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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

In the joined cases of *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*,¹ a preliminary ruling by the Court of Justice of the European Union (CJEU) is pending on a number of questions put to the Court by the *Raad van State* (Council of State) of the Netherlands.² The request for such a ruling arose from the asylum applications lodged in the Netherlands by three individuals, who are nationals of Sierra Leone, Uganda and Senegal, and are respectively referred to as X, Y and Z in the context of the proceedings before the CJEU in Luxembourg. Each of the three men maintains that he has a well-founded fear of persecution in his country of origin based on his – undisputed – same-sex sexual orientation³ and the fact that sex between men is criminalised in each of their home countries.⁴

¹ *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (Minister for Immigration, Integration and Asylum), Joined Cases C-199/12, C-200/12, C-201/12 (Directive 2004/83/EC – Conditions to be met by third country nationals or stateless persons claiming refugee status – Meaning of persecution – Sexual Orientation, the Qualification Directive), available at:

<http://curia.europa.eu/juris/documents.jsf?pro=&lgrec=en&nat=&oqp=&lg=&dates=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-199%252F12&td=ALL&pcs=0&avg=&page=1&mat=or&jge=&for=&cid=1450360>. (Last access 1 October).

² To ensure the effective and uniform application of EU legislation and to prevent divergent interpretations, the national courts of EU Member States may, and sometimes must, refer to the CJEU and ask it to clarify a point concerning the interpretation of EU law. The CJEU's reply takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The CJEU's judgment likewise binds other national courts before which the same problem is raised. It is thus through references for preliminary rulings that individuals can seek clarification of the European Union rules that affect them. See Court of Justice of the European Union, available at: http://curia.europa.eu/jcms/jcms/Jo2_7024/. (Last access 1 October).

³ See Opinion of Advocate General Sharpston in *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (C 199/12, C 200/12 and C 201/12), 11 July 2013, para. 18, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=139426&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1452296>. (Last access 1 October).

⁴ The Senegalese Penal Code criminalizes homosexual acts under Article 319(3) pursuant to which a person convicted of committing certain homosexual acts is to be sentenced to a term of imprisonment of between one and five years and a fine of between XOF (15) 100 000 and XOF 1 500 000 (approximately

The Dutch Council of State has asked the 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?⁵
- 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?⁶
- 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?⁷

On 11 July 2013 Advocate General Sharpston delivered her ‘Opinion’ in the case.⁸ Amnesty International and the International Commission of Jurists share her views in respect to questions 1) and 2) set out above. In brief, Advocate General Sharpston concluded that asylum applicants “who have a homosexual orientation may, depending on the circumstances in their country of origin, form a particular social group within the meaning of” relevant EU refugee law provisions.⁹ She did not consider “that an applicant for refugee status should be expected to conceal his sexual orientation in order to avoid persecution in his country of origin”.¹⁰

However, Amnesty International and the International Commission of Jurists do not share Advocate General Sharpston’s view concerning question 3). Advocate General Sharpston

EUR 150 to EUR 2000). In Sierra Leone homosexual acts are criminal offences under Section 61 of the Offences against the Person Act of 1861, and are subject to a minimum term of imprisonment of 10 years up to a maximum of life. In Uganda under Section 145 of the Penal Code Act 1950 a person found guilty of an offence described as “carnal knowledge against the order of nature” is subject to a term of imprisonment. The maximum penalty is life. See Opinion of Advocate General Sharpston, para. 15.

⁵ See Reference for a preliminary ruling from the Raad van State (Netherlands) lodged on 27 April 2012 - Minister voor Immigratie en Asiel v X (Case C-199/12), available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=124762&pageIndex=0&doclang=EN&m ode=req&dir=&occ=first&part=1&cid=1701493>. (Last access 1 October); Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304; “the Qualification Directive”) in Article 10(1)(d) states “a group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article”. See Qualification Directive, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>. (Last access 1 October).

⁶ See Opinion of Advocate General Sharpston, para. 62.

⁷ See Opinion of Advocate General Sharpston, para. 2.

