

Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the rights to freedom of peaceful assembly and of association

REFERENCE:
AL TZA 1/2020

31 January 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders; Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolutions 34/5, 42/22, 36/6, 34/18 and 41/12.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the enforced disappearance, alleged arbitrary detention and subsequent charges with non-bailable financial crimes against human rights lawyer Tito Magoti and journalist Erick Kabendera.

Mr. **Tito Magoti** is a Tanzanian human rights lawyer and Mass Education Officer for the Legal and Human Rights Centre (LHRC). Through LHRC he advocates for the adherence to international human rights standards in Tanzania as well as the promotion and safeguarding of good governance in the country. Mr. **Erick Kabendera** is a freelance investigative journalist who writes for a number of high-profile international media outlets. They both have been vocal critics of the current Government.

According to the information received:

On the evening of 29 July 2019, Mr. Erick Kabendera was taken from his residence in Dar es Salaam by six individuals in plainclothes who claimed to be police officers, though they refused to reveal their individual identities or present a warrant. The men informed family members that he would be taken to Oysterbay police station, however when lawyers for the Tanzanian Human Rights Defenders Coalition (THRDC) paid a visit to the station, they could not locate the journalist.

On 31 July 2019, the Dar es Salaam Regional Police Commander allegedly confirmed the arrest of Mr. Kabendera, claiming that he had been held for interrogation at Kilwa road police station regarding questions over his citizenship. As they were not informed about his whereabouts, Mr. Kabendera's lawyers were not present for the two first days of his interrogation and his wife was ordered to surrender his passport and academic transcripts in relation to the charge.

Charges unrelated to the citizenship question were added to Mr. Kabendera's case during interrogation. He was accused of "online sedition", reportedly related to an article published in the "Economist" in October 2017, in which he criticised President John Magufuli's suppression of free speech and economic policies.

Mr. Kabendera's lawyers sought to have the journalist granted bail, however upon his hearing at the Kisutu Resident Magistrates' Court, he was informed that he was charged with "leading organised crime", "tax evasion"; and "money laundering", the latter accusation being a non-bailable charge. Mr. Kabendera has had his hearing rescheduled more than 12 times. He is currently in detention and will remain until the investigation is complete.

On 20 December 2019 at approximately 10.00 a.m., Mr. Tito Magoti was handcuffed and abducted by four unidentified men in the Kinondoni district of Dar es Saalam in Tanzania. He was reportedly blindfolded, placed in a civilian vehicle and taken to an undisclosed location. No warrant was presented to Mr. Magoti at the time of his arrest. Colleagues, fearing that Mr. Magoti had been abducted, visited several police stations but were unable to locate him.

On the evening of 20 December 2019, Dar es Salaam Regional Police Commander released a statement disclosing that Mr. Magoti was in police custody. The Police Commander did not disclose the place of his detention nor the crimes that he was alleged to have committed. The Regional Police Commander for the Kinondoni district later claimed that he had no knowledge of the arrest. The statements of the respective Police Commanders appeared to contradict one another.

On 23 December 2019, THRDC lawyers submitted a certificate of urgency to the High Court of Tanzania requesting that bail be granted to Mr. Magoti. According to the information received, it is contrary to the Tanzanian Criminal Procedure Act to hold a suspect for 24 hours without the option for bail or to appear before court.

On 24 December 2019, following four days of incommunicado detention, Mr. Magoti and a colleague of his were brought before the Kisutu Resident Magistrate Court in Dar es Salaam. Mr. Magoti was informed that he was to be charged with "leading organised crime"; "possession of a computer program designed for the purpose of committing an offence"; and "money laundering" a sum of 173,347,047.02 Tanzanian shillings (around USD 75,410).

As is the case with Mr. Kabendera, Mr. Magoti has not been entitled to apply for bail and must remain in his place of detention, Segerea Remand Prison, until his hearing, which at the time of writing has already been postponed twice with the next hearing due to take place on 5 February 2020.

Mr. Magoti was reportedly questioned about his connections to a number of vocal anti-government critics as well as his use of social media, in which he reports on issues of human rights and good governance. This line of questioning reportedly follows a more general crackdown on freedom of expression and freedom of association and peaceful assembly in Tanzania. In recent years, a number of media outlets have allegedly been closed and online speech and peaceful protests are becoming increasingly restricted.

We are deeply concerned regarding the employment of charges of “sedition” and “leading organised crime” that appear to be used to silence dissent in Tanzania. We express our particular concern regarding the use of financial crimes, such as “money laundering”, which is a non-bailable offence and allows the Government to hold its critics in detention without trial and for an indefinite period. We are deeply concerned about the change in charges brought against Mr. Erick Kabendera, especially considering the seriousness of the current allegations he faces. At the time of writing, Mr. Magoti’s hearing has been postponed twice and Mr. Kabendera’s hearing has been postponed over 12 times. We fear that Mr. Magoti and Mr. Kabendera may be held in detention indefinitely, without being formally sentenced, despite neither being proved guilty of any offence.

We express our particular concern regarding these recent arrests in light of events in Tanzania that have been subject to communications sent to your Excellency’s Government in recent years regarding the growing restrictions placed on the exercise of the rights to freedom of expression, association and peaceful assembly and the deteriorating environment for civil society. In communications TZA 1/2019, TZA 4/2018, TZA 3/2018 and TZA 2/2018 sent to your Excellency’s Government, concerns were expressed that alleged arbitrary detentions and increasingly restrictive legislation in the country would have a chilling effect on civil society and the defence of human rights in Tanzania. While we thank your Excellency’s Government for the reply acknowledging receipt of TZA 1/2019, we regret that it does not address all the concerns raised. We therefore still await substantive responses from Your Excellency’s Government to these communications.

