

## **WORKING GROUP ON ARBITRARY DETENTION: PRELIMINARY FINDINGS FROM ITS VISIT TO SRI LANKA (4 TO 15 DECEMBER 2017)**

### **Introduction**

At the invitation of the Government, the United Nations Working Group on Arbitrary Detention conducted its official country visit to Sri Lanka from 4 to 15 December 2017. The Working Group was represented by Mr. José Guevara Bermúdez (Mexico, Chair-Rapporteur), Ms. Leigh Toomey (Australia, Vice-Chair) and Ms. Elina Steinerte (Latvia, Vice-Chair), and accompanied by staff from the Office of the United Nations High Commissioner for Human Rights. The Working Group thanks the UN Country Team, its Resident Coordinator and the Human Rights team for supporting the visit.

The Working Group extends its gratitude and appreciation to the Sri Lankan Government for inviting it to undertake this country visit, and for its cooperation throughout the visit. In particular, the Working Group met with the Minister of Justice; the Minister of Prison Reforms, Rehabilitation, Resettlement and Hindu Affairs, the Commissioner General of Prisons and the Commissioner General for Rehabilitation; the Minister of Law and Order and Southern Development, the Inspector General of Police, and senior police officers from the Criminal Investigation Division, the Terrorist Investigation Department, the Special Task Force and the Organised Crime Division; the Minister of Women and Child Affairs; the Minister of Health, Nutrition and Indigenous Medicine; the Deputy Minister of National Policy and Economic Affairs; the Secretary to the Ministry of Foreign Affairs; the Secretary to the Ministry of Defence, the Chief of Defence Staff, the Commanders of the Army, Navy and Air Force and the Chief of the State Intelligence Service; the Controller General of Immigration and Emigration; the Chief Justice; the Attorney General; members of the judiciary and the Bar Association; the Human Rights Commission; the National Police Commission; the Legal Aid Commission as well as various authorities at the provincial level in Anuradhapura, Vavuniya, Trincomalee, and Polonnaruwa. The Working Group also recognises the numerous stakeholders within the country who shared their perspectives on the arbitrary deprivation of liberty, including representatives from civil society. The Working Group thanks all of them for the information and assistance they provided.

The observations presented today constitute the preliminary findings of the Working Group. They will serve as the basis of the forthcoming deliberations between the five members of the Working Group at its forthcoming sessions in Geneva over the next year. This will be followed by a report that the Working Group will officially adopt and submit to the Human Rights Council at its 39<sup>th</sup> session in September 2018.

The Working Group visited over 30 places of deprivation of liberty including police stations; remand, long-term and open prisons; immigration detention facilities and entry ports; army and navy camps; homes for children, women and the elderly; institutions for persons with psychosocial disabilities; rehabilitation centres for ex-combatants and centres for treatment of drug dependency. It was able to confidentially interview over 100 persons who are currently deprived of their liberty.

In determining whether the deprivation of liberty is arbitrary, the Working Group refers to the five categories outlined in its Methods of Work, namely: 1) when it is impossible to invoke any legal basis justifying the deprivation of liberty; 2) when the deprivation of liberty results from the exercise of certain rights guaranteed by the Universal Declaration

of Human Rights or the International Covenant on Civil and Political Rights; 3) when the right to a fair trial has been seriously violated; 4) when asylum-seekers, immigrants or refugees are subjected to prolonged administrative detention without the possibility of an administrative or judicial review or remedy; and 5) when the deprivation of liberty constitutes a violation of international law on the grounds of discrimination of any kind.

### **Good practices and positive developments**

#### **Engagement with international human rights mechanisms**

The Working Group commends the constructive cooperation of the Government of Sri Lanka with the international community, in particular the United Nations Human Rights Mechanisms. The visit of the Working Group and the recent visits of other UN Special Procedures are a clear example of such engagement.

The Ministry of Foreign Affairs, together with the Ministry of National Policies and Economic Affairs, is planning to put in place a permanent governmental body to coordinate the engagement of Sri Lanka with the international human rights mechanisms, including the Special Procedures and the UPR. The Working Group welcomes this plan and urges the Government to further develop it, involving from the outset of this process all the relevant stakeholders, including the Human Rights Commission and civil society actors.

#### **The implementation of resolution 30/1 of the Human Rights Council**

The Working Group notes the commitments undertaken by Sri Lanka under the Human Rights Council resolution 30/1 on promoting reconciliation, accountability and human rights. Addressing past instances of arbitrary deprivation of liberty, including cases of abductions and enforced disappearances, is crucial in promoting confidence and building trust in society. The Government must ensure that the recently established Office on Missing Persons is enabled to commence its functions immediately, with full involvement and participation of victims, victims' groups and civil society organizations. The Working Group also calls on the Government to establish, without delay, the Truth and Reconciliation Commission, the Reparations programme and the Special Accountability Mechanism as outlined in HRC resolution 30/1, with the full involvement and participation of all relevant stakeholders. Without addressing past violations, efforts made by the Government to address instances of arbitrary detention occurring presently will be seriously undermined.