⁸ “The Advocates General assist the Court. They are responsible for presenting, with complete impartiality and independence, an ‘opinion’ in the cases assigned to them.” See Court of Justice of the European Union, available at: http://curia.europa.eu/jcms/jcms/Jo2_7024/#composition. (Last access 1 October).

⁹ See Opinion of Advocate General Sharpston, paras. 36 and 77 (1). Indeed, the Qualification Directive itself, unlike the Refugee Convention, mentions sexual orientation in Article 10(1).

¹⁰ *Ibid*, para. 63.

concluded that “the criminalisation of homosexual acts does not *per se* constitute an act of persecution for the purposes of” relevant EU refugee law provisions.¹¹

In commenting on the criminalisation of same-sex sexual activity *per se* in her Opinion, Advocate General Sharpston stated that “[w]ithin the European Union, there has been a shift in approach in as much as legislation which criminalises and imposes sanctions for homosexual acts in private between consenting adults is now considered to be contrary to the [European Convention on Human Rights – ECHR]. It is plain therefore that across the Member States such measures would today constitute an infringement of an individual’s fundamental rights, whether they were actively applied or not.”¹² This was consistent with the submissions made to the CJEU on behalf of the applicants, namely that sexual orientation is a critical facet of human identity, and that laws that criminalise same-sex sexual activity have the effect of stigmatising certain sexual orientations or gender identities. They thus *per se* violate various provisions of EU law, including the human dignity provision in Article 1 of the EU Charter of Fundamental Rights. Laws that criminalise same-sex sexual activity – even when they are not enforced – have the effect of humiliating, debasing and dehumanising people who are, or are suspected of being, lesbian, gay, bisexual, transgender or intersex (LGBTI), causing serious psychological harm in turn.¹³ Such laws stigmatise individuals simply because of who they are

¹¹ See Opinion of Advocate General Sharpston, para. 77 (2). She further opined that “It is for the competent national authorities to assess, in the light of the circumstances pertaining in an applicant’s country of origin in relation, in particular, to:

- the risk and frequency of prosecution;
- in the event of successful prosecution, the severity of the sanction normally imposed; and
- any other measures and social practices to which the applicant may reasonably fear to be subjected, whether a particular applicant is likely to be subject either to acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of human rights, or to an accumulation of various measures, including violations of human rights, which is sufficiently severe similarly to affect the applicant.

(3) In assessing whether criminalisation of the expression of homosexuality as an expression of sexual orientation is an act of persecution within the meaning of Article 9(1) of the Directive, the competent authorities of a Member State must consider whether the applicant is likely to be subject to acts, or an accumulation of various measures, that are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights”, *ibid*, para. 77(2) and (3).

¹² See Opinion of Advocate General Sharpston, para. 41, footnote in the original omitted.

¹³ See, for example, South Africa- Constitutional Court, CCT 11/98, 9 October 1998, *The National Coalition for Gay and Lesbian Equality et al. v. The Minister of Justice et al.*, para. 28 (majority opinion) and para. 107 (concurring opinion Sachs J); “[28] ... The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity ...”

Hong Kong- Court of Appeal, Civil Appeal No. 317 of 2005, 20 September 2006, *Leung T C William Roy v. Secretary for Justice*, para. 29(2) and (4); “4. ... (3) As a result, the Applicant has suffered from distress and loneliness.... 29.... (2) Notwithstanding the fact that a prosecution is neither in existence nor in contemplation and there is no relevant decision which directly affects the Applicant, yet it is clear on the facts that he and many others like him have been seriously affected by the existence of the legislation under challenge. The facts outlined in paragraphs 2 and 4 above, uncontradicted by the Respondent, amply demonstrate this. It is fair to say that the Respondent has been living under a considerable cloud..... the maintenance in force of the impugned legislation constituted an interference with the applicant’s right to respect for his private life (which includes his sexual life) ... Even though the applicant has not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life: either he respected the law and refrained from engaging in

or what others may think of them, and in turn cause psychological damage, injury to self-esteem and social marginalisation.

