



LESOTHO

NOTE NO.1

FR/UN/12

The Ministry of Foreign Affairs and International Relations of the Kingdom of Lesotho presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to refer to the Note Verbales dated 30 November, 2015 and 19 February, 2016 and the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, dated 24 February, 2016 addressed to the Government of the Kingdom of Lesotho.

The Note Verbales relate to the alleged arbitrary arrest, detention, torture, and ill-treatment, and unfair trial of at least 23 members of the Lesotho Defence Force (LDF); the alleged killing of the former Commander of the LDF, Brigadier Maaparankoe Mahao by members of the LDF; as well as the alleged on-going threats and attacks against the independence of the judiciary and lawyers by the LDF and the Executive branch.

The Ministry herewith transmits the Response of the Government of Lesotho in relation to the said Note Verbales and the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

The Ministry of Foreign Affairs and International Relations of the Kingdom of Lesotho avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

MASERU

01 June, 2016



M.P.

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RESPONSES TO SPECIAL MANDATES OF THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

The Government of the Kingdom of Lesotho (the Government) acknowledges receipt of Communication of the Mandate Holders from the Office of the High Commissioner for Human Rights, namely the Special Rapporteur on extrajudicial or arbitrary executions, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers, dated 30 November 2015 and 19 February 2016, respectively. The Government regrets that there was no prompt response to the allegations raised in the Communications. We also take note of the Report of the Special Rapporteur on Torture dated 24 February 2016 whereby on the basis of the delay on the part of Government to respond, the Special Rapporteur draws a conclusion that the allegations hold water. Notwithstanding the delay, the Government wishes to rebut the drawn conclusion and hereby responds as follows:

ALLEGATIONS OF MUTINY AND TORTURE

The Government wishes to comment on the reports furnished to the Office of the High Commissioner for Human Rights (OHCR) regarding the alleged instances of torture and prolonged detention of 23 members of the Lesotho Defence Force (LDF), which allegations have been proved to be groundless. The Government wishes to assure the Office of the High Commissioner that Lesotho is governed by the rule of law and continues to uphold the principles of democracy and good governance.

The Government acknowledges that originally, indeed there were more than 50 members of the LDF that were arrested between May and June 2015. We wish to report however that they were not arrested by unidentified men as per the allegations, but by fellow members of the LDF. In terms of section 86 of the LDF Act 1996, a warrant of arrest is not a prerequisite for the arrest of members of LDF to be effected. In terms of the above referred section, there is no requirement for prior notification before effecting arrest and the fact that no notification was given to was not a violation of any provision of the law.

The Government also denies that the charges brought against them were not clear, on the contrary, the charges were unambiguous and this was evidenced in the

Application brought before the High Court in June 2015 in the case of **Matlhokomelo Jobo and Others v Commander Lesotho Defence Force and Others**¹ in which applicants were able to challenge the charges. A plethora of habeas corpus applications which were launched by families of the said soldiers, based on unfounded and venomous allegations regarding the death of the detainees. Those unfounded allegations were made not because their families were not given information about their whereabouts and the charges they were facing.

Regarding the issue of soldiers detained in the Maseru Central Prison, the Government wishes to elucidate that the said detainees are rightfully detained there, as a Lesotho Defence Force (Imprisonment and Detention Place) Regulation 206 of 2000 provides that the Maximum Security Section shall be used as a Military Detention Centre and thus falls within the LDF jurisdiction. We also wish to report that Lesotho still retains death penalty in its statute books for most serious crimes such as murder, statutory rape and high treason. As such, the offence of mutiny is not exceptional.

Further, we wish to discredit the allegations made in the *habeas corpus* applications. The reports relating to torture against the detained members of the LDF during *habeas corpus* proceedings are lacking in substance. We wish to clarify that during those applications, the merits of torture were not the subject matter thereof, and could not be, what is involved in such applications, save the production of the detainees. There is a right of access to courts of law in Lesotho and every person, including the arrested members of LDF, can approach the courts where there are allegations of the nature under discussion. Notwithstanding the existence of that right, no cases have been lodged before the courts of law dealing with torture. The Office of the High Commissioner for Human Rights is advised that the Government has put in place legislative measures to ensure that the acts of torture do not go unpunished.

The 1993 Constitution of Lesotho protects the right to freedom from torture as a fundamental human right. Section 8 thereof provides that ‘no one shall be subjected to torture or to inhuman or degrading punishment or other treatment.’ As one of torture prevention measures, section 12 (1) of the Constitution further protects the right to fair trial, which entails the right to be brought before court within a

¹CIV/APN/189/194/198/199/203/2015.

reasonable time and to be tried by an independent and impartial court established by law. The requirement of fair trial is observed under the LDF Act.

