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Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

11 December 2018

Honourable President,

Please find attached an amicus for the consideration of the Court in its review of the constitutionality of amendments to section 178/B of the Act II of 2012 on Misdemeanors, in relation to persons residing in public spaces as habitual dwelling. Case No. Case no.: III/01628/2018, initiated by Kaposvár District Court (Kaposvári Járásbíróság).

Please do not hesitate to contact me if you require any further information or documentation.

Sincerely,

A handwritten signature in black ink, which appears to read "Leilani Farha". The signature is fluid and cursive.

Leilani Farha
Special Rapporteur on adequate housing as a component
of the right to an adequate standard of living,
and on the right to non-discrimination in this context

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Amicus Curiae Submitted by Ms. Leilani Farha, UN Special Rapporteur on Adequate Housing and the right to non-discrimination in this context

I. Introduction

1. As Special Rapporteur, I am an independent expert appointed by the UN Human Rights Council with a mandate to monitor and promote the full realization of the right to adequate housing as a component of the right to an adequate standard of living in all member States of the United Nations.¹

2. During the course of my mandate, I have been concerned about the growing numbers of homeless persons and the treatment of those who are homeless by governments, including through laws that criminalize or penalize those who are homeless or which systematically force them to move from where they are living. In 2016 I presented a report on homelessness and the right to adequate housing and non-discrimination (A/HRC/31/54) to the United Nations Human Rights Council.

3. I have monitored with particular concern the growth in the number of homeless persons in Hungary and recent measures adopted by the government to impose penalties, including forced community service and incarceration, for being homeless in a public place. In June 2018, I decided to make use of the “communications procedure” that is available to me, through the Office of the High Commissioner on Human Rights, to send an Open Letter to the Permanent Mission of Hungary expressing my concerns that a proposed amendment to modify Article XXII Section 3 of the Fundamental Law of Hungary, to prohibit habitual residence in a public space, appeared to violate a number of human rights to which Hungary has committed under international human rights law. A copy of my Open Letter and of the response from the Permanent Mission of Hungary, is attached as appendix 1.

4. Since that time, I have received information about amendments that have been adopted to the Act on Misdemeanors which appear to make residing in public spaces as habitual dwellings a petty offence, punishable by community service work or confinement. Section 178/B of the Act on Misdemeanors authorizes a police officer to request that a homeless person move from a habitual dwelling and issue a warning. If the same person receives three warnings within 90 days, the homeless person must be placed under short term arrest. Personal belongings are to be confiscated and stored by the police for a maximum period of six months.

5. It may assist the court for me to clarify Hungary’s obligations under

¹ This third party submission is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed herein, in full accordance with the independence of my position, was neither sought nor given by the United Nations, including the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

international human rights law with respect to the treatment of homeless persons and to explain my concern that Article 178/B of the Act on Misdemeanors contravenes the right to adequate housing and other human rights that are binding on Hungary.

6. This amicus asserts my opinion that if Article 178/B of the Act on Misdemeanors is upheld by this Court and allowed to remain in effect, it would place Hungary in clear non-compliance with its international human rights obligations. By ratifying a number of UN human rights treaties, Hungary has accepted the obligation to respect, protect and fulfill the right to adequate housing as a binding obligation under international human rights law.

7. The right to adequate housing is most prominently contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) (article 11, paragraph 1), which Hungary ratified in 1974. Key components of the right to housing and protections from forced evictions are also contained in the International Covenant on Civil and Political Rights (articles 6, 17), the Convention on the Rights of the Child (article 27, paragraph 3), the Convention on the Elimination of All Forms of Discrimination against Women (article 14, paragraph 2(d)), the Convention on the Elimination of All Forms of Racial Discrimination (article 5(e)) and the Convention on the Rights of Persons with Disabilities (articles 10, 19, 28), all of which have been ratified by Hungary.

8. A central obligation in relation to the right to adequate housing is to address homelessness as an urgent and immediate priority, through the adoption and implementation of a strategy to reduce and eliminate homelessness in the shortest possible time, ensuring access to adequate housing in which to live in peace, security and dignity.²

9. This brief will outline how international human rights law prohibits any action to require people to move from where they are living, except where they are fully consulted and provided with access to adequate, alternative housing that is freely chosen. It will explain that requiring homeless people to move from where they are living on public land into shelters against their will, without consideration of individual circumstances, without full consultation and without considering alternatives that are more compliant with the right to adequate housing constitutes a gross violation of international human rights law. And finally, it will clarify that penalizing or incarcerating homeless people for living on public land or engaging in activities such as eating or sleeping in public places is prohibited under international human rights law.

II. Relevant International Human Rights Law and Jurisprudence

- i) **Evicting or relocating from a habitual place of residence on public property without consultation and requiring homeless people to move into a shelter against their will is a violation of international human rights law**

² Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing. E/1992/23 paras 11-14.

