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Center for Human Rights

Nigeria v. Egbeda 57

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHORS:

Staff at the American Bar Association Center for Human Rights helped draft this report. The **American Bar Association** (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The **ABA Center for Human Rights** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries. It is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative.

Members of the **University of Virginia Law School's International Human Rights Clinic** helped draft this report. The Clinic provides students with the opportunity to gain first-hand experience in human rights advocacy, working in partnership with nongovernmental organizations, human rights practitioners, and law firms in the United States and abroad.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

The statements and analysis expressed have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and do not represent the position or policy of the American Bar Association. Furthermore, nothing in this report should be considered legal advice for specific cases. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



ABA Center for Human Rights staff who are members of the TrialWatch Experts Panel assigned these proceedings a grade of D:

The proceedings against 47 men arrested during a raid of the Kelly Ann Hotel in Nigeria violated international and regional non-discrimination guarantees. The men were arrested, detained, and prosecuted on the basis of their actual or imputed sexual orientation. Further, credible reports indicate that the authorities abused several defendants to coerce them into confessions, in violation of international and regional prohibitions on torture. At trial, the defendants were denied the right to be informed of the charges and to adequately prepare their defense, reflecting severe prosecutorial misconduct.

Because these violations have resulted in significant harm to the defendants, including but not limited to loss of employment, severance of family ties, and trauma, the proceedings have been assigned a “D” under the grading methodology described in the Annex.

From November 2019 to October 2020, the American Bar Association (ABA) Center for Human Rights monitored criminal proceedings against 47 individuals in Nigeria as part of the Clooney Foundation for Justice’s Trial Watch initiative. The accused were prosecuted for public displays of same sex affection under Nigeria’s Same Sex Marriage Prohibition Act (SSMPA) - the first prosecution under the SSMPA. While the case against the accused was ultimately struck out by the Federal High Court in Lagos, the proceedings breached international and regional human rights standards. In particular, the arrest, detention, and prosecution of the accused violated the right to non-discrimination and equality before the law, which encompasses discrimination based on actual or perceived sexual orientation. Meanwhile, several defendants reported in sworn affidavits that they had been physically abused by the authorities while in custody: the conduct alleged amounted to torture, in violation of the prohibition on torture. The prosecution also engaged in severe misconduct by pursuing the case without sufficient evidence and refusing to disclose key materials to the defense. The termination of the case notwithstanding, the accused have suffered significant harm as a result of the proceedings, including but not limited to trauma, loss of employment, loss of jobs, and severance of familial ties.

On August 26, 2018, police officers raided the Kelly Ann Hotel in Lagos, Nigeria based on an alleged tip-off that patrons were engaging in same sex activity. 57 men were arrested. On August 27, the Lagos State Police Commissioner presented the men to the media as part of a press conference on the arrests, after which videos purportedly “outing” the men went viral. The group was held in custody at various detention facilities for two days. On August 28, they were released on bail. That same day, the men were formally charged with offenses relating to participation in an unlawful society under the laws of Lagos State as well as with violating the SSMIPA provision on same sex displays of affection.

In September 2019, after the Lagos State Attorney General declined to pursue charges, the police (as permitted by Nigerian law) filed the same charge under the SSMIPA at the federal level. The trial of 47 men (10 accused were removed from the case for absconding) began in December 2019, comprising six hearings. The prosecution presented two witnesses - neither of whom connected any individual accused to the alleged offense - and repeatedly requested adjournments. The proceedings, which were halted in March due to the onset of the coronavirus pandemic, concluded in October with the Federal High Court in Lagos striking out the case.

At the pretrial stage, the authorities’ arrest of the 57 accused violated the right to liberty enshrined in the International Covenant on Civil and Political Rights (ICCPR) and African Charter. Under both treaties, arrests must be lawful: in compliance with domestic laws and procedures. Applicable Nigerian legislation permits the authorities to conduct arrests without warrants where there is reasonable suspicion that an offense has been perpetrated. In the present case, the accused reported that the police simply rounded up individuals at the Kelly Ann Hotel: drivers sitting in the parking lot, hotel guests emerging from their rooms because of the commotion, and visitors drinking at the bar. In falling afoul of domestic procedure, the arrest likewise fell afoul of lawfulness requirement of the ICCPR and African Charter.

Further, the arrests and ensuing detention of the men were arbitrary because they violated the right to non-discrimination. Under the ICCPR and African Charter, arrests and detention based on discriminatory grounds are arbitrary. The United Nations Human Rights Committee, charged with interpreting the ICCPR, has established that discrimination encompasses targeting on the grounds of sexual orientation. The African Commission, charged with interpreting the African Charter, has likewise indicated as much. In the present case, the hotel was raided due to an alleged tip-off that patrons were engaging in “same sex act[s].” The accused were subsequently prosecuted for having allegedly engaged in same sex displays of affection under the SSMIPA. As such, their arrests and detention were discriminatory and, correspondingly, arbitrary.

While in police custody, a number of the accused were subjected to torture and ill-treatment. In sworn affidavits, several defendants alleged that the police had abused them,

seemingly in order to obtain confessions. One man, for example, recounted being “brutalized” into signing a statement while two others recounted the police throwing tear gas canisters into their cell shortly prior to interrogating them. The conduct alleged, consistent with broader reports on the pervasiveness of torture in Nigerian detention facilities, violates the prohibition on torture and cruel, inhuman, or degrading treatment set forth in the ICCPR, African Charter, and Convention against Torture. The inaction of the authorities in investigating the accused’s allegations contravenes Nigeria’s obligations under these same treaties.

Once the trial began, violations persisted. The prosecution refused to disclose key documents to the defense, such as the investigation report compiled by the police, information on the alleged tip-off that motivated the raid, the list of prosecution witnesses, and descriptions of evidence that the prosecution planned to introduce at trial. Under the African Charter and ICCPR, the authorities are obligated to share such materials as part of the accused’s right to adequate facilities to prepare a defense. In the present case, the prosecution flouted repeated court orders that it conduct the requisite disclosure.

The accused’s ability to prepare a defense was further undermined by the vagueness of the charge sheet. The ICCPR and African Charter require that accused persons be informed of the nature of the charges against them, including the general facts alleged by the prosecution. The document charging the 47 accused, however, contained no details or individualized information as to the accused’s alleged violation of the SSMPA, instead charging the 47 *en masse* and providing just their names and the SSMPA provision at issue.

The prosecution’s conduct, described above, constituted a grave violation of prosecutorial ethics. In accordance with prosecutorial guidelines, prosecutors must decline to pursue a case when it becomes apparent that the evidence does not support the charges. In the present case, that the Lagos State Attorney General declined to pursue charges, that the prosecutor’s office was unable to present witnesses linking the accused to any criminal offense, that the prosecutor’s office refused disclosure, and that the prosecutor’s office continually requested adjournments indicates that the prosecution lacked the necessary proof to proceed with the case. Indeed, in October 2020 the Federal High Court in Lagos struck out the case for want of diligent prosecution.

The authorities additionally mistreated the accused by parading them before the media soon after their arrests, in what amounted to a forcible “outing”. Regardless of whether the defendants actually identify as LGBTQ, the authorities’ conduct in making public the defendants’ intimate lives violated their right to privacy. Under ICCPR standards, interference with privacy is only permissible where such intrusion both pursues a legitimate

aim and is necessary and proportionate. In the present case, the authorities' aim appears to have been to shame the accused. In any event, the havoc wreaked on the accused's lives is far greater than any possible law enforcement gains.

More broadly, the SSMPA violates the right to non-discrimination and equality before the law, as enshrined in the ICCPR and African Charter. In criminalizing displays of same sex affection as well as same sex marriage, the Act discriminates on the basis of sexual orientation. The UN Human Rights Committee has found the SSMPA to be in violation of the ICCPR for this very reason. The SSMPA further violates the ICCPR and African Charter because of its vagueness. The Act's proscription of "public show[s] of same sex amorous relationship directly or indirectly" is unclear, failing to explain what would constitute a "public show of same sex amorous relationship" or what would qualify as indirect and direct methods of such. This contravenes ICCPR and African Charter requirements that grounds for criminal liability be delineated with precision, so as to enable individuals to regulate their conduct accordingly.