While we do not wish to prejudice the accuracy of these allegations, we express our serious concern at the targeted application of “money laundering” charges against those who exercise their profession, defend human rights in Tanzania and express their views and opinions on government practice and policies, as it deprives them of their right to bail. Such punishment represents a severe restriction on the right to freedom of expression, including access to information, as it impedes the free exchange of information on matters of interest to the general public. We remind your Excellency that bail may only be denied for particular purposes as to prevent flight, interference with evidence or the recurrence of crime for which the employment of blanket non-bailable charges is inconsistent.

We express our serious concern that the detention of Mr. Magoti and Mr. Kabendera could amount to an arbitrary deprivation of liberty, and thus would be in violation of international human rights law.

We are also concerned regarding the non-disclosure and relocation of Mr. Magoti and Mr. Kabendera's place of detention shortly after their arrest, which amounts to the practice of short-term enforced disappearance. This practice, undertaken without informing relatives of the accused, deprives the accused persons of the right to legal representation, impeding on their right to a fair trial and increasing the risk of cruel and inhuman treatment while in custody. Furthermore, neither Mr. Magoti nor Mr. Kabendera were presented with a warrant at the time of their arrest and neither they nor their families were informed as to the reason for their arrest until a number of days had passed. This is reportedly in clear violation of Section 32(1) of Tanzania's Criminal Procedures Act, which requires that a person taken into custody without a warrant must be brought before a court within 24 hours of being taken into custody, unless the charge is one punishable by death.

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 the observations of your Excellency's Government 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 the legal and factual basis of the charges against Mr. Tito Magoti and Mr. Erick Kabendera, and please explain how these are consistent with international human rights standards.
3. Please explain how the alleged arrest of Mr. Magoti and Mr. Kabendera without a warrant, without informing them of the reasons for their arrest, and without disclosing their location is consistent with your obligations under international human rights law.
4. Please provide the details of any investigation, or judicial or other inquiries which may have been carried out in relation to the reported arbitrary arrest an enforced disappearance of Mr. Magoti and Mr. Kabendera. If no inquiries have taken place, or if they have been inconclusive, please explain why.
5. Please indicate what specific legal and administrative measures have been taken to ensure that journalists and human rights defenders in Tanzania, including human rights lawyers are able to carry out their legitimate work,

including through the exercise of their right to freedom of opinion and expression, their rights to freedom of peaceful assembly and of association in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any sort against either themselves or their families.

We would appreciate receiving a response within 60 days. Thereafter, 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.

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

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their recurrence 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.

Michel Forst
Special Rapporteur on the situation of human rights defenders

Leigh Toomey
Vice-Chair of the Working Group on Arbitrary Detention

Luciano Hazan
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Annex
Reference to international human rights law

Arbitrary detention and fair proceedings

In connection with above alleged facts and concerns, we would like to refer to article 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), to which the United Republic of Tanzania acceded on 11 June 1976, which guarantees the right not to be arbitrarily deprived of liberty and to fair proceedings before an independent and impartial tribunal. We wish to highlight that deprivation of liberty resulting from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR is arbitrary.

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 to determine the lawfulness of the detention.

We recall that article 9(3) of the ICCPR requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. It should not be the general practice to subject defendants to pre-trial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Pre-trial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances (Human Rights Committee, General Comment No. 35, para. 38).

Article 14 stipulates that, in the determination of any criminal charge, everyone shall be entitled to adequate time to communicate with counsel of choice. Article 14 also guarantees the right to be tried without undue delay. The right to have access to a lawyer without delay and in full confidentiality is also enshrined in principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), and the Basic Principles on the Role of Lawyers (Principles 7 and 8).

The rights to freedom of opinion and expression, of peaceful assembly and of association

Article 19 of the ICCPR guarantees the right to freedom of expression, which includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

We would like to remind your Excellency's Government that any limitation to the right to freedom of expression must meet the criteria established by international human rights standards, such as article 4 and 19 (3) of the Covenant and article 29 of the Universal Declaration of Human Rights (UDHR). Under these standards, limitations must be determined by law and must conform to the strict test of necessity and proportionality, must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

We once again wish to reiterate the principle enunciated in Human Rights Council Resolution 12/16, which calls on States to refrain from imposing restrictions which are not consistent with article 19(3), including on discussion of government policies and political debate; reporting on human rights, engaging in peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.

The Human Rights Committee also established in General Comment 34 that "any restrictions on the operation of websites, blogs or any other internet-based (...) are only permissible to the extent that they are compatible with paragraph 3" (CCPR/C/GC/34, paragraph 43). We reiterate the recommendations by the Human Rights Committee, that "States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty" (CCPR/C/GC/34, para 47).

We recall that the ICCPR guarantees the rights to freedom of peaceful assembly and of association in its articles 21 and 22. These rights can be subject to certain restrictions in strict conditions of necessity and proportionality.

In this regard, we would like to refer to Human Rights Council Resolution 24/5 which "reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others".

We would also like to refer to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

We wish to particularly stress the following articles:

- article 5 (b), which provides for the right to form, join and participate in nongovernmental organizations, associations or groups,
- article 6 (a) which provides that everyone has the right, individually and in association with others to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems.
- article 6 (b) and c) which provide that everyone has the right, individually and in association with others to freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; and to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and to draw public attention to those matters.

Enforced or Involuntary Disappearances

We would also like to refer to the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, which sets out the necessary protections with respect to the responsibility of the State; in particular that no State shall practice, permit or tolerate enforced disappearances (Article 2), that any person deprived of liberty shall be held in an officially recognized place of detention (Article 10.1) and that an official up-to date register of all persons deprived of their liberty shall be maintained in every place of detention (Article 10.3).

We would also like to highlight that there is no time limit, no matter how short, for an enforced disappearance to occur.