Mandates of the Working Group on Arbitrary Detention and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

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(Please use this reference in your reply)

14 February 2023

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, pursuant to Human Rights Council resolutions 51/8 and 51/21.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the reported adoption of legal instruments that amend the existing legal framework pertaining to the treatment of persons allegedly involved in drug-related offences, including with regard to the processes of their rehabilitation. Specific reference is made to the Poisons, Opium and Dangerous Drugs (Amendment) Act amending the Poisons, Opium and Dangerous Drugs Ordinance, passed in the Parliament on 19 October 2022, as well as the Bureau of Rehabilitation Bill, passed in the Parliament on 18 January 2023.

According to the information received:

Poisons, Opium and Dangerous Drugs (Amendment) Act

Sri Lanka's Poisons, Opium and Dangerous Drugs Ordinance criminalizes drug-related offences including import, export, trafficking, and possession of number of narcotic substances, with the quantity of drugs being the determinant of the charge and punishment, and with death or life imprisonment being the maximum punishments under section 54A.

On 9 September 2022, the Minister of Justice, Prisons Affairs and Constitutional Reforms submitted to the Parliament the Poisons, Opium and Dangerous Drugs (Amendment) Act, amending a number of sections of the Ordinance, and on 19 October 2022, the Parliament approved the proposed amendment act, which came into effect on 23 November 2022.

Several of the amendments proposed by this new Act raise questions about the adopted approach *vis-à-vis* the treatment of the suspected drug-offenders, the role and conduct of competent State authorities in the identification of suspects and investigation of the alleged offences, as well as the treatment and rehabilitation of the alleged offenders.

The amendment Act maintains the imposition of death penalty for drug-related offences, which is incompatible with the international human rights standards, as such offences do not meet the threshold of "most serious crimes". International human rights mechanisms have repeatedly called on States to consider the abolition of the death penalty for drug-related offences and commuted death sentences. For example, in its 2021 thematic study relating to drug policies, the UN Working Group on Arbitrary Detention expressed concerns about the imposition of disproportionate

sentences for drug-related offences, some of which are longer than those handed down for serious violent crimes such as murder and rape and underscored that "imposing the death penalty for drug-related offences is incompatible with the international standards on the use of the death penalty", calling for its abolition (A/HRC/47/40). In addition, the International Narcotics Control Board has repeatedly called upon States to give due regard to the principle of proportionality in the elaboration and implementation of criminal justice policy in their efforts to address drug-related matters (INCB, 2007 Report).

Furthermore, the amendment Act stipulates that, persons who have more than 5 grams of certain drugs would not be eligible for bail even in "exceptional circumstances", because it is the provided threshold attracting the death penalty or life imprisonment. The 5-gram threshold concerns narcotic substances such as morphine, heroin, cocaine, and methamphetamine. Setting rigid quantifiable thresholds for the imposition of severe criminal penalties neglects the contextual aspect and particularity of each investigated case, while at the same time the Act itself does not appear to provide any distinction between drug users and drug traffickers, or clarification with regard to the assessment of intent in judicial proceedings.

In this regard, reference is made to the relevant international human rights standards, in particular articles 9 and 14 of the ICCPR with regard to the presumption of innocence, due process and fair trial guarantees. Furthermore, the International Guidelines on Human Rights and Drug Policy highlight States' responsibility to guarantee that any person arrested, detained, or convicted for drug-related offences benefits from non-custodial measures, such as bail or other alternatives to pre-trial detention, sentence reduction or suspension, parole and pardon or amnesty, and particularly for persons charged with or convicted of drug offences or drug-related offences of a minor nature (International Guidelines, section 7).

In the context of criminal detention as a measure of drug control, the UN Working Group on Arbitrary Detention has also found that pretrial detention systems, including "arraigo" or other forms of detention to investigate, as well as bail systems, diminish a person's ability to challenges his or her detention and affect, among others, the presumption of innocence (A/HRC/30/36, para 62). Reference is also made to the general comment no. 35 by the UN Human Rights Committee regarding article 9 of the International Covenant on Civil and Political Rights (ICCPR), which underscores the importance of an "individualized determination" of cases of detention pending trial, which takes into account "all the circumstances" (CCPR/C/GC/35, para. 38).

Section 84, allows for initial administrative detention of up to 12 months for those individuals who have not been convicted and sentenced under sections 54A(1) and 54B of the Ordinance, without providing any details with regard to the assessment process resulting in such a decision. At the same time, the wording of this provision appears to differ between the Sinhala, Tamil and English versions of the text, with "detention" being used in the Tamil and English versions, and "remand" in the Sinhala one, thus adding further confusion.

