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AUX DROITS DE L'HOMME

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Special Rapporteur on the situation of human rights defenders.

REFERENCE: AL G/SO 214 (67-17) Health (2002-7) G/SO 214 (107-9)
ZMB 1/2013

14 May 2013

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Special Rapporteur on the situation of human rights defenders pursuant to Human Rights Council resolution 16/4, 15/22, and 16/5.

In this connection, we would like to bring to your Excellency's Government's attention information we have received concerning criminal charges against Mr. **Paul Kasonkomona** and an alleged campaign against defenders of the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals.

Mr. Kasonkomona is a human rights defender working for Engender Rights Centre for Justice, a local human rights group focusing on the rights of sexual minorities in Zambia, and running campaigns in support of the rights of gay people, sex workers, and people living with HIV/AIDS.

According to the information received:

On 7 April 2013, Mr. Kasonkomona was the evening guest on the television show "The Assignment" on Muvi TV, an independent television station operating from Lusaka. During the broadcast, he reportedly emphasized the need for improved access to health care by sex workers, prisoners and sexual minorities.

At approximately 9:00 p.m. the same night, as he was exiting the premises of Muvi TV, Mr. Kasonkomona was arrested by plain-clothes police. After his arrest,

Paul Kasonkomona was taken to Woodlands police station in Lusaka, where he has been detained until 12 April 2013. During the detention, Mr. Kasonkomona allegedly faced delays in receiving tuberculosis and anti-retroviral medicines, which were required by his medical condition (TB and HIV co-infection). He was subsequently charged under article 178(g) of the Penal Code for “soliciting for immoral purposes”, which is punishable with one month’s imprisonment or a fine not exceeding sixty penalty units or both. He is scheduled to reappear in court on 15 May 2013.

It is reported that sections 155(a) and 157 of the Zambian Penal Code criminalize consensual sexual activities of two people of the same sex, but that there are no recent reports of imprisonment on these grounds. However, during the dates of 29 and 30 March 2013, four same-sex couples attempted to register their marriage and were refused. This reportedly led the Minister for Home Affairs to issue a warning against those practising homosexuality in the country. In addition, he reportedly instructed the police to ensure that those advocating for the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals were arrested and punished.

Concern is expressed at the criminal charges brought against Mr. Paul Kasonkomona for activities which appear to be peaceful and in defence of human rights. Further concern is expressed at the alleged campaign against human rights defenders working peacefully to ensure the basic rights of LGBTI individuals.

While we do not wish to prejudge the accuracy of these allegations, we wish to remind your Excellency’s Government that Zambia, as a State party to the International Covenant on Civil and Political Rights (ICCPR), has a duty to guarantee equal protection before the law and to prohibit discrimination on any ground. The words “or any other grounds” in article 26 ICCPR have been interpreted to include sexual orientation. The right to freedom from discrimination on grounds of sex is also recognized in article 2 of the African Charter on Human and Peoples’ Rights, which was ratified by Zambia on 10 April 1984. The African Commission, in outlining that the aim of the principle in article 2 is to ensure equality of treatment for individuals, listed sexual orientation as one of the grounds of prohibited discrimination (Twenty-First Activity Report of the African Commission on Human and Peoples’ Rights, para. 169 (EX.CL/322 (X))).

Furthermore, we wish to appeal to your Excellency’s Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in article 19 of the International Covenant on Civil and Political Rights, which provides that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

In connection to the allegations received indicating that the criminal charges brought against Mr. Paul Kasonkomona are related to his activities in defence of human rights, we would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice".

Furthermore, we would like to bring to the attention of your Excellency's Government article 6 points b) and c) which provide that everyone has the right, individually and in association with others as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; and to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

With regard to article 7 of the Declaration on human rights defenders, the Special Rapporteur on the situation of human rights defenders has stated that the right to develop and discuss new human rights ideas is enshrined in the Declaration on Human Rights Defenders as an important provision for the ongoing development of human rights. This includes the right to discuss and advocate for human rights ideas and principles that are not necessarily new but that, in some contexts, may be perceived as new or unpopular because they address issues that might challenge tradition and culture. In this connection, the Special Rapporteur has encouraged States to do the necessary to guarantee the principle of pluralism and recognize the right of defenders to promote and advocate for new human rights ideas or ideas that are perceived as new. She has further encouraged States to take additional measures to ensure the protection of defenders who are at greater risk of facing certain forms of violence and discrimination because they are perceived as challenging accepted sociocultural norms, traditions, perceptions and stereotypes, including about sexual orientation and gender identity.

