**Working Group on Arbitrary Detention: Preliminary Findings from its visit to Botswana (4 to 15 July 2022)**

**Introduction**

At the invitation of the Government, the UN Working Group on Arbitrary Detention conducted an official visit to Botswana from 4 to 15 July 2022. The Working Group was represented by Ms. Elina Steinerte (Latvia) and Mr. Mumba Malila (Zambia) and accompanied by staff from the Office of the UN High Commissioner for Human Rights.

This is the first official visit of the Working Group to the country and the Working Group extends its gratitude and appreciation to the Government of Botswana for the invitation to undertake this country visit and for its cooperation. In particular, it met with officials of the Ministry of Foreign Affairs, Ministry for State President, Ministry of Local Government and Rural Development, Ministry of Health, Ministry of Defence and Security, Ministry of Justice, Attorney General’s Chambers, Office of the Ombudsman, Directorate of Intelligence and Security, Tlokweng Kgotla Customary Court, and Customary Court of Appeals for the Southern region.

The Working Group would like to thank the UN Country Team, the Resident Coordinator, and their staff for supporting the visit. The Working Group also recognizes the numerous stakeholders within the country who shared their perspectives on the arbitrary deprivation of liberty, including representatives from civil society and lawyers. The 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 a basis for future deliberations between the members of the Working Group at its forthcoming sessions in Geneva. The Working Group will then submit its report to the UN Human Rights Council in September 2023.

The Working Group enjoyed full and unimpeded access and visited 19 places of deprivation of liberty, including police custodial facilities, prisons, an intelligence and security facility, a military facility, an immigration detention centre, a refugee camp, a mental health hospital, and rehabilitation facilities for children. It was able to confidentially interview over 100 persons deprived of their liberty.

**Good practices**

**Cooperation with the Special Procedures**

This visit is a tangible expression of Botswana’s commitment to constructive cooperation with the Human Rights Council Special Procedures. The Group commends not only Botswana’s standing invitation to the Special Procedures but also its meaningful implementation. In a spirit of cooperation and transparency, the Group was granted full and free access to all places of deprivation of liberty. This visit is an example to other countries in the region as it has been well over a decade since the Working Group has been able to visit Southern Africa.

**Ratification of international treaties**

The Working Group commends the commitment expressed by the Government of Botswana to upholding international human rights by ratifying core international human rights treaties including the International Covenant on Civil and Political Rights (Covenant); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); the Convention on the Rights of the Child (UNCRC); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). The Working Group also commends the efforts of the Government to catch up with its reporting obligations under the various treaties.

However, due to the country’s dualist legal system, the ratification of all international treaties must undergo transformation into the domestic legislation, which is yet to take place in respect to all these treaties, with the exception of the UNCRC. The Group welcomes the current legislative work to transform the provisions of the CRPD into domestic law and urges the Government to transform all other international human rights treaties to which Botswana is a party into the domestic law.

Botswana is not a party to the Optional Protocol to the Convention against Torture (OPCAT). The Group recalls that regular independent oversight over all places of deprivation of liberty significantly reduces and prevents arbitrary detention, and urges the ratification of OPCAT, its transformation into domestic law and the establishment of effectively functioning national preventive mechanisms in line with OPCAT.

**National Human Rights Institution**

Although the Ombudsman Act No. 22 of 2021, which introduces amendments to the Act No. 5 of 1995, has made progress in approximating this institution to the National Human Rights Institution, it remains to be commenced. The Group welcomes the Government’s efforts to expand the mandate of the Office of the Ombudsman to include a human rights mandate and investigative functions into allegations of human rights violations. It is notable that funding has been allocated and the Group encourages the Government to commence the Act without delay to allow the Office to function as an independent national human rights institution in compliance with the Paris Principles.