It is important to recall that the measure of administrative detention presents significant risks of arbitrary deprivation of liberty and thus it should only be applied in the most exceptional circumstances. In such cases, the competent State authorities are the ones who bear the full burden of proof that the detained individuals present a "direct and imperative threat" to State security and public order and that such a threat

cannot be addressed by alternative measures (CCPR/C/GC/35, para. 15). It is questionable whether persons involved in drug-related criminal cases with the quantity thresholds of prohibited substances indicated in this new Act would constitute a "direct and imperative threat" to State security and public order, which would justify a decision for administrative pre-trial detention, and which would potentially also open the door for other human rights violations while in detention, disproportionately affecting those in most vulnerable situations. With regard to this latter point, the UN Working Group on Arbitrary Detention has often underscored that criminal and administrative detention for drug control purposes has a disproportionate impact on vulnerable groups, including children, youth and persons belonging to minorities and people who use drugs (A/HRC/30/36, para. 58).

Section 86 of the new Act states that a person will not be prosecuted under the relevant provisions of the law, namely sections 52 (possession and consumption), 54 (selling, supplying, procuring) and 54A (manufacturing and trafficking), if the quantity of the prohibited narcotic substance is less than 1 gram; if the person agrees to undergo treatment for "de-addiction and rehabilitation"; and, if the Attorney-General has stayed prosecution. From the reported wording of section 86, it appears that a mandatory and possibly coercive rehabilitation treatment becomes a precondition for the lifting of any criminal prosecution. The same section also bestows upon the police the power to refer persons to Government medical officers to assess their "extent of dependency", and then to designated centres for their treatment. It appears that the whole referral process is determined and controlled by law enforcement officers without the involvement of any judicial authority to assess its lawfulness and compatibility with human rights standards, and without the person's free and informed consent to undergo such a treatment. Police and other law enforcement bodies could use this provision to arrest suspected drug-offenders and drug users and to subject them to arbitrary drug detention and involuntary and compulsory drug treatment, all of which constitute serious violations of international human rights law, including the right to highest attainable standard of physical and mental health, with no discrimination, as provided in articles 12 and 2.2. of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is applicable to all people, irrespective of the fact of their drug use, and may amount to torture, under article 7 of the ICCPR.[1]

We would like to also recall that treating persons who use drugs as criminals is counterproductive from a right to health perspective (see Reports of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/32/32, A/65/255, and A/64/272). In particular, the criminalization and the excessive law enforcement practices in this regard deter people from accessing services and treatment, creates discrimination and stigma, increases risks while using drugs and have a disproportionate impact on vulnerable and marginalized communities and called on States to "decriminalize or de-penalize possession and use of drugs" (A/65/255). The Special Rapporteur also indicated that "decriminalization, in culmination of several other measures, contributes to reduce the mortality and other harmful consequences associated with drug use".[2] He indicated that evidence shows that repressive and punitive responses to drugs have not been effective in reducing drug use or supply and that they have produced negative consequences" (A/HRC/32/32).

[1] A/HRC/30/36, para. 59.

[2] https://www.unodc.org/documents/hlr/follow-up-process/2020-thematic-discussions/19th_Oct/Panel/UNOHCHR_Draft_CND_Statement-_SR_Health_final.pdf

With regard to States' obligations to prevent the application of coercive and involuntary placement and medical intervention, reference is made to the General Comment No. 14 by the UN Committee on Economic, Social and Cultural Rights (E/C.12/2000/4, para 34) and to the general comment no. 20 by the UN Committee against Torture.

Finally, section 87 states that if a person is under the age of 18 when committing a drug-related offence that attract the death penalty or life imprisonment under the relevant provisions of the law, that person shall not be punished with death or life imprisonment but instead with imprisonment of not more than ten years, compulsory rehabilitation, and five years of probation. Such a provision would contravene international standards pertaining to the rights of the child and those relating to the administration of juvenile justice. It would also overlook the numerous recommendations by human rights mechanisms against the criminalization of children because of their drug use or possession and their regular appeals for alternatives to custodial sentencing, which are to be proportional and time-bound, and to prioritize the best interests of the child, while any drug treatment and harm reduction service is to be offered only by competent health and social service institutions, on a voluntary basis, based on free and informed consent. Special reference is made to the articles 3, 37 and 40 of the Convention on the Rights of the Child (CRC), ratified by Sri Lanka on 12 July 1991, which provide for the respect of the best interests of the child as a primary consideration; protect children against any unlawful and arbitrary arrest, detention and imprisonment; and, guarantees due process and the dignified treatment of children in conflict with the law, which "takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." *Bureau of Rehabilitation Bill*

On 23 September 2022, the Minister of Justice, Prison Affairs and Constitutional Reforms presented the above-mentioned bill and on 18 January 2023, the Parliament adopted the text in its second reading. The proposed bill aims at "regulating the rehabilitation of the misguided combatants, individuals engaged in extreme or destructive acts of sabotage and those who have become drug-dependent persons". According to its expressed scope, the bill assumes that the involuntary rehabilitation treatment of persons with drug dependency can be of the same nature as the one applied to former combatants and persons allegedly involved in terrorist activities.

