

Mandates of the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the right to privacy; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the right to privacy; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on violence against women, its causes and consequences and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 35/11, 37/2, 32/2, 32/19 and 32/4.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **acts of harassment and discrimination directed towards a young lesbian couple and the unauthorized filming and posting on social media of a video of them kissing, affecting their right to privacy.**

According to the information received:

On 30 January 2018 at 8pm two lesbian women, [REDACTED], were kissing while waiting at [REDACTED]. Two individuals approached the lesbian couple and, without notification, filmed the scene. After filming them, the two individuals started yelling at them, saying: "Shame! Have you completely lost your conscience?! There are kids around!" At the same time, a heterosexual couple seating next to the lesbian women was kissing too, without drawing any attention. The lesbian couple got scared and immediately stopped kissing. They did not reply to the yelling couple nor did they notice that they had been filmed.

After this event, the video was uploaded on a Facebook account, becoming publicly available with a request to maximise its dissemination. The post read as follows:

"These might be someone's children and sisters or acquaintances. REPOST this. Make them talk to them. Maybe it is still possible to summon them, correct them or at least put them to shame. #shameless #kazakhstan #almata #esentaimall #kinopark #upbringing #uvd [Internal Affairs Department] #lawmakers #morality #all #people #good #deeds #notall #girls #notagoon #soul #aching P.S. There is a fine and "Oybay" [expression of public judgement] for praying 5 times in public places

while pinks and blues [a derogatory term for lesbians and gays] have roaming freedom".

The post had more than 41,400 views and was reposted 854 times. The leading pro-state media outlets published articles using the video and the Facebook post. Following the publication, people started to recognise the lesbian couple and confronted them with derogative and threatening statements, such as "how come you are still alive".

On 19 February 2018, [REDACTED] filed a complaint to the [REDACTED] court of Almaty City alleging that their right to the "own image" under Article 145 of the Kazakhstan Civil Code had been violated. The trial was postponed three times because the defendant (individual filming the video) did not appear in court. Prior to the court hearing, the individual who filmed the video announced the time, date and address of the hearing on social media to mobilise potential supporters.

On 18 May 2018, the [REDACTED] court of Almaty city concluded to partially satisfy the complaint. The court established that sharing the video which contained the image of the two lesbian women on Facebook was unlawful and imposed a fine for moral damage in the amount of USD 40. The person who took the video appealed to Almaty City appeal court in civil cases. In this appeal, he used the decision of the private Centre for the Family Well-being which found that: "open demonstration of erotic sexuality between same sex partners destroys the family values in children's conscience. Our society is not ready to open sexual relations between same sex people. The Family Code...the same sex unions are illegal under the law".

On 17 August 2018 the Almaty City appeal court concluded to revoke the decision of the court of first instance and established that: "The behaviour and actions of the complainants filmed by the defendant in the public space openly violate moral and ethical values of the society. Therefore, acting immorally the applicants (victims) are not entitled to claim protection of their rights under Article 145 of the Civil Code". The Court stated that the defendant had "acted as a defender of morality of the people; the complainants' actions in the eyes of the majority of society are considered immoral and obscene and the fact that this is occurring before children is immoral and affects their mental health".

Allegedly, an appeal has been submitted to the court of cassation and it is now pending consideration.

While we do not wish to prejudge the accuracy of the information made available to us, we express our serious concern regarding the acts of hate-motivated violence, including harassment and intimidation, based on sexual orientation and gender identity. In this regard we also wish to express our concern that the posting of the video of the lesbian couple kissing on Facebook violates their privacy and could pose a serious risk to their

personal safety. Such violations of their right to privacy are likely to result in further discrimination and risks to their physical and mental well-being, as well as the ability to enjoy other human rights.

We also express grave concern about the fact that a law about offence of public morals be used inappropriately to justify acts of harassment and discrimination based on sexual orientation and gender identity in Kazakhstan. These discriminatory attitudes lead to stigma, violence and abuse. Furthermore, we are equally concerned that moral-based justifications are used in national courts in decisions that affect the enjoyment of human rights and freedoms of LGBT people.

