

Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Ref.: AL SWZ 2/2023

(Please use this reference in your reply)

24 November 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders and Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, pursuant to Human Rights Council resolutions 50/17, 52/9, 52/4 and 50/10.

In this connection, we would like to bring to the urgent attention of your Excellency's Government information we have received concerning **the refusal to register Eswatini Sexual and Gender Minorities (ESGM), an association aiming to advance the protection of human rights of lesbian, gay, bisexual, transgender and intersex persons in the Kingdom of Eswatini.**

According to the information received:

In May 2019, ESGM applied to reserve the company name 'Eswatini Sexual and Gender Minorities' pending its application for registration. This was acknowledged by the Registrar of Companies on 11 May 2019. In June 2019, ESGM filed the necessary documents for registration under section 17 of the Companies Act, which provides for the incorporation of not for profit associations as companies limited by guarantee. The objectives of ESGM, as stated by the organisation, are as follows:

- a. *To advance the protection of the rights of lesbians, gay, bisexual, transgender and intersex (LGBTI) in Eswatini and reduce harm that affect their wellbeing based on their sexual orientation and gender identity (SOGI);*
- b. *To research the issues that make the LGBTI vulnerable to HIV and AIDS, and further reduce harm the prevalence by addressing the issue of prevention, treatment and care amongst them;*
- c. *To ensure that there is equal opportunity and treatment for all people in terms of service delivery;*
- d. *To advocate in order to increase acceptance of LGBTI members of society in respective communities and families;*

- e. *To address the challenges individual sexual and gender minorities come across in their daily livelihood and create a conducive policy environment for LGBTI at a local and national level;*
- f. *To carry out activities necessary and incidental or conducive to achieving its aims and objectives or any of them;*
- g. *To apply income received by the company towards financing development programmes in line with the above objectives.*

On 5 July 2019, the Registrar of Companies wrote to ESGM's attorneys, requesting their further patience and indicating that he had forwarded ESGM's application for registration to the Ministry's Principal Secretary for his guidance, and to the Attorney General for a legal opinion.

On 9 August 2019, ESGM started court proceedings against the Registrar for failing to take a decision on the registration of ESGM. These proceedings were discontinued after the Registrar wrote to ESGM refusing registration on 9 September 2019. In refusing to register ESGM, the Registrar reportedly argued that ESGM's purpose was unlawful and contrary to Eswatini's Constitution. In his decision letter, the Registrar noted that the purpose of ESGM includes to advance protection of LGBTI persons in Eswatini, reduce harm that affects their wellbeing based on sexual orientation and gender identity, and to advocate to increase acceptance of LGBTI members of society in respective communities and families. Eswatini's common law criminalises same-sex relations between men, but this law is not enforced in practice. Section 27 of the Constitution provides the right to marry only for men and women. The Registrar also referred to the fact that Eswatini's Constitution provides protections against discrimination on the basis of gender, race, place of origin, political opinion, colour, religion, creed, age or disability, but does not expressly protect against discrimination on the basis of sexual orientation.

ESGM applied to the High Court of Eswatini to set aside the Registrar's decision and make a declaration that the Registrar's order was unconstitutional, and a declaration that registration of an association that promotes the interests and aspirations of LGBTI persons in Eswatini is not unlawful or incompatible with section 17 of the Companies Act. ESGM argued that the Registrar's reasoning was flawed and misrepresents the law in Eswatini, and that the decision violates ESGM members' constitutional rights. ESGM argued that its mission is to protect and advance the interests of LGBTI persons through education and advocacy and Eswatini's laws do not make it a crime to be LGBTI.

On 20 October 2020, a full bench of the High Court heard the arguments on the application for the registration of ESGM. On 29 April 2022, the High Court handed down its decision. The High Court ruled against setting aside the decision of the Registrar and registering ESGM. The Court stated:

'Having alluded to the fundamental rights, it is clear that our Constitution guarantees the rights irrespective of gender or sex. So that it is safe to say that LGBTs have the rights conferred by section 14 of the Constitution. They have a right to life, liberty, privacy or dignity. They have a right not to be

discriminated against or be subjected to inhumane and degrading treatment. They have a right to associate. They have a right to form a company. They have a right to freedom of expression. These rights are inherent in them not by reason of their sexual preferences as LGBTs but as human beings. These rights are however subject to the laws as prevailing in the Kingdom and which have not been challenged anywhere’.

A dissenting opinion stated that the decision to refuse the Applicant’s application for registration was reached in a ‘grossly irregular manner, without legal merit or basis’. The Judge also referred to section 25 of Eswatini’s Constitution, which protects the rights to freedom of association and assembly.

ESGM filed a notice of appeal against the decision of the High Court, stating that the Court erred in law and in fact. The appeal was heard on 5 May 2023.