#### **National Human Rights Action Plan**

The Working Group welcomes the adoption of the National Action Plan for the Protection and Promotion of Human Rights 2017 – 2021 which was published in November 2017. Many issues raised by the Working Group are consistent with the commitments made by the Government in its National Action Plan. The Working Group was informed that there will be a new coordination mechanism established by the Government to monitor the implementation of this Plan. There will also be an open platform for stakeholders, including civil society and the Human Rights Commission, to monitor the progress of implementation. The Working Group welcomes these initiatives and urges the Government to immediately embark upon the implementation of the objectives set out.

## **Recent ratification of international human rights treaties**

The Working Group was informed that the Government has approved the requisite documents on the accession of Sri Lanka to the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Notably, on 5 December 2017, Sri Lanka acceded to the OPCAT and, on 4 January 2018, this instrument will enter into force in respect to Sri Lanka. This is an important step undertaken by the Government. The system of regular, independent monitoring of all places of deprivation of liberty that OPCAT puts in place is not only a crucial tool for the prevention of torture and ill-treatment, but also for combating the arbitrary deprivation of liberty.

Equally, the Working Group commends the 2016 ratification of the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities, pending enabling legislation to incorporate these conventions in the domestic legal framework. These international instruments, when properly implemented in Sri Lanka, will strengthen its legal framework to prevent and address instances of arbitrary detention.

## **Right to Information Act**

The Right to Information Act of 2017 is a positive step towards the promotion and protection of human rights in Sri Lanka, and can make a significant contribution towards addressing arbitrary detention by allowing access to information which would otherwise be available only to law enforcement agencies.

## **National Human Rights Commission**

The fact that the Human Rights Commission is able to access a wide variety of places of deprivation of liberty without hindrance from the authorities, including for unannounced visits, is positive. However the Working Group is seriously concerned that there is no institutionalized practice by the authorities to systematically seek the views of the Commission on draft legislation despite the clear mandate of the Commission to review legislation as provided for in section 10 of the Human Rights Commission of Sri Lanka Act, No.21 of 1996. The Working Group urges the Government to ensure that the advice of the Human Rights Commission is sought on draft legislation, allowing it an opportunity to provide comments and engage in a constructive dialogue with the Commission concerning its recommendations.

Furthermore, the Commission is understaffed and its funding and recruitment processes seem cumbersome. The independence and financial autonomy of the Human Rights Commission is essential to the effective discharge of its functions and it is the duty of the Government to ensure that this is preserved.

The Human Rights Commission will be designated as the National Preventive Mechanism (NPM) for Sri Lanka in accordance with the terms of OPCAT. The Working Group was pleased to learn that the Government sought the views of the Human Rights Commission prior to its designation as the NPM and notes that the Commission agreed to undertake this role. However, the Human Rights Commission is likely to require further resources, both financial and human, to enable it to effectively discharge the NPM mandate as it is already overstretched in its ability to implement its current mandate. The

Working Group urges the Government of Sri Lanka to ensure that such adequate additional resources, both in terms of the personnel and financial allocation, are allocated to the Human Rights Commission so as to enable it to discharge its NPM functions effectively.

### **Fundamental rights procedure**

According to articles 17 and 126 of the Sri Lankan Constitution, any aggrieved party or his or her legal representative may file a petition before the Supreme Court for remedy with respect to the infringement of fundamental rights through executive or administrative action by the State. The petition must be filed within one month of an actual or imminent infringement of a fundamental right, though this period has been expansively interpreted in Supreme Court decisions. The Working Group considers that the fundamental rights procedure is a potentially important mechanism for the release of individuals who have been arbitrarily deprived of their liberty. However, it is underutilised due to flaws in the procedure including the one-month limitation for petitions, the lack of standing for public interest petitions, and the fact that the petition must be made to the Supreme Court and is not easily accessible to people living outside Colombo. The Working Group urges the Government to adopt measures in the draft Constitutional Bill of Rights to address these flaws in the fundamental rights procedure.

#### **The right to personal liberty**

The Working Group is mindful of the complex history of Sri Lanka which has seen the country live under state of emergency legislation for decades. However, Sri Lanka has now returned to peace and, as a democratic country, it must embrace the rule of law. This requires strict adherence to the rule of law by all public officials and full respect for the principle of personal liberty. Throughout its visit, the Working Group observed instances of deprivation of liberty being the automatic response by the authorities to a wide variety of situations in which deprivation of liberty was not absolutely necessary or prescribed by law.

Freedom for all in Sri Lanka must be the rule and deprivation of liberty must be the exception applicable only in extraordinary circumstances, following due process established by law. This means that all those authorities who are authorized to limit personal freedom through, for example, arrest and administrative detention, must be subjected to strict limits so as to prevent any instances of abuse of power. Every instance of deprivation of liberty, be it in the criminal justice or healthcare setting or others, must have a clear and precise legal basis.