Whilst the Government admits that there is no specific law criminalizing torture, there are a number of pieces of legislation which proscribe acts which amount to or are related to torture; and also provide guarantees aimed at prevention of torture. These include:

- Lesotho Defence Force (LDF) Act No. 4 1996: The Lesotho Defence Force is a constitutional creature, established in terms of section 146 of the Constitution of Lesotho. The LDF Act is intended to provide for the command, control and administration of the LDF. Amongst others, the Act provides in sections 50 and 76 that it is an offence for any person subject to it (i.e. military personnel) to use violence or ill-treat other officers irrespective of ranks. It also prohibits the officers from conducting themselves in a cruel and disgraceful manner. Further, the Lesotho Defence Force Act confers jurisdiction on the Court-Martial to try civil offences committed by the members of the army.
- LDF (Imprisonment and Detention) Regulations of 2000: These regulations were enacted pursuant to section 134 of the LDF Act and are intended inter alia to prevent and prohibit torture and related offences in military detention facilities. Amongst others, regulation 16 (1) provides for medical examination of detained military officers upon their reception at the detention facility, during detention as well as at the time when they are removed to another detention facility.
- Penal Code Act No.6 of 2010: Although the Penal Code Act does not contain a specific offence of torture, it proscribes acts which involve infliction of physical or emotional pain or suffering which constitute the core elements of torture. These offences include assault, aggravated assault, murder, culpable homicide, indecent assault and unlawful sexual act.

The Government therefore, assures the Office of the High Commissioner for Human Rights that, should such cases be reported, the law will take its course. The courts of Lesotho have dealt with a number of cases in which torture and related offences were alleged to have been committed. Where evidence led in court points to commission of torture, the courts have not been hesitant to find the Government liable and to award appropriate damages to the complainants.

ALLEGATIONS OF INTIMIDATION OF LAWYERS AND INTERFERENCE WITH THE INDEPENDENCE OF THE JUDICIARY

With regard to the issue of a prominent lawyer fleeing the country on account of fear for his life, the Government wishes to shed light that the said lawyer has since returned to Lesotho and is presently engaged with operations of his law firm and continues to represent the same clients. In relation to the members of the LDF forcing their way into judges' chambers and compromising the independence of the judiciary, we wish to state that the members of LDF were present on the Court premises, but they never entered the court rooms or chambers, in the manner described or alleged in the reports.

Pertaining to the issue of the publication of the 'hit-list' on the social media, we wish to state clearly that whatever that is being published in such platforms is not per the Government authorization and, it is not within the purview of the Government to prevent such unfounded and unfortunate allegations.

On the allegation of the lawyers being threatened by the members of the LDF, the Government wishes to vehemently deny this allegation and report that LDF and lawyers representing the detainees are working in harmony and that cooperation is manifested by the peaceful proceedings of the Court-Martial. The lawyers are allowed, unreservedly, to consult with their clients during the proceedings and at the Detention Centre. In relation to the Religious Leaders, Civil Society and Family Members, the LDF (Detention and Imprisonment) Regulations of 2000 gives them the right to consult with the detainees within the eyesight and earshot, not to the contrary, which was their demand.

ALLEGATIONS OF CONTINUED DETENTION

LDF has not used the decision of SADC as a justification for keeping the detainees under close arrest pending the finalization of the Court-Martial trial. The correct position is that, LDF Act permits the LDF Authority to keep the detainees under close arrest even for any days exceeding 42 days as long as there are justifiable grounds for doing so. Indeed there were justifiable grounds as has been recently stated by the Court of Appeal of Lesotho in the case of Brigadier **Tlhoriso Mareka**

and 22 others v Commander LDF and 7 Others,² judgment of which was handed down on 29 April 2016.

Whilst the Government admits that in terms of the LDF Regulations, the detainees may be kept on open arrest, and they have on several occasions invoked that provision of the law before the High Court and the Court of Appeal of Lesotho, they have however been unsuccessful as per **Mareka's** judgment cited above.

ALLEGATIONS RELATING TO THE COURT MARTIAL AND COMMISSION OF INQUIRY

The Court Martial has been constituted by the Convening Authority and has been proceeding accordingly. The matter pertaining to its independence, impartiality and fairness are matters which can safely be dealt with by the Judiciary. In terms of the SADC Summit Decision 2 (iv) of the Record of the Meeting held in the Republic of Botswana, Gaborone on 18 August 2015, it was decided that the Court-Martial proceedings can no longer be kept on hold as earlier decided in Pretoria. Thus, its proceedings and those of the Commission of Inquiry were permitted to run simultaneously by the SADC Summit.

With regard to the alleged 'contempt of court' application, the High Court of Lesotho dismissed it in October 2015 and made a ruling that the LDF had not been contemptuous. This suffices to say that there is no Court Order that has been disrespected by the LDF.

