

**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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on violence against women, its causes and consequences; and the Working Group on discrimination against women and girls**

REFERENCE:  
UA UGA 2/2020

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Excellency,

We have the honour to address you in our capacity 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on violence against women, its causes and consequences; and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 41/18, 42/22, 42/16, 34/19, 41/17 and 41/6.

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 of 23 people and detention of 19 of them, including gay, bisexual, and trans women in Kyengera, Uganda.**

According to the information received:

In the midst of the COVID-19 crisis, the Government of Uganda has taken several measures to combat the spread of the disease, including the prohibition of public gatherings of more than 10 people (reduced to five on 30 March 2020).

On 29 March 2020, the Mayor of Nsangi Municipality, assisted by members of the Local Defence Unit and the Uganda Peoples Defence Forces (UPDF) raided a shelter for lesbian, gay, bisexual, and transgender (LGBT) persons in Kyengera, Wakiso District, run by the nongovernmental organisation Children of the Sun Foundation. The Mayor allegedly explained the raid by the fact that homosexuality cannot be tolerated. As a result of the raid, 23 persons were arrested. Among the detainees 15 were shelter residents, two were shelter staff (the Executive Director and a nurse), and six were visitors. It is reported that the Mayor physically assaulted at least two of them as he questioned them about their sexuality. The shelter was also searched, allegedly for evidence of homosexuality,

and anti-retroviral medicines, HIV self-testing kits and condoms were seized in this process.

The nurse and three of the visitors were released later without charge, but the 19 remaining detainees were taken to the police and afterwards presented on 31 March 2019 before the Grade 1 Magistrate of Nsangi Magistrates Court. Allegedly, the police initially considered charging them with having carnal knowledge against the order of nature under section 145 of the Penal Code, but later decided to use the charge of negligent act likely to spread infection of disease in violation of Section 171 of the Penal Code Act, which may entail a maximum of seven years of imprisonment. They pleaded not guilty in front of the court. They will be remanded to Kitulya Prison until 29 April 2020. The case is officially filed as *Uganda Vs. Mukiibi Henry and others*, Criminal case No. 113 of 2020.

The police reportedly explained that they were disobeying COVID-19 related regulations on social distancing by “congesting in a school-like-dormitory setting within a small house” despite the prohibition of gatherings. None of the restrictions, however, has limited the number of residents in a private home or shelter.

According to the information at our disposal, none of the detainees presented symptoms of COVID-19, and none of them were subjected to a COVID-19 test that turned out positive. Also, it is reported that at least four of the detainees were HIV-positive. There is no information available as to whether they have appropriate access to HIV treatment while in detention.

#### *Court visits by lawyers*

The allegations before us further include that on 31 March 2020, the lawyers of the detainees were not able to get to court on time due to the COVID-19 regulation that prohibit travelling by both public and private means and that they were, therefore, not present in court when the detainees were remanded to prison. They later arrived at court using alternative means but found the court premises closed with no one present. On 6 April 2020, the lawyers prepared an application for a production warrant. However, while they reportedly tried to have it filed and heard in three different courts within the geographical jurisdiction of the case, they could not do so since the courts stayed closed. On 7 April 2020, the lawyers tried to secure a certificate of urgency from the High Court, although such attempt failed. Later, they filed the application for a production warrant at the Nsangi Court, but the Magistrate has not yet made a decision.

### *Prison visits by lawyers*

On 2 April 2020, the lawyers of the detainees contacted the Officer In Charge of Kityala Prison, where they are detained, and were informed that they would not be allowed access to them without authorisation from Prisons Headquarters. On 3 April 2020, the lawyers formally requested access to the Commissioner General of Prisons. The officials who received the written petition at Prison Headquarters emphasised that, given the COVID-19 crisis, access to detainees was to be granted directly by the Commissioner General of Prisons. The lawyers followed up on their request on 6 and 7 April 2020, but the Commissioner General of Prisons has not yet responded.

### *Expected release of certain inmates*

On 6 April 2020, the Commissioner General of Prisons announced, in a media interview, plans to have over 2000 inmates released in response to the COVID-19 pandemic. He stated that those to be released include petty offenders who have served three quarters of their sentence, lactating mothers and those above 65 years who have served half of their sentence and are not capital offenders. He stated that a request was made to the Registrar of Courts, to take steps towards having petty offenders who have served the mandatory remand period released on bail. The 19 detainees, however, are not within the ambit of those that are to be released. This was confirmed reportedly by the spokesperson of Uganda Prisons Service who informed their lawyers that persons on remand who are not due for release on mandatory bail will not be freed.

