him only once or twice each year since 2004. Due to his situation and the extremely poor conditions at Chichiri Prison, Mr. Newiri suffers from depression and anxiety, has difficulties sleeping and has developed mental health problems. Because of the distance between his place of detention and his home village, his family is unable to provide him with food on a regular basis, and because prisoners often go without any meals due to a lack of resources, Mr. Newiri also suffers from hunger and malnutrition.
9. Mr. Newiri has approached welfare officers at Chichiri Prison twice to seek a resolution of his case, but to no avail.
10. Mr. Boxtan Kudziwe (court records show his first name incorrectly as "Boston"), born on 19 February 1978, a high school-educated small-business owner, usually residing in Chisombezi, Limbe, was arrested near his residence by two police officers without a warrant on 10 April 2006, at approximately 10 a.m. When arresting him, the police

demanded that he informed them of the whereabouts of an individual with the name of Vierra Chidzidzira. Mr. Kudziwe explained to the police officers that he did not know a person by that name, but was nonetheless taken to Bangwe police station without a reason provided, where he was detained for three days.

11. The police informed him that he was being held liable for crimes committed by Mr. Chidzidzira, who, according to the police, had been involved in the robbery and sale of cell phones, and was also accused of murder. Mr. Kudziwe was told that he would be released if he disclosed the hiding place of Mr. Chidzidzira. After learning more about the circumstances Mr. Kudziwe realised that he indeed knew Mr. Chidzidzira, however, under the name of Felix Funali, with whom he had conducted some business transactions in the past. He, however, did not know that Mr. Funali was in fact Mr. Chidzidzira and that this person was accused of murder and robbery.

12. Still unable to provide the police with the whereabouts of Felix Funali, alias Vierra Chidzidzira, Mr. Kudziwe was reportedly beaten with the butt of a rifle for three days by police officers while in detention. As a result, he sustained a scar on his head. The police stopped beating him only when Mr. Kudziwe led them to the mother-in-law of Mr. Funali/Chidzidzira who could not provide information about the whereabouts of her son-in-law, either. Mr. Kudziwe was held at Bangwe police station for another two months without charge or trial until he was finally taken before the Midima Magistrate Court on 23 June 2006, where he learned for the first time that he was being charged with murder under Section 209 of the Penal Code. He was transferred to Chichiri Prison in Blantyre on that day where he has been detained ever since.

13. Beyond his limited business relationship with Mr. Funali/Chidzidzira, the police officers were unable to link Mr. Kudziwe with the allegations of murder and robbery. Mr. Funali/Chidzidzira was arrested in August 2006 in connection with another offence. At that time Mr. Kudziwe was brought to Bangwe police station to confirm that the person he knew as Mr. Funali was indeed Mr. Chidzidzira, which he did. When confronted with Mr. Kudziwe, Mr. Funali/Chidzidzira accused him of having committed the crimes he had been accused of himself. In February 2007, Mr. Funali/Chidzidzira attempted to escape from Chichiri Prison and was subsequently transferred to a maximum security prison.

14. In August 2006, Mr. Kudziwe applied for bail. His legal-aid lawyer left Malawi without informing his client. The bail application did not produce any results. His parents hired a private lawyer, but his second bail application was denied in light of the escape attempt of Mr. Funali/Chidzidzira.

15. Since his arrest and detention Mr. Kudziwe has been unable to provide for his wife and two young children, which has left him depressed and anxious. In addition, he suffers from malnourishment, sleeplessness and ulcers. Given his penchant for learning, he spends his time at Chichiri Prison studying IT and marketing, as well as reading to co-inmates.

16. In July 2008 Mr. Kudziwe was again formally charged before the High Court in Blantyre, however, no trial date has been set.

17. Mr. Lawrence Ndele, born on 28 September 1981, whose most recent place of residence was Soche Township in Blantyre, was arrested on 8 June 2004 near Manje market without a warrant by four officials of the Criminal Investigation Department from Bvumbwe. The officers explained to him that they were taking him to the police station for further questioning. On 11 June 2004 the First Grade Magistrate Court in Midima issued a remand warrant on suspicion of homicide under Section 209 of the Penal Code and ordered his detention until 30 June 2004 without formally charging him. On the same day he was transferred from the police station in Bvumbwe to Chichiri Prison where he has been detained ever since.