As the jurisprudence of the European Court of Human Rights has recognised, the continuing existence of laws that criminalise consensual same-sex acts *per se* - even when not enforced - constitutes a violation of the right to privacy (Article 8, ECHR).¹⁴ Thus, even when they are not enforced, laws criminalising same-sex sexual activity are persecutory in their effect and lead to people being subjected to inhuman or degrading treatment because of their real or imputed sexual orientation or gender identity. In light of this and consistently with international refugee and human rights law and standards, as well as international and domestic jurisprudence, Amnesty International and the International Commission of Jurists consider that, even when they have not been recently enforced, when such laws provide the possibility of imprisonment upon conviction their mere existence gives rise to a real risk of persecution.¹⁵

Nevertheless, Advocate General Sharpston went on to state that “the goal of the [Qualification] Directive is not to grant protection whenever an individual cannot fully and effectively exercise the freedoms guaranteed by the Charter or the ECHR in his country of origin. [T]he aim is not to export those standards.”¹⁶

Amnesty International and the International Commission of Jurists note that legislation that criminalizes and imposes imprisonment upon conviction for same-sex sexual activity violates

any prohibited sexual acts prior to the age of 18 or he committed such acts and thereby became liable to criminal prosecution.”

India- High Court of Delhi at New Delhi, WP(C) No. 7455/2001, 2 July 2009, *Naz Foundation v. Government of NCT of Delhi and Others*, para.50; "50. The studies conducted in different parts of world including India show that the criminalisation of same-sex conduct has a negative impact on the lives of these people. Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination. There is extensive material placed on the record in the form of affidavits, authoritative reports by well known agencies and judgments that testify to a widespread use of Section 377 IPC to brutalise MSM and gay community. Some of the incidents illustrating the impact of criminalisation on homosexuality are earlier noted by us."

¹⁴ In its judgment in the case of *Norris v Ireland* (Application no. 10581/83), 26 October 1988, the European Court of Human Rights held "38.....It is true that, unlike Mr Dudgeon, Mr Norris was not the subject of any police investigation. However, the Court's finding in the Dudgeon case that there was an interference with the applicant's right to respect for his private life was not dependent upon this additional factor. As was held in that case, "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life ... within the meaning of Article 8 para. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life ..." See also *Modinos v. Cyprus* (no. 15070/89), 22 April 1993. In 1994, the UN Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, found that the laws in the Australian state of Tasmania, which provided for up to 21 years' imprisonment for men convicted of consensual private sexual activity, were a violation of Article 17, paragraph 1, and Article 2, paragraph 1, of the Covenant, despite the fact that these laws had not been enforced for a number of years. See Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Document CCPR/C/50/D/488/1992 (1994), available at: <http://www.unhcr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>. (Last access 1 October).

¹⁵ For example, in *Norris*, the European Court of Human Rights stated: "33. Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant's case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect (see paragraph 20 above). **A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to 'run the risk of being directly affected' by the legislation in question.**" (Emphasis added). See also *Dudgeon v. the United Kingdom* (Application no. 7525/76), 22 October 1981.

¹⁶ Opinion of Advocate General Sharpston, para. 41, footnote in the original omitted.

international human rights law and standards and is contrary to human dignity and equality as reflected in the EU Charter of Fundamental Rights¹⁷ and in the ECHR,¹⁸ among others. Individuals are entitled to enjoy those fundamental rights not just because they happen to be in the EU, since those rights are universal and inalienable and have been recognised at a global level in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, among other international instruments.

The fundamental rights that underpin the EU legal order are part of the inalienable human rights of every human being, which are also recognised by universal human rights instruments and those from other regions. Thus, laws that criminalize and impose imprisonment upon conviction for same-sex sexual activity are inconsistent with human rights law and standards and “constitute an infringement of an individual’s fundamental rights, whether they were actively applied or not”,¹⁹ and whether in the EU or elsewhere. National authorities in the EU, as much as the CJEU, ought to interpret EU refugee law consistently with the 1951 Refugee Convention and its 1967 Protocol (as mandated by EU law itself) and should thus ensure that refugees enjoy the protection to which they are entitled, including through the widest possible exercise of their human rights and freedoms in accordance with international standards.

