

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE: AL
TKM 1/2016:

10 June 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 24/6 and 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **recently adopted "Law of Turkmenistan on combating the spread of diseases caused by the human immunodeficiency virus (HIV)"**. The Law allegedly contains a number of provisions that may unduly restrict the rights to be free from degrading treatment, the right to health, the right to privacy, and the right to marry and to found a family.

According to the information received:

On 26 March 2016, the parliament of Turkmenistan adopted "the Law of Turkmenistan on combating the spread of diseases caused by the human immunodeficiency virus (HIV)". The Law entered into force on 4 April 2016, following its publication in the State newspaper.

It is alleged that the legislative process has been neither transparent nor inclusive. The parliament of Turkmenistan has reportedly not held any public consultations involving civil society and other relevant stakeholders prior to the adoption of the Law which.

According to your Excellency's Government, the Law aims to "create conditions for forming healthy families and prevent the birth of HIV-infected children". article 13(1)(2) of the Law therefore requires couples to undergo a "mandatory medical examination for HIV" prior to getting married. It is reported that,

following this provision, persons living with HIV/AIDS could be prevented from obtaining a marriage licence.

Pursuant to article 13 (1), HIV testing is further compulsory for the following groups: blood and organ donors, certain medical professionals, surgical patients, pregnant women, blood recipients, persons with sexually transmitted diseases, persons with HIV-positive partners, persons suspected of using narcotic drugs, detainees, children born to HIV-positive mothers, foreign citizens applying for work visas and stateless persons.

Article 12 of the Law allows for compulsory HIV testing to be carried out “without the consent of the subject or without the consent of his legal representative [...]”. The provision further stipulates that the “actual results and the confidentiality of the compulsory medical examinations for HIV are protected by law”.

While acknowledging the positive aspects of the Law, including improvements in treatment, psychological support and social protection, concerns were raised about its potential adverse impact on the rights to health, privacy, and family life in Turkmenistan, in particular of key populations more at risk of being exposed to HIV/AIDs including men who have sex with men, sex workers, drug users, and migrants.

The implications of such measures could seriously compromise the protection of persons living with HIV/AIDS from discrimination, stigma and violence linked to their health status. Compulsory HIV testing may constitute degrading treatment if it is done without respecting consent, confidentiality and necessity requirements. Persons who discover their status as the result of involuntary testing often face stigma and can be deterred from accessing appropriate services, undermining long-term prevention and treatment efforts from a public health perspective.

While we do not wish to prejudice the accuracy of these allegations, we would like to express our concerns about the compulsory nature of the medical examinations, which undermines the principle of informed consent as an integral part of the right to the highest attainable standard of physical and mental health. Further serious concern is expressed that compulsory HIV testing may amount to degrading treatment if it is conducted on a discriminatory basis and without due regard to consent, confidentiality and necessity requirements. If persons living with HIV/AIDS are denied a marriage licence, compulsory testing may further violate the right to marry and to found a family. Finally, concern is expressed that the provisions compromise the right to privacy by allowing the disclosure of private health information. All of this could potentially lead to the discrimination of persons living with HIV /AIDS based on their health status.

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 provide detailed information on measures taken to ensure compliance of the Law with Turkmenistan's obligation under international human rights law and standards.
3. Please provide details of any actions taken with a view to ensuring the protection of privacy and confidentiality of persons living with HIV/AIDS.
4. Please indicate whether the ability to obtain a marriage license will depend on the results of the pre-marital medical examinations stipulated under article 13(1)(2) of the Law.
5. Please provide information on any measures undertaken to include civil society and other relevant stakeholders in meaningful consultations prior to the adoption of the Law by the Parliament of Turkmenistan.

We would appreciate receiving a response within 60 days.

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.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

Juan Ernesto Mendez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment

Dainius Pūras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health

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 right of everyone to the highest attainable standard of physical and mental health as set forth in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Turkmenistan in 1997. In General Comment No. 14, the Committee on Economic, Social and Cultural Rights stressed that the right to health implies the right to have personal health data treated with confidentiality. According to the Committee, this right should not be impaired by the right to information accessibility concerning health issues (GC 14, para. 12(b)).

With respect to concerns regarding the confidentiality of test results, we would also like to refer your Excellency's Government to article 17 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkmenistan in 1997, which states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. In General Comment No. 16, the Human Rights Committee emphasized that States Parties are obliged to take effective measures to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In General Comment No. 20, the Committee further stressed that States should address widespread stigmatization and ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant (GC 20, para. 33).

With regards to the compulsory nature of HIV testing, we would like to bring to your Excellency's Government attention report A/64/272 on the right to health and informed consent, where the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health stated that successful HIV/AIDS testing is underpinned by conditions of counselling, informed consent and confidentiality. International guidelines recommend that public health legislation demand that HIV/AIDS testing be performed only on the basis of individual informed consent and grounded in an approach protecting human rights. Compulsory testing, unless justified by public health requirements, must never be used as a means of policing private behaviour. Any limitations of informed consent must be critically examined to ensure that they: (a) are fully respectful of individual rights and liberties; and (b) pay the utmost attention to supporting a continuous process of counselling, testing and treatment.

We would also like to refer your Excellency's Government to report A/HRC/10/44 by the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, in which he noted that compulsory HIV testing is a common abuse that may constitute degrading treatment if it is done on a disciplinary basis without respecting consent, confidentiality and necessity requirements (para. 65).

Finally, we would like to draw the attention of your Excellency's Government to the International Guidelines on HIV/AIDS and Human Rights (2006). The Guidelines clearly state that mandatory premarital testing and/or the requirement of "AIDS-free certificates" as a precondition for the grant of marriage licences under State laws infringe on various human rights, including the right to marry and to found a family (para. 118).

The Guidelines further reiterate that public health, criminal and anti-discrimination legislation should prohibit mandatory HIV testing of targeted groups, including key populations and groups in vulnerable situations (Guidelines 5). In this connection, the Guidelines recommend that States enact laws a public health legislation to ensure that HIV testing of individuals should only be performed with the specific informed consent of that individual. Exceptions to voluntary testing would need specific judicial authorization, granted only after due evaluation of the important considerations involved in terms of privacy and liberty. In addition, public health legislation should ensure, whenever possible, that pre- and post-test counselling be provided in all cases (Guideline 3).

Moreover, the Guidelines establish that general confidentiality and privacy laws should be enacted, that HIV-related information on individuals should be included within definitions of personal/medical data subject to protection, and that the unauthorized use and/or publication of HIV-related information on individuals should be prohibited. Privacy legislation should enable an individual to see his or her own records and to request amendments to ensure that such information is accurate, relevant, complete and up to date. Provisions should also be made for professional bodies to discipline cases of breaches of confidentiality as professional misconduct under codes of conduct (Guidelines 5).