While the charges have been struck out, the proceedings have severely impacted the lives of the men and their loved ones. The case aptly demonstrates how damaging the institution of criminal proceedings can be - even where proceedings end in dismissal. To ensure against future such harms and to comply with its international and regional obligations, Nigeria should repeal the SSMPA.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

Government and legal system

Nigeria has a federal system of government, including both federal and state judicial systems.¹ At the federal level, the Supreme Court is the highest appeals court and has limited original jurisdiction.² The second highest appeals court, the Court of Appeal, holds appellate jurisdiction³ and sits in the country's capital, Abuja. There are an additional 19 divisions of the Court of Appeal spread out throughout the country. One level down, the Federal High Court - based in Abuja but with divisions in each of Nigeria's 36 states - is primarily a court of original jurisdiction, hearing both criminal and civil matters.⁴ On the same level but within the State system are State High Courts, State Customary Courts of Appeal, and State Sharia Courts of Appeal, which operate pursuant to - respectively - English, customary, and Sharia law, reflecting the country's heritage and diversity.⁵ The Constitution establishes a High Court for all 36 states⁶ and Sharia Courts of Appeal and Customary Courts of Appeal as required.⁷ Abuja, its own entity outside the State system known as the Federal Capital Territory (FCT), has its own High Court, Customary Court of Appeal, and Sharia Court of Appeal.⁸ Below the State and FCT appellate courts are Magistrate Courts, Customary Courts, and Sharia Courts. The present case was initially brought before the Lagos Magistrate Court and then pursued at the federal level, before the Federal High Court's Lagos division.

LGBTQ+ Rights in Nigeria

Same sex acts between men are illegal under Nigeria's criminal code and potentially punishable with up to fourteen years in prison.⁹ In the twelve northern states that have implemented Sharia law, a conviction for same sex activity between men may be punished with execution by stoning.¹⁰

¹ Constitution of Nigeria, 1999, Part 1 and Article 6. Available at https://www.constituteproject.org/constitution/Nigeria_1999.pdf.

² Id. at Articles 230.1, 232.1, 2.

³ Id. at Articles 237.1, 240.

⁴ Id. at Articles 249.1, 251.1.

⁵ See id. at Articles 270.1-284.

⁶ Id. at Article 270.1.

⁷ Id. at Articles 275.1, 280.1.

⁸ Id. at Articles 255.1-269.

⁹ Criminal Code Act, Sections 214, 215, 217. Available at <http://lawsofnigeria.placng.org/laws/C38.pdf>.

¹⁰ Erasing 76 Crimes, "Anti-LGBT Laws: Nigeria." Available at <https://76crimes.com/anti-lgbt-laws-nigeria/>.

In January 2014, President Goodluck Jonathan signed the Same Sex Marriage (Prohibition) Act (SSMPA) into law.¹¹ The act “prohibits a marriage contract or civil union entered into between the persons of same sex,”¹² establishing a jail sentence of up to fourteen years for those who violate the provision.¹³ In addition to forbidding same sex marriages and civil unions, the SSMPA prohibits the “registration of gay clubs, societies, and organizations, their sustenance, processions and meetings.”¹⁴ The SSMPA further criminalizes “the public show of same sex amorous relationship directly or indirectly.”¹⁵ Those found guilty of “directly or indirectly” making a “public show of same sex amorous relationship” can be sentenced to up to ten years imprisonment.¹⁶ The same sentence applies to convictions for registering, operating, participating in, or supporting gay clubs, societies, and organizations.¹⁷

Since the SSMPA’s enactment, human rights organizations have documented an increase in harassment of the LGBTQ+ community.¹⁸ According to Amnesty International, “as soon as the law was passed, scores of people suspected of engaging in same-sex relationships were rounded up by the Nigerian police and the *hisbah* (Sharia police) on the streets, arrested at their homes and taken into custody.”¹⁹ In January 2014, for example, a police department in northern Nigeria reportedly compiled a list of 167 individuals to arrest “based on their perceived sexual identity.”²⁰

Human Rights Watch likewise documented an incident shortly after the passage of the SSMPA in which police officers raided an HIV awareness meeting in Abuja, charging the participants with “promoting homosexuality.” The group was detained for three weeks and apparently only released after paying a bribe to the police.²¹ One month following the SSMPA’s enactment, also in the Abuja area, “a group of approximately 50 people armed with machetes, clubs, whips, and metal wires dragged people from their homes and severely beat at least 14 men whom they suspected of being gay.”²²

¹¹ Same Sex Marriage (Prohibition) Act, 2013. Available at <https://www.refworld.org/pdfid/52f4d9cc4.pdf>.

¹² *Id.* at Explanatory Memorandum.

¹³ *Id.* at Article 5(1).

¹⁴ *Id.* at Article 4(1).

¹⁵ *Id.* at Article 4(2).

¹⁶ *Id.* at Article 5(2).

¹⁷ *Id.* at Articles 5(2), 5(3).

¹⁸ U.S. State Department, “2019 Country Report on Human Rights Practices: Nigeria”, 2020, pg. 39. Available at <https://www.state.gov/wp-content/uploads/2020/02/NIGERIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

¹⁹ Amnesty International, “Happening now: LGBT Nigerians Jailed After Passage of New Anti-Gay Law”, 2014. Available at <https://www.amnestyusa.org/happening-now-lgbt-nigerians-jailed-after-passage-of-new-anti-gay-law/>.

²⁰ *Id.*

²¹ Human Rights Watch, “Tell Me Where I Can Be Safe: the Impact of Nigeria’s Same Sex Marriage (Prohibition) Act”, October 20, 2016. Available at <https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act>.

²² *Id.*

Notably, as detailed by Human Rights Watch, the harassment of actual or perceived LGBTQ+ individuals in Nigeria has primarily consisted of violence, arbitrary arrest, and extortion - not prosecutions. In February 2020, for example, Reuters interviewed “five people who acknowledged having same-sex relationships [and] said that police in Lagos use that fear and the *threat* of the law to extort money from men.”²³

The present case was the first time anyone had been prosecuted under the SSMPA.

Arbitrary Arrest and Pretrial Detention

Concerns about arbitrary arrest and detention in Nigeria are widespread. In August 2019, the United Nations Human Rights Committee highlighted

allegations of arbitrary arrests by law enforcement agents... the arrest of a large number of women, without charge, for alleged links with Boko Haram by the military; lengthy pretrial detention and incommunicado detention, especially in cases involving suspected Boko Haram fighters; frequent denial of basic legal safeguards, such as the right to be informed of charges and the right to communicate with a lawyer or to notify family members; and a discretionary granting of bail (arts. 2, 9 and 14).²⁴

In its 2019 Country Report on Human Rights Practices in Nigeria, the U.S. State Department likewise cited the issue of arbitrary arrests, including arrests without a warrant.²⁵ According to the State Department, detainees are often held incommunicado without access to their lawyers or families.²⁶ Prison officials have reportedly requested bribes to facilitate access to visitors.²⁷

Under domestic law, arrested persons must be brought before a magistrate within 48 hours.²⁸ As documented by the U.S. State Department, the Nigerian authorities do not always comply with this requirement.²⁹ Even arrestees who are brought before a judge face extended pretrial detention, described by the State Department as a “serious problem.”³⁰ From 2011-2015, available data from Nigeria’s Bureau of Statistics showed that

²³ Reuters, “A Police Raid, Viral Videos, and the Broken Lives of Nigeria’s Gay Law Suspects”, February 24, 2020. Available at <https://www.reuters.com/article/uk-nigeria-lgbt-widerimage-idUKKCN20112J>. Emphasis added.

²⁴ Human Rights Committee, Concluding observations on Nigeria in the absence of its second periodic report, U.N. Doc. CCPR/C/NGA/CO/2, August 29, 2019, para. 36.

²⁵ U.S. State Department, “2019 Country Report on Human Rights Practices: Nigeria”, 2020, pgs. 10-12.

²⁶ *Id.* at pg. 11. See also Amnesty International, “Torture in Nigeria: In summary”, 2014. Available at <https://www.amnesty.org/download/Documents/4000/afr440052014en.pdf>.

²⁷ *Id.* at pg. 9.

²⁸ *Id.* at pg. 10.

²⁹ *Id.* at pg. 11.

³⁰ *Id.* at pg. 12.

more than 70 percent of the prison population consisted of pretrial detainees.³¹ 2019 produced similar numbers: data from the Nigerian Corrections Service showed that 68 percent of the prison population consisted of pretrial detainees, many of whom had already spent years in detention.³²

According to the U.S. State Department and the UN, conditions of detention generally fail to meet international standards. The former has characterized conditions in prisons and jails as “harsh and life threatening,”³³ with reports of “torture, gross overcrowding, food and water shortages, inadequate medical treatment, deliberate and incidental exposure to heat and sun, and infrastructure deficiencies that led to wholly inadequate sanitary conditions that could result in death.”³⁴ In its 2019 Concluding Observations the UN Human Rights Committee also expressed concern about “the poor conditions of detention in police cells, military detention facilities and other places of detention, in particular regarding overcrowding, sanitary conditions and access to medical care, food and water.”³⁵ Like the State Department, the Committee received reports of “torture, including for obtaining confessions.”³⁶ Amnesty International has echoed these allegations, stating that “[i]n order to obtain quick ‘confessions’ pending investigation, the so-called ‘holding charge’, officers often torture suspects and detain them in conditions that amount to ill treatment.”³⁷

Fair Trial Rights

The Nigerian judicial system has been criticized for failing to uphold fair trial rights. As documented by the U.S. State Department, authorities often do not respect the right to be promptly informed of the charges, the right to trial within a reasonable time, the right to be present at trial, the right to receive the counsel of an attorney of choice, the right to adequate time and facilities to prepare a defense, the right to call and examine witnesses, and the privilege against self-incrimination.³⁸ In the context of trials of Boko Haram suspects, Human Rights Watch has documented violations of many of these same rights.³⁹

³¹ Quartz Africa, “Up to three-quarters of the Nigerian prison population is serving time without being sentenced”, January 24, 2017. Available at <https://qz.com/africa/892498/up-to-three-quarters-of-nigerias-prison-population-is-serving-time-without-being-sentenced/>. See also Open Society Justice Initiative, “Improving Pretrial Justice in Nigeria”, February 2013. Available at <https://www.justiceinitiative.org/publications/fact-sheet-improving-pretrial-justice-nigeria>.

