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To the attention of the Special Rapporteur on the situation of human rights defenders

Dear Ms. Sekaggya:

The ICJ would like to call to your attention recent events in Malawi that pose severe threats to the human rights of people who are being targeted on the basis of their sexual orientation, as well as those who advocate on their behalf.

## *Factual Situation*

On 29 December 2009, two Malawian men, Tiwonge Chimbalanga and Steven Monjeza, were arrested by Blantyre Police after becoming publicly engaged in a traditional ceremony in Chirimba Township outside the city of Blantyre.<sup>1</sup> They have been charged with gross public indecency and unnatural offences and are being held at Chichiri Prison pending trial. The state prosecutor has applied for an order to force the two to undergo anal examinations to prove that they have had sex with each other.<sup>2</sup> Section 153 of the Penal Code of Malawi defines "unnatural offences" as "permitting a male person to have carnal knowledge against the order of nature" and imposes a maximum sentence of fourteen years in prison. Section 156 punishes gross indecency with a prison term of up to five years in prison.<sup>3</sup>

In addition, on 4 January 2010, police raided the offices of the Centre for the Development of People (CEDEP) and arrested Dunker Kamba, an HIV/AIDS activist. He has been charged with possession of pornographic material. The executive director of CEDEP, Gift Trapence, has stated that

<sup>1</sup> "Police Arrest Gay Lovebirds," The Daily Times, 29 December 2009.

<sup>2</sup> Sources: "Married Malawian gay couple face test to prove they had sexual relations," The Guardian, 1 January 2010; "Malawi 'gay wedding' couple deny indecency charges," BBC, 30 December 2009; "Amnesty International calls for the unconditional release of gay couple," Amnesty International Public Statement, 6 January 2010; "Malawi gay wedding couple denied bail for 'own protection,'" The Guardian, 4 January 2010; "Malawi gay wedding couple lose bail appeal," BBC, 4 January 2010.

<sup>3</sup> Daniel Ottosson, *State-Sponsored Homophobia* (ILGA May 2009) at 27.

he will voluntarily report to police. CEDEP is a non-governmental organization that advocates for sexual minorities and people with HIV/AIDS. CEDEP had been active in protesting the arrests of Mr. Chimbanga and Mr. Monjeza and Mr. Trapence had been frequently quoted in news reports.<sup>4</sup>

## ***Legal Background***

### *Arbitrary Detention*

The ICJ believes that the arrest and continued detention of Mr. Chimbanga and Mr. Monjeza are arbitrary and thus contrary to international law. The criminalization of consensual same-sex sexual activity violates Articles 17 and 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Malawi is a party.<sup>5</sup> In the case of 11 persons detained in Cameroon under a law that criminalized same sex conduct, the Working Group on Arbitrary Detention concluded that their detention was arbitrary and contravened Articles 17 and 26 of the ICCPR.<sup>6</sup> The Working Group reached a similar conclusion in the case of 55 men arrested in Cairo, Egypt in 2001.<sup>7</sup>

### *Torture*

The ICJ further believes that any forced forensic anal examinations would be a form of torture or cruel, inhuman and degrading treatment and punishment under Article 7 of the ICCPR and Articles 1 and 2 of the Convention Against Torture, to which Malawi is a party. Both the Committee against Torture and the Special Rapporteur on torture have repeatedly expressed concern about the mistreatment of “sexual minorities.”<sup>8</sup> In its Concluding Observations on Egypt in 2002, the Committee against Torture expressed concern about the “ill-treatment inflicted on men because of their real or alleged homosexuality” and recommended that Egypt take steps to “prevent all degrading treatment during body searches.”<sup>9</sup> In his 2001 report, the Special Rapporteur on Torture listed as an example of cruel, inhuman and degrading treatment the practice of subjecting persons “suspected of homosexuality” to “compulsory, intrusive and degrading medical examinations of anus and penis in order to determine whether penetration had taken place.”<sup>10</sup>

### *Freedom of Association and Expression*

In addition, the ICJ is very concerned about the raid on the offices of CEDEP and the arrest of and charges against Mr. Kamba. Both the raid and the arrest appear to be in retaliation for CEDEP’s public defence of Mr. Chimbanga and Mr. Monjeza. They thus threaten to undermine the rights to freedom of association and freedom of expression, which are guaranteed by Articles 19 and 22 of the ICCPR. The raid of CEDEP and the arrest of Mr. Kamba have a chilling effect on all human rights defenders in Malawi and especially those who advocate on behalf of LGBT individuals.

Experts mandated by the UN Human Rights Council under the Special Procedures system have made clear that the rights to freedom of association and freedom of opinion and expression are rights held by everyone, regardless of sexual orientation or gender identity.<sup>11</sup> The Special Representative of the

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<sup>4</sup> See [www.cedepmalawi.org/index.html](http://www.cedepmalawi.org/index.html).