On 16 June 2023, the Supreme Court of Eswatini delivered its decision, which set aside the High Court’s decision, made the Registrar’s decision null and void, referred the matter to the Minister of Commerce and Industry to consider the application afresh, and ordered the Minister to advise the Appellants of his decision in writing within 60 days. The Supreme Court’s decision was based on finding that it was not legally permissible for the Registrar to either perform his function in conjunction with persons not so empowered by the Act or delegate his powers to such persons. Contrary to this, the Registrar had enlisted advice from the Attorney General and the Principal Secretary of the Ministry. The Court commented that the Registrar did not state in his letter which one of ESGM’s objects he found offensive and that the approach taken by the Registrar in this regard does not meet the requirements of administrative justice in section 33 of the Constitution. However, given the Court had already found the Registrar’s decision void, these issues were not considered at length.

Between 22 June and 28 September 2023, ESGM and the office of the Minister exchanged correspondence regarding the application for registration of ESGM.

On 27 September 2023, more than 60 days after the Supreme Court’s decision, the Acting Minister for Commerce, Industry and Trade wrote to ESGM’s lawyers declining to register ESGM. The letter states that he is of the view that: Eswatini’s Constitution does not prohibit discrimination on the basis of sexual orientation or gender identity; in the absence of such protection, the principles of rules of the Roman Dutch Common law are still enforceable as the common law of the country; and he considers the name and objects of ESGM seek to offend against the customary principles as preserved ‘*in our Swazi law and custom that a man and a woman shall start and maintain a love relationship*’.

On 8 November 2023, ESGM and several of its members submitted an application to the High Court of Eswatini to review and set aside the Minister’s refusal to register ESGM. ESGM is also seeking a declaration that the Minister’s decision is in breach of the Applicants’ rights under sections 14, 18(1), 20, 24, 25 and 33 of the Constitution and section 17 of the Companies Act. ESGM is also seeking an order to the Registrar of Companies to register

ESGM. They note that sections 24 and 25 of the Constitution protect the rights to freedom of expression and freedom of peaceful assembly and association.

ESGM argues that it fulfils the requirements for registration as set out in section 17 of the Companies Act, and that the refusal to register ESGM is in breach of ESGM members' constitutional rights, including their rights to dignity, freedom of association and expression, and that the decision is in breach of Eswatini's obligations under international law to prevent discrimination. ESGM's application states that neither the common or statutory law in Eswatini criminalise persons based on their sexual orientation or gender identity, and do not prevent ESGM members from associating and forming organisations that promote, advocate and protect their interests and the human rights of marginalised communities.

Without prejudging the accuracy of these allegations, we would like to express our concern about the inability of members of the human rights organisation ESGM to exercise their fundamental human rights to non-discrimination, freedom of expression, and freedom of association and of peaceful assembly, all of which are essential to their ability to defend the rights of LGBTI persons.

As indicated by the Special Rapporteur on the rights to peaceful assembly and association on multiple occasions, civil society involvement in the realisation of human rights, is paramount, and States should exert all efforts to support, rather than inhibit, the work of civil society and human rights defenders.¹ The Special Rapporteur further emphasised that the rights to freedom of peaceful assembly and of association play a key role in empowering individuals belonging to groups most at risk, including LGBTI people, to claim other rights and overcome the challenges associated with marginalisation. Such rights must therefore not only be protected, but also facilitated.

In a joint statement on the importance of free expression and association in eliminating homophobia and transphobia, UN and regional human rights experts expressed their concern at the existence, and adoption of laws that ban the dissemination of information about sexual orientation or gender identity issues and arbitrarily restrict the right to freedom of association and peaceful assembly.² The 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*'.³

The Human Rights Council has also repeatedly stressed that when provided with an enabling environment, civil society can contribute effectively to 'addressing and resolving challenges and issues that are important to society', including empowering persons belonging to minorities and vulnerable groups.⁴ Every person in the Kingdom of Eswatini, including all LGBTI persons, without exception, have the right to equal treatment and protection against discrimination, and the right to exercise their fundamental freedom to expression, and freedom of association and of peaceful

¹ A/HRC/23/39, para 42, A/73/279 and A/74/349.

² "Free expression and association key to eliminating Homophobia and Transphobia", *Joint Statement by UN human rights experts, the Inter-American Commission on Human Rights, the Special Rapporteur on Human Rights Defenders in Africa of the African Commission on Human and Peoples' Rights and the OSCE Representative on Freedom of the Media*, 15 May 2014: www.ohchr.org/en/press-releases/2014/05/international-day-against-homophobia-and-transphobia-idaho-t-saturday-17-may.

³ Ibid.

⁴ A/HRC/RES/24/21.

assembly.