**National Human Rights Strategy**

The Group welcomes the National Human Rights Strategy and Action Plan, an initiative of the National Human Rights Coordinating Committee, which has formed a Task Force to that effect, composed of authorities and representatives of the civil society. The Strategy and Action Plan is guided by the Government’s Vision 2036 plan, which proposes anchoring human rights across all Government policies. All national authorities should embrace this comprehensive national human rights action plan and the Government should ensure the effective alignment of its policies with the Strategy.

**Decriminalisation of homosexuality**

The Group welcomes the November 2021 decision of the Court of Appeals, upholding the High Court of Botswana’s decision declaring unconstitutional sections 164 and 165 of the Criminal Code, which criminalize homosexuality. The Group urges the Government to enact the requisite legislation without delay and review all cases of individuals convicted under these sections with a view to releasing them from prison and expunging their criminal records.

**Constitutional review**

The visit coincides with the ongoing Constitutional review process. To this end, and at the initiative of the President, a Constitutional Review Committee was formed in January 2022, comprised of a wide range of stakeholders. As per its Terms of Reference, the Committee is to carry out consultations and submit its final report in September 2022, forming the basis for further decision-making concerning the review of the Constitution. The Group welcomes the extensive efforts of the Committee to make this process inclusive through traveling across the country, establishing consultations at *kgotlas*, and allowing individuals and civil society to make written submissions. However, there is no simplified version of the Constitution nor is the Constitution available in local languages. The review process was initiated with little prior notice or explanation of its aims, remit, or outcomes to the civil society, which prevented it from engaging with its constituencies to aid the process. The Group commends the efforts to carry out consultations and invites the Government to ensure that all voices, including those most marginalized, are heard and duly reflected.

**Remission of sentences**

The Prisons Act grants remission of one third of the sentence to anyone who has been imprisoned for more than one month unless the person has been sentenced to life imprisonment or detained at the President’s Pleasure or if the remission would result in the discharge of any prisoner before serving a term of imprisonment of one month. The Group commends the consistent observance of this rule in practice.

**Detention in the context of criminal justice**

**Common law and traditional justice systems**

While there is one legal system in Botswana, there are two parallel court systems. In addition to magistrate courts, there are customary courts, presided by traditional chiefs (di*kgosi*), with jurisdiction over civil and criminal matters, regulated by the Customary Court Act. *Kgosi* is a hereditary title and, as such, a *kgosi* is not a professional lawyer or judge although some training is provided. There are two customary appeal courts in the country.

The Working Group was able to observe the proceedings of a customary court. While the proceedings resemble those of magistrate courts, customary court hearings take place in the traditional *kgotla* and the accused appear without a lawyer. If the accused wishes to have legal representation, the matter must be referred to the magistrate court.

Customary courts apply the Penal Code and other relevant law. Except for the most serious crimes, they may hear a number of criminal matters. The Customary Courts (Procedure) (Amendment) Rules of 2016 sets out the procedure they follow and a Court Warrant sets the limits of sentences that each *kgosi* may impose. *Dikgosi* may impose fines (up to 10 000 pula), corporal punishment (up to 8 strokes) and imprisonment in regular prisons (for up to 15 years).

While the ability of these courts to swiftly deliver often community-based resolution and reconciliation is commendable, the Group has serious reservations as to their extensive criminal jurisdiction and sentencing powers. The Group recalls that equality of arms is a fundamental requirement of the right to a fair trial, which presupposes the right to defend oneself in person or through a lawyer of one’s own choosing. While individuals are not prevented from having legal representation, if they choose to have it, their case is required to go through the much slower route of magistrate courts.

The Group observed that *dikgosi* do not commonly resort to prison sentences and only about 10-15% of individuals sentenced in prisons have gone through the customary courts. Among those are individuals having received extensive imprisonment sentences of 5 to 15 years. Noting that such severe punishments are imposed by *dikgosi*, who are not trained legal professionals, following proceedings in which the defendants have no legal representation, there appears to be a *prima facia* breach of article 14 of the Covenant. The Government should urgently review the criminal jurisdiction of customary courts, especially in relation to the complexity of the cases they may hear and the severity of punishment they can impose.