³² U.S. State Department, “2019 Country Report on Human Rights Practices: Nigeria”, 2020, pg. 12.

³³ *Id.* at pg. 1.

³⁴ *Id.* at pg. 8.

³⁵ Human Rights Committee, Concluding observations on Nigeria in the absence of its second periodic report, U.N. Doc. CCPR/C/NGA/CO/2, August 29, 2019, para. 34.

³⁶ *Id.* at para. 32.

³⁷ Amnesty International, “Torture in Nigeria: In summary”, 2014.

³⁸ U.S. State Department, “2019 Country Report on Human Rights Practices: Nigeria”, 2020, pg. 14.

³⁹ Human Rights Watch, “Flawed Trials of Boko Haram Suspects; Ensure Due Process, Victim Participation”, September 17, 2018. Available at <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects>.

According to the State Department, noncompliance with fair trial standards “frequently [stems from] a lack of capacity and resources.”⁴⁰ The United Nations Human Rights Committee has likewise linked fair trial issues to “a lack of resources and staff.”⁴¹

Judicial independence is also of concern. In its 2019 Concluding Observations on Nigeria, the UN Human Rights Committee remarked on “political influence and corruption in the judiciary.”⁴² According to the United Nations Office on Drugs and Crime, it is not uncommon for judges and prosecutors to receive bribes to, among other things, expedite proceedings and do away with fines.⁴³ As stated by Freedom House, “political interference [and] corruption ... remain important problems.”⁴⁴

B. CASE HISTORY

In the early hours of August 26, 2018, police officers in Lagos, Nigeria raided the Kelly Ann Hotel and arrested fifty seven men.

As stated by the Commissioner of Police, the men were arrested “upon information from resident of the area, that the aforementioned persons engaged themselves in same sex unlawful act within the scene of crime and upon which tip off, the police men swung into action and arrested them.”⁴⁵ According to defense counsel, the police did not obtain a warrant prior to conducting the arrests.

The accused recounted that police officers “indiscriminately” rounded up individuals whom they found in public areas of the hotel.⁴⁶ Some were attending a birthday party;⁴⁷ some were visiting the hotel bar;⁴⁸ some were hotel guests;⁴⁹ and some were drivers waiting in the parking lot before returning home the next morning.⁵⁰ People were arrested all over the hotel - in the bar, the club, the party room, the pool area, and the parking lot.⁵¹ One defendant, hearing noise, emerged from his hotel room only to be

⁴⁰ U.S. State Department, “2019 Country Report on Human Rights Practices: Nigeria”, 2020, pg. 14.

⁴¹ Human Rights Committee, Concluding observations on Nigeria in the absence of its second periodic report, U.N. Doc. CCPR/C/NGA/CO/2, August 29, 2019, para. 38.

⁴² *Id.*

⁴³ U.N. Office on Drugs and Crime, “Corruption in Nigeria: Patterns and Trends”, December 2019, pgs. 50-51. Available at https://www.unodc.org/documents/nigeria/Corruption_Survey_2019.pdf.

⁴⁴ Freedom House, “2020 Freedom in the World Report: Nigeria”, 2020. Available at <https://freedomhouse.org/country/nigeria/freedom-world/2020>.

⁴⁵ Commissioner of Police Remand Request, August 28, 2018.

⁴⁶ Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019, Defendants 1, 40, 47.

⁴⁷ Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019, Defendants 1, 3, 6, 7, 15, 17, 20, 21, 23, 25, 27, 42, 43, 44, 46, 47, 51, 55.

⁴⁸ *Id.* at Defendants 2, 11, 12, 13, 16, 24, 32, 34, 36, 37, 38, 39, 40, 54, 56.

⁴⁹ *Id.* at Defendants 4, 19, 28, 31.

⁵⁰ *Id.* at Defendants 8, 45.

⁵¹ Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019.

seized by the police.⁵² Women were also detained but quickly released: only men were taken to the police station.⁵³

Many of the accused stated that the police did not initially explain why they were being arrested. It was not until arriving at the Shasha Provincial Police Station that they were informed they had been arrested for cultism (as discussed below, the cultism allegation was later discarded in favor of other offenses):

I was arrested for an offence I know absolutely nothing about. I was then taken to Egbeda police station together with the rest of the young men arrested at the hotel. We were all detained there. It was while I was at the station that I was informed that I was arrested for being a cultist.⁵⁴

The policemen did not inform me of the offence for which I was being arrested. Instead, they took me to the police station where I was accused of cultism and then detained.⁵⁵

They ignored me when I asked them why I was being arrested. I was then ordered to enter into one of the buses they came with, whereupon I was taken to a nearby police station and detained there. At the police station, the police accused me of being a cultist.⁵⁶

I was not immediately informed why I was being arrested. The police ordered me to enter into one of the buses they came with, whereupon I was taken to a nearby police station and detained there. At the police station, the police accused me of being a cultist.⁵⁷

On August 27, the morning after the arrests, the Lagos State Police Commissioner held a press conference in which he “paraded” the men in front of the media.⁵⁸ Videos of the event went viral on social media.⁵⁹ In the words of one of the accused: “[t]he police invited the press to interview me so as to further embarrass me and the rest of the 56 young men arrested at the same birthday party venue. The press did this by insinuating

⁵² Id. at Defendant 28.

⁵³ Id. at Defendants 1, 8, 15, 40, 44, 47.

⁵⁴ Id. at Defendant 31.

⁵⁵ Id. at Defendant 37.

⁵⁶ Id. at Defendant 38.

⁵⁷ Id. at Defendant 45.

⁵⁸ Reuters, “Court case of 47 Nigerian men charged under homosexuality law delayed again”, February 5, 2020. Available at <https://www.voanews.com/africa/court-case-47-nigerian-men-charged-under-homosexuality-law-delayed-again>; The Initiative for Equal Rights, “A Timeline of the ‘Egbeda 57’ Case.” Available at <https://theinitiativeforequalrights.org/acquit57/>.

⁵⁹ Id.

that the 56 young men and I must have committed crimes of a sexual nature at the party.”⁶⁰

On August 27, the men were transferred from the Shasha Provincial Police Station to the Anti-Cultism Section, State Criminal Investigation and Intelligence Department in Gbagada, where they spent the night.⁶¹ Some men described suffering police abuse while in custody, including for the purpose of obtaining confessions:

At the station, I was accused of being a cultist and was ordered to write a statement. When I refused to do so, I was brutalized by the police. I had to tell them what they wanted to hear in order to save myself from further brutalization.⁶²

I was later taken back to the police station where I was ordered to write a statement. I was later taken to the SARS station at Gbagada, Lagos State. While being detained at police cell, the police introduced teargas inside the cell so as to make us as uncomfortable as possible. One of us in the cell started vomiting. The following day, I was ordered to remove my cloths and to write another statement admitting that I am a cultist. I was totally surprised by this accusation because they are totally not true.⁶³

The following day, we were taken to the Oshodi Task Force and were later taken back to the police station where I was compelled to write a statement. I and the rest of the arrested persons were later taken to Ikeja. We were paraded like common criminals and kept under the sun for hours while being interviewed. From Ikeja, we were taken to the SARS station at Gbagada. We were locked up in a cell and the police threw in a teargas canister inside the cell regardless of any adverse health conditions any of us might have suffering at the time. At the anti-cultism police station in Gbagada, I was directed to write a statement stating that I am a cultist.⁶⁴

According to an August 28, 2018 charge sheet filed with the Lagos State Magistrate Court, the 57 men were accused of three violations of Lagos State criminal law and one violation of federal law:

⁶⁰ Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019, Defendant 51.

⁶¹ Commissioner of Police Remand Request, August 28, 2018.

⁶² Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019, Defendant 5.

⁶³ Id. at Defendant 25.

⁶⁴ Id. at Defendant 3.

