

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the human rights of migrants; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on the human rights to safe drinking water and sanitation

REFERENCE:
AL KEN 9/2018

21 September 2018

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the human rights of migrants; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 33/30, 33/9, 34/21, 32/2, 34/19 and 33/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **allegations of acts of violence, harassment and discrimination against lesbian, gay, bisexual and transgender (LGBT) refugees living in Kenya and their arbitrary arrests, detention, and ill-treatment. Allegations received also pertain to the lack of access to food and other basic necessities by the refugees while in detention and in Kakuma camp, as well as to the lack of appropriate access to HIV/AIDS-related prevention and care.**

According to the information received:

March 2018 – attacks against [REDACTED]

[REDACTED] *transgender refugees.*

.../2

Her Excellency
Ms. Monica Juma
Cabinet Secretary for Foreign Affairs and International Trade

On 29 March 2018, at 7pm, individuals from the host community and members of the Kenyan police attacked the seven transgender refugees mentioned above, who were camping in front of Kakuma Camp, Kenya. According to information at our disposal, the seven transgender refugees were insulted, pelted with stones and severely beaten by the crowd and police officers who were hurling homophobic insults. Some of them were violently stripped naked to expose their genitals and summoned to say whether they were women or men. As a result of the attack, several of them reportedly suffered deep cuts, internal bleedings and bone fractures and were then brought to a health facility by ambulance.

The seven persons had been camping in front of the UNHCR Kakuma Camp compound for five weeks, seeking protection from UNHCR due to acts of violence and harassment inflicted upon them in the camp. During this time, they were reportedly subjected to insults and attacks by the host community and other refugees that escalated into the event of 29 March 2018.

*May 2017 – arrest, detention, torture and ill-treatment of [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 18 gay,
lesbian, bisexual and transgender refugees.*

On 9 May 2017, the 18 LGBT refugees mentioned above were attempting to consult UNHCR in Nairobi to enquire about their case and discuss protection issues while the police reportedly rounded them up roughly and took them to Kileleshwa police station where they were incarcerated overnight.

The next day, they were allegedly all taken to Pangan police station. Five of them were kept in detention at the police station while the others were sent to the Refugee Affairs Secretariat. During their transfer, they were held at gunpoint and beaten. It is reported that several of them were injured.

On 12 May, the five persons who were still incarcerated were brought out of cells and forced into a bus that drove them to Kakuma Camp, leaving all their belongings behind. They stayed for seven days in the camp, without support, and when the 18 LGBT refugees complained about their living condition, the Kenyan police allegedly rearrested them. The police placed them in a container at Kakuma police station where they were detained for three days and deprived of food and water. It is reported that they were then ordered – at gunpoint - to sign papers and provide fingerprints and that the police officers advised them to plead guilty to be released but the refugees resisted and refused to sign as they were not understanding the content of the papers and the charges brought against them. According to the information at our disposal, the police officers took them one

after the other, beat them up and forced them to provide their fingerprints, which they did. One of them was allegedly subjected to harsh beatings and she fainted.

According to information at our disposal, they were then brought to Kakuma Court and sentenced to a 12,000 Kenyan shilling fine. Their complaints about the ill-treatment and enquiries about the charges brought against them remained unanswered. Reports indicate that as they were unable to pay, all of them, except the one who was subjected to harsh beatings, were sent to Lodwar prison and incarcerated for 30 days with violent and serious offenders. While in prison, the wardens— out of curiosity – forced them to have sexual relations with each other and watched them. They arguably threatened to kill them if they did not surrender.

According to the information received, on their release, UNHCR came to receive them and took them to Kakuma Camp where – in the absence of formal registration in the camp - they were allegedly unable to obtain food or other assistance.

Since then, some of the refugees have been interviewed in the context of the refugee status determination process, and most have reportedly left the camp to go back to Nairobi.

Access to HIV/AIDS-related care, counselling and testing

According to information at our disposal, HIV-infected LGBT refugees living in Kakuma Camp are reportedly facing challenges in accessing antiretroviral drugs and appropriate HIV/AIDS-related care. In addition, prevention or sensitization programmes, free testing, or health counselling services are not reaching the LGBT community living in the camp on an equal basis with others, which is reported to be leading to unsafe behaviors and new infections.