In her comment on the Opinion of Advocate General Sharpston on the case, Karon Monaghan QC observed,²⁰ *inter alia*, that:

the impact of the laws in issue, even where apparently not enforced, must be confronted. Criminal laws, are connectedly both normative and punitive. They tell society what is acceptable and tell individuals what is not acceptable – they operate as a legal and social imperative not to do something, or, to be someone and license society to express its disapproval through stigmatisation, prejudice and discrimination. Laws criminalising homosexuality cause shame, damage to self-esteem, fear and psychological damage, and utterly eat away at a person’s human dignity, personality and therefore humanity, and may affect their enjoyment of State protection.

Amnesty International and the International Commission of Jurists have extensively documented how laws or regulations that directly or indirectly criminalise same-sex sexuality or conduct provide state actors with the means to perpetrate human rights violations, including through harassment, extortion and discriminatory “criminal” investigations, prosecutions, trials and imprisonment.²¹ In addition, in some countries, people who are, or who are perceived to be, LGBTI have been subjected to cruel, inhuman or degrading treatment by state actors.²²

¹⁷ See, in particular, Articles 1, 20 and 21 of the EU Charter of Fundamental Rights.

¹⁸ See, in particular, Articles 8, 13 and 14 of the ECHR, as well as Protocol No. 12 to the Convention.

¹⁹ Opinion of Advocate General Sharpston, para. 41.

²⁰ See Karon Monaghan QC’s ‘Case Comment: AG’s Opinion in *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (C-199/12, C-200/12 and C-201/12)’, 24 July 2013, available at <http://eutopialaw.com/2013/07/24/case-comment-ags-opinion-in-x-y-and-z-v-minister-voor-immigratie-integratie-en-asiel-c%E2%80%9119912-c%E2%80%9120012-and-c%E2%80%9120112/>. (Last access 1 October).

²¹ Joint written submissions in the case of *M.E. v Sweden*, Application no. 71398/12, before the European Court of Human Rights by the Fédération Internationale des Ligues des Droits de l’Homme, the International Commission of Jurists and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), as well as the written submissions of Amnesty International in the same case.

²² State actors have for example enforced anal exams on individuals suspected of same-sex sexual activity. See Amnesty International, ‘Making Love a Crime – Criminalisation of Same-Sex Conduct in Sub-Saharan Africa’, April 2013, available at: <http://www.amnesty.org/en/library/asset/AFR01/001/2013/en/9f2d91b7-bc0e-4ea7-adae-7e51ae0ce36f/afR010012013en.pdf>. (Last access 1 October). It is noteworthy that in her Opinion Advocate General Sharpston refers to the very same Amnesty International report. See footnote 21 of her Opinion; see also Amnesty International, ‘Republic of Cameroon, Make Human Rights a Reality’, January 2013, p. 31, available at: <http://www.amnesty.org/en/library/asset/AFR17/001/2013/en/384e1431-5fbb-4946-875e-78078329ee16/afR170012013en.pdf>. (Last access 1 October); Amnesty International, ‘Fighting for Justice and Human Rights: Egypt’s Women Activists tell of their Struggle’, March 2013, p.

Equally, these laws enable non-state actors to persecute with impunity LGBTI individuals, or people who are perceived to be LGBTI. Indeed, laws that criminalise same-sex sexual activity in some countries, even if infrequently or not at all enforced in recent years, contribute to an atmosphere of state-supported homophobia and serve as both the motivation and justification for harassment, extortion and physical abuse of LGBTI and/or other gender non-conforming individuals by non-state actors.²³

Overall, the existence of such laws works to deprive individuals who are, or are perceived to be, LGBTI of adequate protection from violence and discrimination, including police protection and judicial redress.²⁴ This in fact makes the provision of effective protection by state authorities extremely unlikely if not altogether impossible given that extending such protection would in turn be tantamount to aiding and abetting the perpetration of the very acts that such laws criminalise. Putting the same point another way: protection is neither effective nor available when laws criminalising consensual same-sex sexual relations or acts exist - even when they are not enforced - because the individuals who need protection would effectively be outing themselves to the authorities should they decide to seek protection from them.