### **Deprivation of liberty in the context of the criminal justice system**

#### **Pre-trial detention**

In regular criminal matters, suspects are rarely held in police stations beyond a 24-hour period and normally are produced before the courts at the end of this period. At that point, the accused can be either granted bail or remanded in custody. According to information received, the current prison population of Sri Lanka is 20,598, of which 11,009 are held in pre-trial detention. Over half of the present Sri Lankan prison population is awaiting trial, which is exceptionally high. It is common for pre-trial detention to continue for 3-4 years and in some instances longer, even up to 10 years, and it is often followed by a

lengthy trial. Time spent in pre-trial detention is not always taken into account when the final sentence is calculated, and is left to the discretion of the judge. People on remand are held in dire conditions and often choose to plead guilty to expedite the proceedings. In a number of cases, accused persons have spent numerous years in pre-trial detention but were subsequently acquitted and released from prison without any acknowledgement of the wrongful imprisonment or compensation for the years spent in custody.

Such a long pre-trial detention in itself is incompatible with article 9 of the ICCPR and the Government of Sri Lanka must take effective steps to reduce it by: (i) promoting the use of bail and other alternatives to detention; (ii) expediting investigations; and (iii) expediting court proceedings by ensuring that there are sufficient prosecutors and judges in the country. Time spent in custody during the pre-trial stage must always be taken into account when the final custodial sentence is determined.

### Bail

The bail system in Sri Lanka is problematic. Pre-trial detention should be used as a measure of last resort. Whenever possible, non-custodial measures should be applied and these measures must be realistic. The Working Group learned of numerous cases in which accused persons were granted bail, but remained in custody because they were unable to afford the bail or provide the requisite sureties.

### Undue delay in trials

The excessive duration of trials is of great concern. According to testimony received, some trials have been delayed for many years. These delays are reportedly caused by a number of factors including the lack of sufficient investigative capacity of the police; insufficient resources in the Office of the Attorney General and the courts, both in infrastructure and personnel, to deal diligently with pending cases; poor case management policies that do not prioritise consecutive court hearings; legal practices allowing for repeated postponement of hearings that take little account of the urgency to end remand, and lack of accountability for long judicial delays, among other procedural factors. Under international human rights law, detained persons are entitled to trial within a reasonable time or to release. Persons who are not released pending trial must be tried as expeditiously as possible.

### Confessions obtained by torture

Numerous alarming allegations were received concerning the use of torture and other inhuman or degrading treatment by the police, including the CID and TID, in order to obtain confessions from detainees, either to facilitate the investigation or in certain instances to be used as evidence in court. Any confession should be made before a judge who must ensure that it was given without coercion. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.

### Right to challenge the legality of detention

The right to challenge the legality of detention is not effectively guaranteed. The lack of legal assistance guaranteed for all detainees from the moment of arrest, the unjustified

delay of criminal proceedings and judicial remedies for the protection of fundamental rights, the excessive use of pre-trial detention, the lack of effective access to bail or other alternatives to detention, and the practice by police to obtain statements without the presence of lawyer and through coercion, are some of the abuses that could be prevented if an effective control of the legality of detention by the judiciary was in place.

Persons deprived of their liberty must be informed, in a language and format that the detainee understands, of the right to legal representation, the reasons justifying the deprivation of liberty, possible judicial avenues to challenge the arbitrariness and lawfulness of the deprivation of liberty, and the right to bring proceedings before the court and to obtain without delay appropriate and accessible remedies.

### The right to legal assistance

The right to legal assistance is far from guaranteed in different contexts of deprivation of liberty, including in the criminal justice system. Persons arrested or detained by the police are not systematically informed of their right to legal assistance which affects their access to counsel. Furthermore, while lawyers seem to have access to their clients at certain stages of their detention, this right of the detainee is not sufficiently protected by law. In practice, most detainees only have access to legal representation at the time of their court appearance.

Proposed amendments to the Criminal Procedure Code should guarantee the right to legal assistance so that it applies from the moment of arrest and before an accused person makes a statement to police. The Government must abide by its international human rights obligations with regard to the right of every person to legal assistance.

### Conditions of detention, presidential pardons, and abolition of the death penalty

The Working Group observed overcrowded prisons and noted that remand and convicted persons were held in the same facilities. Long term prisoners and persons serving a life sentence are held in harsh conditions with limited time for family visits, lack of opportunities to work and participate in other vocational, educational or recreational activities, and limited out-of-cell time. The authorities must ensure that the prison system is aimed at the rehabilitation and reintegration of inmates.

In addition, the exercise of presidential pardons for convicted prisoners should be regulated by clear guidelines to avoid arbitrary application and ensure that there is a means for release on compassionate grounds. Serious consideration should be given to abolishing the death penalty in Sri Lanka.

### **Deprivation of liberty in the context of Prevention of Terrorism Act (PTA)**

The Prevention of Terrorism Act, Law No 48 of 1979, is still operational in Sri Lanka but the Working Group was informed by the authorities that no more arrests are carried out under the provisions of this Act: While there has been a number of arrests since 2015, their number seem to have diminished significantly..

