

**Mandates of the Special Rapporteur on the sale of children, child prostitution and child pornography
and the Special Rapporteur on violence against women, its causes and consequences**

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the sale of children, child prostitution and child pornography and Special Rapporteur on violence against women, its causes and consequences pursuant to Human Rights Council resolutions 25/6 and 23/25.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **reported release of Mr. [REDACTED], who had been convicted for the rape of a child, following a presidential pardon.**

According to the information received:

Mr. [REDACTED] was condemned on 4 February 2014 for the rape of a 14 year old girl. The trial concluded that Mr. [REDACTED] had met the victim at the Misisi Compound and had brought her to a lodge where he raped her between 31 of January and 1 of February 2012. He was found guilty of the offence of Defilement contrary to Section 138(1) of the Penal Code and sentenced to 18 years of imprisonment. This sentence was confirmed on appeal by the High Court of Zambia on 24 April 2014 and he was sent to jail.

According to different sources, in March 2015, Mr. [REDACTED] was temporarily released to perform at the Heroes Stadium for the commemoration of the International Women's Day. In June 2015, Mr. [REDACTED] released a song, while still serving his jail sentence, named "Ulemu" in which he praised the President.

On 16 July 2015, the President reportedly announced his decision to pardon Mr. [REDACTED] during a visit to Mukobeko Maximum Security Prison in Kabwe. The President also allegedly decided to appoint Mr. [REDACTED] as an ambassador for the fight against gender violence.

Following his release, it has been further reported that Mr. [REDACTED] assaulted one of his three wives. Moreover, it is alleged that, in August, he released a song in which he condemned those who had criticised his pardon and questioned the length of the sentence that had been given to him.

Since the rape in 2012, it is reported that the child victim has suffered from trauma and stigmatisation. She has purportedly changed schools and finally stopped going to school due to the systematic negative attention she receives, which includes bullying. She has also had suicidal thoughts. Furthermore, she has been re-victimised with messages on social media which have portrayed her as being of "loose morals". Her family is also suffering from her re-victimisation, and the girl has had to move houses due the public exposure related to her case.

We would like to take this opportunity to express our grave concern to your Excellency's Government regarding the aforementioned pardon of Mr. [REDACTED]. Although we welcome the original 18 year jail sentence, the subsequent pardon of Mr. [REDACTED], after one year of imprisonment, undermines the strong message against sexual crimes that the Zambian judicial authorities sent through their effective implementation of national legislation. Furthermore, the pardon trivialises the grave nature of sexual offences committed against children. Moreover, his release puts the security, safety and well-being of the child victim at risk, and undermines her right to a just and effective remedy.

The granting of a pardon for sexual offences against a minor after a brief incarceration promotes impunity. Indeed, the pardon of Mr. [REDACTED] after serving a minimal amount of his sentence lessens the seriousness of the sexual abuse of a child. Even though pardons do not expunge the underlying conviction, and consequently do not nullify the individual criminal responsibility established by a conviction, they exempt a convicted criminal from serving his or her sentence, in whole or in part. In order to comply with international human rights norms and standards, including the respect for the rule of law and legal certainty, the use of the prerogative of pardon, such as the procedural and substantive criteria to request and grant pardon, must be specified by law. In this regard, Article 59 and 60 of the Constitution of Zambia Act, which refer to the prerogative of mercy and the related advisory committee, do not specify the procedure and the merits that are required to grant the prerogative.

In general, pardons are granted on humanitarian grounds, and may require that the victim be consulted, and the convicted person expresses the acceptance of responsibility. More importantly, a series of international human rights treaties, such as the Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography, and the Convention on the Elimination of All Forms of Discrimination against Women, require State parties to ensure the punishment of certain offences, such as sexual abuse and violence against children and discrimination against women and girls, with penalties that reflect the gravity of the crimes.

The just and effective remedy due to the child victim is also negated by the pardon and early release of the perpetrator. According to the Human Rights Committee, the right to an effective remedy includes the cessation, reparation and the prevention of recurring violations (CCPR/C/21/Rev.1/Add.13). The latter is specifically at risk through the early release of the perpetrator. Besides, if the victim was not consulted in the decision to pardon Mr. [REDACTED] it further marginalises her and diminishes her sense of agency.

We are further seriously concerned by the reported appointment of Mr. [REDACTED] as an ambassador for the fight against gender violence after his condemnation for the rape of a child. Not only would this measure appear cynical to society at large, contradict the decision rendered by the judiciary, and trivialise the grave nature of the sexual crimes against women, including girls, it would re-traumatise the child victim as it places the perpetrator in a prominent position and portrays him as a role model thus minimising the seriousness of the damage suffered by the victim and questioning her condition of victim. In addition, it discourages other potential child victims from reporting and filing charges for similar offences, enhancing impunity for these heinous acts.

Section 138(1) of the Penal Code under which Mr. [REDACTED] has been sentenced also raises some concerns as the terminology and the scope of the law in use does not comply with international human rights norms and standards. Firstly, it is unclear if the crime of defilement falls under the definition of rape in Section 132. Moreover, the definition of rape in Section 132 only concerns women and girls even though, in practice, men and boys may also be victims of such a crime. Secondly, as it was underlined by the Special Rapporteur on violence against women, its causes and consequences, following her visit to Zambia (A/HRC/17/26/Add.4), the use of "unlawful" in Section 138 is "problematic as it may suggest that there are instances in which one may have lawful carnal knowledge of a child." Lastly, the Penal Code states in Section 131A that a child means a person below the age of sixteen in contradiction of Article 1 of the Convention on the Rights of the Child which sets the age at eighteen.