Ultimately, the state cannot provide effective protection against its own state-approved persecution. In these circumstances it is unreasonable to expect that people should seek state protection against harm that that state itself commits, perpetuates or at the very least condones. In light of the above, and in the absence of compelling evidence to the contrary, Amnesty International and the International Commission of Jurists consider that any country where same-sex sexual activity is criminalised – even when the relevant criminal provisions have not been recently enforced – should be viewed as unable or unwilling to provide effective protection to individuals against persecution on the grounds of their real or perceived sexual orientation or gender identity.

Further, Amnesty International and the International Commission of Jurists consider that both the Dutch authorities and Advocate General Sharpston have not actually confronted the critical issue that is at the heart of this case. The CJEU is being asked to consider whether - just by virtue of their mere existence - laws that criminalise same-sex sexual activity or conduct and provide the possibility of imprisonment upon conviction, even when they have not recently been enforced, create, in and of themselves, a real risk that individuals will be exposed to persecution because of their real or imputed sexual orientation or gender identity.

For the reasons set out above, Amnesty International and the International Commission of Jurists consider that laws that criminalise same-sex sexual activity or conduct and provide the possibility of imprisonment upon conviction, even when they have not been enforced recently, meet the threshold of well-founded fear of persecution. As outlined above the organizations consider that these laws engender a range of human rights violations and persecution of LGBTI individuals by state and non-state actors that extend far beyond criminal prosecution and as such must be treated as a decisive factor irrespective of whether there is a record of recent prosecutions or even convictions in a country.

24, available at: <http://www.amnesty.org/en/library/asset/MDE12/011/2013/en/4b46a265-c3db-443d-b22a-a70e6d9fb0fd/mde120112013en.pdf>. (Last access 1 October); Amnesty International, 'Iraq: Civilians Under Fire', April 2010, p.21, available at: http://www.amnesty.org.uk/uploads/documents/doc_20327.pdf. (Last access 1 October); Amnesty International, 'Love, Hate and the Law Decriminalizing Homosexuality', July 2008, p. 8, available at: http://www.amnesty.nl/sites/default/files/public/love_hate_and_the_law.pdf. (Last access 1 October).

²³Amnesty International 'Making Love a Crime – Criminalisation of Same-Sex Conduct in Sub-Saharan Africa', pp. 11, 72; Amnesty International, 'Love, Hate and the Law Decriminalizing Homosexuality', p. 10, 12.

²⁴ See for example 'Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook', International Commission of Jurists, 2001, available at <http://www.icj.org/sogi-casebook-introduction/>. (Last access 1 October); 'Sexual orientation and gender identity in international human rights law: The ICJ UN compilation', 2013 Fifth updated edition, available at http://ici.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/SOGI-UN-Compil_electronic-version.pdf. (Last access 1 October).

Amnesty International and the International Commission of Jurists also maintain that the existence of such laws, including in countries where the relevant penal provisions have not been recently enforced, gives rise to a sufficiently real risk that such provisions may be enforced in the future. Thus their existence constitutes an ongoing, real risk of prospective persecution, meaning that the fear of the individuals concerned is well-founded, and thus in turn is capable, coupled with the other relevant elements, of meeting the definition of a refugee in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

Recent country examples demonstrate that a lack of implementation of domestic criminal law does not guarantee that enforcement of the relevant criminal provisions will not resume in future. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity.

For example, according to sections 155 and 157 of the Zambian Penal Code Act of 1995, Chapter 87, same-sex sexual activity is illegal in Zambia.²⁵ Until 2013 the law had however been largely unenforced.²⁶ In May 2013 police in Kapiri Mposhi arrested Phil Mubiana and James Mwansa, both aged 21, on charges of having sex “against the order of nature”.²⁷ The arrest of the two young men took place just weeks after a human rights activist was arrested in the capital, Lusaka, after he appeared on television supporting LGBTI rights.²⁸ The arrests appear to be a direct response to increasingly homophobic statements made by political and religious leaders since the election of President Michael Sata in September 2011.²⁹