The Working Group is gravely concerned about the numerous severe restrictions to fair trial guarantees that the application of PTA entails. For example, under Part II of the PTA, a suspect does not have the right to the legal assistance until the court proceedings

commence. In practice, this means that any statements, including confessions, which normally form an essential part of the prosecution under the PTA, are given in the absence of lawyers. The Working Group recorded numerous instances where those convicted under the PTA had allegedly been subjected to harassment, intimidation, threats and even ill-treatment and torture to extract confessions. There were numerous instances reported of confessions written in Sinhala signed by suspects who do not understand that language. The Working Group was informed that this practice is ceasing and that instead, the Tamil suspects are forced to write and sign their own confessions in Tamil to avoid any accusations over their ability to speak Sinhala.

In the view of the Working Group, the absence of a lawyer at the time of statements recorded by the police under the PTA is a crucial factor, which contributes to the risk of confessions extracted under ill-treatment and torture. The Working Group strongly urges the Government to review this practice to guarantee all suspects, irrespective of the charges, the immediate access to lawyer, free of charge. Moreover, any confessions should only be recorded in front of the judge.

Furthermore, the so-called “voir dire” inquiry can be used to determine whether a confession has been made voluntarily or not. In accordance with this procedure, the suspect has to prove that a confession presented to the court has been extracted under duress. Initially, it falls upon the prosecution to show that the statement has been freely given, the standard of proof being that of the balance of probabilities. It then falls upon the suspect to prove beyond reasonable doubt that the confession has been extracted under duress. However, given the exceptionally lengthy pre-trial periods which normally precede the trial stage, it is nearly impossible for the suspects to reach this high standard of proof.

The Working Group strongly urges the Government of Sri Lanka to fully honour the obligations it has undertaken in accordance with the Convention against Torture. Any statements that have been extracted by duress must be declared inadmissible and when the suspect is able to show *prima facie* case of torture used for the extraction of confessions, the burden of proof must shift to the state to show, beyond reasonable doubt, that the statement has been freely given.

Equally, the Working Group was informed of the challenges of accessing bail that are faced by people investigated under the PTA, for which bail is only possible with the agreement of the Attorney General and this consent is given extremely rarely. This has led to the de facto exclusion of these PTA suspects from the ordinary bail regime. This means that once a person has been arrested under the provisions of this Act, s/he must remain in pre-trial detention until the completion of proceedings. However, the pre-trial detention under the PTA is longer than that under regular criminal proceedings. This exceedingly long period is usually around 10 years and is sometimes even longer than that, with the longest period reported to the Working Group being 22 years. Moreover, some individuals have been acquitted and released after exceptionally long pre-trial period but without any acknowledgement of the wrongful imprisonment and compensation.

Any pre-trial detention, including for the most serious offences and terrorism related crimes, must remain exceptional and must never be of excessive length. The Working Group strongly recommends that the decision on whether a suspect is eligible for bail should be individualized and no group of suspects, such as those held under the PTA, are

submitted to a blanket exclusion from bail. The decision on whether to grant bail or not must always be made by the judiciary, and must not be dependent upon the consent of the prosecution, including the Attorney General. Moreover, any time spent in pre-trial detention must be taken into account when calculating the final sentence and in case of acquittal, the person has the right to a public acknowledgement of the wrongful imprisonment and adequate compensation.

According to the information received, there are currently 69 suspects who are remanded in custody and charged under the PTA and of those, 59 are of Tamil origin. There are a further 17 suspects who are remanded in custody under the PTA but are yet to be charged and of those 10 are of Tamil origin.

The Working Group was informed of cases which had been recently transferred from the High Courts in Vavuniya and Trincomalee (districts where court proceedings take place in Tamil), to Anuradhapura (with proceedings in Sinhalese). In the High Court of Anuradhapura, there is only one Tamil translator for the court proceedings. Equally there are significant delays in relation to the translation of the court documents. Currently in the High Court of Anuradhapura, in addition to the transferred case, there are 17 suspects under the PTA, and of those 15 are of Tamil origin. The language barrier that Tamil suspects face in the courts is a serious impediment to the full implementation of their fair trial rights.

Furthermore, the Working Group was informed that there are no Tamil speaking judges in the Supreme Court in Colombo at the moment. The Government must undertake reforms in the current delivery of justice to ensure that everyone is treated equally before the courts in Sri Lanka.

The Working Group urges the Government to repeal the PTA without delay. The current regime put in place by the PTA falls significantly short of the international standards in relation to fair trial rights and is of such gravity as to give the deprivation of liberty under the PTA an arbitrary character. The Working Group notes that the replacement of the PTA with new counter-terrorism legislation which complies with the international human rights standards and best practices is one of the short-term goals of the Government as stipulated in the National Action Plan for the Protection and Promotion of Human Rights 2017 – 2021. The Working Group urges the Government in strongest terms to implement this goal immediately.

### **Deprivation of liberty of children**

The Working Group is deeply concerned that over 14,000 girls and boys under the age of eighteen are currently deprived of their liberty in 425 child care institutions across Sri Lanka. Only 26 of these institutions are operated by the Government. Sri Lanka's legal framework regarding children falls short of international best practices in several areas. These include the failure to: (i) stipulate a uniform definition of a child and an internationally acceptable minimum age of criminal responsibility; (ii) ensure that the best interests of the child is the primary focus and that the deprivation of a child's liberty is a matter of last resort and for the shortest possible period; (iii) prioritise the diversion of children away from the criminal justice system, and (iv) distinguish between the responses applicable to children in conflict with the law and children in need of care and protection.

