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By Facsimile

His Excellency Dr. John Pombe Joseph Magufuli
President of the United Republic of Tanzania
c/o Embassy of the United Republic of Tanzania
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Your Excellency:

I write on behalf of the New York City Bar Association (the “Association”) to express our grave concern regarding the treatment of lesbian, gay and bisexual individuals, and other gender and sexual minorities in Tanzania. We urge you to make institutional reforms to ensure that the Tanzania Penal Code reflects the rights of all citizens, consistent with Tanzania’s Constitution and the international agreements to which Tanzania is a signatory, and to ensure that government officials’ actions are consistent with such reforms.

The Association is an independent non-governmental organization with more than 24,000 members in over 50 countries. Founded in 1870, the Association has a long history of dedication to human rights. This history includes engagement in Africa through its Committee on African Affairs, which closely monitors and responds to legal developments in Africa, and its Committee on International Human Rights, which investigates and reports on human rights conditions around the world. In addition, the Association’s Cyrus R. Vance Center for International Justice advances global justice by engaging lawyers across borders to support civil society and an ethically active legal profession.

Our concerns begin with provisions of Tanzania’s Penal Code criminalizing homosexual acts, and are intensified by recent events, including attacks by government officials against sexual minorities, their supporters and human rights workers, as well as the shuttering of vital health service centers providing treatment for AIDS.

Section 157 of the Tanzania Penal Code states:

Any male person who, whether in public or private, commits any act of gross indecency with another male person ... is guilty of an offence and is liable to imprisonment for five years.¹

This hold-over of British colonialism² should be repealed in light of the fundamental rights guarantees in the Tanzania Constitution and the African Charter on Human and Peoples' Rights.

Tanzania's Constitution provides that "the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring. . .that human dignity and other human rights are respected and cherished. . .[and] that all forms of injustice, intimidation, discrimination, corruptions, oppression or favouritism are eradicated."³

Section 157 of the Tanzania Penal Code is also inconsistent with the African Charter on Human and Peoples' Rights, which has been signed and ratified by Tanzania.⁴ The African Charter prohibits discrimination of any kind against individuals, guarantees equal protection of the law, guarantees respect for life and integrity of the person, and prohibits torture and other cruel, inhuman or degrading treatment.

In 2014, the African Commission on Human and Peoples' Rights—the principal body responsible for the protection and promotion of human rights in the 55 member states of the African Union, including Tanzania—adopted Resolution 275 ("Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity"). Resolution 275 confirms that acts of violence and discrimination against individuals based on sexual orientation or identity constitute violations of member states' obligations under the African Charter.

In the Resolution, the Commission expressed alarm at "acts of violence, discrimination and other human rights violations. . . committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity."⁵ The Resolution condemned these acts of violence and human rights abuses by state and non-state actors, and urged African Union member states to (a) end all acts of violence and abuse, including by enacting laws prohibiting

¹ Tanzania Penal Code, chapter XV, section 157.

² See Human Rights Watch, *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism*, December 17, 2008, available at <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>, noting that "the Queensland Penal Code spread across Africa indifferently to the will of Africans."

³ Constitution of the United Republic of Tanzania of 1977, ch. 1, part II, section 9.

⁴ The African Charter on Human and Peoples' Rights was signed by Tanzania on May 31, 1982 and ratified on February 18, 1984.

⁵ The Commission notes that these acts include "'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detention, extra-judicial killings and executions, forced disappearances, extortion and blackmail." *Id.*

such violence and abuse, (b) investigate and prosecute such acts, and (c) establish judicial mechanisms to aid victims. The Commission highlighted for particular concern violence and human rights abuses “targeting human rights defenders and civil society organizations working on issues of sexual orientation or gender identity in Africa.” Resolution 275 calls on states “to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities.”

Despite the mandates of Tanzania’s Constitution and international human rights law, several prominent Tanzanian government officials have taken or threatened action against sexual minorities and their allies. Home Affairs Minister Mwigulu Nchemba threatened to arrest citizens and ban foreigners who campaign for gay rights.⁶ Justice Minister Harrison Mwakyembe announced plans to suspend the registration of charities and NGOs that “support homosexuality.”⁷ Paul Makonda, regional commissioner for Dar es Salaam, publicized his “crackdown” on gays and his intention to use social media platforms, including Facebook and Instagram, to identify and arrest individuals suspected of being gay.⁸ Furthermore, the Home Affairs and Justice Ministers have taken actions that not only harass citizens, but also deprive them of necessary services. For example, in February 2017, “authorities shut down 40 private health centers that were providing treatment for AIDS patients.”⁹

