

24 October 2017

Tanzania: ICJ condemns the arbitrary detention of lawyers and human rights defenders

Today the ICJ expressed its grave concern at the arrest and arbitrary detention of 13 Tanzanian human rights defenders and lawyers on charges that are incompatible with international legal obligations binding on Tanzania. The ICJ has called for their immediate release.

On 17 October 2017 13 human rights defenders, some of whom are lawyers, were arrested and detained in Tanzania after participating in a legal consultation aimed at considering legal challenges to the Tanzanian government's ban on drop-in centres serving people at risk of HIV and a ban on the importation of water-based lubricants that are an essential HIV prevention tool.

Those 13 human rights defenders are all affiliated with the Initiative for Strategic Litigation in Southern Africa (ISLA) and Tanzanian organisation Community Health Services and Advocacy (CHESA).

Though they have not been charged, they appear to be under investigation for promoting homosexuality and in terms of section 154 of the Penal Code, which prohibits having 'carnal knowledge of any person against the order of nature'.

To date 12 of the 13 remain in custody. After initially being granted bail by the Tanzanian police services, their bail was revoked without specified reason on 20 October 2017 and the 13 continue to face the real threat of criminal prosecution.

Instead of releasing the detained on bail, on 24 October the Tanzanian police services approached a Tanzanian court seeking an order granting them permission to perform 'medical tests' in the form of 'forced anal tests'.

The police sought to perform these tests on the nine men who remain in detention. These invasive and demeaning tests appear to have been aimed at obtaining evidence for their criminal prosecution for performing sexual acts with other men.

If carried out non-consensually such exams violate the prohibition against torture and cruel, inhuman or degrading treatment.

The 13 charged under archaic colonial-era criminal laws that prohibit 'carnal knowledge against the order of nature', and which criminalize consensual sexual conduct between consenting males a sentence of 'imprisonment for life and ... for a term of not less than thirty years', in contravention of international standards.

The laws, which are inherently abusive under any circumstance, do not even appear to be in any way applicable to the 13 persons who were meeting for purposes of HIV prevention and promoting the right to health and the right to life.

The ICJ is concerned that arrests have been undertaken in contravention of rights protected under the Tanzanian Constitution and international law, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights, treaties to which Tanzania is party.

The protected rights include freedom of expression, the right to liberty, including freedom from arbitrary deprivation of liberty and the right to equal protection of the law; and the right to non-discrimination.

If they are carried out, any 'forced anal tests' would violate the right to be free from torture and cruel, inhuman or degrading treatment or punishment.

In addition, the ICJ has previously denounced such tests as evidentially and medically worthless.

Tanzanian authorities also appear to be attempting to use this prosecution to clamp down on the activities of civil society organizations.

The registration of CHESA has been suspended in what appears to be an attempt to halt its operations.

This amounts to a violation of the right to freedom of association, which is protected by the Tanzanian Constitution, the African Charter and the International Covenant on Civil and Political Rights.

The ICJ urges the authorities to drop the charges against these 13 human rights defenders. Pending revocation or dismissal of the charges, the 12 remaining detainees should in any event be immediately released.

The ICJ condemns the attempts of the Tanzanian police services to perform forced anal tests on male detainees, which constitute ill-treatment under international law, and urges the authorities to immediately desist from this course of action.

Background

In 2016 UNAIDS estimated that Tanzania is home to as many as 1.6 million people living with HIV, with 66 000 new infections and as many 41 000 AIDS-related deaths. Tanzania is under an obligation to take effective measures to address this scourge, which has had catastrophic consequences for the rights to life and health in Tanzania. The work of civil society and human rights defenders is a critical resource to that end.

The Tanzanian Constitution guarantees the 'freedom of opinion and expression' (Article 18(1)) and the right to equality of 'all human beings' (Article 12 (1)). The Constitution makes no distinction between human beings based on sexual orientation and is clear that 'every person is entitled to recognition and respect for his dignity' (Article 18(2)).

It is in this context that the ICJ has joined the Initiative for ISLA and CHESA in condemning the arrest and continued detention of the 13 as 'amount[ing] to arbitrary detention'. The arbitrary detention amounts to a violation of its international obligations under the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples Rights (ACHPR).

These instruments also protect other rights of concern in respect of the situation of the detainees, including the rights to freedom of expression equal protection of the law, freedom from torture and cruel, inhuman or degrading treatment, freedom of association and the requirement that all rights be protected without discrimination, particular on status-grounds such as sexual orientation.

As a general rule persons whose trials are pending should be granted bail unless there are exceptional circumstances such as a threat to the public or a serious risk that such persons will attempt to evade prosecution by fleeing from the jurisdiction of a particular prosecuting authority.

Furthermore the ICJ notes that Tanzania is a party to the International Covenant on Economic Social and Cultural Rights which imposes a duty on all agents of government to respect, protect and fulfil the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (Article 12 (1)). The right to health is also protected by Article 16 of the ACHRPR.

Finally, The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the UN General Assembly in 1998, affirms the obligation of States not to respect and protect human rights defenders 'effectively under national law' even when they 'oppose[] ... through peaceful means, activities and acts ... attributable to states that result in violations of human rights and fundamental freedoms'.

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