In light of the above, we would therefore encourage your Excellency's Government to withdraw and render ineffective its decision to pardon Mr. [REDACTED] and its intention to appoint him as an ambassador for the fight against gender violence. In addition, we would strongly urge your Excellency's Government to review the Penal Code in order to ensure its conformity with international human rights law.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned case.

2. Please provide information or reasons for Mr. [REDACTED]'s appointment as an ambassador for the fight against gender violence after his condemnation for the rape of a child.

3. Please provide information on the care and recovery measures provided to the child victim, including psycho-social support, and any measures taken to ensure her security and safety, as well as measures to support the family since the commission of the crime. In addition, have measures been adopted to provide an effective remedy, including reparation for the harm suffered, to the victim.

4. Please indicate if any measures have been taken to prevent and address the re-victimisation of the child in view of the release of the perpetrator.

5. Please provide information on the prerogative of mercy of the Executive and on the Advisory Committee on the prerogative of mercy, in particular, regarding its limitations and past jurisprudence regulating its use.

6. Please provide any further information on any measures taken by your Government to prevent the commission of sexual crimes against children and combat discrimination against women and girls, such as awareness raising campaigns and education programmes, trainings of professionals dealing with child victims and potential victims, including girls; child-friendly reporting and complaint mechanisms, as well as child and gender-sensitive judicial proceedings.

We would appreciate a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We further wish to inform you that we reserve the right to publicly express our concerns in the near future, as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issues in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

Maud De Boer-Buquicchio
Special Rapporteur on the sale of children, child prostitution and child
pornography
Dubravka Šimonović
Special Rapporteur on violence against women, its causes and consequences

Annex
Reference to international human rights law

The above-mentioned alleged facts would indicate a prima facie violation of Article 2 (3) of the International Covenant on Civil and Political Rights, to which your Excellency's Government is party since 10 April 1984, which calls upon States Parties "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," and most importantly, requires the competent authorities to enforce such remedies when granted.

The alleged facts further violate Article 39 of the Convention on the Rights of the Child, which your Excellency's Government ratified on 6 December 1991, on the right to recovery and reintegration of the child. The Committee on the Rights of the Child further elaborates in its General comment No.5 (2003) on General measures of implementation of the Convention on the Rights of the Child that "for rights to have meaning, effective remedies must be available to redress violations." It further insists on the need to have "appropriate reparation".

The Committee on the Elimination of Discrimination against Women (CEDAW) in its general recommendation No. 19 (1992), defines gender-based violence against women as impairing or nullifying the enjoyment by women of human rights and fundamental freedoms, and constitutes discrimination within the meaning of article 1 of the Convention on the Elimination of All forms of Discrimination Against Women, whether perpetrated by a State official or a private citizen, in public or private life. Thus, the Committee considers that States parties are under an obligation to act with due diligence to investigate all crimes, including that of sexual violence perpetrated against women and girls, to punish perpetrators and to provide adequate compensation without delay. The Committee also sets out specific punitive, rehabilitative, preventive and protective measures States should introduce to fulfil this obligation; in paragraph 9, it makes clear that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Paragraph 24, t (i) also provides that "States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia: (i) effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace".

Specifically, Article 2 (b) of the Convention on the Elimination of All Forms of Discrimination against Women, which was ratified on 21 June 1985 by your Excellency's Government, "contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the

Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.”

In addition, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in Article 4 (2) calls inter alia upon States to “enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public; adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women; punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims; as well as establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women”. Additionally, the Declaration on the Elimination of Violence against Women in its Article 4 (d) calls upon States to provide women with access “to just and effective remedies for the harm they have suffered”.

On the subject of sentencing, the Handbook for Legislation on Violence Against Women (ST/ESA/329) states in Chapter 3.11 that legislation should provide that sentences are commensurate with the gravity of the crime of violence against women and that guidelines are developed to ensure consistency in sentencing outcomes. Moreover, provisions such as minimum sentences are a way to reduce sentencing discrepancies.

The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (E/CN.15/2014/L.12/Rev.1) further recognize in Chapter 8 that protection and assistance measures for child victims of violence must continue after the person accused of that violence has been convicted and sentenced. Member States should in particular ensure “the right of a child victim of violence, or his or her parents or legal guardian, to be notified of the offender’s release from detention or imprisonment if they so wish” as well as ensure “that the risk to a child victim of violence and the best interest of that child are considered at the time of making decisions concerning the release of the offender from detention or imprisonment or the re-entry of the offender into society.” The Model Strategies also recognize in Chapter 9 that Member States should “ensure that safety risks, including the vulnerability of victims, are taken into account in decisions concerning non-custodial sentences, bail, conditional release, parole or probation, especially when dealing with repeat and dangerous offenders”.

In respect to terminology, the Convention on the Rights of the Child speaks in Articles 19, 34 and 39 of sexual abuse, violence and exploitation, and words such as

“carnal knowledge” and “defilement” do not meet international norms and standards, including the respect for the human dignity of the child. Moreover, such words do not encompass the broad nature of sexual assaults as set out in the Handbook for Legislation on Violence Against Women (ST/ESA/329).

Similarly, following the visit to Zambia in 2010 by the Special Rapporteur on violence against women, its causes and consequences, she emphasized in her report (A/HRC/17/26/Add.4) that “Additional amendments to the Penal Code that should be considered include: review of the definition of rape; introduction of aggravating circumstances for the crime of rape, such as when it is committed within intimate relations; review of the definition of defilement, age of the child in defilement offences”.