Count 1: Felony “membership of unlawful society, attending meetings of unlawful society” in violation of “sec. 411cap, ch,c17, vol.3 laws of Lagos state 2015.”⁶⁵

Count 2: Belonging to the “unlawful society suspected to be known as ‘Alora’ confraternity” in violation of “section 42(a) Cap, Ch, C17, Vol. 3 laws of Lagos state 2015.”⁶⁶

Count 3: Attending a “meeting of unlawful society suspected to be known as ‘Alora’ confraternity” in violation of “section 43(1) Cap, Ch, C17, Vol.3 laws of Lagos state 2015.”⁶⁷

Count 4: Participating “in gay club within Kelley hotel and directly make public show of same sex amorous relationship [sic].”⁶⁸

The Commissioner of Police submitted a two-page document requesting detention on remand for all 57 defendants. The request argues for detention on the basis that the defendants were arrested “while committing the offence of same sex unlawful act [sic]”; that the accused were “transferred” to the Anti-Cultism Section of the State Criminal Investigation and Intelligence Department in Gbagada; that “24hrs or 48hrs as the case may be w[ould] not be sufficient to arraign the suspects”; that the accused were suspected of a felony for which formal charges were being prepared; and that it was “in the interest of justice and the general public” that the defendants be remanded “to prevent tampering and preven[t] the proper investigation of the offence committed with others at large.”⁶⁹ The request for detention contains no details regarding the threat of tampering or interference with the investigation. On August 28, the same day the request was submitted, the Lagos State Magistrate Court granted the defendants bail: all accused met their bail conditions by the beginning of October.

According to defense submissions, the Lagos State Attorney General notified the police that there was insufficient evidence to make a case against the 57 accused and sought to withdraw the prosecution.⁷⁰ Nevertheless, the police prosecutor (in Nigeria, police are authorized to undertake prosecutions in certain circumstances) continued to prosecute the case before the Lagos State Magistrate Court. The state-level case was ultimately dismissed on March 3, 2020. Separately, on September 2, 2019, the police prosecutor filed charges before the Federal High Court of Justice, Lagos Judicial Division (hereafter Lagos Federal High Court). On November 26, 2019, the federal charge sheet was amended to reflect the court striking out the names of 10 defendants who appeared to have absconded. The case proceeded with 47 defendants.

⁶⁵ Commissioner of Police, Charge Sheet, August 28, 2018.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Commissioner of Police Remand Request, August 28, 2018.

⁷⁰ Federal High Court, Lagos Judicial Division, Applicant’s Reply on Application for Bail, Charge No. FHC/1/311c/19, November 26, 2019. See also records of proceedings before the Lagos State Magistrate Court, August 28, 2018.

The November charge sheet contains only one count: the allegation that defendants “and others at large on the 26th day of August 2018 at about 02:00 am at Kelly Hotel, Egbeda Area... did find making public show of Same Sex Amorous Relationship with each other in Hidden places within said Kelly Hotel and thereby committed an offence contrary to and punishable Under Section 5(2) of Same Sex Marriage (Prohibition) Act 2013 [sic].”⁷¹ The charge sheet makes no reference to specific facts that might support such a charge.

As part of the federal level case, the prosecution asked that the defendants again be detained, citing fears that they would abscond or interfere with the proceedings.⁷² On November 14, 2019, the defendants requested that the Lagos Federal High Court grant bail.⁷³ While the defendants had yet to be re-arrested, they submitted the request to ensure against remand to prison. In support of the bail request, the defendants noted that they had consistently appeared before the Lagos State Magistrate Court after that court granted them bail and that they had committed no offenses in the meantime. The defendants also cited the impossibility of interfering with “any prosecution witnesses or destroy[ing] any evidence,” stating that they had yet to either be informed of prosecution witnesses or “se[e] the proofs of evidence till date.”⁷⁴ In conjunction with the request for bail, nearly all of the accused submitted affidavits briefly describing the events surrounding their arrest and asserting their innocence.⁷⁵

During the federal bail proceedings, which took place on November 26, the defense raised concerns regarding the case against the accused. First, the defense argued that the case lacked merit in light of the fact that - as referenced above - the Lagos State Attorney General had sought to withdraw the charges, with only the police insisting on pursuing the prosecution.⁷⁶ As characterized by the defense, after the Lagos State Attorney General opted not to proceed with the case, the police “secretly” filed another case in federal court.⁷⁷ Second, the defense noted the insufficiency of the Proof of Evidence, a document that the prosecution is required to disclose to the defense and which must contain, among other things, a list of prosecution witnesses, a summary of witness statements, and a list of documents and other evidence that the prosecution intends to present at trial. According to the defense, the Proof of Evidence: “d[id] not show any iota of evidence about commission of offense. For example, there is nothing in the Proof of Evidence by two persons who were said to have reported the incident to the police, and

⁷¹ Federal High Court, Lagos Judicial Division, Charge Sheet No. FHC/L/311c/2019, November 26, 2019.

⁷² Federal High Court, Lagos Judicial Division, Defendants’ Written Address in Support of the Motion on Notice for Bail, Charge No. FHC/1/311c/19, November 14, 2019.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019.

⁷⁶ Federal High Court, Lagos Judicial Division, Applicant’s Reply on Application for Bail, Charge No. FHC/1/311c/19, November 26, 2019.

⁷⁷ *Id.*

there is no investigation report or a summary of what the report would say, as required in a proper Proof of Evidence.”⁷⁸ As stated by the defense, the Proof of Evidence contained only statements from the defendants.⁷⁹ On November 26, the Lagos Federal High Court granted the accused bail of 500,000 naira, “a significant sum locally.”⁸⁰

The first hearing in the case took place on December 11, 2019.⁸¹ The two police officers called by the prosecution as witnesses did not show up.⁸² The prosecutor stated that he intended to call four witnesses in total. The defense noted that the prosecution had yet to disclose its witness list or share any information about the topics on which prosecution witnesses would testify.⁸³ Adjourning the hearing to the next day, the magistrate ordered the prosecution to formally serve the defense with a complete Proof of Evidence and to ensure that the prosecution’s witnesses appeared at the subsequent hearing.⁸⁴ The prosecution, however, failed to secure any witnesses to attend the hearing on December 12,⁸⁵ and the case was reset for February 4 and 5, 2020.⁸⁶

On February 4, a new prosecutor showed up, apparently having been called in at the last minute to handle the case.⁸⁷ He questioned the one prosecution witness who appeared, a police inspector.⁸⁸ During this examination, the substitute prosecutor questioned the witness as to his name, current position, force number, and whether he “knew” the defendants.⁸⁹ The witness stated that he was familiar with the accused from his work in the Anti-Cultism Unit. The prosecution elicited no other information from the witness and requested an adjournment to secure its final witness.⁹⁰ At the end of the hearing, the defense again noted that the prosecution had yet to disclose witness names and statements.⁹¹ The prosecution committed to providing the information before the hearing on February 5.⁹²

On February 5, however, the prosecution had yet to provide this information to the defense.⁹³ After the court rejected the prosecution’s request to re-examine the officer who

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ The Guardian, “First men go on trial under Nigeria’s anti-homosexuality laws”, December 11, 2019. Available at <https://www.theguardian.com/world/2019/dec/11/first-men-go-on-trial-under-nigerias-anti-homosexuality-laws>.

⁸¹ Monitor’s Notes, December 11, 2019.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Monitor’s Notes, December 12, 2019.

⁸⁶ Id.

⁸⁷ Monitor’s Notes, February 4, 2020.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ Monitor’s Notes, February 5, 2020.

testified on February 4,⁹⁴ the prosecution moved to postpone the hearing, as the final witness scheduled to testify was not in attendance. The case was reset for March 3, 2020.⁹⁵

On March 3, the prosecution had still not provided the defense with any information about its witnesses.⁹⁶ Nevertheless, the prosecution proceeded with examination of its second witness. The witness, the Divisional Police Officer in charge of Shasha Provincial Station at the time of the raid, stated that on August 26, 2018 he was ordered by police headquarters to mobilize for an operation related to a “gay initiation” at the Kelly Ann Hotel.⁹⁷ Upon arriving at the hotel, he and his colleagues cordoned off the premises. The witness testified that as soon as he entered the meeting hall where “they were all assembled,” around 100 male youth fled the scene. The officers ultimately arrested fifty seven individuals, none of whom the witness had seen before. As the arrest occurred at night, the witness was unable to recognize any of the defendants in the courtroom.⁹⁸ Despite the prosecution’s February 4 proclamation that it intended to call only two witnesses, the prosecution requested an adjournment to call additional witnesses: four in total.⁹⁹

The court adjourned the trial to April 2 to give the prosecution a final chance to provide the defense with the requisite information and present its witnesses.¹⁰⁰ Due to the coronavirus, the hearing on April 2 was postponed. On October 27, the trial resumed.¹⁰¹ Neither the prosecutor nor prosecution witnesses showed up.¹⁰² In response, the court struck out the case for want of diligent prosecution (striking out a case - as opposed to dismissal - means that the prosecution could theoretically re-arrest the defendants and file new charges).¹⁰³

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Monitor’s Notes, March 3, 2020.

⁹⁷ Id. The police officer misspoke in his testimony and stated that the orders came down on August 27, 2018.

⁹⁸ Monitor’s Notes, March 3, 2020.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Monitor’s Notes, October 27, 2020.

¹⁰² Id.

¹⁰³ Id.