**Presentation before a judicial authority following an arrest or detention**

The Criminal Procedure and Evidence Act allows for suspects in criminal cases to be detained in custody no longer than 48 hours. The Group was informed by all officers in charge of detention facilities visited that although suspects are not usually detained beyond the stipulated time, where the circumstances require a detention beyond 48 hours, warrants are obtained from magistrate courts authorizing detention in remand at prison facilities. However, the Group found that in some cases, detention exceeded 48 hours without warrants from magistrates, particularly in cases involving suspected irregular immigrants. The Group is also concerned that there appear to be no safeguards to ensure that magistrates’ warrants authorizing longer detention are not abused and that individuals are produced before the magistrate in person.

Additionally, the practice whereby one police station apprehends a suspect and delivers him or her to be detained at a different police station may facilitate detention beyond the authorised period. Although the arrests of suspects are generally recorded in registers of the arresting police station, details of their custody at and release from the hosting police station are in some cases not recorded to account for the detained.

The Group is also concerned that individuals detained by the police often appear before customary courts and *dikgosi* decide on their pre-trial detention. Article 9 (3) and (4) of the Covenant requires appearance of the detained person before an independent judicial authority. While *dikgosi* are designated judicial authorities in Botswana, the Group considers that they do not satisfy the requirements of the Covenant.

**Pre-trial detention and alternatives to remand**

The Criminal Procedure and Evidence Act provides for a number of alternatives to pre-trial detention such as bail, surety and recognizance, which applied in practice. The Working Group strongly encourages further application of these alternatives.

However, in relation to bail, Section 104 of the Criminal Procedure and Evidence Act allows bail for all offences with the exception of treason and murder although the magistrate may grant bail to a person under the age of 18 charged with murder. The Group was informed that in practice, any individual charged with murder may apply for bail.

The Group commends the wide application of bail in practice but remains seriously concerned about the mandatory pre-trial detention of those charged with murder and treason. Mandatory pre-trial detention violates the requirement under article 9(3) of the Covenant that pre-trial detention be an exceptional measure rather than the rule. It also violates the requirement that pre-trial detention be based on an individualised determination that it is reasonable and necessary in the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Mandatory pre-trial detention also deprives judicial authorities of their essential functions of assessing the necessity and proportionality of the detention in each case. The Group invites the Government to review this without delay.

The Working Group also observed that those awaiting trial normally constituted the largest prison population in Botswana with the average time spent on remand being around 2.5 years. Some individuals spend an excess of 6 years on remand. Pre-trial detention should be used for the shortest period of time and reviewed periodically. The Government should ensure that no excessive pre-trial detention occurs in Botswana.

**Forced confessions and excessive use of force**

The Group received testimonies about the police using excessive force, including beatings, electrocution, and suffocation of suspects to extract confessions. When the suspects would raise this with the magistrates, medical examinations would be ordered but often not carried out and the consideration of cases would proceed. The Group recalls that any such treatment may amount to torture and ill-treatment absolutely prohibited in international law and also lead to arbitrary detention. Judicial authorities must ensure that the Government has met its obligation of demonstrating that confessions were given without coercion, including through any direct or indirect physical or undue psychological pressure. Judges should consider inadmissible any statement obtained through torture or ill-treatment and should order prompt and effective investigations into such allegations.

The Group invites the Government to consider the Principles on Effective Interviewing for Investigations and Information Gathering (‘Mendez Principles’) to assist the work of its law enforcement agencies by eliminating confessions as cornerstone of the investigative process and thus guarding against arbitrary detention.