We are also troubled by the recent detention and mistreatment of South African human rights lawyer, Sibongile Ndashe and two of her colleagues, who were in Tanzania at the invitation of Community Health and Education Advocacy, a Tanzanian organization, to consider legal protections for drop-in centers offering HIV/AIDS services. The South African human rights defenders were granted then denied bail, and “threatened with forced anal exams, a form of torture with no basis in science that is nonetheless sometimes used by authorities in Tanzania and elsewhere to ‘prove’ homosexuality.”¹⁰ These actions are among those expressly condemned by Resolution 275. They encourage the stigmatization of a vulnerable population and violate the government’s constitutional and international commitments to uphold human dignity and human rights.¹¹

⁶ Connor Gaffey, *Gay in Africa: “Even Cows” Disapprove of Homosexuality, says Tanzania Amid Crackdown*, NEWSWEEK, June 27, 2017, available at <http://www.newsweek.com/gay-africa-tanzania-john-magufuli-629333>.

⁷ Sophie Tremblay, *‘Seeds of Hate’ Sown as Tanzania Starts LGBT Crackdown*, THE GUARDIAN, August 6, 2016, available at <https://www.theguardian.com/world/2016/aug/08/seeds-of-hate-sown-as-tanzania-starts-lgbt-crackdown>.

⁸ *Id.*

⁹ Gaffey, *supra* 5.

¹⁰ Robbie Corey-Boulet, *With Raid on Lawyers, Tanzania Takes Anti-Gay Fight Beyond Its Borders*, WORLD POLITICS REVIEW, November 2, 2017, available at <https://www.worldpoliticsreview.com/trend-lines/23510/with-raid-on-lawyers-tanzania-takes-anti-gay-fight-beyond-its-borders>.

¹¹ Indeed, it may be worth noting that scientific studies have demonstrated a genetic component to sexual orientation and identity. See Alan R. Sanders et al., *Genome-Wide Association Study of Male Sexual Orientation*, December 7, 2017, available at <http://www.nature.com/articles/s41598-017-15736-4>. See also Siddhartha Mukherjee, *The Gene: An Intimate History*, 2016, pp. 371-77 (reporting that “[A] piece of DNA associated with sexual orientation could be physically mapped to the human genome.... Somewhere near [chromosome] Xq28... was a gene that determined male

We do not dispute that the state has an interest in maintaining a healthy population and preventing sexually transmitted diseases. The state should strive for that goal, though, not through intimidation, but by treating everyone equally and with dignity. Education and comprehensive health services are effective ways of preventing and treating all diseases.

The Association respectfully urges the Tanzanian government to cease all human rights violations by State actors against sexual and gender minorities and their allies, and to allow the work of human right defenders and service organizations supporting these vulnerable populations to proceed in an open environment, free of harassment or other hindrances. The Association further urges the Tanzanian government to repeal Section 157 of the Tanzania Penal Code, and to enact necessary reforms consistent with the fundamental rights guaranteed by the Tanzania Constitution and the African Charter on Human and People's Rights.

Respectfully,



John S. Kiernan

Cc:

H.E. Dr. Ali Mohamed Shein
President of Zanzibar

H.E. Kassim Majaliwa Majaliwa
Prime Minister of the United Republic of Tanzania

Hon. Dr. Hamis Andrea Kigwangalla
Deputy Minister of Health, Community Development, Gender, Elders and Children

H.E. Ambassador Wilson Mutagaywa Masilingi
Ambassador of the United Republic of Tanzania to the United States

Honorable Commissioner Zeid bin Ra'ad Zeid Al-Hussein
High Commissioner of the UN Commission of Human Rights
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais des Nations

The Honorable John J. Sullivan
Acting U.S. Secretary of State
Department of State

sexual identity.”). Thus, rather than going “against the order of nature” (*see* Tanzania Penal Code chapter XV, section 154(1)(a)), expression of one’s biological sexual identity can be seen as just one (albeit the prevailing variant) of nature’s genetic variations.

Ambassador Nikki Haley
U.S. Permanent Representative to the U.N.

Rep. Ed Royce
Chair, Foreign Affairs Committee

Rep. Eliot Engel
Ranking Member, Foreign Affairs Committee

Rep. Christopher Smith
Chair, Africa, Global Health, Global Human Rights, and International Organizations
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Senator Jeff Flake
Chair, Subcommittee on Africa and Global Health Policy, Foreign Relations

Senator Cory A. Booker
Ranking Member, Subcommittee on Africa and Global Policy, Foreign Relations

H.E. Moussa Faki Mahamat
Chair of the African Union Commission

Honorable Faith Pansy Tlakula
Chairperson of the African Commission on Human and Peoples' Rights