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice’s TrialWatch initiative, the ABA Center for Human Rights deployed monitors to the criminal proceedings against the 47 men before the Federal High Court of Nigeria in Lagos from December 2019 to October 2020. The monitors did not experience any impediments in entering the courtroom. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendants’ fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the fairness of the proceedings and arrive at a grade, ABA Center staff who are members of the TrialWatch Experts Panel reviewed court documents, notes taken during the proceedings, and CFJ TrialWatch App responses. Center staff found that the proceedings violated core international human rights standards, including the right to non-discrimination and equality before the law, the prohibition on torture and cruel, inhuman, or degrading treatment, and the right to prepare a defense. Center staff further found that the proceedings violated best practices on prosecutorial ethics.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (the “ICCPR”); jurisprudence from the United Nations Human Rights Committee, tasked with monitoring implementation of the ICCPR; the African Charter on Human and Peoples’ Rights (the “African Charter”); jurisprudence from the African Commission on Human and Peoples’ Rights (the “African Commission”), tasked with interpreting the African Charter and considering individual complaints of Charter violations; jurisprudence from the African Court on Human and Peoples’ Rights (the “African Court”), which - complementing the African Commission’s work - is tasked with interpreting and applying the African Charter; the African Commission’s Resolution on the Right to Recourse and Fair Trial (the “Fair Trial Resolution”); the African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the “Fair Trial Guidelines”); the African Commission’s Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the “Luanda Guidelines”); and the Convention against Torture.

The African Court has “jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples’ Rights, the Protocol [on the Court’s establishment] and any other relevant human rights instrument ratified by the States concerned.”¹⁰⁴ Nigeria ratified the African Charter in 1983 and the Protocol in 2004.¹⁰⁵ Notably, the African Court has frequently relied on jurisprudence from both the European Court of Human Rights and the Inter-American Court of Human Rights, ruling that the two bodies have analogous jurisdiction and are guided by instruments similar to the African Charter.¹⁰⁶ The Court has also stated that where the ICCPR provides for broader rights than those of the Charter, it can apply the ICCPR if the country under consideration has already acceded to or ratified it.¹⁰⁷ Nigeria acceded to the ICCPR in 1983 and ratified the Convention against Torture in 2001.

¹⁰⁴ African Court on Human and Peoples’ Rights, “Welcome to the African Court.” Available at <https://en.african-court.org/>.

¹⁰⁵ African Commission on Human and Peoples’ Rights, “State Parties to the African Charter.” Available at <https://www.achpr.org/statepartiestotheafricancharter>; African Union, “List of Countries which have signed, ratified/acceded to the Protocol of the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.” Available at https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf.

¹⁰⁶ See Jamil Ddamulira Mujuzi, “The African Court on Human and Peoples’ Rights and Its Protection of the Right to a Fair Trial”, *The Law and Practice of International Courts and Tribunals*, December 5, 2017, pg. 193. Available at https://brill.com/abstract/journals/lape/16/2/article-p187_187.xml.

¹⁰⁷ African Court on Human and Peoples’ Rights, *Alex Thomas v. Tanzania*, App. No. 005/2013, November 20, 2015, paras. 88-89; African Court on Human and Peoples’ Rights, *Wilfred Onyango Nganyi et al v. Tanzania*, App. No. 006/2013, March 18, 2016, paras. 165-166.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Right to Liberty and Security of Person

Under Article 9(1) of the ICCPR, “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The United Nations Human Rights Committee has advised that the concept of “arbitrariness” must be “interpreted broadly, to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality.”¹⁰⁸ The African system also prohibits unlawful or arbitrary arrest and detention. Under Article 6 of the African Charter, “every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

The defendants in this case were subjected to unlawful and arbitrary arrest as well as to arbitrary detention. The August 26, 2018 warrantless mass arrest of 57 men was unlawful. The police possessed no individualized suspicion that any of the men arrested had actually committed a crime. Further, the police arrested and detained the men on the basis of their actual or perceived sexual orientation, rendering both measures discriminatory and thereby arbitrary.

Mass Arrest without a Warrant

Under Article 9 of the ICCPR, any procedure “for carrying out legally authorized deprivation of liberty should ... be established by law,” and states must comply with these laws.¹⁰⁹ Article 9 thus “requires compliance with domestic rules that define the procedure for arrest by identifying the officials authorized to arrest or specifying when a warrant is required.”¹¹⁰ In its Concluding Observations on Honduras, for example, the Committee condemned “the frequent use of arrest on suspicion by members of the security forces, including mass round-ups based on appearance alone and with no warrant from a competent authority.”¹¹¹

Article 6 of the African Charter imposes requirements similar to Article 9 of the ICCPR. As stated by the African Commission in the Fair Trial Guidelines, arrests “shall only be

¹⁰⁸ Human Rights Committee, *Ismet Ozcelik et. al. v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, May 28, 2019, para. 9.3.

¹⁰⁹ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 23.

¹¹⁰ *Id.*

¹¹¹ Human Rights Committee, *Concluding Observations on Honduras*, U.N. Doc. CCPR/C/HND/CO/1, December 13, 2006, para. 13.

carried out strictly in accordance with the provisions of the law and by any competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion, or for probable cause.”¹¹²

As noted above, the accused were initially arrested on suspicion of cultism and two days later were charged with offenses related to participation in an unlawful society and violation of the SSMPA. Nigerian legislation permits arrests without a warrant where there is reasonable suspicion that a criminal offense has been committed.

In the present case, the authorities did not possess a warrant and lacked reasonable suspicion that the accused had perpetrated an offense, rendering the arrests unlawful - without grounding in domestic legislation - as well as arbitrary. As discussed above, the police raided the hotel on the basis of a tip-off that patrons were engaging in “in same sex unlawful act[s].” The defendants reported that officers rounded up men in the hotel’s public areas, whether the person was a driver waiting in the parking lot, a guest emerging from his room to ascertain the source of the commotion, or individuals drinking at the bar.¹¹³ Like the Honduran operations denounced by the Human Rights Committee, the authorities seem to have conducted a “mass round-u[p] based on appearance alone.”

The conduct of the proceedings against the accused further demonstrates that reasonable suspicion was likely not present upon arrest. The Lagos State Attorney General reportedly sought to withdraw the charges due to the lack of evidence and in six hearings before the Lagos Federal High Court, the prosecution was unable to present evidence linking any individual defendant to illegal acts: the first witness who testified stated only that he was familiar with the accused from his previous work in the Anti-Cultism Unit, whereas the other witness recounted raiding the hotel on a tip-off but offered nothing further with respect to the accused’s criminal conduct.

Mere presence at a hotel where an allegedly illegal event is suspected to be occurring does not qualify as reasonable suspicion. As such, the arrests violated Article 9(1) of the ICCPR and Article 6 of the African Charter.

Arrest and Detention Conducted on Discriminatory Grounds

Articles 2(1), 3, and 26 of the ICCPR guarantee equality before the law and prohibit discrimination. Article 2(1), for example, provides:

¹¹² African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle M(1)(b).

¹¹³ Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019, Defendants 1, 40, 47.

[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As stated by the United Nations Human Rights Committee, “[a]rrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is ... in principle arbitrary.”¹¹⁴

The Committee has specifically confirmed that discrimination based on sex includes discrimination based on sexual orientation.¹¹⁵ In line with this jurisprudence, the United Nations Working Group on Arbitrary Detention has held on multiple occasions that detention based on sexual orientation constitutes arbitrary detention and a breach of Article 9 of the ICCPR.¹¹⁶ In an Egyptian case, for example, at least 55 men were arrested after the police raided a discotheque, with the authorities “target[ing] men who appeared to them to be homosexuals or who were not accompanied by women” and subsequently bringing charges of contempt of religion and engaging in immoral acts.¹¹⁷ The Working Group found that the group had been detained and charged on account of their sexual orientation, violating Articles 2(1) and Article 26 of the ICCPR.¹¹⁸ The Working Group thus concluded that the detention of the men was arbitrary.¹¹⁹

In the Luanda Guidelines, the African Commission has similarly advised that neither arrests nor detention may be motivated by “discrimination of any kind.”¹²⁰ While the African Commission has yet to explicitly hold that discrimination based on sexual orientation is prohibited, it has recognized and denounced human rights violations based on sexual orientation or gender identity in various decisions and soft law instruments. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, for example, the Commission stated:

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under

¹¹⁴ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 17.

¹¹⁵ See Human Rights Committee, *Nicholas Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992, March 31, 1994, para. 8.7.

¹¹⁶ See Working Group on Arbitrary Detention, Opinion No. 22/2006: *François Ayissi et al. v. Cameroon*, U.N. Doc. A/HRC/4/40/Add.1, August 31, 2006; Working Group on Arbitrary Detention, Opinion No. 42/2008: *Messrs. A, B, C, and D v. Egypt*, U.N. Doc. A/HRC/13/30/Add.1, November 25, 2008.