**Right to legal assistance**

In 2013, the Legal Aid Bill was adopted and Legal Aid Botswana was established. However, legal aid is only available in civil cases and while an attorney will be assigned to those facing capital punishment, no state assigned lawyers are available in other criminal matters. Where the State appoints a lawyer, the accused person may have no choice over their legal representation, which is sometimes provided by junior lawyers.

The Working Group met individuals sentenced to exceptionally long prison terms, including up to 45 years, despite having received no legal assistance. In some cases, when individuals were able to benefit from the state assigned lawyers or even been able to engage a lawyer privately, the services lacked the requisite degree of professionalism as lawyers failed to consult with their clients and/or promptly appear at court hearings.

**Undue delay**

The Group learned of undue delays of trials usually rooted in the insufficient number of court reporters producing proceeding records and the frequent adjournment and rescheduling of trials due to failure of the legal defence or even the magistrates to appear. It can take up to two years to produce records, creating significant delays especially for the appellate proceedings. While the authorities recognize this serious problem, with some 2000 cases backlog reported, and the Court Registrar is taking steps to train additional court reporters, delays may result in arbitrary detention and prejudice the right to appeal. The Group received numerous testimonies about the failure of lawyers to appear at court hearings without a legitimate reason, causing the frequent adjournment of cases, especially in cases when the lawyer is a state-appointed attorney. Similar instances are reported in relation to judges. The Group considers that such undue delays are a significant factor contributing to excessive pre-trial detention and recalls that everyone has the right to expeditious trial under article 14 of the Covenant.

**Imprisonment for debt**

The Group met individuals detained due to their inability to repay a debt, which is often not a large sum of money. Additionally to the debt that they have failed to pay, these individuals are liable for Sheriff’s costs, which in many cases doubles or even triples the owed amount. Although imprisonment is not lengthy, usually of three months, they are detained together with other prisoners and required to repay the debt, including the Sheriff’s costs upon release.

Article 11 of the Covenant, which is non-derogable and reflects customary international law, prohibits the deprivation of liberty due to debt. The Group considers that detention due to inability to pay debt is arbitrary in itself and because it discriminates against individuals due to their economic status. The Government must urgently review the system and ensure that individuals are not imprisoned due to inability to repay debt.

**Vague offences and disproportionate and mandatory sentencing**

The Group is seriously concerned about vague offences that may lead to imprisonment under the current legislation of Botswana, such as “common nuisance”, “idle and disorderly persons”, “use of insulting language” and “rogues and vagabonds”. These offenses are treated as matters of criminal law and therefore anyone, including children, can be found guilty of such crimes, with penalties ranging from a fine or one month imprisonment or both for first offenders, to up to a year of imprisonment for repeat offenders. The Group was informed that, in the context of Covid-19 legislation, failure to wear a facemask may result in imprisonment.

The Group met individuals imprisoned for these offences and observed these provisions applied against individuals in situations of vulnerability such as vagrants, and used against children considered to be unruly. These provisions are also used against those who have spoken against various Government policies and/or authorities and used to curb legitimate debate in a democratic society.

The Group noted the widespread application of the Stock Theft (Amendment) Act No. 7 of 2019, which imposes a minimum mandatory sentence of 5 years for first offenders and 7 years for repeat offenders, without distinction between adults and children. The Group noted numerous cases of children as young as 15 being sentenced to 5 years of prison under this Act.

Article 9 of the Covenant requires that detention be used only on an exceptional basis and article 37 of the UNCRC makes this obligation even more onerous in respect of children. Mandatory minimum sentencing deprives judicial authorities of their duty to assess the proportionality of sentences to individual circumstances in each case. The Government should review its Penal Code to significantly reduce offences punishable by deprivation of liberty, bearing in mind necessity and proportionality. Sentences of those imprisoned should be reviewed to determine whether they remain proportionate.