While we do not wish to prejudge the accuracy of the information made available to us, we express our serious concern about these allegations of acts of violence, harassment, and discrimination against lesbian, gay, bisexual and transgender refugees living in Kakuma Camp and elsewhere in Kenya and the lack of response and adequate protection measures. Serious concern is also expressed by the alleged involvement of police officers in the attacks against the transgender persons and the arbitrary arrests, detention, torture, sexual violence and ill-treatment of the LGBT refugees, the conditions of detention, and the humiliating and degrading treatment they were subjected to while in detention. An equal matter of serious concern is the use of forced confessions as evidence forming the basis for their conviction and the lack of investigation into whether evidence used by the Court was obtained under duress. Finally, we express grave concern at the lack of access to food and other basic necessities by the asylum seekers both in detention and in Kakuma camp, as well as to allegations regarding the lack of appropriate access to HIV/AIDS-related prevention and care on an equal basis with others.

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 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 information on measures taken by the Kenyan authorities to address the safety and protection concerns of LGBT asylum seekers and refugees both within and outside the Kakuma camp, to prevent attacks, violence and to address root causes to prevent future incidents.
3. Please provide information on the charges brought against the 18 lesbian, gay, bisexual, transsexual refugees and the legal grounds for their arrests and detentions and explain how these measures are compatible with Kenya's international human rights obligations.
4. Please provide the details, and where available the results, of any investigation carried out in relation to the allegations of arbitrary arrests, detention, torture or ill-treatment, and sexual abuse of the lesbian, gay, bisexual and transgender refugees. If no inquiries have taken place, or if they have been inconclusive, please explain why.
5. Please provide information on the measures undertaken to ensure due process as well as fair trial to all defendants, and where available the results of any investigation carried out in relation to the allegations of the use of forced confessions as evidence forming the basis for their conviction. If no inquiries have taken place, or if they have been inconclusive, please explain why.
6. Please explain the measures taken to ensure that lesbian, gay, bisexual and transgender refugees and asylum seekers enjoy an adequate standard of living, including adequate food, housing, and access to appropriate health services and HIV/AIDS related prevention and care on an equal basis with others.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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.

Please note that a letter was also sent to UNHCR with a copy of this allegation letter with a view to seeking clarifications on the above mentioned allegations, requesting additional information, and urging UNHCR to cooperate with your Excellency's Government to address the safety and protection concerns of LGBT asylum seekers and refugees both within and outside the Kakuma camp.

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 prejudge any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

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

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Dainius Puras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health

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Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above. In particular, we would like to recall articles 2, 7, 9, 10, 14, 17 and 26 of the International Covenant on Civil and Political Rights (ICCPR), which Kenya acceded on 1 May 1972, that guarantee the enjoyment of human rights without distinction of any kind, the right to liberty and security, the prohibition of torture and cruel, inhumane or degrading treatment or punishment, the principle of presumption of innocence and of minimum guarantees of due process, the right to effective remedy, and the right to privacy.

Additionally, the principles of equality and non-discrimination are part of the foundations of the rule of law and human rights. Sexual orientation and gender identity are prohibited grounds of discrimination under international law. Kenya acceded on to the Covenant on Economic, Social and Cultural Rights (ICESCR) on 1 May 1972; in this connection both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have found that States have a legal obligation to ensure to everyone the rights recognized by the two Covenants (ICCPR and ICESCR) without discrimination on the basis of sexual orientation or gender identity (E/C.12/GC/20, para. 32, and CCPR/C/GC/35, para. 3).

In 2016, the Committee on Economic, Social and Cultural Rights explained that "State parties also have an obligation to combat homophobia and transphobia, which lead to discrimination" (E/C.12/GC/22, para. 23). In 2013, the Committee had expressed concern about the fact that LGBT persons were stigmatized and socially excluded in Kenya (E/C.12/KEN/CO/2-5, para. 21). A year before, the Human Rights Committee had recommended that Kenya take necessary steps to put an end to the social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity (CCPR/C/KEN/CO/3, para. 8).