¹¹⁷ Working Group on Arbitrary Detention, Opinion No. 7/2002: *Yasser Mohamed Salah et al v. Egypt*, U.N. Doc. E/CN.4/2003/8/Add.1, June 21, 2002, paras. 5-8.

¹¹⁸ *Id.* at paras. 27-28.

¹¹⁹ *Id.* at para. 28.

¹²⁰ African Commission on Human and Peoples’ Rights, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines)*, 55th Ordinary Session, April 28-May 12, 2014, paras. 2(b), 11(a)(i), 14(a). Available at <https://www.refworld.org/docid/5799fac04.html>.

Article 2 of the Charter provides the foundation for the enjoyment of all human rights.... The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age *or sexual orientation* (emphasis added).¹²¹

In Resolution 257, passed in 2014, the Commission “[c]ondemn[ed] the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity.”¹²² More recently, the African Commission recognized individuals “marginalised on the basis of sexual orientation or gender identity” to be “vulnerable persons” in its Principles on Decriminalisation.¹²³ As such, taken in conjunction with African Court jurisprudence applying broader ICCPR principles in states that have ratified that instrument, arrests and detention based on the grounds of imputed or real sexual orientation are impermissible under the African Charter.

In the present case, the accused were arrested and detained on the grounds of their actual or imputed sexual orientation. According to the Lagos State Police Commissioner, the hotel raid was motivated “by information from resident of the area, that the aforementioned persons engaged themselves in same sex unlawful act within the scene of crime and upon which tip off, the police men swung into action and arrested them [sic].”¹²⁴ Subsequently, the accused were charged with violating the SSMPA: specifically, the provision concerning same sex displays of affection. Given that the accused’s arrest and detention were based on their real or perceived sexual orientation, both measures were arbitrary.

Right to be Informed of the Reasons for Arrest

Under the ICCPR, authorities must give an arrested person notice of the reasons for arrest at the time of arrest.¹²⁵ Receiving prompt notice of the reasons for arrest enables the arrestee “to seek release if [he or she] believe[s] that the reasons given are invalid or unfounded.”¹²⁶ The reasons provided must include both the legal grounds for arrest

¹²¹ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, May 15, 2006, para. 169.

¹²² African Commission on Human and Peoples’ Rights, 275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)2014, 55th Ordinary Session, April 28-May 12, 2014. Available at <https://www.achpr.org/sessions/resolutions?id=322>.

¹²³ African Commission on Human and People’s Rights, *Principles on the Decriminalisation of Petty Offences in Africa*, 61st Ordinary Session, November 1-15, 2017, para. 1.

¹²⁴ Commissioner of Police Remand Request, August 28, 2018.

¹²⁵ ICCPR, Article 9(2).

¹²⁶ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 25.

as well as facts regarding what the arrestee is alleged to have done, including the identity of any alleged victim.¹²⁷

Under the African Commission's Fair Trial Guidelines, "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest."¹²⁸ The Commission has correspondingly found a violation of Article 6 of the African Charter where individuals were not informed at the time of arrest of the reasons for their arrest.¹²⁹

In the present case, a number of defendants reported that notwithstanding their requests, the police did not inform them of the reasons for their arrest (alleged cultism) until they arrived at the police station.¹³⁰ This delay deprived the accused of an opportunity to seek immediate release by explaining the error of the arresting authorities, in violation of both the ICCPR and the African Charter.

Prohibition on Torture

The prohibition on torture enshrined in Article 7 of the ICCPR and Article 5 of the African Charter is a critical component of international human rights law. While the ICCPR does not define torture and the United Nations Human Rights Committee has explicitly declined to "draw up a list of prohibited acts or to establish sharp distinctions between the different types of punishment or treatment" prohibited under Article 7,¹³¹ Article 1 of the Convention against Torture, to which Nigeria is party, defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹³²

¹²⁷ *Id.*

¹²⁸ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle M(2)(a).

¹²⁹ African Commission on Human and Peoples' Rights, Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola, Communication No. 292/04, May 2008, paras. 54-55. Available at <https://www.refworld.org/cases,ACHPR,51b6fd4e7.html>.

¹³⁰ See Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019, Defendants 27, 31, 37, 38, 42, 45.

¹³¹ Human Rights Committee, General Comment No. 20, March 10, 1992, para. 4.

¹³² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.

The African Commission and Court have endorsed this definition of torture.¹³³

In *Malawi African Association and Others v. Mauritania*, for example, the African Commission found a violation of Article 5's prohibition on torture where individuals were subjected to beatings, sleep deprivation, and solitary confinement, and were correspondingly forced to make inculpatory statements.¹³⁴ In a Nigerian case, the Commission ruled that keeping an individual in leg irons and handcuffs and beating him violated Article 5.¹³⁵

In the present case, several of the accused reported treatment amounting to torture in their sworn affidavits, consistent with reports from institutions such as the U.S. State Department and the United Nations Human Rights Committee about the prevalence of torture in Nigerian detention facilities. One man said that the authorities "brutalized" him in their efforts to coerce a statement: "at the station, I was accused of being a cultist and was ordered to write a statement. When I refused to do so, I was brutalized by the police. I had to tell them what they wanted to hear in order to save myself from further brutalization."¹³⁶ Another man stated that he was ordered to remove his clothes and write a statement.¹³⁷ That same man and a third man alleged that the police threw a teargas canister into their detention cell not long before interrogating detainees, with the result that one individual "started vomiting."¹³⁸ The Center received additional, credible information that the accused were beaten and taunted by the authorities for "look[ing] gay."

In some cases, the physical abuse reported appears to have been "intentionally inflicted" for the purposes of "obtaining ... information or a confession." It also seems that the men were targeted for abuse on the basis of their actual or perceived LGBTQ status. As such, the accused's rights under Article 7 of the ICCPR and Article 5 of the African Charter were violated.

Article 7 must be read in conjunction with Article 2(3) of the ICCPR, under which States Parties are obligated to provide an effective remedy to persons whose Covenant rights

¹³³ African Commission on Human and Peoples' Rights, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 32nd Ordinary Session, October 17-23, 2002, para. 4; African Court on Human and Peoples' Rights, *Alex Thomas v. United Republic of Tanzania*, App. 005/2013, November 20, 2015, para. 144.

¹³⁴ African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, May 11, 2000, paras. 115-118.

¹³⁵ African Commission on Human and Peoples' Rights, International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria, Communication Nos. 137/94, 139/94, 154/96 and 161/97 October 31, 1998, paras. 78-81.

¹³⁶ Federal High Court, Lagos Judicial Division, Affidavits in Support of Bail, Charge No. FHC/1/311c/19, November 14, 2019, Defendant 5.

¹³⁷ *Id.* at Defendant 25.

¹³⁸ *Id.* at Defendants 3, 25.

are violated.¹³⁹ In accordance with Article 2(3), States Parties are required to ensure that any allegation of torture or cruel, inhuman, or degrading treatment is promptly investigated by an impartial factfinder.¹⁴⁰ The African Commission and Court have likewise made clear that Article 5 requires investigation of torture allegations.¹⁴¹

In the present case, the authorities have yet to investigate the accused's allegations of torture, despite the fact that such allegations were made in affidavits submitted almost a year ago. This inaction violates the African Charter and ICCPR.

C. VIOLATIONS AT TRIAL

Right to Be Informed of the Charges

Article 14(3)(a) of the ICCPR entitles every person charged with a criminal offence "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." The United Nations Human Rights Committee has explained that "'promptly' requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law."¹⁴² The accused must be informed of "both the law and the alleged general facts on which the charge is based."¹⁴³

Article 7 of the African Charter guarantees individuals the right to a fair trial. In its Fair Trial Guidelines, the African Commission has elaborated on the subcomponent right to notification of the charges:

(a) Any person charged with a criminal offence shall be informed promptly, as soon as a charge is first made by a competent authority, in detail, and in a language, which he or she understands, of the nature and cause of the charge against him or her.

(b) The information shall include details of the charge or applicable law and the alleged facts on which the charge is based sufficient to indicate the substance of the complaint against the accused.

¹³⁹ Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.9, March 10, 1992, para. 14.

¹⁴⁰ *Id.*

¹⁴¹ See African Commission on Human and Peoples' Rights, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 32nd Ordinary Session, October 17-23, 2002, paras. 17-19.

¹⁴² Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 31.