The representations before us allege that the COVID-19 sanitary measures issued through presidential directive, and their connection to Article 171 of the Criminal Code, have been and continue to be utilised in a discriminatory manner to target the residents of the shelter because of their perceived sexual orientation and / or gender identity. It is further alleged that the presidential directive and the Criminal Code have been and continue to be used to justify, in a discriminatory manner, the detention in the absence of evidence of commission of the offence of carnal knowledge against the order of nature.

While we do not wish to prejudge the accuracy of the information made available to us, we express our serious concern over the allegations of **arbitrary arrests of the 23 people in the shelter and detention of 19 of them;** of obstacles to legal representation during their court hearing, and obstacles to access to legal counsel. Further, we express our grave concern at risk of contamination to COVID-19 while in detention and at the extreme vulnerability of the detainees to violence and discrimination in detention on the basis of their actual or perceived sexual orientation and gender identity or expression. We are also concerned that HIV treatment for detainees may be hindered or deprioritised due

to the COVID-19 crisis and about the increased risk that this would impose into HIV-positive detainees' the immune system.

These allegations appear to be in contravention of the rights of every individual to life, liberty and security of the person, physical integrity, privacy, fair trial, health and non-discrimination, as laid down, among others, in articles 3, 5, 7, 9, 10, and 25 of the Universal Declaration of Human Rights (UDHR); articles 2, 6, 7, 9, 10, 14, 17, and 26 of the International Covenant on Civil and Political Rights (ICCPR), which Uganda acceded to on 21 June 1995; articles 2 and 16 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), which Uganda acceded to on 3 November 1986; and articles 2(2) and 12 and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Uganda acceded to on 21 January 1987. These rights are of universal nature and apply to everyone, irrespective of their sexual orientation or gender identity.

Sexual orientation and gender identity are prohibited grounds of discrimination under international law. The criminalisation of sexual relations between consenting adults has been condemned as violating international human rights norms enshrined in treaties to which Uganda is party, including the ICCPR, the CAT, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (ratified by Uganda on 22 July 1985), and the Convention on the Rights of the Child (ratified by Uganda on 17 August 1990). Human rights treaty bodies and the High Commissioner for Human Rights have repeatedly called for such discriminatory laws to be repealed (A/HRC/29/23, A/HRC/19/41). The Human Rights Committee and the Working Group on Arbitrary Detention have clarified multiple times that detention on discriminatory grounds, including based on sexual orientation and gender identity, is per se arbitrary, and violates the ICCPR (CCPR/C/GC/35, A/HRC/22/44 and Opinion No. 14/2017 of the Working Group on Arbitrary Detention).

On the basis of international human rights norms and standards and the work of the United Nations human rights treaty bodies and special procedures, in 2015 the United Nations High Commissioner for Human Rights emphasised that States have an obligation to, among other things, revise criminal laws to remove offences relating to consensual same-sex conduct and other offences used to arrest and punish persons on the basis of their sexual orientation and gender identity or expression; protect individuals from violence, torture and discrimination based on their sexual orientation and gender identity; provide redress to victims; and, provide training to law enforcement personnel and judges in gender-sensitive approaches to addressing violations related to sexual orientation and gender identity. In addition, the High Commissioner for Human Rights 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).

In this vein, we would like to recall Concluding Observations of 8 July 2015 of the Committee on Economic, Social and Cultural Rights, in which it was highly concerned about the criminalisation of consensual same-sex sexual conduct in Uganda's Penal Code, as well as about information that there had been an increase in arbitrary detention and police abuse of LGBTI persons. In light of this, the Committee urged Uganda to immediately take steps to amend the Penal Code to decriminalise consensual same-sex sexual conduct. The Committee also urged Uganda to investigate, deter and prevent acts of discrimination against LGBTI people, bring perpetrators to justice and provide compensation to victims (E/C.12/UGA/CO/1, para. 16).

We further wish to draw attention to the Concluding Observations of 5 November 2010 of the Committee on the Elimination of Discrimination against Women, in which it noted with grave concern the criminalisation of homosexual behaviour in Uganda as well as reported harassment, violence, hate crimes and incitement of hatred against women on account of their sexual orientation and gender identity. Therefore, the Committee called on Uganda to decriminalise homosexual behaviour and to provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity, in particular through the enactment of comprehensive anti-discrimination legislation covering, inter alia, the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation and gender identity. The Committee also urged Uganda to intensify its efforts to combat discrimination against women on account of their sexual orientation and gender identity, including by launching a sensitisation campaign aimed at the general public, as well as providing appropriate training to law enforcement officials and other relevant actors (CEDAW/C/UGA/CO/7, paras. 43-44).