10. Evictions from any habitual place of residence is only permitted under international law if it is done with full consultation with the affected community, in accordance with plans developed with their full participation, and in accordance with the obligation to ensure access to adequate housing in which to live in peace, security and dignity. Forcing people to move from where they are living in a manner that does not meet these and all other requirements of international human rights law constitutes a “forced eviction”, which has been recognized as a gross violation of international human rights law.³

11. In any relocation, whether temporary or permanent, from public or private land, States must comply with the basic principles and guidelines on development-based evictions and displacement.⁴ Accordingly, where relocation is unavoidable, it must be done with consultation with those affected. Relocation sites should be located in the vicinity of the original site, have access to all necessary amenities and maintain access to livelihoods.

12. Emergency shelters for those who are homeless should be provided as a matter of choice and never imposed by force. Requiring homeless people to move into shelters with the alternative of arrest and possible incarceration in a penal institution is, a fortiori, a violation of international human rights law.

13. Forced eviction has been defined by the Committee on Economic, Social and Cultural Rights (CESCR) as “the permanent or temporary removal against the will of individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate form of legal or other protection.”⁵ Evictions are only permitted when carried out both in accordance with the law and in conformity with the provisions of international human rights treaties.⁶

14. In its recent jurisprudence under the optional complaints procedure (Optional Protocol) to the ICESCR, the CESCR has had the opportunity to further clarify the obligations under the Covenant with respect to evictions. In the case of *M.D.G. and others v. Spain* (Communication 5/215) the Committee held that forced eviction is prima facie incompatible with the requirements of the Covenant and that evictions can be justified only in the most exceptional circumstances, and in accordance with the relevant principles of international law.⁷ The Committee held that in these exceptional circumstances when eviction is justified, it must be carried out “in accordance with legislation that is compatible with the Covenant, including the principle of human dignity contained in the preamble, in accordance with the general principles of reasonableness and proportionality and in keeping with procedural protections which include, inter alia, an opportunity for genuine consultation with those concerned.”⁸ The

³ Commission on Human Rights, Resolution 1993/77

⁴ A/HRC/4/18, annex I.

⁵ CESCR, General comment No. 7 Forced Evictions (1997), 1997 E/1998/22 para 4.

⁶ Ibid para. 1.

⁷ *M.D.G. and others v. Spain* (Communication 5/215) para 13.3

⁸ Ibid, para 13.4; CESCR, General comment No. 7, para.15. This requirement has also become the norm in the domestic law of countries that recognize the right to housing either directly or indirectly, as a component of the right to life. See for example Constitutional Court of South Africa, judgment in *Occupiers of 51 Olivia Road v. City of Johannesburg* [2008] ZACC 1, paras. 9–23. The Supreme Court of India has also underscored the safeguards in cases of eviction of homeless persons from public spaces, dating back to the case of *Olga Tellis & Ors v. Bombay Municipal Corporation*, *All India Reporter* 1986,

Committee held that “there must be a real opportunity for genuine prior consultation between the authorities and the persons concerned, there must be no less onerous alternative means or measures available and the persons concerned must not remain in or be exposed to a situation constituting a violation of other Covenant or human rights.”⁹ The Committee also noted that there cannot be a right without an effective remedy and that persons whose right to adequate housing might be affected as a result of a forced eviction must be accorded access to effective and appropriate judicial remedies.¹⁰

15. The Committee emphasized that States must take all appropriate measures to ensure, where possible, that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. The Committee held that States must pay particular attention to the effects of evictions on women, children, older persons, persons with disabilities or other vulnerable individuals or groups who are subjected to systemic discrimination.¹¹ It stated that “Policies on alternative housing in case of eviction should be commensurate with the need of those concerned and the urgency of the situation and should respect the dignity of the person”¹²

16. Forced eviction from a habitual place of residence, without resettlement to adequate housing, violates human rights law even if the individual or community does not have a legal right to reside there. In General Comment 4, the Committee on Economic, Social and Cultural Rights (CESCR) states that the right to security of tenure includes protection from eviction from occupied land.¹³

17. These protections also apply, though within a narrower scope, under the International Covenant on Civil and Political Rights (ICCPR). In *Liliana Assenova Naidenova et. al. v. Bulgaria*, the Human Rights Committee considered a case in which a community lived unlawfully on public land and refused to leave voluntarily.¹⁴ The Sofia Municipality issued an eviction order for the community, which was affirmed by the local and administrative courts.¹⁵ The Human Rights Committee, however, found that the evictions would constitute a violation of article 17 of the ICCPR because the municipality provided no due consideration to the consequences for the evictees and provided no satisfactory replacement housing immediately.¹⁶ Consequently, the State was under the obligation to stop the evictions until satisfactory housing was available.¹⁷

18. In my capacity as UN Special Rapporteur on the right to adequate housing, I have reported to the UN Human Rights Council on the scope of States’ obligations with regards to preventing and addressing homelessness. I stated in my Report that “[e]viction without full consultation with those affected is a clear violation of international human rights” and that States the obligation “to explore every alternative

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⁹ *M.D.G. and others v Spain*, para 13.4.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para 15.2

¹² *Ibid.*, para 15.3 citing Leilani Farha (Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context).

¹³ Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991), para 8(a).

¹⁴ See Communication No. 2073/2011, *Liliana Assenova Naibidenova et. al. v. Bulgaria*, Views adopted on Oct. 30, 2012, para. 2.2.

