

Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the right to privacy; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL ZMB 1/2020

12 March 2020

Excellency,

We have the honour to address you in our capacities as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Working Group on Arbitrary Detention; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the right to privacy; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 41/18, 42/22, 35/11, 37/2 and 34/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the conviction and sentencing of Mr. Japhet Chataba and Mr. Steven Sambo to 15 years' imprisonment for allegedly engaging in consensual same-sex relations, in violation of their right to privacy and non-discrimination, and their right to health and freedom from torture and cruel, inhuman and degrading treatment or punishment.**

After independence in 1964, Zambia retained the parts of the British colonial Penal Code that criminalised 'carnal knowledge against the order of nature' in section 155. This provision has been widely interpreted to criminalise both consensual and non-consensual sexual relations between persons of the same sex (sodomy laws), which is punishable by 14 years' imprisonment. The courts have however interpreted the fourteen (14) year penalty to mean that 14 years is the mandatory minimum sentence to be imposed by the courts. Attempting to engage in 'sodomy' is also a crime, punishable by 7 years in prison. The Zambian Penal Code further prohibits "indecent practices between persons of the same sex", for which adults could serve at least 7 years in prison.

According to the information received:

On 27 November 2019, the High Court of the District of Kabwe in Zambia, confirmed a judgment and conviction of the Magistrates' Court or trial Court at Kapiri Mposhi District of the Central Province of the Republic of Zambia in the case "*The People v Japhet Chataba and Steven Sambo*", Case Number *HBR/06/2018*.

The High Court confirmed the judgement in which **Mr. Japhet Chataba** was charged and convicted of unnatural offences contrary to section 155 (a) of the Penal Code Chapter 87 of the laws of Zambia (“Penal Code”), finding that he had carnal knowledge of **Mr. Steven Sambo** against the order of nature on 25 August 2017. Mr. Steven Sambo was charged with unnatural offences contrary to section 155(c) of the Penal Code, in that he permitted a male person to have carnal knowledge of him against the order of nature. Both men were sentenced to 15 years’ imprisonment.

On 4 September 2017, both men were subjected to anal examinations at Kabwe General Hospital at the request of law enforcement officials, which included the men being subjected to forced penetration by a medical doctor.

While we do not wish to prejudge the accuracy of the information made available to us, we express our serious concern over the sentencing to 15 years of detention of these two adult men, which seems to be solely based on their sexual orientation. The criminalization of consensual same-sex relations violates an individual’s rights to privacy and to non-discrimination, which constitutes a breach of international human rights law. Subjecting persons to anal examinations violates an individuals’ rights to dignity, health and freedom from torture and other cruel, inhuman or degrading treatment or punishment.

We are particularly concerned that laws criminalizing sodomy have a discriminatory and disproportionately negative impact on lesbian, gay, bisexual and transgender persons (LGBT) adult persons engaging in consensual relations, contribute to and reinforce social stigma against LGBT individuals, and foster a climate in which hate speech, family and institutional violence are condoned and perpetrated with impunity. In addition, we are concerned that the criminalisation of LGBT individuals and discriminatory legislation have serious detrimental impacts on the enjoyment and realisation of other human rights, such as the right to education, employment, health, housing, as well as increases individuals’ vulnerability to torture and other cruel, inhuman or degrading treatment or punishment. Finally, imposing prison sentences as a sanction for same-sex relations between consenting adults is likely to amount to cruel, inhuman or degrading punishment and, due to its inherently discriminatory nature, may even constitute torture.

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 grounds for the arrest, detention and sentencing of the two men mentioned above and explain how these measures are compatible with Zambia's international human rights obligations.
3. Please provide information on the steps taken by Zambia to prohibit anal examinations and other forms of torture and other cruel, inhuman, or degrading treatment or punishment, in line with Zambia's international human rights obligations.
4. Please provide detailed information on measures taken to ensure that LGBT people are able to exercise their rights, in particular the right to be free from torture and ill-treatment, the right to privacy, the right to liberty and security of the person, the right to physical integrity, the right to privacy, conscience and non-discrimination, the right to fair legal treatment, the right to freedom of expression, and the right to promote and protect human rights.
5. Please provide detailed information concerning the trial of the two men 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 whether the two men were provided with the necessary legal fundamental safeguards applicable in case of detention and with basic fair trial and due process guarantees.
6. Please advise what steps are being considered to repeal laws criminalising consensual sexual activity between adults, including people of the same sex.

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.

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.

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.

Victor Madrigal-Borloz
Independent Expert on protection against violence and discrimination based on sexual
orientation and gender identity

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

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

Joseph Cannataci
Special Rapporteur on the right to privacy

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

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, 7, 14, 17 and 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Zambia has been a party since 10 April 1984. These rights are of universal nature and apply to everyone, irrespective of their sexual orientation or gender identity.

