

Mandates of the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE: AL
ZMB 1/2015:

9 April 2015

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 26/7 and 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged arbitrary arrest and prosecution of [REDACTED] and another man on the sole basis of their sexual orientation, as well as the lack of fair trial and due process in their case.**

According to the information received:

On 6 March 2014, [REDACTED], 36 years old, and another man were arrested by the police in their village in [REDACTED]. Both men were accused of committing offences 'against the order of nature' under sections 155(a) and 155(c) of the Penal Code of Zambia as amended by Act No. 15 of 2005. They were released on bail pending trial and are living in their village.

The investigation into the accusation was conducted by the Zambian police, which took testimonies from alleged witnesses and ordered forensic tests. The forensic tests consisted of the measurement of the anal orifice and inspection of the private parts of both accused. The forensic tests were taken without the informed consent of the accused and the results allegedly corroborated the existence of homosexual intercourse. Three police officers, the medical examiner who conducted the forensic tests on the accused, and the father of one of the accused are witnesses in the case.

[REDACTED] is alleged to have stated orally that he engaged in consensual relations with an adult of the same sex and may have signed a written statement in this sense.

The trial was conducted for the most part of 2014 before a [REDACTED] court of first instance and concluded on Friday 27 March. The verdict date was set up for 10 April 2015. If convicted of the offences they are accused of, [REDACTED] and the other accused are facing from 15 years minimum to life in prison.

[REDACTED] and the other accused were not provided with legal representation during their trial in contradiction with Zambia's own Constitution. [REDACTED] was reportedly asked by the court whether he had a lawyer to which he responded by the negative. Despite the seriousness of the offence he was accused of and the severity of the sentence faced, the court made no effort to explain to him that he had the right to appoint a lawyer and that, if he could not afford one, one would be appointed through legal aid. [REDACTED] also complained to the court that he was not allowed to cross-examine the medical doctor who gave evidence and testified against him.

Serious concern is expressed about the alleged arbitrary arrest and prosecution of [REDACTED] and the other accused, which seem to be solely based on their sexual orientation. Serious concern is also expressed with regard to the humiliating and degrading nature of the physical examination that [REDACTED] and the other accused were subjected to without their informed consent, which may contravene the absolute prohibition on torture and other cruel, inhuman and degrading treatment or punishment. Further concern is expressed about the lack of basic fair trial and due process guarantees in their case; in particular concern is expressed about the absence of legal representation during their trial.

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

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 therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide detailed information on the legal ground for the arrest and prosecution of [REDACTED] and the other accused and explain how these measures are in line with international human rights norms and standards related to privacy and non-discrimination, as enshrined, inter alia, in articles 17 and 26 of the International Covenant on Civil and Political Rights.
3. Please provide detailed information concerning the trial of [REDACTED] and the other accused and explain how it complied with the right to a fair trial and due process, as recognized, inter alia, in article 14 of the International Covenant on Civil and Political Rights and the Basic Principles on the Role of Lawyers. In particular, please explain why [REDACTED] and the other accused did not have lawyers.

4. Please provide detailed information on the measures taken to protect the rights of [REDACTED] and the other accused, including measures taken to protect them from violence, torture and other cruel, inhuman and degrading treatment, and discrimination, in particular on the basis of their sexual orientation.

We would appreciate receiving a response within 60 days.

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.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

Gabriela Knaul

Special Rapporteur on the independence of judges and lawyers

Juan E. Méndez

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your Excellency's Government attention to the following human rights standards.

The International Covenant on Civil and Political Rights (ICCPR), to which Zambia acceded on 10 April 1984, reaffirms the prohibition of discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (article 2). Article 26 of the ICCPR further establishes that everyone is equal before the law and is entitled without any discrimination to the equal protection of the law. This means that the law must prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, including sexual orientation.

The right to equality before the courts and to a fair and public hearing, which includes the right to defend oneself in person or through legal assistance of his/her own choosing, to be informed, if one does not have legal assistance, of this right, and to have legal assistance assigned to him/her if he/she does not have sufficient means to pay for it, is enshrined in article 14 of the ICCPR. The right to have access to a lawyer is further recognized in the Basic Principles on the Role of Lawyers.

In relation to the provisions of the Penal Code of Zambia as amended by Act No. 15 of 2005 which criminalize same-sex sexual activities between consenting adults, we would like to note that the Human Rights Committee recommended that to uphold its obligations under articles 17 and 26 of the ICCPR Zambia should repeal these provisions (CCPR/C/ZMB/CO/3, para. 24).

Furthermore, United Nations treaty bodies have consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law (see for example: CCPR/C/50/D/488/1992, and CCPR/C/KWT/CO/2, para. 30; CESCR General Comment No. 20, E/C.12/GC/20, para. 32, and General Comment No. 14, E/C.12/2000/4, para. 18; CRC General Comment No. 13, CRC/C/GC/13, para. 60 and 72(g), and General Comment No. 4, CRC/GC/2003/4, para. 6; CAT General Comment No. 2, CAT/C/GC/2, para. 21; CEDAW General Recommendation No. 28, CEDAW/C/GC/28, para. 18).

We would further like to recall resolutions 17/19 and 27/32 of the Human Rights Council, in which the Council expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.

The United Nations High Commissioner for Human Rights recommended that States repeal laws criminalizing homosexuality, ensure that criminal laws are not used to harass or detain people on the basis of their sexual orientation or gender identity, protect persons from homophobic and transphobic violence, prevent the torture and cruel, inhuman and degrading treatment of lesbian, gay, bisexual and transgender persons in

detention and enact comprehensive laws that include sexual orientation and gender identity as prohibited grounds of discrimination (A/HRC/19/41, para 84(a)-(h)).

Finally, the Committee against Torture, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Working Group on Arbitrary Detention have condemned the practice of subjecting men accused of engaging in homosexual conduct to non-consensual anal examinations and held that it contravenes the prohibition on torture and ill-treatment under international law (A/HRC/19/41, para. 37).