We would also like to recall resolution 17/19 of the Human Rights Council, where the Council expressed grave concern at acts of violence and discrimination, in all regions

of the world, committed against individuals because of their sexual orientation and gender identity.

With regard to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, we would like to refer your Excellency's Government to article 12 of the International Covenant on Economic, Social and Cultural Rights – acceded to by your country on 10 April 1984. This includes an obligation on the part of all States parties to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially the most vulnerable or marginalized sections of the population, without discrimination. Furthermore, article 2 of the Covenant requires States to guarantee that all rights enunciated in the Covenant will be exercised without discrimination of any kind.

We also wish to draw the attention of your Excellency's Government to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which provides that the right to health is closely related to, and dependent upon, the realization of other human rights including non-discrimination, privacy and right to information (para.3). The Committee reiterates the Covenant's prohibition of any discrimination in the realization of the right to health on the grounds of national or social origin, sexual orientation, health status (including HIV/AIDS), and civil, political, social or other status (para.18). The principle of non-discrimination applies to all aspects of the right to health and constitutes an immediate obligation (para.30).

In his report to the Human Rights Council, the Special Rapporteur on the right to health points out that criminalization of same-sex conduct has an adverse effect on the ability of individuals to access appropriate health facilities, goods and services due to the stigma attached to criminalization (A/HRC/14/20, paras.17-18). We would also like to draw the attention of your Excellency's Government to the Human Rights Committee's decision in *Toonen v. Australia* (CCPR/C/50/D/488/1992), which held that criminalization of consensual same-sex conduct was discriminatory, violated the right to privacy, could not be considered a necessary public health measure and was not a reasonable measure to prevent the spread of HIV/AIDS (paras.8.2, 8.5 and 8.7). Furthermore, in reference to discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, the United Nations High Commissioner for Human Rights recommends States to repeal laws used to criminalize individuals on grounds of homosexuality for engaging in consensual same-sex sexual conduct, and ensure that other criminal laws are not used to harass or detain people based on their sexuality or gender identity and expression (A/HRC/19/41, para 84(d)).

With regard to allegations of the delayed access of Mr. Kasonkomona to tuberculosis and anti-retroviral medicines during detention, we would like to refer your Excellency's Government to General Comment 14 of the Committee on Economic, Social

and Cultural Rights, which indicates that States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees to preventive, curative and palliative health services (para.34). We would also like to reiterate the Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111, according to which “Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation” (Principle 9). As a person living with HIV and tuberculosis co-infection, Mr. Kasonkomona’s continued treatment is critical as even a short interruption may lead to drug resistance.

Moreover, 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. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters:

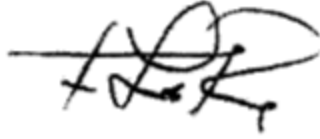
1. Are the facts alleged in the summary of the case accurate?
2. Has a complaint been lodged by or on behalf of the alleged victim?
3. Please indicate the legal basis for the charges brought against Mr. Paul Kasonkomona and how these comply with Zambia’s obligations under international human rights law.
4. Please provide the details on how the actions undertaken by public officials regarding this case are compatible with the international norms and standards of the right to freedom of opinion and expression, particularly on the charges against Mr. Paul Kasonkomona and the campaign initiated by the Government.
5. Please indicate what measures have been taken to ensure that human rights defenders, including those working for the rights of LGBTI individuals, are able to conduct their peaceful and legitimate activities.
6. Please provide the details of measures taken to ensure the enjoyment of the right to physical and mental health by Mr. Kasonkomona, including the continued access to medicines for his medical condition.

We would appreciate a response within sixty days. Your Excellency’s Government’s response will be made available in a report to the Human Rights Council for its consideration.

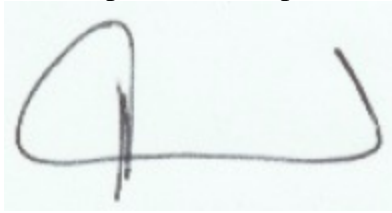
While waiting for your response, we urge your Excellency’s Government to take all necessary measures to guarantee that the rights and freedoms of Mr. Paul Kasonkomona are respected and, in the event that your investigations support or suggest

the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency's Government adopt effective measures to prevent the recurrence of these acts.

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



Frank La Rue
Special Rapporteur on the promotion and protection of the right to
freedom of opinion and expression



Anand Grover
Special Rapporteur on the right of everyone to the enjoyment of the
highest attainable standard of physical and mental health



Margaret Sekagya
Special Rapporteur on the situation of human rights defenders