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 indicate what measures have been taken or are envisaged to ensure citizens of Kazakhstan are not discriminated against based on their sexual orientation or gender identity and to guarantee their legitimate right to privacy.
3. Please provide information on measures taken by your Excellency's Government to prevent, investigate and punish violence and discrimination based on sexual orientation and gender identity perpetrated by both State and non-State actors, as well as to provide reparations to victims, regardless of whether the violence occurred in the public or the private sphere?
4. Please provide information on the measures your Excellency's Government has taken to halt and publically condemn homo-, bi and transphobic attitudes and provide full details of any prosecutions which have been undertaken.
5. Please provide information on any other measures taken by the authorities to prevent further calls for, and acts of discrimination, incitement, hostility and violence against the LGBT community.
6. Please explain what measures have been taken or are envisaged to be taken by your Excellency's Government to eliminate discrimination on the grounds of sexual orientation and gender identity, through the development and implementation of a public sensitization and education campaign, to raise public awareness and implement safety and support measures.

7. Please provide information on any plans to enact legislation that would include the grounds of sexual orientation and gender identity as prohibited grounds for hate speech, incitement to discrimination, and incitement to violence and hate crimes.

We would appreciate receiving a response within 60 days. Passed 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.

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 accept, Excellency, the assurances of our highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Joseph Cannataci
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Annex

Reference to international human rights law

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. Under article 1 of the Universal Declaration of Human Rights, '[a]ll human beings are born free and equal in dignity and rights', and '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction 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 of the Declaration). We would further like to recall articles 2, 3, 17 and 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Kazakhstan is party since 24 January 2006. These rights are of universal nature and apply to everyone, irrespective of their sexual orientation or gender identity.

We also wish to refer your Excellency's Government to the jurisprudence, General Comments and concluding observations of United Nations treaty bodies that consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law. In addition, the special procedures of the Human Rights Council have long recognized discrimination on these grounds.

The Human Rights Committee found that States have a legal obligation to ensure to everyone the rights recognized by the ICCPR without discrimination on the basis of sexual orientation or gender identity (CCPR/C/GC/35, paragraph 3) and established that "States parties shall respond appropriately to patterns of violence against certain categories of victims, including violence against persons because of their sexual orientation or gender identity" (CCPR/C/GC/35, para. 9).

In addition, the Human Rights Committee in its General Comment 34, stated that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination (CCPR/C/GC/34, paragraph 32). In 2016, the Committee on Economic, Social and Cultural Rights established that "any other social condition", as reflected in article 2.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), includes sexual orientation (E/C.12/GC/20, para. 32).

We would also like to recall that, in a joint statement on free expression and association, UN and regional human rights experts stated that they "categorically reject arguments that such restrictions to the rights of LGBTI people are necessary to protect public morals, health or the well-being of vulnerable people."¹

¹ Joint statement by UN Special Rapporteurs on freedom of opinion and expression, freedom of peaceful assembly and of association, right to health, and human rights defenders African Commission on Human and Peoples' Rights, Special Rapporteur on Human Rights Defenders in Africa, Inter-American Commission

We further would like to recall resolution 17/19, 27/32 and 32/2 of the Human Rights Council, where 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. United Nations experts have also condemned the persistence of impunity for these violations and repeatedly called for investigation, prosecution and punishment, and reparations for victims (See CCPR/C/BOL/CO/3, para. 7, A/HRC/26/36/Add.1, paras. 85-88, CAT/C/GC/3, paras. 8, 32).