The Working Group is also seriously concerned about numerous provisions in Botswana legislation imposing criminal sanctions for offences arising from mere peaceful exercise of rights protected by the Covenant, especially freedoms of expression, assembly and association. Thus, the Penal Code criminalises defamation, the Cybercrime and Computer Related Crimes Act, No 18 of 2018 allows for imprisonment of up to one year for “offensive electronic communication”, and the Emergency Powers (Covid-19) Regulations of 2020 penalized “publishing with the intention to deceive” with up to five years imprisonment. The Public Order Act No 6 of 1967 requires prior permission from the police for any public meeting or gathering. Failure to obtain such a permission may lead to a fine or up to six months imprisonment or both. Finally, the Media Practitioners Act, No 29 of 2008 requires all media workers and outlets to register, including websites and blogs. Failure to register leads to a fine or up to three years imprisonment or both.

These provisions may have a chilling effect on freedom of expression and especially on journalistic freedom in Botswana. The Group recalls that laws formulated in vague and broad terms breach the principle of *lex certa*, violating due process of law. The principle of legality requires that laws be formulated with sufficient precision so that individuals may have access to and understand the law, and regulate their conduct accordingly. The Group recalls that laws that are vaguely and broadly worded may deter the exercise of the rights to freedoms of opinion, expression, peaceful assembly and association, participation in political and public affairs, as they have the potential for abuse, including the arbitrary deprivation of liberty.

The Working Group’s Deliberation No. 11 calls upon the States to devote particular attention to necessity and proportionality of deprivation of liberty in the context of public health emergencies, including the Covid-19 pandemic. Particularly, the Group called for the reduction of detained people and reminded that emergency powers must not be used to silence the work of human rights defenders, journalists, members of the political opposition, or any person expressing dissent or criticism of emergency powers or disseminating information contradicting measures addressing the health emergency.

**Corporal punishment**

The Group notes with utmost concern that Section 25 of the Penal Code and Section 90 of the Children’s Act establish corporal punishment as a non-custodial sentence, which can be imposed by magistrate and customary courts. It is also widely used in civil disputes and as a measure against ‘unruly’ children. Similarly, the Prison Act establishes corporal punishment as a disciplinary measure in prisons. While not widely used, it is still possible and special canes are found in prisons.

Corporal punishment violates the absolute prohibition of torture, ill-treatment and inhuman or degrading treatment or punishment as codified in article 7 of the Covenant and article 39 of the UNCRC. Moreover, it may never be considered a legitimate alternative to a custodial sentence under international human rights law. The Government must urgently repeal these legal provisions and carry out public awareness campaigns to explain the incompatibility of corporal punishment with the values of a country rooted in respect for human rights and rule of law.

**Death penalty**

Section 25 of the Penal Code provides for death penalty, the implementation of which is fully operational in Botswana. While there exists an Advisory Committee on the Prerogative of Mercy, its terms of reference and the criteria it applies for determining the success or failure of applications are unclear. The Group recalls the 2021 Human Rights Committee’s Concluding Observations on Botswana[[1]](#footnote-1) and calls for an urgent revision of the Penal Code to align it with the requirements of article 6 of the Covenant. An immediate moratorium on any further executions should be imposed.

**Conditions of detention**

The Group observed that poor detention conditions are prevalent in police cells and prisons in Botswana. While some police cells are undergoing refurbishment, most of these repair works have been outstanding for years. Police detainees lack adequate bedding provisions. Prisoners sleep on the floor or on very thin mattresses and prison facilities require fundamental refurbishment to ensure proper running water and sanitation. There were numerous complaints about both the quality and quantity of the food provided. Prisoners are subjected to an unreasonable regime whereby they are locked up from around 4:30 pm until the next morning. The situation of foreign national detainees is particularly challenging as they have no family to provide additional clothing, food or other supplies, and have difficulty in accessing medications and treatments. The Government must ensure that conditions in places of detention are fully in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”). The regime should also be adjusted to allow for reasonable evening lock-up time. Foreign nationals must be provided with clothing and basic necessities and be able to access medication and medical treatment on an equal basis with Batswana prisoners.