Malawi is another example where an apparent practice of non-enforcement of criminal provisions has been abruptly reversed. In January 2010, Steven Monjeza and Tiwonge Chimbalanga were prosecuted for holding a wedding ceremony in December 2009. The two individuals were reportedly subjected to torture and other ill-treatment while in custody. They were later sentenced to 14 years’ hard labour for “gross indecency”,³⁰ though subsequently pardoned following engagement of the United Nations with the then Malawian president.³¹ Prior to this case, there had been no recent reports of prosecutions using the colonial era law banning same-sex sexual activity.³² Following the election of Joyce Banda in April 2012 to the Malawian Presidency, Justice Minister Ralph Kasambara reportedly stated that the enforcement of laws criminalising same-sex sexual conduct would be suspended, based on

²⁵ Immigration and Refugee Board of Canada, *Zambia: Treatment of homosexuals by society and government authorities; (2005 - July 2007)*, 10 October 2007, ZMB102571.E, available at: <http://www.refworld.org/docid/474e8957c.html>. (Last access 1 October).

²⁶ Open Society Initiative for Southern Africa, ‘Zambia’, available at: <http://www.osisa.org/countries/zambia>. (Last access 1 October).

²⁷ Amnesty International, ‘Zambia urged to release two men charged with same-sex sexual conduct’, 8 May 2013, available at: <http://www.amnesty.org/en/news/zambia-urged-release-two-men-charged-same-sex-sexual-conduct-2013-05-08>. (Last access 1 October).

²⁸ Amnesty International, ‘Two men on trial for unnatural sex ‘unnatural’’, 15 May 2013, available at: <http://www.amnesty.org/en/library/asset/AFR63/001/2013/en/0a96e1f9-469f-471f-bab3-d105e9b63e7e/af630012013en.pdf>. (Last access 1 October).

²⁹ Open Society Initiative for Southern Africa, ‘Zambia begins jailing gays’, 7 May 2013, available at: <http://www.osisa.org/rights-wrongs/zambia-begins-jailing-gays>. (Last access 1 October).

³⁰ Amnesty International, ‘Malawian couple sentenced to 14 years hard labour for ‘gross indecency’’, 20 May 2010, available at: <http://www.amnesty.org/en/news-and-updates/malawian-couple-sentenced-14-years-hard-labour-gross-indecency-2010-05-20>. (Last access 1 October).

³¹ UN News Centre, ‘In Malawi, Ban welcomes pardoning of gay couple’, 29 May 2010, available at: <http://www.un.org/apps/news/story.asp?NewsID=34859#.UyYmssjaKE8>. (Last access 1 October).

³² Pink News, ‘Amnesty International joins calls for release of gay Malawi couple’, 6 January 2010, available at: <http://www.pinknews.co.uk/2010/01/06/amnesty-international-joins-calls-for-release-of-gay-malawi-couple/>. (Last access 1 October).

concerns that Malawi's anti-gay laws may be unconstitutional.³³ At the end of 2012, however, he rescinded his instruction to suspend the arrests of gay people, after church leaders had criticised the decision.³⁴

In Zimbabwe, colonial era laws prohibiting same-sex sexual conduct were rarely used until 1998. However, against the backdrop of increasing homophobic statements by President Robert Mugabe, LGBTI people have been victims of growing persecution with police regularly arresting LGBTI activists on exaggerated charges.³⁵ In 2010 the police raided the offices of the organisation 'Gays and Lesbians of Zimbabwe' (GALZ) leading to the prosecution of staff member Ellen Chademana and visitor Ignatius Mhambi.³⁶

The current law that criminalises same-sex sexual activity in Uganda had not, until 2012, been used regularly to convict individuals.³⁷ However, this did not prevent the introduction in 2009 of a Parliamentary Bill – still pending – that seeks to increase the penalties for same-sex sexual activity as well as proposing imprisonment for individuals who do not report breaches of its provisions. The proposed penalties include life imprisonment, and the original draft bill even sought to introduce the death penalty in some cases. The lack of enforcement of the law prior to 2012 also in this case does not reflect the deeply hostile environment for LGBTI people in Uganda which has rapidly worsened in recent years, as evidenced by the violent murder of LGBTI activist David Kato in January 2011. Amnesty International has documented how state-endorsed homophobia in Uganda has led to students being expelled from schools, people being evicted from their homes, bars being raided and venues closed down.³⁸

