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Comments of the International Commission of Jurists and the International Gay and Lesbian Human Rights Commission on the Response of the Cameroon Government in the case with reference number G/SO/218/2 under examination by the Working Group on Arbitrary Detention.

1. The International Commission of Jurists (ICJ) and the International Gay and Lesbian Human Rights Commission (IGLHRC) are grateful to the Working Group on Arbitrary Detention, for the opportunity to make comments on the Cameroon Government's response to communication submitted by IGLHRC concerning the detention of eleven men for alleged homosexual activities.

2. The ICJ and IGLHRC recall that the Working Group, in expressing its views on homosexuals who are detained or given prison sentences solely because of their sexual orientation, has said that such "*detention (is) arbitrary because it violate(s) articles 2 (1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) which guarantee(s) equality before the law and the right to equal legal protection against all forms of*

*discrimination, including that based on sex.”*¹ The Working Group based this opinion on the UN Human Rights Committee’s statement that “*reference to ‘sex’ in articles 2, paragraph 1 and 26 (ICCPR) is to be taken as including sexual orientation.*”²

3. The eleven alleged homosexual men in this case were arrested on June 1, 2005 pursuant to Article 347 of the Cameroon Penal Code, which criminalizes same sex relations with a prison term of between 6 months to five years and a fine of 20,000 - 200, 000 francs. The government alleges that these men were improperly put before the Tribunal of First Instance in Yaoundé Cameroon for their alleged transgressions, and instead, ought to have been immediately brought to trial on the grounds of having committed a “flagrant offence.” The Government explains that the Tribunal’s “release” of the men on April 21, 2006 was recognition that the incorrect procedure had been initiated. They argue that the continued incarceration of the men was based on new orders of detention, which was a function of putting in process the correct criminal prosecution procedure. Given this background, the Government’s position was that a) the men were detained pursuant on a legally prohibited offence, b) there was no arbitrary interference in the personal life of the men and c) there was no violation of the right to equality before the law and non-discrimination.

4. Nine of the men were eventually convicted in the prosecution pursuant on the Cameroon Penal Code. They were released shortly after conviction, based on time served in their pre-trial detention. One of the convicted men has since died due to AIDS related complications that was induced by the circumstances of his detention.

¹ Report of the Working Group on Arbitrary Detention: “Civil and political rights including the questions of torture and detention”, E/CN.4/2004/3, December 15, 2003

² Supra n1

5. The ICJ and the IGLHRC recall the Opinion adopted by the Working Group on Egypt.³ According to the source of that communication, at least 55 men were arrested in Cairo on the grounds of their sexual orientation in the early hours of 11 May 2001. Ten undercover officers from a Cairo Vice Squad are said to have entered a bar around 2 am, after watching and filming dancing by the exclusively male patrons.

6. The Egyptian Government argued that there was no national legislation that provided for the prosecution of a person on account of his or her sexual orientation and that the men were charged with a combination of contempt of religion and habitually engaging in immoral acts with men which were criminal offences punishable under the Penal Code of Egypt and the Prevention of Prostitution Act. They argued that it was the personal conduct of each of the defendants - meaning their perpetration of immoral acts and offences against public decency - which was regarded as a criminal offence under the relevant legislation and that “sexual orientation” had not been a material factor in their detention. This argument was countered with information detailing accounts of anal examination that was occasioned by the Procurator’s Office as part of the prosecution procedure.

7. The Working Group considering the Egypt case cited the anal examinations ordered by the Procurator’s office as evidence that the arrest was based on the men’s homosexual orientation. The Working Group considered the relevant question to be whether the reference to “sex” in articles 2(1) and 26 of the ICCPR, could be regarded as covering “sexual orientation ” and if this is so, whether it follows that the detention of the defendants was “arbitrary” because it was based on domestic legislation (namely the Egyptian Penal Code),

³ Opinion No 7/2002 (Egypt) in “Opinions adopted by the Working Group on Arbitrary Detention,” UN Doc. E/CN.4/2003/8/Add.1, January 24, 2003

which was not in accordance with article 2 (1) Universal Declaration of Human Rights (UDHR) and articles 2 (1) and 26 of the ICCPR. The Working Group decided that the approach adopted by United Nations human rights bodies with regard to this question would argue in favour of an affirmative answer.

8. In discussing its opinion in the Egypt case, the Working Group used UN human rights jurisprudence that is also of relevance in the present case of the detention of the eleven alleged homosexual men in Cameroon. We will indicate the previous approach of the Working Group in the Egypt case and include analysis that is relevant for the Working Group's current consideration.

9. In the Egypt case, the Working Group discussed the UN Human Rights Committee case of *Nicholas Toonen v. Australia*⁴. In that case, the Human Rights Committee made its observations on the communication authored by a gay man from the Australian state of Tasmania, who argued that the continued criminalization of consensual buggery between adult men, violated articles 2 (1), 26 and 17 of the ICCPR. The Committee found that there was a violation of article 17 and further noted that “(t) he State Party has sought the Committee's guidance as to whether sexual orientation may be considered an ‘other status’ for the purposes of article 26. The same issue could arise under article 2 paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”

10. Confirming this approach, the Human Rights Committee has subsequently called on States not only to repeal laws criminalizing homosexuality but also include the prohibition of

⁴ Communication No. 488/1992: Australia, CCPR/C/50/D/488/1992, and *Nicholas*

discrimination based on sexual orientation in their constitutions.⁵ In addition, the Committee has in a later communication, clearly stated that: “*article 26 comprises (also) discrimination based on sexual orientation.*”⁶