¹⁴³ *Id.*

(c) The accused must be informed in a manner that would allow him or her to prepare a defence and to take immediate steps to secure his or her release.¹⁴⁴

The information provided in the indictment failed to meet the ICCPR and African Charter requirement that defendants be apprised of the “alleged facts” on which charges are based. The document, which amounts to two pages, contains only the names of the 47 defendants, the date and location of the alleged offense, and the SSMPA provision under which the defendants were charged. There is no further reference to any individual defendant: the group is charged *en masse*. The absence of factual details in the charge sheet, including the lack of any individualized information, falls short of ICCPR and African Charter standards on notification. Likewise, without any specificity as to the nature of the accusation, the charge sheets do not “allow [the accused] to prepare a defence and to take immediate steps to secure [their] release.”¹⁴⁵

Right to Adequate Time and Facilities

Under Article 14(3)(b) of the ICCPR, accused persons must have adequate facilities for the preparation of a defense. According to the United Nations Human Rights Committee, “adequate facilities” entails access to documents and other evidence, including “all materials that the prosecution plans to offer in court against the accused or that are exculpatory.”¹⁴⁶ The Committee has defined “exculpatory materials” not only as evidence demonstrating an accused’s innocence but also as evidence that “could assist the defense.”¹⁴⁷ Nondisclosure is only justified in limited circumstances, such as national security.¹⁴⁸

In *Khoroshenko v. Russia*, for example, the UN Human Rights Committee found that the complainant “did not receive a copy of the trial’s records immediately after the first instance verdict was issued [and] that despite numerous requests, he was not given some documents, he considered relevant for his defence.”¹⁴⁹ The Committee concluded that this conduct violated Article 14(3)(b).

As stated by the African Commission, the right to a fair trial outlined in Article 7 of the African Charter encompasses “adequate time and facilities for the preparation of [an

¹⁴⁴ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(1).

¹⁴⁵ *Id.* at Principle N(1)(c).

¹⁴⁶ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 33.

¹⁴⁷ *Id.*

¹⁴⁸ See Human Rights Committee, *Mansour Ahani v. Canada*, U.N. Doc. CCPR/C/80/D/1051/2002, June 2004, para. 10.5.

¹⁴⁹ Human Rights Committee, *Khoroshenko v. Russian Federation*, U.N. Doc. CCPR/C/101/D/1304/2004, April 29, 2011, para. 9.7.

accused’s] defense.”¹⁵⁰ The Commission’s Fair Trial Guidelines expand on what constitutes adequate facilities, noting that the defense must have access to “materials necessary to the preparation of a defence.”¹⁵¹ The Guidelines detail the authorities’ obligation to disclose such information. Principle I(d) states: “It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at its earliest appropriate time.”¹⁵²

In the present case, the accused were continuously denied access to relevant documents. At hearings held on December 11, December 12, February 4, February 5, and March 3, the presiding magistrate ordered the prosecution to disclose its list of witnesses as well as the subject matter of their testimony. According to defense submissions, the Proof of Evidence provided by the prosecution contained only statements from the defendants - not the investigation report, details on the alleged tip-off to the police, or particulars regarding prosecution witnesses.¹⁵³

The defense cannot contest the prosecution’s evidence if does not know what that evidence is. The prosecution’s prolonged withholding of the requisite materials violated the accused’s right to adequate facilities in the preparation of a defense, guaranteed by Article 14(3)(b) of the ICCPR and Article 7 of the African Charter.

D. OTHER FAIRNESS CONCERNS

Prosecutorial Misconduct

The prosecution’s conduct, described above, breached best practices on prosecutorial ethics. Under the United Nations Guidelines on the Role of Prosecutors, prosecutors in criminal proceedings must “not initiate or continue prosecution,” or should “make every effort to stay proceedings, when an impartial investigation shows the charges to be unfounded.”¹⁵⁴ Guidelines produced by the International Association of Prosecutors (IAP Guidelines), which complement the UN Guidelines on the Role of Prosecutors, require

¹⁵⁰ African Commission on Human and Peoples’ Rights, Resolution on the Right to Recourse and Fair Trial, 1992, para. 2(e)(i).

¹⁵¹ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N(3)(d).

¹⁵² *Id.* at Principle I(d).

¹⁵³ Federal High Court of Nigeria, Lagos Judicial Division, Applicant’s Reply on Application for Bail, Charge No. FHC/1/311c/19, November 26, 2019.

¹⁵⁴ United Nations Office of the High Commissioner for Human Rights, United Nations Guidelines on the Role of Prosecutors, 1990, para. 14. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

prosecutors to proceed in criminal cases “only when a case is well-founded upon evidence reasonably believed to be reliable and admissible,” and to “not continue with a prosecution in the absence of such evidence.”¹⁵⁵

The African Commission’s Fair Trial Principles outline similar standards: “prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”¹⁵⁶

With respect to the accused, it seems that the prosecution never had reliable and admissible evidence upon which to predicate its case. According to defense submissions, the Lagos State Attorney General decided that there was insufficient evidence to support the charges and sought to withdraw the case.¹⁵⁷ Undeterred, the police prosecutor refiled the case at the federal level. In the two years following the arrests and, more specifically, the eleven months between the first hearing on the federal charge and the striking out of the case, the prosecution never put forth evidence that the individuals arrested on August 26, 2018 at the Kelly Ann Hotel committed a criminal offense. Of the two witnesses called, one testified to his name, position, and force number,¹⁵⁸ and the other stated that it was dark during the raid and he could not recognize anyone.¹⁵⁹ Correspondingly, the only information contained in the prosecution’s Proof of Evidence were the accused’s own statements: according to the defense, none were incriminating.¹⁶⁰

The state should have dropped the charges as soon as it became apparent that they were unfounded. Instead, the prosecution pursued the case and continuously requested that hearings be rescheduled, resulting in the proceedings dragging on for over a year. This conduct contravened best practices on prosecutorial ethics.

Same Sex Marriage Act: In Contravention of International Standards

Lack of Clarity

¹⁵⁵ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999, Principle 4.2(d). Available at [https://www.iap-association.org/getattachment/Resources-Documents/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Documents/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx).

¹⁵⁶ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle F(j).

¹⁵⁷ Federal High Court, Lagos Judicial Division, Applicant’s Reply on Application for Bail, Charge No. FHC/1/311c/19, November 26, 2019.

¹⁵⁸ Monitor’s Notes, February 4, 2020.

¹⁵⁹ Monitor’s Notes, March 3, 2020.

¹⁶⁰ Federal High Court, Lagos Judicial Division, Applicant’s Reply on Application for Bail, Charge No. FHC/1/311c/19, November 26, 2019.

The SSMPA violates the requirement that offenses be sufficiently delineated to allow individuals to regulate their conduct accordingly. As noted above, Article 9(1) of the ICCPR provides that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The United Nations Human Rights Committee has emphasized that “any substantive grounds for arrest or detention ... should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”¹⁶¹

Article 6 of the African Charter similarly protects the right to liberty and security of person, prohibits arbitrary arrest and detention, and guarantees that “[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law.” Like the United Nations Human Rights Committee, the African Commission has stated that the grounds for deprivation of liberty must “be clear, accessible and precise.”¹⁶²

The provision of the SSMPA under which the 47 accused were prosecuted, Article 5(2), fails to meet these standards. Article 5(2) states: “a person who registers, operates, or participates in gay clubs, societies, and organizations, or directly or indirectly makes public show of same sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of ten years imprisonment.” In broadly criminalizing the direct or indirect “public show of same sex amorous relationship,” Article 5(2) is far from “clear, accessible and precise” and does not define with “sufficient precision” the “substantive grounds for arrest or detention.” It is unclear what would constitute a “public show of same sex amorous relationship” or what would qualify as indirect and direct methods of such. Due to this lack of specificity, it is difficult for individuals to regulate their behavior accordingly, contravening Article 9(1) of the ICCPR and Article 6 of the African Charter.

Right to be Free from Discrimination

The SSMPA discriminates against same sex couples and the prosecution of the accused under the SSMPA was thereby discriminatory, in violation of international and regional standards.

The right to freedom from discrimination and equality before the law is protected under Articles 2 and 26 of the ICCPR. As noted above, Article 2 requires State Parties to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property,

¹⁶¹ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 22.

¹⁶² African Commission on Human and Peoples’ Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), 55th Ordinary Session, April 28-May 12, 2014, para. 2(a).

birth or other status.” Article 26 reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The United Nations Human Rights Committee has established that discrimination relating to actual or perceived sexual orientation is prohibited under Articles 2 and 26.¹⁶³

The Committee has further stated that the term “discrimination” in the ICCPR should be understood “to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose of or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹⁶⁴ According to the Committee, Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities,” even beyond “those rights which are provided for in the Covenant.”¹⁶⁵ The Committee has thus repeatedly condemned laws criminalizing same sex activity, including the SSMPA,¹⁶⁶ for violating the ICCPR’s non-discrimination guarantees.¹⁶⁷

Article 2 of the African Charter entitles every individual “to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.” Article 3 provides for equality before the law and equal protection of the law. While the African Court and Commission have yet to specifically hold that sexual orientation is either encompassed by the term “sex” or falls under the “other status” umbrella, the Commission has recognized and condemned human rights violations based on sexual orientation and gender identity.¹⁶⁸ Additionally, the African Court has stated that where the ICCPR provides for broader rights

¹⁶³ See Human Rights Committee, *Nicholas Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992, March 31, 1994, para. 8.7; Human Rights Committee, *Young v. Australia*, U.N. Doc. CCPR/C/78/D/941/2000, September 18, 2003; Human Rights Committee, *X (represented by counsel) v. Australia*, U.N. Doc. CCPR/C/89/D/1361/2005, May 14, 2007.