Discriminatory patterns are magnified in detention contexts, and when LGBTI persons are deprived of their liberty, they are particularly exposed to the risk of being ill-treated or even tortured. For these reasons, LGBTI persons are in situations of heightened vulnerability in all detention settings. We would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment as codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Zambia acceded to on 7 October 1998.

We also wish to refer your Excellency's Government to the jurisprudence, General Comments and concluding observations of United Nations treaty bodies that consistently hold 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 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 further would like to recall resolution 17/19, 27/32, 32/2 and 41/18 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.

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, the High Commissioner observes that States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity – including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called “public scandal” – are discriminatory and arbitrary. He concludes that based on the international human rights framework, States must refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity.

We further wish to draw your attention to the reports of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, in which he observes that the mere existence of laws or by laws criminalizing gender expression including through offences of “cross dressing” or “imitating the opposite sex” and other such discriminatory regulations impact on the liberty and security of LGBT persons and tends to foster a climate where hate speech, violence and discrimination are condoned and perpetrated with impunity (A/72/172, para. 21). He further observes in his report to the Human Rights Council (A/HRC/38/43), that the combination of social prejudice and criminalization has the effect of marginalizing LGBT persons and excluding them from essential services, including health, education, employment, housing and access to justice. He observes that the spiral of discrimination, marginalization and exclusion may start within the family, extend to the community and have a life-long effect on socioeconomic inclusion.

We further would like to draw your attention to the right to privacy, which is enshrined in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights, which state that no one should be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence” Articles 9 of the Universal Declaration and the Covenant further protect individuals from “arbitrary arrest and detention”. In its general comment no. 16, the Human Rights Committee confirmed that any interference with privacy, even if provided for by law, “should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”.

Since *Toonen* in 1994, the Human Rights Committee has held that laws used to criminalize private, adult, consensual same-sex sexual relations violate rights to privacy and to non-discrimination. The Committee has rejected the argument that criminalization may be justified as “reasonable” on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor

proportionate. In their concluding observations, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have urged States to reform such laws and, where relevant, have welcomed their repeal (Human Rights Committee concluding observations on Togo (CCPR/C/TGO/CO/4), para. 14; Uzbekistan (CCPR/C/UZB/CO/3), para. 22; and Grenada (CCPR/C/GRD/CO/1), para. 21; Committee on Economic, Social and Cultural Rights, concluding observations on Cyprus (E/C.12/1/Add.28), para.7; Committee on the Elimination of Discrimination against Women, concluding observations on Uganda (CEDAW/C/UGA/CO/7), paras. 43-44; and Kyrgyzstan (Official Records of the General Assembly, Fifty-fourth session, Supplement No. 38 (A/54/38/Rev.1)), paras. 127-128; and Committee on the Rights of the Child, concluding observations on Chile (CRC/C/CHL/CO/3), para. 29.

The Working Group on Arbitrary Detention has held that detaining someone on the basis of sexual orientation constitutes arbitrary detention in breach of article 9 of the International Covenant on Civil and Political Rights (See opinions No. 22/2006 on Cameroon (A/HRC/4/40/Add.1), No. 14/2017 on Cameroon (A/HRC/WGAD/2017/14), No 25/2009 on Egypt (A/HRC/16/47/Add.1), No. 42/2008 on Egypt (A/HRC/13/30/Add.1) and No. 7/2002 on Egypt (E/CN.4/2003/8/Add.1). See also A/HRC/16/47, annex, para. 8 (e)).

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.

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; see also the Principles and Guidelines here too – principle 9 and guideline 8 of the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court).

We further wish to draw your attention to the revised UN Standard Minimum Rules for the Treatment of Prisoners (known as the “Nelson Mandela Rules”), which refer to the principle of non-discrimination and its practical implications, by stating that the “prison authorities shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory” (Rule 2(2)). These provisions establish that ensuring substantive equality and meeting detainees’ special needs may require additional measures for

specific groups of detainees who are in situations of vulnerability, including LGBTI persons.

Finally and regarding the practice of anal examination, we wish to draw your attention to article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights and article 2 of the Convention against Torture. In addition to being scientifically worthless, such tests are a violation of bodily integrity. In a case where men were subjected to anal examinations, the Working Group on Arbitrary Detention stated: “These tests, forcibly undertaken, are in and of themselves intrusive in nature and violative of bodily rights of the individual under human rights law ... Accordingly, the Working Group considers that ... forced anal examinations contravene the prohibition of torture and other cruel, inhumane and degrading treatment, whether if, like in the present cases, they are employed with a purpose to punish, to coerce a confession, or to further discrimination. In addition, they are medically worthless for the determination whether or not a person has engaged in same-sex sexual conduct or whether the person has been involved in the practice of habitual debauchery or the prostitution of men” (Opinion No. 25/2009 on Egypt (A/HRC/16/47/Add.1), at paras. 23, 28-29) The practice has also been denounced by the Special Rapporteur on Torture, the Subcommittee on the prevention of Torture and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity as being “medically worthless” and amounting to torture or other ill-treatment.