In light of the above, national authorities and the CJEU ought to consider the mere existence of laws that criminalise same-sex sexual activity and that provide the possibility of imprisonment upon conviction as sufficient to render an individual's fear well-founded. Even without considering the broader societal effects (described above as persecutory) engendered and perpetuated by the mere existence of these laws, national authorities ought to conclude that the prospective risk of persecution through prosecution, conviction and imprisonment is real, i.e. well-founded, even in countries where the relevant criminal provisions have not been enforced in the recent past, because there is no bar to their enforcement resuming at any point in the future. In the circumstances, the fear of persecution is well-founded and the risk is real.

Amnesty International and the International Commission of Jurists consider that laws or regulations criminalising same-sex sexual activity and providing for imprisonment upon conviction disclose *per se* sufficiently cogent evidence to meet the threshold of well-foundedness of persecution in the sense of article 9(2) (b), (c) and (d) of the Directive where there is evidence of enforcement of such laws as well as in the sense of article (9)(2) (b) and (d) where there is no documentation of their having been recently enforced.³⁹

³³ Human Rights Watch, 'Malawi: Courageous Move to Suspend Anti-Gay Laws', 6 November 2012, available at: <http://www.hrw.org/news/2012/11/06/malawi-courageous-move-suspend-anti-gay-laws>. (Last access 1 October).

³⁴ The Independent, 'Malawi: Churches force U-turn on gay rights', 9 November 2012, available at: <http://www.independent.co.uk/news/world/africa/malawi-churches-force-uturn-on-gay-rights-8298527.html>. (Last access 1 October).

³⁵ BBC News, 'Homosexual and hated in Zimbabwe', 12 August 1998, available at: http://news.bbc.co.uk/1/hi/programmes/crossing_continents/143169.stm. (Last access 1 October).

³⁶ Human Rights Watch, 'Letter to UN Human Rights Defenders Special Rapporteur Regarding Raid and Prosecution of Defenders in Zimbabwe', 3 May 2010, available at: <http://www.hrw.org/news/2010/05/29/letter-special-procedures>. (Last access 1 October).

³⁷ Amnesty International 'Making Love a Crime – Criminalisation of Same-Sex Conduct in Sub-Saharan Africa', p. 19.

³⁸ *Ibid*, p. 20.

³⁹ Belgium- Council for Alien Law Litigation, no. 57.425, 7 March 2011, available at: <http://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-council-alien-law-litigation-7-march-2011-nr-57425#content>. (Last access 1 October); Germany- Administrative Court Neustadt a.d. W., 3 K 753/07, 8 September 2008, available at: <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-neustadt-adw-8-september-2008-3-k-75307nw>. (Last access 1

Further information

Laws that criminalise consensual same-sex sexual activity and non-normative gender identities violate a range of universally protected human rights, including the rights to human dignity, non-discrimination, equality before the law, privacy, freedom of expression, association and assembly, the highest attainable standard of health, freedom from torture and other cruel, inhuman or degrading treatment or punishment, and the right to life, and mental and physical integrity.⁴⁰

Further, even where laws criminalising same-sex sexual conduct have been repealed, societal prejudice, including on the part of law enforcement and other state officials, may be so entrenched as to generate a continued risk where the authorities fail to enforce protective laws. The absence of law criminalising same-sex sexual relations does not mean *per se* that a fear of persecution is not well-founded, since in such circumstances laws of general applications, such as public morality or public order laws, may also be enforced against LGBTI people in a persecutory way.

October); Italian Supreme Court (Corte Suprema di Cassazione) Ord. n. 15981/2012, 20 September 2012, available at: http://www.meltingpot.org/IMG/pdf/2012_Cass_15981-asilo.pdf. (Last access 1 October).

⁴⁰ Amnesty International 'Making Love a Crime – Criminalisation of Same-Sex Conduct in Sub-Saharan Africa', pp. 64-67, 72.