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## **EU Court ruling a setback for refugees**

The Court of Justice of the European Union (CJEU) today declined to hold that the criminalization of consensual same-sex activity constitutes “persecution” for the purposes of EU asylum law, showing it is out of step with international human rights and refugee law, Amnesty International and the International Commission of Jurists said.

In *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* the Luxembourg-based CJEU considered three joined cases arising from asylum requests lodged in the Netherlands by nationals of Senegal, Sierra Leone and Uganda. The three men claimed that they have a well-founded fear of persecution based on their – undisputed – same-sex sexual orientation and the fact that sex between men is criminalized in their home countries.

“The Court skirted around the real issue in this case and missed a key opportunity to state clearly that to criminalize consensual same-sex conduct ultimately amounts to criminalising people for who they are and, therefore, amounts to persecution per se, regardless of how often sentences of imprisonment are enforced,” said Sherif Elsayed-Ali, Amnesty International's Head of Refugee and Migrants' Rights.

A key question facing the Court was whether “the criminalization of homosexual activities and the threat of imprisonment” for the same constitute “persecution” under EU asylum law.

The Court did affirm that the prosecution and imprisonment of a person for such conduct would constitute persecution.

According to the two organizations, the mere existence of laws that criminalize consensual same-sex sexual activities – and which thus effectively criminalize individuals for their sexual orientation and who they are – also runs contrary to international human rights law and jurisprudence, as well as a growing raft of national court decisions.

“The Court should have found that these laws, even when they have not recently been applied in practice are capable of giving rise to a well-founded fear of persecution in lesbian, gay, bisexual transgender and intersex (LGBTI) people, and who accordingly should be recognised as refugees when they apply for asylum,” said Livio Zilli, Senior Legal Adviser at the International Commission of Jurists.

Amnesty International has extensively documented how these laws provide state actors with the means to perpetrate human rights violations and contribute to an atmosphere of state-supported homophobia. They enable harassment and abuse, and deny LGBTI individuals – or those perceived to be LGBTI – effective state protection to which they are entitled under international human rights law.

Note to Editors:

In its request to the CJEU, the Dutch Council of State asked the Luxembourg-based CJEU to answer the following questions:

- 1) “Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d)” of the Qualification Directive?
- 2) “Which homosexual activities fall within the scope of the Directive”; “how should national authorities assess what constitutes persecution in this context” and “whether applicants for refugee status should be expected to conceal, or exercise restraint in expressing, their sexual orientation in their country of origin” in order to avoid persecution?
- 3) Do the criminalisation of same-sex sexual activity and the possibility of imprisonment upon conviction constitute persecution within the meaning of the Qualification Directive?

For additional information, see Observations by Amnesty International and the International Commission of Jurists on the case X, Y and Z v Minister voor Immigratie, Integratie en Asiel (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/Observations-by-AI-and-ICJ-on-X-Y-and-Z-CJEU-ref-2-OCT-2013-FINAL-with-index-number-and-logos.pdf>