18. Mr. Ndele filed a bail application for the first time in May 2008. His hearing on the bail application was adjourned twice before being denied on 8 June 2008 on the grounds that he had run away to Blantyre from his usual home in Msamuti village in Thyolo where an alleged manslaughter took place. It was not until September 2008 that Mr. Ndele was granted a committal hearing before the Blantyre High Court which charged him with manslaughter to which he pleaded not guilty following the advice of a lawyer. The High Court informed Mr. Ndele that his case would be adjourned for trial to a later date without specifying it. Mr. Ndele has not been called to appear before the High Court since September 2008.

19. The source argues that the arrest and detention of Messrs. Newiri, Kudziwe, and Ndele is arbitrary. At the time of their arrests the police did not inform them of their right to remain silent which is guaranteed under Section 42 (2) (a) of the Malawi Constitution: "Every person arrested... have the right promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement". They were not informed of the charges against them when they were arrested, which is in violation of Section 42 (1) (a) of the Malawi Constitution which requires that "[e]very person who is detained... shall have the right to be informed of the reason for his or her detention promptly, and in the language which he or she understands".

20. Mr. Newiri was brought before a court only six days after his arrest in violation of Section 42 (2) (b) of the Malawi Constitution which provides: "Every person arrested for, or accused of an alleged omission of an offence shall, in addition to the rights which he or she has as a detained person, have the right... as soon as it is reasonably possible, but not later than when 48 hours expire, outside ordinary court hours or on a date which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason of his or her further detention, failing which he or she must be released". Mr. Kudziwe was brought before the Magistrate Court in Midima only two and a half months after his arrest. Mr. Ndele was not brought before a court within 48 hours of his arrest, either, and was not formally charged by the Midima Magistrate Court.

21. Mr. Newiri and Mr. Ndele were not informed of their right to legal counsel guaranteed under Section 42 (1) (c) of the Malawi Constitution, which reads as follows: "Every person who is detained... shall have the right... to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State".

22. Since Mr. Newiri, for more than four years, Mr. Kudziwe, for more than two and a half years, and Mr. Ndele, for more than four and a half years, have been detained without trial, their rights under Section 42 (2) (i) of the Malawi Constitution have also been violated: "Every person who is detained... shall have the right... to public trial before an independent and impartial court of law within a reasonable time after having been charged". In addition, the Magistrate Court authorised Mr. Ndele's detention on remand only until 30 June 2004.

23. In the interest of ensuring mutual cooperation, the above-mentioned allegations were transmitted to the Government of Malawi by letter from the Chairperson-Rapporteur of the Working Group dated 1 April 2009. The Government did not reply to this letter within the 90 days limit established by paragraph 15 of the Working Group's methods of work.

24. A reminder was sent by note verbale dated 20 August 2009 expressing that the Working Group intended to render an Opinion on these cases during its fifty-fifth session, however, no reply from the Government was received. The Government did not request an

extension of the time limit to submit a response. The Working Group considers, on the basis of the dispositions of paragraph 16 of its Methods of Work, that it is in a position to render an Opinion on the basis of all the information it has obtained on these cases.

25. The failure of the Government to respond should be considered as a tacit acceptance of the allegations received from the source and transmitted by the Working Group.

26. On this basis, the Working Group considers that Messrs. Newiri, Kudziwe and Ndele were not informed at the moment of their arrests of their right to keep silent and to not declare against themselves. They were not informed about the nature and cause of the charges brought against them. Mr. Newiri was brought before a court solely six days after his arrest. He was not informed of his right to legal counsel and has been detained without trial during more than four years. Mr. Kudziwe was brought before a Court only two and half months after his arrest. He has been kept on remand for more than two and half years. Mr. Ndele was not brought before a court within 48 hours of his arrest and was not formally charged. He was not informed of his right to legal counsel and has been detained without trial for more than four and half years.

27. These three persons were held during several months without having had the possibility to challenge the lawfulness of their detention before a judge and have been kept in pretrial detention during several years (in two cases, during more than four years) without being able to benefit from a regular trial.

28. Consequently, the Working Group expresses the following Opinion:

The violations of applicable international norms relating to the right to a fair trial and to the due process of law are of such gravity as to render the deprivation of liberty of Messrs. Paul Newiri, Boxtan Kudziwe and Lawrence Ndele an arbitrary character, according to Category III of the categories applied by the Working Group to the consideration of cases brought before it. The detention of the above-mentioned three persons is contrary to articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

29. Having rendered this Opinion, the Working Group requests the Government to take all appropriate measures to remedy the situation of these three persons and to comply with its international commitments in this matter.

Adopted on 2 September 2009