On the allegation relating to the Government not being willing to cooperate with the Commission of Inquiry, we wish to state clearly that it is not true. For example The Prime Minister, Deputy Prime minister, Ministers of Defence, Minister of Home Affairs, Commander of LDF and other top LDF officials appeared before the Commission more than once. Even the Chairman of the Commission, His Lordship Phumaphi J, in his closing remarks thanked the Government for cordial cooperation throughout the proceedings. He further wrote to the Heads of the Lesotho Defence Force and Lesotho Mounted Police Service for their unwavering corporation.

Further, in January 2016, the report was handed to the Government for implementation of the recommendations. The Government is presently considering

² C of A (CIV) No. 52/2016.

the report and is in the process of implementing the recommendations. Efforts undertaken by SADC to assist the Government in restoration of peace and security have been remarkable. Lesotho remains committed to the process of maintaining the prerequisites of democracy, rule of law and good governance.

It is important to highlight also that it is not the LDF that prevented the detainees from participating in the proceedings, instead Section 16(4) of the Public Inquiries Act 1994 stipulates that *“a person shall not be summoned by a Commission to give evidence about any matter in respect of which he or she has been charged with an offence unless the charge has been finally disposed of.”*

Worthy of note is the fact that the Executive Secretary of SADC was in the country in March 2016 and met with senior Government officials to pave the way forward for implementation of the recommendations. The Government has committed itself to drawing up a road map to this effect. The Government has been cooperating with the Commission of Inquiry and remains committed to its obligation under international law.

ALLEGED ARBITRARY ARREST OF, CHARGES AND SERIOUS THREATS AGAINST MR. KHOTSO NTHONTHO

The Government denies that Attorney Nthonto was unlawfully and arbitrarily arrested. The truth of the matter is that, when Attorney Nthonto was applying for the variation of Order of the Court Of Appeal of Lesotho, in the matter between **Aupa Mohasi and Molato Mohatlane v The Commander of Lesotho Defence Force and 3 others**,³ he deposed to his founding affidavit on 09 November 2015 that “I have been authorized by clients, to depose to this affidavit as they are still in prison and under solitary confinement.” On the contrary, the Attorney’s affidavit, which he made under oath, was found to be false, a fabrication of evidence, deceptive and fraudulently made. He stated that Mr. Mohatlane, the 2nd Appellant was under solitary confinement whilst he has since been released under open arrest. He was accordingly arrested by the police and charged with the crime of perjury. The matter has since been committed before the High Court of Lesotho and is yet to be set down for hearing.

³ C of A(CIV) 29/2015

The Government is taken aback by the allegation that ‘there is a pattern of interference by both the executive branch and the LDF into the independence of lawyers and judges,’ which has no basis at all. We wish to clearly state that, Lesotho as a democratic state upholds the principles of democracy which includes among others, the principle of separation of powers. The Executive cannot in anyway interfere with the affairs of the Judiciary. Attorney Nthonto like any other citizen is entitled to fundamental rights and freedoms as spelled out in Chapter 2 of the 1993 Constitution, but at the same time, he is not immune to prosecution where necessary.

LESOTHO’S INTERNATIONAL OBLIGATIONS

To further indicate the Government’s commitment to respect, protect and promote the right to freedom from torture, the Government has acceded to and ratified a number of international human rights instruments against torture. Apart from the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which Lesotho ratified in 2001, Lesotho is a State Party to several other international human rights instruments which contain states parties’ obligations to prevent torture and other cruel, inhuman or degrading treatment. These instruments include the following:

- a. Universal Declaration of Human Rights 1948;
- b. International Covenant on Civil and Political Rights 1966;
- c. Statute of the International Criminal Court 1998;
- d. Convention on the Rights of the Child 1981;
- e. Convention on the Elimination of All Forms of Racial Discrimination 1963;
- f. African Charter on Human and Peoples’ Rights 1981;
- g. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003;
- h. African Charter on the Rights and Welfare of the Child.

CONCLUSION

The reports received by the Office of the High Commissioner for Human Rights against the Government relating to alleged torture of some LDF members, alleged unlawful arrest of Mr. Khotso Nthonto, lawyers' intimidation, compromising the independence of the judiciary are therefore meant to tarnish the image of the country since the authors of such reports have a political agenda. The High Commissioner may also wish to note that there were allegations of abductions of members of the LDF and these allegations have been found by the courts of law to be unfounded.

While Governments bear the primary duty of promoting and protecting all human rights, non-state actors, other duty bearers and every citizen play an important role in ensuring that the enjoyment of human rights becomes a reality. We therefore believe that non-state actors also have the responsibility to report the state of affairs in Member States in a balanced manner. We are therefore of the view that the current reports furnished to the Office of the High Commissioner for Human Rights against Lesotho are biased and partial.

The Government reiterates its commitment to the Office of the High Commissioner for Human Rights which continues to stand with the millions of people around the world, whose voices are denied and demand what should be guaranteed: universal, indivisible and inalienable human rights.