The bill provides for the creation of an institution responsible for the provision and supervision of rehabilitation services, the "Bureau of Rehabilitation". The Bureau appears to have a strong security character, given that its Chief Executive Officer is the Commissioner-General of Rehabilitation, an institution that was created under the provisions of the Public Security Ordinance and the Prevention of Terrorism (Temporary Provisions) Act no. 48. The Commissioner-General is charged with the administration of the affairs of all the Centres, including the administration and control of their staff, while section 17 of the bill provides for the discretion of the President to designate, by means of an Order, members and officers of the national army, navy, and air force, as staff/employees of the Bureau.

There would be doubts with regard to the Bureau's accountability and the conduct of its officers, given that section 22 of the bill appears to waive any liability of any Bureau's officer or "any officer authorized by such officer", whether civil or

criminal, as long as the exercise, performance or discharge of any power, duty or function is "done in good faith", and that section 25 requires the Commissioner-General of Rehabilitation and every officer or employee of the Bureau to sign a non-disclosure agreement.

There is also a need for further clarity with regard to the meant scope, under section 28, of the prescribed necessary means, including "minimum force", applied by the employees of the Centres of Rehabilitation in order to "compel obedience", and for an alignment of the judicial proceedings and penalties under section 26 of the bill in cases of alleged ill-treatment perpetrated by the Centres' employees (namely, a fine and a maximum 18-month imprisonment) with those proceedings and penalties prescribed under the relevant provisions of Sri Lanka's Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1994 (namely, a non-bailable offence with a fine and imprisonment of not less than 7 years but not exceeding 10 years).

The open-ended character of section 23, would bestow authority on the Minister of Justice, Prison Affairs and Constitutional Reforms to establish rehabilitation and treatment centres "for any other person or group of persons", other than the categories stipulated in the proposed bill, without reference to any specific judicial processes with regard to the grounds for the placement of such persons or groups of persons.

During its visit to Sri Lanka in 2017, the Working Group on Arbitrary Detention had observed in the Kandakadu and Senapura treatment and rehabilitation centres "numerous irregularities in the way court orders had been obtained. It is very common for family members to request the courts to make such orders, or for those arrested for possession of drugs to be placed under a detention order in the rehabilitation camps without any medical assessment of whether the individuals in question are in fact addicted to drugs and therefore require rehabilitation. In fact, the only medical assessment carried out in relation to those arrested takes place after the judge has made the decision to refer the individual to the rehabilitation camps and only certifies whether the person is fit, physically and mentally, to be sent to such a camp. Moreover, following the arrest and court order, it is common for those arrested to be sent to remand prisons for periods of two to three weeks before they are transferred to rehabilitation camps. During that period, and even when they have been transferred to a rehabilitation camp, addicts receive no medical treatment and must therefore go without treatment or relief for withdrawal symptoms." The Working Group also observed that "the compulsory rehabilitation programmes were not carried out by specifically trained medical professionals and subjected detainees to long hours of physically strenuous exercise. The detainees did not have access to legal representation, impairing their ability to contest their confinement or to obtain release at the end of the programme, while the remote location of these centres had negative repercussions for family visits".[3] Questions with regard to the nature of these programmes, and whether they have a real "rehabilitation" character may be raised by the section 4(d) of the bill, which empowers the Bureau of Rehabilitation to "productively use" those placed in rehabilitation centres in order "to enhance the economy", which may result in instances of exploitation through forced labour, which violates Sri Lanka's obligations under article 8 of the ICCPR and ILO's relevant conventions.

[3] A/HRC/39/45/Add.2

As 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 be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) on the above-mentioned analysis

2. Please explain how the above-mentioned amendments to the Poisons, Opium and Dangerous Drugs Ordinance, and the provisions of the Bureau Rehabilitation Bill comply with Sri Lanka's obligations under international law, in particular with the principles and standards protecting against discrimination, arbitrary deprivation of liberty, torture and ill-treatment, forced labour, and the rights to due process and fair trial guarantees, and to adequate standards of physical and mental health, enshrined in international human rights treaties, including in the ICCPR and ICESCR.

3. Please provide detailed information on the judicial procedures and on any assessments undertaken for the placement and treatment in rehabilitation centres.

4. Please provide detailed information on the existing rehabilitation programmes for persons involved in drug-related offences and those who are drug users, and the measures undertaken to ensure that harm reduction services are provided on a voluntary basis, ensuring the full respect of human rights.

5. Please provide information on any measures undertaken to ensure the full protection of the rights of all children in conflict with the law, and in particular those children allegedly involved in drug-related crimes, in accordance with Sri Lanka's international obligations under CRC and other relevant international instruments.

6. Please provide information on any measures that the Government of Sri Lanka has taken or intends to take in order to implement the recommendations by UN human rights mechanisms referred to in the above-mentioned analysis, and to bring its legislation into compliance with international human rights law.

7. Please provide information on any further amendments to the above-mentioned pieces of legislation.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Mumba Malila
Vice-Chair of the Working Group on Arbitrary Detention

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