Moreover, although remand and sentenced prisoners are required to be separated, these detainees were held together in all facilities visited. All prisoners are required to wear a uniform, albeit of a different colour. Remand prisoners are not eligible to work or attend other programs and there is no provision for them in terms of purposeful activity. Article 10 of the Covenant requires separation of pre-trial detainees from convicted persons and that they be treated in a manner respectful of their non-convicted status.

**Child justice**

Minimum age of criminal responsibility

Section 13 (1) of the Penal Code sets the minimum age of criminal responsibility at 8 while Section 13 (2) states that a person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that the person had capacity to know that he or she ought not to do the act or make the omission. Similarly, Section 82 of the Children’s Act No. 8 of 2009 states that “a child under the age of 14 shall not be presumed to have the capacity to commit a crime unless it can be proven that a child had the capacity”. The Working Group is concerned as to the discrepancy between these provisions and that a number of stakeholders it met, including those responsible for the administration of justice, are confused about the exact minimum age of criminal responsibility in Botswana. Recalling the Concluding Observations of the Committee on the Rights of the Child[[2]](#footnote-2), the Working Group urges the Government to raise the minimum age of criminal responsibility to at least the age of 14 without exceptions.

Diversion from the criminal justice process

The Group notes the absence of an effective diversion system for children. Although some children are released into the care of their families who provide sureties that children will be cared for and supervised, a systemic approach and/or route to divert children is lacking, especially for children who may not have family able to provide the requisite supervision.

Under article 37 of the UNCRC, detention of a child must be a measure of last resort. Further, article 40 (3) and (4) requires adoption of measures diverting children through such measures of dispositions as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and to the offence. The Working Group urges the Government to ensure effective diversion systems are available to boys and girls in conflict with the law in Botswana.

Children’s courts

The lack of dedicated courts to handle cases involving children in conflict with the law is also concerning. Currently, magistrate courts convert to children’s courts, which means little more than in-camera hearings. While the Government’s acknowledgement of the need to reform the child justice system and current “Child-friendly justice” project are positive steps, the Government must urgently expedite the work in this area.

Detention of girls together with women

While there are detention facilities for boys, there are no dedicated facilities in Botswana for girls. The Working Group observed that while the numbers of girls detained are commendably very low, those who are detained are held together with women prisoners. The Government is obliged to ensure that children are not held in facilities mixed with adults and it should cease the current practice without delay.

**Detention in the context of national security**

Established under the Intelligence and Security Service Act, the Directorate of Intelligence and Security (DIS) has powers to arrest with or without a warrant. The DIS usually requests individuals to come in for an interview and has no powers to detain anyone beyond 48 hours; any overnight detention would take place in regular police stations. The Group was able to visit the DIS facilities in Sebele and received numerous testimonies from persons who have been taken there for interviewing, making it evident that individuals can be detained in that facility even if that detention does not last more than few hours. Moreover, while arrest without a warrant is permissible only when there is a reasonable suspicion of a crime being committed, the evidence received indicates that arrests without a warrant are a rule rather than an exception, in contravention to article 9 of the Covenant.

The Working Group recalls that even short periods of detention constitute deprivation of liberty when a person is not free to leave at will and in all those instances when safeguards against arbitrary detention are violated, also such short periods may amount to arbitrary deprivation of liberty. In this regard the Working Group wishes to reiterate that presence of a lawyer as well as the ability to notify the family about one’s whereabouts are among the key safeguards in ensuring that the detention is not arbitrary. However, during its visit the Working Group learned of instances when persons are taken to DIS for interviewing without being given the possibility to notify their next of kin and that while individuals are allowed to consult their lawyers prior to being interviewed, lawyers are not allowed to be present during the interviews.