11. The Working Group noted General Comment No. 14 (2000)⁷ of the Committee on Economic, Social and Cultural Rights in the Egypt case. In its discussion of “non-discrimination and equal treatment” of article 2, paragraph 2 of the ICESCR (which is similar to that of the article 2 of the International Covenant on Civil and Political Rights), General Comment 14 stated that the article proscribes any discrimination, including that based on “*sexual orientation.*” It also bears noting that the Committee on Economic, Social and Cultural Rights has later named “*sexual orientation*” as a prohibited category of discrimination in its later General Comment 15 (2002) as well.⁸

Toonen v. Australia, April 4, 1994

⁵ Concluding Observation: Namibia, CCPR/CO/81/NAM, July 30, 2004

22. The Committee notes the absence of anti-discrimination measures for sexual minorities, such as homosexuals (arts. 17 and 26).

The State party should consider, while enacting anti-discrimination legislation, introducing the prohibition of discrimination on grounds of sexual orientation.

Concluding Observations: Egypt, CCPR/CO/76/EGY, November 28, 2002

19. The Committee notes the criminalization of some behaviours such as those characterized as “debauchery” (articles 17 and 26 of the Covenant).

The State party should ensure that articles 17 and 26 of the Covenant are strictly upheld, and should refrain from penalizing private sexual relations between consenting adults.

Concluding Observations: Lesotho, CCPR/C/79/Add.106, April 8, 1999

13. The Committee notes with concern that a sexual relationship between consenting adult partners of the same sex is punishable under law.

The Committee recommends that the State party amend the law in this respect.

⁶ Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, *Mr. Edward Young v Australia*, September 18, 2003

⁷ General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, August 11, 2000: “Special Topics of Broad Application”

12. The Working Group in the Egypt case recalled a Concluding Observations on Kyrgyzstan from the Committee on the Elimination of Discrimination against Women (CEDAW). In this observation, the CEDAW Committee elucidated as follows: “*The Committee is concerned that lesbianism is classified as a sexual offence in the Penal Code, and accordingly, recommends that lesbianism be re-conceptualised as a sexual orientation and that penalties for its practice be abolished.*”⁹ This repudiation of laws criminalizing consensual same sex relations is an observation that is increasingly being made by UN treaty bodies.¹⁰

13. The Working Group in the Egypt case also cited the “Guidelines on International Protection: gender-related persecution within the context of article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees” (2002),¹¹ produced by the Office of the United Nations High Commissioner for Refugees (UNHCR). Under the heading “Persecution on account of one’s sexual orientation,” it stated that: “*Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.*” This guideline clearly evinces a strong statement of principle against discrimination based on sexual orientation and illustrates that the vindication of this principle is not to be detained by peculiar societal considerations.

⁸ General Comment No 15: The Right to Water (arts 11 and 12), E/C.12/2002/11, January 20, 2002

⁹ A/5438

¹⁰ Supra n 5

¹¹ HCR/GIP/02/01

14. In light of the foregoing approaches, the Working Group in the Egypt case was of the opinion that the detention of the men constituted an arbitrary deprivation of liberty and was in contravention of the provisions of article 2 (1) of the UDHR and articles 2(1) and 26 of the ICCPR, of which Egypt was a party. Consequently, the Working Group requested that the Egyptian Government (a) take the necessary steps to remedy the situation by bringing it into conformity with the standards and principles set forth in the UDHR and the ICCPR and (b) consider the possibility of amending its legislation to bring it into line with the Universal Declaration of Human Rights and other relevant international instruments to which it is a party.

15. Considering the previous approach taking by the Working Group on Arbitrary Detention in line with the UN human rights jurisprudence, the issue for consideration must now be whether detention pursuant on Cameroon laws which criminalize consensual, homosexual relations between adults constitute an “arbitrary” deprivation of liberty.

16. In its observations in *Nicholas Toonen v. Australia*, the Human Rights Committee recalled that “*pursuant to its General Comment 16 on article 17(ICCPR), the ‘introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances.’*” On the issue of the right to privacy and article 17 of the ICCPR, the Human Rights Committee interpreted the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case. The Committee did not accept that criminalization of homosexual practices could be considered a

reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS. In addition, they clearly indicated that for the purposes of article 17 of the Covenant, it was incorrect for States to argue, “*moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy.*”

17. Similarly, it is not a sustainable argument that the laws criminalizing adult consensual conduct are part of the moral peculiarities of Cameroon, as the government averred in their response. Criminalization of adult consensual homosexual relations has been found to violate the right to privacy and offend the principle of equality before the law and non-discrimination in international human rights law.¹²

18. The Universal Declaration of Human Rights provides in article 9 that “*no one shall be subjected to arbitrary arrest, detention or exile*”. Article 9(1) of the International Covenant on Civil and Political Rights also states that: “*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*”

19. The Working Group has developed three categories of deprivation of liberty that it considers to be arbitrary. It states its category II as follows:

“*When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human*

¹² Generally, *supra* n 4 and 5

Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights.”

20. The deprivation of the liberty of the eleven Cameroon men was founded on laws under the Cameroon Penal Code that violate the right to equality before the law and non discrimination, as well as the right to privacy (Articles 2 (1), 26 and 17 of the ICCPR). As a consequence, this falls within Category 11 of the Working Group stipulations against arbitrary detention.

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