¹⁶⁴ Human Rights Committee, General Comment No. 18, 1989, para. 7.

¹⁶⁵ *Id.* at para. 12.

¹⁶⁶ See Human Rights Committee, *Concluding Observations: Nigeria*, U.N. Doc. CCPR/C/NGA/CO/2, August 29, 2019, para. 18.

¹⁶⁷ See Human Rights Committee, *Concluding Observations: Barbados*, U.N. Doc. CCPR/C/BRB/CO/3, May 11, 2007, para. 13; Human Rights Committee, *Concluding Observations: Egypt*, U.N. Doc. CCPR/CO/76/EGY, November 28, 2002, para. 19; Human Rights Committee, *Concluding Observations: Kenya*, U.N. Doc. CCPR/CO/83/KEN, April 29, 2005, para. 27.

¹⁶⁸ For example, in Resolution 257, passed in 2014, the African Commission “[c]ondemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity.” African Commission on Human and Peoples’ Rights, 275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)2014, 55th Ordinary Session, April 28-May 12,

than those of the Charter, it can apply the ICCPR if the country under consideration has already acceded to or ratified it.

The Same Sex Marriage (Prohibition) Act explicitly discriminates on the basis of sexual orientation by criminalizing “a marriage contract or civil union entered into between the persons of same sex”;¹⁶⁹ “registration of gay clubs, societies, and organizations, their sustenance, processions and meetings”;¹⁷⁰ and “the public show of same sex amorous relationship directly or indirectly.”¹⁷¹ All of these offenses, which are based exclusively on an individual’s actual or perceived sexual orientation, are punishable with periods of imprisonment from ten to fourteen years.¹⁷² Under both the ICCPR and the African Charter, distinctions based on sexual orientation are prohibited. The SSMPA thereby violates both treaties - as did the accused’s prosecution under the SSMPA provision on displays of same sex affection.

Right to Privacy

Under Article 17(1) of the ICCPR, “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honor and reputation.” As stated by the United Nations Human Rights Committee, “the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”¹⁷³ While the right to privacy is not absolute, the Committee has made clear that “competent public authorities should only be able to call for such information relating to an individual’s private life the knowledge of which is essential in the interests of society as understood under the Covenant.”¹⁷⁴ The burden is on the state to establish whether an interference with privacy is “essential in the interests of society.”¹⁷⁵

According to the Committee, “the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.”¹⁷⁶ In *Toonen v. Australia*, the Committee ruled that laws criminalizing same sex intercourse violated the right to privacy under Article 17(1),¹⁷⁷

2014. See also African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No. 245/02, May 15, 2006, para. 169.

¹⁶⁹ Same Sex Marriage (Prohibition) Act, 2013, Article 5(1).

¹⁷⁰ *Id.* at Article 4(1).

¹⁷¹ *Id.* at Article 4(2).

¹⁷² *Id.* at Articles 5(1), (2), (3).

¹⁷³ Human Rights Committee, General Comment No. 16, April 8, 1988, para. 4.

¹⁷⁴ *Id.* at para. 7.

¹⁷⁵ See *id.* at paras. 7-8.

¹⁷⁶ Human Rights Committee, *Coeriel et al v. The Netherlands*, U.N. Doc. CCPR/C/52/D/453/1991, December 9, 1994, para. 10.2.

¹⁷⁷ Human Rights Committee, *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992, March 31, 1994, paras. 8.2-8.6.

finding it “undisputed that adult consensual sexual activity in private [wa]s covered by the concept of ‘privacy.’”¹⁷⁸

In *Toonen*, the Australian state had justified its criminalization of homosexuality on public health and moral grounds: specifically, to control the transmission of HIV/AIDS and “because, in the absence of specific limitation clauses in article 17, moral issues must be deemed a matter for domestic decision.”¹⁷⁹ Interpreting the requirement of reasonableness “to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case,”¹⁸⁰ the Committee deemed the criminalization of homosexuality neither a necessary nor proportionate measure to address the government’s stated concerns.¹⁸¹

The Yogyakarta Principles expand on the right to privacy as applied to forced outings. The Principles are: “a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply.”¹⁸² As stated in the Principles, the right to privacy “ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation.”¹⁸³ The Principles, for example, specify that States must ensure that gender identity changes are not disclosed “without the prior, free, and informed consent” of the individual “unless ordered by a court.”¹⁸⁴

The conduct of the authorities in the present case was inconsistent with the right to privacy. The day after the arrest of the 57 accused, the Lagos State Police Commissioner held a press conference in which the men were displayed in front of the news media.¹⁸⁵ As recounted by local organization TIERS, “[v]ideos of the arrested men from this press conference went viral on social media, robbing the men of their right to privacy and right to a fair hearing.”¹⁸⁶ This tactic is reportedly not uncommon: according to the U.S. State

¹⁷⁸ Id. at para. 8.3.

¹⁷⁹ Id. at para. 8.4.

¹⁸⁰ Id. at para. 8.3.

¹⁸¹ Id. at paras. 8.5-8.6.

¹⁸² The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007. Available at http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.

¹⁸³ Id. at pg. 14.

¹⁸⁴ The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, November 10, 2017, pg. 18. Available at http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf. Although gender identity and sexual orientation are not the same and should not be conflated, they both speak to innate characteristics of the individual, which that individual has the right to disclose publicly.

¹⁸⁵ Reuters, “A police raid, viral videos and the broken lives of Nigerian gay law suspects”, February 24, 2020 (“The cameras panned over the faces of the men, capturing expressions of shame, fear and anger.”); Reuters, “Court case of 47 Nigerian men charged under homosexuality law delayed again”, February 5, 2020; The Initiative for Equal Rights, “A Timeline of the ‘Egbeda 57’ Case”, August 25, 2020.

¹⁸⁶ The Initiative for Equal Rights, “A Timeline of the ‘Egbeda 57’ Case”, August 25, 2020.

Department's 2019 report on human rights in Nigeria, "[p]olice used a technique commonly referred to as 'parading' of arrestees, which involved walking arrestees through public spaces and subjecting them to public ridicule and abuse. Bystanders often taunted and hurled food and other objects at arrestees."¹⁸⁷

The Police Commissioner's action amounted to a forced "outing" of the men. Regardless of the veracity of the authorities' assertions as to the accused's LGBTQ status, the Commissioner made public a fundamentally private aspect of the men's lives. They have suffered as a result. One man who ran a dry-cleaning business lost clients who "feared he could introduce their kids to homosexual acts."¹⁸⁸ Another man lost his job of eight years as a bookkeeper and faced eviction. His wife sent money to prison in an effort to protect him from being attacked and members of his community turned their backs on him.¹⁸⁹ Yet another accused was ordered to leave his home by his aunt, who saw him in the police line-up on TV. He stated that he had "brought shame upon the whole family."¹⁹⁰ Physical violence has reportedly also occurred: a defendant relayed that he was assaulted three times after being recognized from the press conference.¹⁹¹

In accordance with the standards established by the UN Human Rights Committee, an interference with privacy must possess a legitimate aim and be reasonable - proportional and necessary - in order to comply with Article 17(1) of the ICCPR. It is unclear what the aim of exposing the accused to the media would have been other than to shame them publicly. Even assuming that the "parading" was undertaken for some unknown legitimate objective, it was neither proportionate nor necessary. Any gains that might have been obtained pale in comparison to the havoc wreaked on the men's lives.

In light of the above, the "parading" of the men constituted an arbitrary interference with the accused's privacy and violated Article 17(1) of the ICCPR. Notably, the ICCPR requires that states provide remedies to those whose right to privacy has been violated.¹⁹²

¹⁸⁷ U.S. State Department, "2019 Country Report on Human Rights Practices: Nigeria", 2020, pgs. 6-7.

¹⁸⁸ CNN, "Nigeria is trying 47 men arrested in a hotel under its anti-gay laws", December 12, 2019. Available at <https://www.cnn.com/2019/12/12/africa/nigeria-men-trial-anti-gay-law-intl/index.html>.

¹⁸⁹ Id.

¹⁹⁰ Id.

¹⁹¹ Id.

¹⁹² See Human Rights Committee, Nabil Sayadi and Patricia Vinck, U.N. Doc. CCPR/C/94/D/1472/2006, Oct. 22, 2008, para. 12.

CONCLUSION AND GRADE



The proceedings against the 47 accused violated international and regional human rights standards. Although the case has been struck out, this is far from a victory. The defendants' lives have been irrevocably impacted and Nigeria must take steps to ensure that where possible, harms are mitigated or remedied. In particular, the authorities should investigate the defendants' allegations of torture and the State should compensate the defendants for damage occasioned by the violation of their right to privacy. More broadly, in compliance with its international and regional treaty obligations, Nigeria should repeal the SSMPA.

GRADE:

D

ANNEX



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹⁹³ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹⁹³ ICCPR, Article 26.