The right to legal assistance is essential to preserve the right to fair trial, as it safeguards the principle of equality of arms enshrined in articles 10 and 11 (1) of the Universal Declaration of Human Rights, article 14 (3) (b) and (d) of the Covenant, and article 7 (1) of the African Charter on Human and Peoples’ Rights. All persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access shall be provided without delay. Legal assistance should be available at all stages of criminal proceedings, namely, during pretrial, trial, re-trial and appellate stages, to ensure compliance with fair trial guarantees.

**Detention in the context of migration**

The Group has very serious concerns about the current policy of detention in the migration context in Botswana. Individuals recognized as refugees are required to reside in the Dukwi refugee camp. At the time of the visit to this camp, there was a population of just over 800 asylum seekers, from 18 nationalities, more than half of whom were children. Recognised refugees must seek a specific permit to leave the camp, even if they wish to visit a shop outside the camp. If found outside without a permit, the person is sent back to Dukwi. As such, individuals interviewed identified as “eternal refugees” with some families living there already in second and even third generation. Existing integration programs are very limited and extend only to a handful of people. Only recognised refugees are provided with housing, a minimal subsistence, basic medical care and schooling for children. Work is prohibited without a specific permit, which is difficult to obtain. Those whose asylum applications are rejected receive no support from the authorities and are left to fend for themselves.

While some whose applications for refugee status have been rejected are still in Dukwi, the majority are held in the Francistown Centre for Illegal Immigrants (FCII), which is a completely closed facility akin to a prison. It was explained that the applicable regime is the same as that of prisons and all the guards are prison officers. At the time of the visit, there were 227 adults and 307 children held at the FCII. The majority have been there for about a year awaiting deportation, but other individuals have spent many years in the FCII, even up to ten years. Among those held there for especially prolonged periods are the so-called “prohibited migrants”, declared as such under the Immigration Act due to their criminal records. They often cannot be returned to their countries of origin due to non-refoulement obligations but also may not be released. As a consequence, they languish in the Centre *de facto* indefinitely.

None of those interviewed at the FCII were aware of what is awaiting them, whether they would be deported or when. Their desperate plight was plain to see. The Group was appalled by their conditions of detention, with lock-up time around 4:30 pm when people are confined to the blocks. There are no purposeful activities and provision for children, especially in relation to education, is lacking. There were numerous credible accounts of widespread violence, including sexual violence involving children.

The Refugee (Recognition and Control) Bill has been in the process of consideration since 2015 and yet, there is no clear prospect of when it will be adopted. The present approach to migrants in Botswana is of punitive nature and the Group recalls that irregular entry and stay in a country should not be treated as a criminal offence. Moreover, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity. The current approach must be revised to reflect the exceptionality of detention in the migratory context and ensure that no indefinite detention takes place. The FCII’s conditions and regime must be urgently reviewed to guarantee they are not prison-like. Furthermore, detaining children because of their parents’ migration status always violates the principle of the best interests of the child and the rights of the child. While children must not be separated from their parents and/or legal guardians, maintaining the family unit cannot justify detaining children whose parents are detained. Alternatives to detention must be applied to the entire family instead.

**Detention in the context of health care**

**Detention in the context of psychosocial disabilities**

Botswana’s Mental Disorder Act of 1971 sets out the legal framework for deprivation of liberty in the context of psychosocial disabilities. Plans to adopt new legislation are expected to take place in 2022 although no concrete date is yet set.

Currently, voluntary and involuntary admissions are possible at the S’brana Psychiatric Hospital. Individuals may be admitted voluntarily, on the basis of a medical report, upon signing a voluntary admission form. In cases of involuntary admission, a family member or social worker may apply to the District Commissioner for a reception order, issued on the basis of a medical report certifying that the person is a danger to self or others. Such reception orders are valid for 30 days, renewable for a total of up to 90 days. The person must then be discharged unless the person agrees to a voluntary commitment. During its visit to the psychiatric hospital, the Group learned that stays there average around 32 days.