## Children in conflict with the law

According to the Convention on the Rights of the Child to which Sri Lanka has been a State Party since 12 July 1991, a person is considered a child until he or she reaches the age of eighteen. This definition has not been incorporated into Sri Lankan legislation in a uniform manner, and the Working Group received conflicting accounts of the definition of a child from some stakeholders. While the Working Group acknowledges a Cabinet decision in November 2016 to amend the Penal Code to increase the minimum age of criminal responsibility from eight to twelve years of age, this legislative change has not yet been made.

While the legal framework in Sri Lanka does not provide for the deprivation of liberty of children who have been in conflict with the law, in practice such children are being detained in several different types of facilities known as ‘certified schools’, ‘detention homes’, ‘remand homes’ and ‘approved homes’. The distinction between the types of services offered by these facilities, their criteria for intake, and the period of admission is not clear. The Working Group learned that some children are placed in these facilities while criminal cases against them are being heard in the courts. Other children are residing in these facilities for their own protection, including girls under 18 years of age who have been involved in underage relationships. In all cases, the placement is ordered by the courts.

Although placement of children in these facilities is considered an alternative to imprisonment, it appears to be used by the courts as the primary option, rather than the last resort. The placements involve significant periods of deprivation of liberty, including for up to three years in certified schools. In some cases, children continue to be held in these institutions after they have reached eighteen years of age. Children between the ages of sixteen and eighteen years of age are also treated in the same way as adults under Sri Lankan law, and in some cases detained in prisons with adult offenders.

## Children in need of care and protection

The Working Group received information that children in need of care and protection, such as orphaned, abused, abandoned and destitute children, are placed in institutions known as ‘receiving homes’, ‘national training and counselling centres’, ‘approved schools’, and ‘voluntary children’s institutions’ throughout Sri Lanka. Some of these facilities are state-funded, though most are privately managed by non-governmental groups. At present, these placements are made under the Children and Young Persons Ordinance 1939 and its amendments. Despite the fact that this Ordinance is only applicable to children aged 12 and above, children as young as 8 are being admitted to remand and care homes.

The Working Group was informed that such placements, which can occur without the consent of the child, take place through a decision of the Provincial Commissioner or a referral by the courts. The legal basis for many placements is unclear and appears to be based on an overly broad discretion exercised by the Provincial Commissioner and the courts to detain children. The Working Group observed registries recording the placement of children that stated the children had been detained because they had “escaped from their homes” or for their own “safety”, including situations in which

parents felt that they could not exercise sufficient control over their children. The authorities administering homes for children appear to defer to court orders, rather than prioritising the best interests of the child.

During the placement, the children undertake counselling and other activities designed to prepare them for life outside the institution such as handicraft training, only some attend school and have the opportunity to learn alongside other children in a formal educational setting. At present, children in need of care are held with children in conflict with the law, contrary to international standards that require their strict separation. Steps are being taken to amend the law through the Children (Judicial Protection) Bill so that children in need of care are placed in separate homes to children in conflict with the law. Some children detained in some care homes have reportedly been beaten and sexually abused, particularly in understaffed and under-resourced centres where staff are not receiving appropriate training or clear guidelines on appropriate disciplinary methods for children under their care. It is not clear whether the children, as survivors of abuse, are receiving any psychiatric assessment or counselling and appropriate medical care. Care homes are not the only setting in which children are deprived of their liberty for their protection. The Working Group observed the case of a 7-year-old child who was detained overnight in a police station in protective custody owing to a lack of care at home.

The Working Group welcomes the steps taken by the Government to address these issues, including the establishment of two dedicated juvenile courts in Jaffna and Colombo, the addition of child desks in police stations and a Child Unit in the Attorney-General's Department, and development by the Department of Probation and Child Care Services of an Alternative Care Policy that emphasizes community-based rehabilitation of children. The Working Group also acknowledges that the remand and care homes are providing a much needed service for children who have no other support, have been subject to abuse in their family homes, and pregnant girls. Nevertheless, the deprivation of liberty of children in these institutions must be subject to a clearly defined legal basis, regularly reviewed by an independent judicial authority, and only undertaken as a last resort and for the shortest time possible. The courts must take a proactive role in considering the necessity of detaining children, and must seek alternatives whenever possible. The National Child Protection Authority must receive the necessary staffing and financial resources to regularly monitor all centres where children are deprived of their liberty, including those operated by non-government groups, and to ensure that reintegration plans are put in place for children after they leave the centres. It is important that a child protection policy and guidelines are in place for every institution at which children are deprived of their liberty, in line with the National Child Protection Policy.