Regarding States' security measures in their response to COVID-19 crisis, the United Nations High Commissioner for Human Rights has stated in March 2020 that "measures to contain and combat the spread of COVID-19 should always be carried out in strict accordance with human rights standards and in a way that is necessary and proportionate to the evaluated risk".<sup>1</sup> UN human rights experts echoed this call and warned "emergency declarations based on the Covid-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals. It should not function as a cover for repressive action under the guise of protecting health". They further stated that although some States and security institutions may find the use of emergency powers attractive because it offers short cuts, "[t]o prevent such excessive powers to become

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<sup>1</sup> Press release by the United Nations High Commissioner for Human Rights "Coronavirus: Human rights need to be front and centre in response, says Bachelet" (March 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E>.

hardwired into legal and political systems, restrictions should be narrowly tailored and should be the least intrusive means to protect public health”.<sup>2</sup>

Regarding the right to health in the context of COVID-19, UN human rights experts, claim that everyone, including LGBT and gender diverse persons as well as people in detention, without exception, have the right to life-saving interventions and this responsibility lies with the Government. They further urged that States take additional social protection measures so that their support reaches those who are at most risk of being disproportionately affected by the crisis.<sup>3</sup>

In regard to LGBT people, we wish to remind Your Excellency’s Government that the authorities have a responsibility to prevent and combat violence against LGBT detainees by other detainees (A/HRC/31/57, para. 35). Regarding measures needed to protect people deprived of liberty during the COVID-19 pandemic, the United Nations Subcommittee on Prevention of Torture (SPT) issued detailed advice on a range of actions governments should take (CAT/OP/10). In the advice, SPT urged all States, among other things, to consider reducing prison population by implementing schemes of early, provisional or temporary release of low-risk offenders, reviewing all cases of pre-trial detention, and extending the use of bail for all but the most serious of cases (Ibid., paras 9 (b), (d)). The SPT further urged that State ensure that fundamental safeguards against ill-treatment (including the right of access to legal assistance and to ensure that third parties are notified of detention) remain available and operable, restrictions on access notwithstanding (Ibid., para 9 (p)).

In this vein, the Joint United Nations Programme on HIV and AIDS (UNAIDS) also concerned that epidemics often expose existing inequalities in society, where those already marginalized and vulnerable, such as people in places of detention, are the most affected by the epidemic. In light of this, UNAIDS echoed the SPT’s advice by recommending States to take steps to reduce the likelihood of transmission in prison. This includes reducing overcrowding through releasing non-dangerous prisoners and reviewing pre-trial detention cases, as well as ensuring that prisoners have access to all necessary prevention, diagnostics, and treatment services including the ability to self-isolate.<sup>4</sup>

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<sup>2</sup> Press release by UN human rights experts “COVID-19: States should not abuse emergency measures to suppress human rights – UN experts” (March 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>.

<sup>3</sup> Press release by UN human rights expert “No exceptions with COVID-19: “Everyone has the right to life-saving interventions” – UN experts say” (March 2020), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E>.

<sup>4</sup> UNAIDS “Rights in the time of COVID-19 — Lessons from HIV for an effective, community-led response” (March 2020), available at <https://www.unaids.org/en/resources/documents/2020/human-rights-and-covid-19>.

The full texts of the human rights instruments and standards recalled above are available on [www.ohchr.org](http://www.ohchr.org) or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned person(s) in compliance with international instruments.

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 any comment you may have on the above-mentioned allegations.
2. Please provide information on the legal grounds for the arrest of the 23 individuals and detention of 19 of them. In particular, please explain how the determination was made that the residents of the shelter in question breached sanitary orders issued through the presidential directive on COVID-19, and whether it was considered that the shelter is the place of residence for most of them.
3. Please provide information on the measures undertaken to ensure due process to all defendants, in particular the right to access their lawyers.
4. Please inform whether you will consider including the detainees arrested in the shelter, in the measure to release over 2,000 inmates in response to the COVID-19 pandemic.
5. Please explain how your Excellency's Government maintains safety of people in detention facilities, especially for those who identify themselves as LGBT. Also for transgender detainees, please provide information about how detention facilities take into consideration their self-identified gender. If no specific protection measures have been taken, please explain why.
6. Please provide information about the measures taken to ensure continuous adequate treatment for HIV-positive detainees.

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 responsible of the alleged violations. We also urge your Excellency's

Government to include the 19 detainees mentioned above in the exceptional measures of release envisaged by Uganda to prevent an outbreak of COVID-19 cases in prisons.

We would like to inform your Excellency's Government that after having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit specific cases relating to the circumstances outlined in this communication through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the present communication and the regular procedure.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

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