However, a number of individuals are kept in the hospital despite having been discharged. The Group met with individuals who had been discharged for as long as 6 months. It was explained that since their family members have not come to collect them, the hospital is unable release them despite their discharge. There is also a handful of ‘long stay’ patients remaining in the hospital for the rest of their lives as they have no family members able to look after them and no community care is available in Botswana. Persons with psychosocial disabilities are entitled to the full respect of their right to liberty as stipulated in article 14 of the CRPD. The Group urges the Government to address the situation of these individuals urgently.

Further, a number of individuals recognized as unfit to stand trial due to their psychosocial disability and therefore not sentenced to a term of imprisonment, are detained at the President’s Pleasure both in S’brana Psychiatric Hospital as well as in prisons across the country. The average length of detention for such individuals is 14.7 years, though the Group encountered persons thus detained for over 20 years. The Mental Health Board assesses the possibility to release such persons based not only on their medical condition but also on their ability to live in the community and have family support, and on whether victim reconciliation has taken place. The assessment of the Board is sent to the Office of the President where the release decision is taken. However, there are no published guidelines to inform the process and the Group was informed of the challenges that individuals face to be released, especially noting the absence of any community-based support and treatment programs in Botswana. The Working Group was informed that there are 37 such persons in S’brana Psychiatric Hospital and further such persons across the prisons in Botswana. The detention of these individuals is *de facto* indefinite. A number of such individuals interviewed stated that, after having already spent decades in detention, they do not know if and when they might be released.

The Group recalls that indefinite detention of individuals is contrary to international law and detention on the basis of disability, including psychosocial disability, contravenes article 14 of the CRPD. Appropriate community-based services must be made available to people with psychosocial disabilities, including those held at the President’s Pleasure.

The Working Group was also informed that there are currently only three psychiatrists in Botswana, with two psychiatrists in S’brana Psychiatric Hospital, which, on the day of the Working Group’s visit, held 285 patients. While there are plans to have two more psychiatrists in the country in the next two years, it is clear to the Working Group that this will not be sufficient to address the current issues in provision of appropriate and effective care to people with psychosocial disabilities in Botswana. The Working Group also wishes to record its concern over the current dilapidated state of the facilities at the psychiatric hospital. Although the staff explained that the patients often damage the facility, it was evident to the Working Group that the design of the hospital does not provide a safe environment for the patients. Moreover, its current state with not only broken windows but also leaking water and broken ceilings, as well as lack of very basic hygiene, must be urgently remedied. The patients complained of lack of warm water and soap to wash themselves as well as of the failure to provide clean and decent clothing. This must be addressed as a matter of priority.

The Group urges the Government to conduct community-based outreach and encourage the provision of care in the community. This would prioritize personal liberty over institutional care of individuals with psychosocial disabilities, in compliance with article 9 of the Covenant and article 14 of the CRPD, and seek to reduce the stigma surrounding such disabilities.

**Detention in the context of drug rehabilitation**

Botswana currently has no State-run facilities providing care for individuals suffering from substance abuse. Their situation is addressed under the Mental Disorder Act of 1971 and they receive treatment at the S’brana Psychiatric Hospital. The Group observed such individuals sharing facilities with people with psychosocial disabilities and was concerned to learn that, unless collected by their families or relatives, they are unable to leave the facility despite having been discharged. The Group recalls that deprivation of liberty in all settings must be an exception and substance abuse treatments must be based on free and voluntary consent.

**Conclusion**

These are the preliminary findings of the Working Group. We look forward to continue engaging in this constructive dialogue with the Government of Botswana over the following months while we determine our final conclusions in relation to this country visit. We acknowledge with gratitude the willingness and openness 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.

1. See also CCPR/C/BWA/CO/2 (2021) at para 16. [↑](#footnote-ref-1)
2. CRC/C/BWA/2-3 at paras 66-67. [↑](#footnote-ref-2)