### **Deprivation of liberty on the grounds of disability**

The Working Group learned that placement of individuals in hospitals and treatment facilities on the basis of a psychosocial disability, such as schizophrenia, bipolar disorder and depression, is increasingly common in post-conflict Sri Lanka. This poses serious risks for persons with a psychosocial disability who are particularly vulnerable to being deprived of their liberty for long periods without the ability to seek a review of the reasonableness, proportionality and necessity of the detention. Around 8,000 patients are admitted to the National Institute of Mental Health (Angoda) each year for treatment. Patients can come to the facility on their own, or can be brought by their family members, police or prison authorities.

The Working Group received no clear explanation of the process of admitting individuals to psychosocial institutions, but it appears that persons with a psychosocial disability are typically involuntarily detained either after referral by a court order in a criminal matter, or if they are believed to be suffering from a serious psychosocial disability that requires treatment. The Working Group was informed that, in criminal matters, the individual is kept under review by a visiting Magistrate who can order discharge. For individuals admitted for treatment, the process is significantly longer, with some patients remaining within treatment facilities for decades and even the rest of their lives. The elderly and patients with a physical disability or co-occurring drug addiction are particularly vulnerable to indefinite detention in such facilities.

The Working Group was informed that once a decision is made by a treating psychiatrist to admit a person to the acute or intermediate care wards, the admitted individual cannot challenge the decision before a judicial authority which is a matter of serious concern. The Working Group urges the Government to ensure that the right to challenge the legality of detention before a court applies to everyone equally, including those with psycho-social disabilities. There appears to be no criteria for admission, including determination of whether the individual is either a danger to him or herself or to society as well as safeguards to prevent arbitrary deprivation of liberty. It appears that the legal basis upon which the admission of the individuals takes place is the Mental Disease Ordinance 1873 and Mental Disease Act 1956. The Government must urgently update this legislation to clarify how and under what circumstances individuals are admitted and remain in the custody of psychiatric facilities. Moreover, admission to treatment facilities is not limited to those suffering from a psychosocial disability, but includes persons with learning disabilities, as well as persons who could be discharged but have no family members that can be traced or are willing to assist them to live in the community. Such a situation does not correspond to the internationally accepted standards and the Government must ensure community based care is provided to such individuals. While the Working Group welcomes the commitment of the National Institute of Mental Health to prioritise community-based care, wherever possible, this appears to be a very limited practice.

## **Deprivation of liberty for rehabilitation purposes**

### **Rehabilitation of ex-combatants**

At present, eight men are being deprived of their liberty at Poonthottam Rehabilitation Centre in Vavuniya, which is administered by the Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Affairs and is the only rehabilitation centre for ex-combatants that remains operational in Sri Lanka. The eight men were originally arrested and charged under the PTA, with various allegations against them of having assisted or been involved in LTTE activities. They were held for substantial periods of time (ranging from 10 to 22 years) in pre-trial detention at New Magazine Prison before being transferred to Poonthottam for up to two years of rehabilitation. The Working Group was informed that their agreement to undergo rehabilitation at Poonthottam was only secured by the prospect of spending one to two years in rehabilitation rather than many years awaiting trial.

The Working Group regards the ongoing deprivation of liberty of these men, as well as others who have been or will be sent to Poonthottam for rehabilitation in future under these circumstances, as arbitrary. The deprivation of liberty at Poonthottam lacks a legal

basis and, in the case of the current eight detainees, was the result of numerous grave violations of the right to fair trial, including lack of effective legal assistance, inability to access the evidence against them, and undue delay in being tried. Testimony and reports received from individuals who have been released from Poonthottam indicate that, along with their family members, they continue to be subject to harassment and surveillance by the authorities. According to the testimony received, the certificate issued at the completion of vocational training at the facility does not prevent released persons from being rearrested at any time. The Working Group learned of one case where a person was released from a rehabilitation centre, only to be re-arrested and transferred to another rehabilitation centre, effectively creating a revolving door of repeated deprivation of liberty. Given the serious issues surrounding the arbitrary deprivation of liberty, the Working Group strongly urges the Government of Sri Lanka to close down the Poonthottam Rehabilitation Centre and unconditionally release those who remain in the Centre.

### Rehabilitation programs of drug users

According to the information received from the Government, in 2016 there were 79 578 persons in Sri Lanka who were arrested for drug related offences. 60% of these where arrests related to cannabis and 35% where related to heroin. In the same year, the total number of prison admissions were 24 060 of which 10535 persons apparently committed offences related to drugs. 66.9% of the arrested people were arrested for the crime of possession and 33.1% for consuming. The Working Group thus notes that almost half of the persons deprived of liberty in the criminal justice system are there for non-violent crimes related to drugs. This is a very high percentage.

Moreover, the Working Group was informed that in 2016, 2355 persons were treated for drug abuse in Sri Lanka. Both the Government and non-governmental organisations provide residential care, treatment and rehabilitation services for those dependant on drugs. Admissions to such treatment and rehabilitation centres can be either voluntary or compulsory. In relation to the compulsory rehabilitation, the Bureau of the Commissioner General of Rehabilitation of the Ministry of Prison Reform, Rehabilitation, Resettlement and Hindu Religious Affairs, informed the Working Group that some rehabilitation camps for the former LTTE cadres have been transformed to rehabilitation camps for “drug addicts”. The aim of the programme in such rehabilitation camps is the rehabilitation of “addicts” through psychological and medical therapy, with the secondary aim being that of the reduction of the overcrowding of prisons.