<sup>5</sup> *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992.

<sup>6</sup> Opinion No. 22/2006 (Cameroon), adopted 31 August 2006, UN Doc. A/HRC/4/40/Add.1 at 91.

<sup>7</sup> Opinion No. 7/2002 (Egypt), adopted 21 June 2002, UN Doc. E/CN.4/2003/8/Add.1 at 68.

<sup>8</sup> See, e.g., *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. E/CN.4/2002/76, Annex III.

<sup>9</sup> Concluding Observations (Egypt), adopted 23 December 2002, UN Doc. CAT/C/CR/29/4.

<sup>10</sup> *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, interim report*, UN Doc. A/56/156, 3 July 2001, at para. 24.

<sup>11</sup> In numerous reports, the Special Representative of the Secretary-General on the situation of human rights defenders has expressed concern about attacks on defenders who are defending the rights of LGBTI persons. See International

Secretary-General on the situation of human rights defenders, Hina Jilani, commenting on draft legislation in Nigeria that introduced penalties for public advocacy or associations supporting the rights of lesbians and gay people, said: “In particular, serious concern is expressed in view of the restriction such law would place on freedoms of expression and association of human rights defenders and members of civil society, when advocating the rights of gays and lesbians.”<sup>12</sup> In his report on the visit to Colombia, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, wrote that “all citizens, regardless of, inter alia, their sexual orientation, have the right to express themselves, and to seek, receive and impart information.”<sup>13</sup>

### *Health*

The charge of possession of pornographic against Mr. Kamba for the possession of AIDS/HIV educational materials clearly impacts the right to health, which is guaranteed by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Malawi is a party. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted the connection between widespread access to information and an effective response to HIV/AIDS. He has called on “Governments to disseminate information addressing all HIV/AIDS-related issues, its modes of transmission and the means of protection. In particular, information on topics that may be considered as taboo or private – such as safe sex or drug use – should be explicit and made available in formats adapted and accessible to the society.”<sup>14</sup>

### *Conclusion*

The ICJ recalls that in factually similar situations the UN Special Procedures have taken urgent action. In the case of the men arrested in Egypt in 2001, where it was alleged that they were subjected to anal forensic medical examinations, the Special Rapporteur on torture sent an urgent appeal.<sup>15</sup> When members of the Blue Diamond Society, a non-governmental organization in Nepal working with sexual minorities and on sexual health issues, were arrested after the organization had filed a complaint of police abuse, a joint urgent appeal was sent by a number of special procedures, including the Special Rapporteur on freedom of opinion and expression, the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, the Special Representative of the Secretary-General on human rights defenders, and the Special Rapporteur on torture.<sup>16</sup>

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Commission of Jurists, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System* (2007) at 55-86.

<sup>12</sup> *Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, Addendum: Summary of cases transmitted to Governments and replies received*, U.N. Doc. A/HRC/4/37/Add.1, 27 March 2007, para. 511.

<sup>13</sup> *Report of the Special Rapporteur on the right to freedom of opinion and expression, Ambeyi Ligabo – Addendum Mission to Colombia*, UN Doc. E/CN.4/2005/64/Add.3, of 26 November 2004, paras. 75 and 76. See also *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Abid Hussain, submitted in accordance with Commission resolution 2000/38*, UN Doc. E/CN.4/2001/64, of 13 February 2001, para. 176 (transmitting urgent appeal to Kuwait where three individuals were sentenced to prison terms for writings “that were said to cause harm to religion and to morality since they mentioned lesbian relationships”). For further examples, see *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System* (ICJ 2007).

<sup>14</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo*, A/HRC/7/14, 28 February 2008, at para. 59.

<sup>15</sup> *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, E/CN.4/2002/76/Add.1, 14 March 2002, at para. 507.

<sup>16</sup> *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, E/CN.4/2005/51/Add.1, 2 February 2005, at para. 50.

Because of the imminent risk that Mr. Chimbalanga and Mr. Monjeza will be subjected to forced anal examinations, in violation of their right to be free from torture and other cruel, inhuman or degrading treatment or punishment, the ICJ respectfully requests that you consider sending an urgent appeal to the Government of Malawi expressing your grave concern about the arrests and continued detention of these two men. In addition, the ICJ requests that you raise the issue of the raid on the offices of CEDEP and the arrest of Mr. Kamba in communications with the Government of Malawi and that you remind the Government of Malawi of its obligations under international law and standards, including the ICCPR, the ICESCR, and the Convention against Torture.

Yours sincerely,



Jan Borgen  
Director

International Law & Protection Programme

**CC: Please note that this letter has also been sent to the Working Group on Arbitrary Detention, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.**