In this connection, we wish to draw your attention to the United Nations High Commissioner for Human Rights report to the Human Rights Council on violence and discrimination based on sexual orientation and gender identity (A/HRC/19/41), as well as his report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity (A/HRC/29/23). In his reports, he draws attention to, inter alia, violence motivated by homophobia and transphobia and recommends that States prohibit and prevent discrimination in private and public spheres, and to diminish conditions and attitudes that cause or perpetuate such discrimination. He further stated that to this end, States should enact comprehensive antidiscrimination legislation that includes sexual orientation and gender identity among protected grounds. He further observes that reported shortcomings include ineffective police action, failure to register cases, loss of documents, inappropriate classification of acts, including physical assault as a minor offence, and investigations guided by stereotypes and prejudices. In addition, he observes that the absence of effective systems for recording and reporting hate-motivated violence, or “hate crimes”, against LGBT persons masks the true extent of violence. He recommends States:

- (a) Enact hate crime laws that establish homophobia and transphobia as aggravating factors for purposes of sentencing;
- (b) Conduct prompt, thorough investigations of incidents of hate-motivated violence against and torture of LGBT persons, holding perpetrators to account, and providing redress to victims;
- (c) Collect and publish data on the number and types of incidents, while providing for the security of those reporting;
- (d) Prohibit incitement of hatred and violence on the grounds of sexual orientation and gender identity, and holding to account those responsible for related hate speech;
- (e) Train law enforcement personnel and judges in gender-sensitive approaches to addressing violations related to sexual orientation and gender identity;

We further would like to refer to the Concluding Observations of 9 August 2016 of the Human Rights Committee, in which it expresses concern about reports of violence against LGBT persons by both State and non-State actors, and the failure to address such violence by Kazakhstan and providing specific recommendations to ensure that

on Human Rights and OSCE Representative on Freedom of the Media, “Free expression and association key to eliminating Homophobia and Transphobia” (May 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14602&LangID=E>

Kazakhstan's anti-discrimination legal framework is in line with the International Covenant of Civil and Political Rights (ICCPR) (CCPR/C/KGZ/CO/2, para. 9-10).

We would also like to specifically draw the attention of your Excellency's Government to article 17 of the ICCPR, which prohibits any "arbitrary or unlawful interference" with the right to privacy. In this regard, the Human Rights Committee stated in *Toonen v. Australia*, Communication No. 488/1992 (CCPR/C/50/D/488/1992) that the criminalization of same-sex relation was an arbitrary infringement of the victims' right to privacy, and therefore constituted a violation of article 17.

Except when carried out for the furtherance or protection of fundamental rights, filming and other recording of public spaces should only be carried out as provided for by law as a measure which is necessary and proportionate in a democratic society. In this sense, it is the prevention, detection, investigation and prosecution of crime, or national security, which may be legitimately considered to be a necessary and proportionate purpose but only in some public places where the risk justifies it, to be filmed by the right persons (a law enforcement or national security agency or entity acting on its behalf) and to be retained only for a specific purpose for the right use for the right length of time. Thus all other intentional (as opposed to accidental) filming or recording of private persons without the permission of the individuals concerned should be clearly deemed to be an infringement of privacy, a breach of human rights which is then aggravated if further intentional dissemination especially via the Internet, occurs. Where an identifiable individual has his or her image disseminated without his or her explicit and informed consent, that individual should be afforded an immediate remedy of take-down of that visual or other recording without delay, irrespective of whether the recording was made intentionally or accidentally.

We would like to also recall that the International Covenant on Civil and Political Rights provides in its Article 20(2) that States must prohibit by law and to ensure full enforcement of the law against every incident of advocacy of hatred that constitutes incitement to discrimination, hostility or violence in accordance with article 20(2), which is further provided for by the Human Rights Committee in paragraph 8 of its General Comment No. 34.

Finally, we would also like to remind your Excellency's Government that States have the responsibility to protect persons from human rights violations committed by non-state actors, by exercising due diligence to prevent, punish, investigate and bring perpetrators to justice; this is set out by the Human Rights Committee General Comment No. 31 ((CCPR/C/21/Rev.1/Add.13, paras. 8).

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