During its visits to Kandakadu and Senapura Treatment and Rehabilitation Centres, the Working Group was informed that the rehabilitation programme consisted of two six months periods, the first six months being spent in Kandakadu for counselling and the second six months’ in Senapura for vocational training. All who enter this programme do so pursuant to a court order. However, the Working Group observed numerous irregularities in the way this court order was obtain. It was very common that family members requested the courts to make such orders or that those arrested for possession of drugs were ordered to the rehabilitation camps without any medical assessment on whether these individuals are in fact addicted to drugs and therefore require such rehabilitation. In fact, the only medical assessment carried out on 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 that those

arrested are sent to remand prisons for periods of 2-3 weeks before they are transferred to rehabilitation camps. During this period and even when transferred to the rehabilitation camp, the addicts receive no medical treatment and must therefore go cold turkey.

The Working Group observed that the compulsory rehabilitation program subjects detainees for long hours of physically strenuous exercise, there is no individualised assessment conducted to determine the most appropriate treatment programme and the overall delivery of the programme is not carried out by the specifically trained medical professionals. The security and overall regime in the two camps is ensured by the army and the programmes are overseen by counsellors who have received limited training on management of drug dependence from a medical standpoint. The Working Group is of the view that military authorities should not be involved in administering rehabilitation programmes and any such programmes must be in the hands of professionally trained medical personnel.

The Working Group considers that although the two rehabilitation centres, benefit from more relaxed rules than a regular prison, are nevertheless akin to prisons in their organisational scheme (i.e. barbed wire fences surround the centre, heavily armed army personnel with military uniforms patrolling the boundaries, fixed schedules for activities, impossibility to freely move in and out, the obligatory uniforms for the detainees and the rules for family visits.) Moreover, the Working Group was concerned about the remote location of these centres, which has negative repercussions for the family visits.

The Working Group observed that the detainees had no legal representation, impairing their ability to contest the confinement in rehabilitation centres or to obtain release at the end of the programme. Moreover, the time that the detainees spend during the second rehabilitation phase in Senapura in fact is not precisely set. While the authorities informed the Working Group that this should be six months, the Working Group came across this period being extended considerably.

The Working Group wishes to emphasize that the absolute prohibition of arbitrary deprivation of liberty and the safeguards which are in place to guard against such instances apply to everyone, including those arrested, detained or charged for drug-related offences as well as those undergoing compulsory rehabilitation programmes for drug addicts.

### Rehabilitation of Women and Other Vulnerable Persons

The Working Group was informed that 175 women are currently deprived of their liberty at the Methsevana State House of Detention in Gangodawila, which is maintained by the Social Services Department of the Western Provincial Council and is the only state women's home in Sri Lanka. An estimated 90% of these women have some form of psychosocial disability and require assessment, medication and care which the facility is not able to provide. The women are very poor and come to Methsevana with a low level of education, but are sent to the facility for rehabilitation and to undertake various vocational training activities.

The Working Group wishes to express its serious concern that women and children are deprived of their liberty at Methsevana without due process and satisfactory judicial review. Most women placed at Methsevana have been found to have committed acts of vagrancy under the Vagrants Ordinance 1841 and detained pursuant to the House of

Detention Ordinance 1907. The Working Group was informed that if a woman pleads guilty to acts of vagrancy, she can be released upon payment of a fine of 100 rupees. However, most women who are found to have engaged in acts of vagrancy cannot afford to make such a payment, and would likely be detained again when found by the police to be loitering or committing other acts under the Vagrants Ordinance. Women who are unable to pay the fine or do not wish to plead guilty are placed in Methsevana by an order of the Magistrates' Court. According to the testimony received, the women cannot afford a lawyer and have no access to legal assistance before or during their court hearing.

Once placed under a court order, the women are not taken back before the court for periodic review. Most of the women are 'no date' detainees who have not been given a release date and are effectively detained indefinitely. Some women have been deprived of their liberty at Methsevana for years, including one woman who has been held in the facility since 1975. The Working Group was informed that either the Minister or a court can order release, but that there are limited prospects for doing so, particularly for women who have no family or guardian willing or able to care for them. In fact, it appears that one of the few ways that a woman will be released is if a husband is found for her through the placement of an advertisement in the newspapers. Women interviewed by the Working Group confirm that staff at the facility make an effort to find employment for them so that they could have a source of income allowing them to reside in the community.

Women residing at Methsevana are not permitted to leave, and the facility is more similar to a prison than a suitable environment for vocational training. Women are often brought to Methsevana in a prison van, uniformed police officers guard the facility, residential areas are secured by locks and bars, and a seclusion cell is used to temporarily house women who have been involved in violent behaviour. The personnel resources at Methsevana are not sufficient to ensure that the women are safely detained, and a further 15-20 staff members are needed. The conditions do not meet international standards for places of detention, particularly the women's living areas, and the buildings are not maintained or suitable for persons who require medical care. Children residing with their mothers at Methsevana are only permitted to do so until the child reaches three years of age, at which point the child is either adopted with the mother's consent or transferred by court order to a child care home. There is no specialized personnel in mental disabilities in Methsevana. The Working Group considers the removal of children from their mothers at such a young age to be contrary to the best interests of the child, and calls upon the Government to introduce legislation outlawing this practice.