We note the Human Rights Committee has expressed concern about the frequent discrimination and violence faced by LGBTI people in Eswatini.⁵ We also note that the Committee has called on Your Excellency's Government to clearly prohibit discrimination on the basis of sexual orientation and gender identity; combat stereotypes and negative attitudes towards persons on the basis of their sexual orientation or gender identity; adopt legislation explicitly prohibiting hate crimes against LGBTI persons; ensure that all acts of violence against them are effectively investigated; and to redouble efforts to combat the high level of HIV/AIDS-related stigma and discrimination.⁶ We note the similarities between these recommendations and the objectives of ESGM, and urge your Excellency's Government to reconsider its decision to refuse the registration of ESGM.

In connection with the 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 or comments in relation to the above-mentioned allegations.
2. Please explain whether your Excellency's Government believes that the refusal to register ESGM is in conformity with its obligations under international human rights law, in particular the rights to non-discrimination, freedom of expression, and freedom of association and of peaceful assembly, including as provided *inter alia* by Articles 2, 19, 21 and 22 of the International Covenant on Civil and Political Rights.
3. Please advise what, if any, remedial measures are being adopted to restore the rights of ESGM members.
4. Please explain what measures have been taken to ensure that all civil society in Eswatini, including human rights defenders working on protecting LGBTI rights, can carry out their peaceful and legitimate activities without restrictions.

We would appreciate receiving a response within 60 days. After this deadline, this communication and any response received from your Excellency's Government will be made public through the communications reporting [website](#). Please note that only the main document will be published, the annexes if any will be kept internally for the mandate holders' review. They will also be made available subsequently in the regular report to be submitted to the Human Rights Council.

⁵ A/HRC/WG.6/39/SWZ/2, para 12.

⁶ A/HRC/WG.6/39/SWZ/2, paras 10 and 12.

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

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

Irene Khan
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

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Independent Expert on protection against violence and discrimination based on sexual
orientation and gender identity

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to refer your Excellency's Government to the International Covenant on Civil and Political Rights (ICCPR), which Eswatini ratified in 2004. Articles 2, 19, 21 and 22 protect the fundamental human rights to non-discrimination, freedom of expression, and freedom of association and of peaceful assembly.

We would like to emphasise that human rights are universal and apply to everyone, irrespective of their sexual orientation or gender identity. The principles of equality and non-discrimination are part of the foundations of the rule of law and human rights. They are reaffirmed in article 2(1) of the ICCPR. The Human Rights Committee emphasised that States have a legal obligation to ensure everyone the rights recognised by the ICCPR without discrimination on the basis of sexual orientation or gender identity.⁷

We would also like to draw your Excellency's Government's attention to article 19 of ICCPR, which guarantees the right to freedom of opinion and expression and states that any restriction on the right to freedom of expression must be: (i) provided by law; (ii) serve a legitimate purpose; and (iii) be necessary and proportional to meet the ends it seeks to serve.

We also recall articles 21 and 22 of the ICCPR, which protect the right of everyone to freedom of peaceful assembly and freedom of association with others. The rights to freedom of peaceful assembly and of association can only be restricted in specific circumstances: as prescribed by law to serve a legitimate purpose and the restrictions must be necessary and proportionate. As stated in a report by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, States not only have a negative obligation to abstain from unduly interfering with these rights but also have a positive obligation to facilitate and protect the rights in accordance with international human rights standards.⁸ This means ensuring that freedom of association and freedom of peaceful assembly is enjoyed by everyone, without discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹

We also wish to refer to Human Rights Council resolution 22/6, which calls upon States to ensure that '*procedures governing the registration of civil society organizations exist, that these are transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal and avoid requiring re-registration, in accordance with national legislation, and are in conformity with international human rights law*'.¹⁰

We also refer to the African Charter on Human and Peoples Rights, which Eswatini ratified in 1995. Articles 2, 9, 10 and 11 protect the right to non-discrimination, freedom of expression and opinion, freedom of association and

⁷ CCPR/C/GC/35, para 3.

⁸ A/HRC/17/27, para 66; and A/HRC/29/25/Add.1.

⁹ Article 2 (1) of the ICCPR.

¹⁰ A/HRC/RES/22/6, para 8.

freedom of assembly. In *Civil Liberties Organisation v Nigeria*, the African Commission on Human and Peoples' Rights held that: '*Freedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends*'.¹¹

Finally, we would like to refer your Excellency's Government 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 Recognised Human Rights and Fundamental Freedoms, adopted on 9 December 1998 (also known as the UN Declaration on Human Rights Defenders). Articles 1 and 2 of the Declaration 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. Article 5(b) of the UN Declaration on Human Rights Defenders provides for the right to form, join, and participate in non-governmental organisations, associations, or groups, and article 7 provides for the right to develop and discuss new human rights ideas and principles and to advocate for their acceptance.

¹¹ African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v Nigeria* (Comm. No. 129/94 (1995)).