In addition, the Human Rights Council, through resolutions 32/2, 17/19 and 27/32, has expressed grave concern at acts of violence and discrimination committed against individuals because of their sexual orientation and gender identity. On the basis of international human rights norms and standards and the work of the United Nations human rights treaty bodies and special procedures, the United Nations High Commissioner for Human Rights has emphasized that States have obligations to, inter alia, protect individuals from violence, torture and discrimination on the basis of their sexual orientation and gender identity, including conducting prompt, thorough investigations of incidents of hate-motivated violence against and torture of LGBT persons, holding perpetrators to account, and providing redress to victims; ensure that police and prison officers are trained to protect the safety of LGBT detainees, and holding to account State officials involved or complicit in incidents of violence. In addition, the

High Commissioner for Human Rights has recommended that States ensure that anti-discrimination legislation includes sexual orientation and gender identity among prohibited grounds (A/HRC/29/23, para. 78 and 79). Reference is made in that regard to UPR recommendation No. 142.41, accepted by Kenya, related to the adoption of a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity (A/HRC/29/10).

With regards to allegations of excessive use of force by law enforcement authorities, we would like to refer to the Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169 of 17 December 1979 and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990). They provide, amongst others, that law enforcement officials may only use force when it is strictly necessary and only to the extent required for the performance of their duties. The use of force and firearms must as far as possible be avoided, using non-violent means before resorting to violent means.

In its General Comment No. 31, the Human Rights Committee observed that there is a positive obligation on States to ensure protection of Covenant rights of individuals against violations by its agents and by private persons or entities, which includes the duty to exercise due diligence to prevent, punish, investigate and bring perpetrators to justice and to redress the harm caused by non-state actors. A failure to investigate and bring perpetrators of such violations to justice could, in and of itself, give rise to a separate breach of the ICCPR (CCPR/C/21/Rev.1/Add.13, paras. 8 and 18).

We would also like to refer to the right not to be arbitrarily deprived of liberty and to fair proceedings before an independent and impartial tribunal, as set forth in articles 9 and 14 of the ICCPR. Article 9 establishes in particular that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law, and that anyone who is arrested shall be informed, at the time of arrest, of the reasons behind such arrest and be brought promptly before a judge for the purpose of legal assessment of detention.

Article 14 stipulates that, in the determination of any criminal charge, everyone should have adequate time to communicate with a counsel of choice, and that no one should be compelled to confess to guilt. The right to have access to a lawyer without delay and in full confidentiality is also enshrined in the Basic Principles on the Role of Lawyers (Principles 7 and 8).

Regarding allegations indicating torture and inhuman and degrading treatment, we would like to bring to the attention of your Excellency's Government the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment which is codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Kenya acceded on 21 February 1997. In this connection, the Committee against Torture has emphasized that States have an obligation under the treaty to protect all persons from

torture and ill-treatment, including on the grounds of sexual orientation and gender identity (CAT/C/GC/2). Article 12 of CAT specifically requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed.

We would also like to draw the attention of your Excellency's Government to article 15 of the Convention against Torture which provides that, "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

With regard to detention conditions, we would like to recall article 10 of the ICCPR which states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". We would also like to refer to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and in particular articles 12 on accommodation and 22 related to food and drinking water. The Committee on Economic, Social and Cultural Rights stated in its General Comment No. 15 on the right to water that "Prisoners and detainees are provided with sufficient and safe water for their daily individual requirements".

We would also like to draw your attention to article 11 of the ICESCR, which provides that everyone is entitled to "an adequate standard of living for himself and his family, including adequate food, clothing and housing". Furthermore, article 11 (2) recognises "fundamental right of everyone to be free from hunger".

Finally, article 12 of the ICESCR enshrines the right of everyone to the highest attainable standard of physical and mental health. In this connection, General Comment 14 of the Committee on Economic, Social and Cultural Rights, indicates that the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of health status (including HIV/AIDS) or sexual orientation (para.18). The provision of immunization against the major infectious diseases is a core obligation of the State in terms of the right to health (para. 44).