The Working Group urges the Government of Sri Lanka to take immediate action to address these issues. The Vagrants Ordinance 1841 and the House of Detention Ordinance 1907 are outdated, and are overly broad in their application to individuals deemed to be 'idle and disorderly', including "prostitutes". Both ordinances should be repealed. In the view of the Working Group, acts of vagrancy are strongly associated with poverty, which is a social problem best addressed through the provision of support services that allow impoverished women to live with dignity and self-sufficiency. The Working Group welcomes a 2014 Cabinet Decision to ensure that individuals with psychosocial disabilities can be transferred from Methsevana to the National Institute of Mental Health. However, the Working Group is aware that this cabinet decision is not implemented and urges the Government to ensure that sufficient resources are put in place at Angoda to implement this decision. Sufficient budget must be allocated to ensure that Methsevana can serve as an open home providing care and formal education and/or

vocational training to women who have no family support structure, rather than as a place of detention, and preferably in more modern premises.

### **Deprivation of liberty on discriminatory grounds**

The Working Group learned of several situations in which people are being deprived of their liberty, or are at high risk of being detained, on discriminatory grounds, contrary to Sri Lanka's obligations under articles 2 and 26 of the ICCPR to ensure the equal protection of the law without distinction of any kind.

Poverty appears to be a major determinant of whether a person will be taken into custody throughout Sri Lanka, and how long he or she will be deprived of liberty. The Working Group received testimony from many people currently in detention that indicated that those who could afford quality legal representation were likely to receive a better outcome in their cases, including individuals charged with PTA or criminal offences, those detained at drug rehabilitation centres and child care institutions. The Working Group also received reports that between 25 to 30 beggars, homeless and street people are reportedly being detained at Ridiyagama Detention Centre in Ambalantota each month. The Centre, which is maintained by the Social Affairs Division of the Southern Provincial Council, also houses anybody sent by court order who is defined as a vagrant under the Vagrants Ordinance. This includes female prostitutes, elderly people, and individuals who have psychosocial impairments or alcohol addiction. The Working Group was informed that a similar detention centre is located at Weerawila.

The Working Group also received accounts of Tamils who were arrested and detained in 2015, 2016 and 2017 when returning to Sri Lanka after seeking asylum in another country or working abroad. The Working Group received testimony that, in some cases, the returnees were beaten and kept under surveillance once released, and charged with offences relating to illegal departure from Sri Lanka. Similarly, civil society organisations, journalists, lawyers, activists and human rights defenders who attempt to protect the rights of Tamils are reportedly subject to threats and harassment for their work.

The Working Group considers that any form of discrimination that results in the deprivation of liberty is clearly arbitrary, and urges the Government to find affordable alternatives to detention for the most vulnerable members of society, including social services to alleviate rather than criminalise poverty. The Working Group also urges the Government to investigate allegations of discrimination against Tamils in the criminal justice system, holding those responsible for human rights violations accountable for their actions.

### **Immigration detention, asylum seekers and refugees**

Sri Lanka is not a party to either the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol. However, arrangements are in place with the UNHCR in the form of a memorandum of understanding to ensure that those arriving in Sri Lanka as asylum-seekers are given protection. The UNHCR registers such individuals, provides them with the requisite documents and upon such time they are able to live freely in the community until resettlement arrangements can be made in the third country. In the view of the Working Group, this is a positive step undertaken by the current Government. However, the Working Group is concerned about the *ad-hoc* nature of this arrangement and strongly urges the Government of Sri Lanka to ratify the 1951 Refugee Convention and its 1967

Protocol and to develop its own national legal framework in relation to asylum-seekers and refugees in a manner which reflects the international standards encapsulated in the 1951 Refugee Convention or its 1967 Protocol.

During its visit, the Working Group observed the dire conditions in the Mirihana immigration detention facility which is overcrowded. Some individuals have been held there for significant periods of time, including a person who has been there since 2010. The Working Group appreciates the difficulties the Sri Lankan authorities face in establishing the true nationality of this individual but recalls that the immigration detention must be a measure of last resort and can never be indefinite. If the nationality of this individual cannot be established, he must be released.

### **Opinions of the Working Group on Arbitrary Detention**

The Working Group requests the Government to give full effect to its Opinions adopted involving Sri Lanka.

### **Conclusion**

These are the preliminary findings of the Working Group. We look forward to continue to engage in the constructive dialogue with the Government of Sri Lanka over the following months while we determine our final conclusions in relation to this country visit. We acknowledge with gratitude the willingness of the Government to invite the Working Group and note that this is an opportunity for introducing reforms to address situations which may amount to arbitrary deprivation of liberty.