¹⁵ *Ibid.*, para. 2.3.

¹⁶ *Ibid.*, para. 15.

¹⁷ *Ibid.*, para. 16.

to eviction and to ensure that residents are adequately consulted about resettlement plans should be applied under domestic law to both private and public land.”¹⁸ If for reasons of health or safety a State must arrange for the relocation of homeless people who are residing at a particular location on public property, this cannot be done without meaningfully consulting all persons affected. The relocation provided should, where possible, be relocation to adequate housing in an appropriate location, as determined by those who are being relocated. At a minimum, where it is not possible to provide adequate housing immediately, the relocation must provide for equal or better standards of living than the original location.¹⁹ Removing homeless people from all public land as a blanket policy, with no consideration of the individual circumstances, no consultation and no assurances of access to adequate housing, is contrary to all of these requirements, and therefore contrary to international human rights law.

19. I have also submitted a report to the UN General Assembly on State obligations in relation to informal settlements and encampments of homeless people. (A/73/310/Rev.1) In that Report I explained that “In any instance of relocation, whether temporary or permanent, or from public or private land, States must comply with the basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I).”²⁰ According to the basic principles and guidelines, States must ensure the right to timely access to remedies to all persons threatened or subject to forced eviction.²¹ Where forced evictions have already taken place, the government must provide fair and just compensation for any losses that the evictees have suffered. Such losses may include personal, real or other property or goods.²² Adjudicative processes must consider the circumstances of each case and ensure full compensation.²³

ii) Laws which directly or indirectly discriminate against, penalize or criminalize persons who are homeless violate international human rights law.

20. The ICESCR and other international human rights treaties ratified by Hungary prohibit discrimination against homeless persons. In its General Comment on the Right to Non-discrimination under article 2(2) of the ICESCR, the Committee on Economic, Social and Cultural Rights stated that discrimination on the grounds of “economic and social situation” is prohibited under the Covenant. The Committee explained that:

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping

¹⁸ *Ibid.*, para 49(d) (emphasis added).

¹⁹ Committee on Economic, Social and Cultural Rights, general comment No. 7 (1997), para. 16; *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, A/HRC/4/18, [Basic Principles and Guidelines] para. 16 (citing to general comment No. 4 on the right to adequate housing, adopted by the Committee on Economic, Social and Cultural Rights in 1991).

²⁰ A/73/310/Rev.1 para 34.

²¹ *Basic Principles and Guidelines*, *supra*, para 59.

²² *Ibid.*, para 60.

²³ *Ibid.*, para 65.

which can lead to the refusal or unequal access to the same quality of education and health care as others as well as the denial of or unequal access to public places.²⁴

21. Similarly, the UN Human Rights Committee has stated that discrimination on the ground of socio-economic status is prohibited under the ICCPR.²⁵ In its recent General Comment 36 the Committee clarified that the guarantee of the right to life in article 6 of the Covenant requires States to take appropriate measures to address homelessness when it prevents individuals from enjoying their right to life with dignity.²⁶ Any measures taken must be consistent with the right to a dignified life and must not discriminate on the basis of socio-economic status.²⁷ In addition to violating the right to non-discrimination in articles 2 and 26 of the ICCPR, the Human Rights Committee has further found that the criminalization of homelessness may violate the right to freedom from cruel, inhuman and degrading treatment in article 7 of the ICCPR and the right to liberty and security of the person and protection from arbitrary arrest or detention in article 9 of the ICCPR.²⁸

22. In my reports to the UN Human Rights Council and to the UN General Assembly on the right to housing and the right to non-discrimination, I have drawn on the jurisprudence of UN treaty monitoring bodies described above to clarify the obligations of States with respect to discrimination and criminalization of homeless persons. In a report to the UN Human Rights Council regarding homelessness and the right to housing (A/HRC/31/54, Dec. 30, 2015) I emphasized that: “Any and all laws or measures that criminalize, impose fines on or restrict homeless people or behaviour associated with being homeless, such as sleeping or eating in public spaces, must be immediately repealed.”²⁹

23. In my report on homelessness and the right to adequate housing I also stated that States must i) Recognize homeless people as a protected group in all relevant domestic anti-discrimination and hate-crime laws; ii) Repeal or amend any existing legislation and policies with discriminatory intent or effect against people who are homeless to comply with international human rights law; iii) Ensure that homeless people have access to hearings and effective remedies for violations of their rights; and iv) Put a stop to any evictions that are intended to render homeless people less visible, such as to promote tourism, or facilitate mega events.³⁰

24. In my report to the UN Human Rights Council on rights based housing strategies I explained that housing strategies should ensure “that legal protections from discrimination are effectively enforced in the housing sector and that housing status — including homelessness — and social and economic situation are recognized as prohibited grounds of discrimination.”³¹ Most recently, in my report to the UN General Assembly on State obligations with respect to informal settlements and encampments of homeless persons, I stated that “States must adopt measures to ensure that

²⁴ CESCR, General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009) para 61.

²⁵ *Whelan v Ireland*, Communication No. 2425/2014.

²⁶ UN Human Rights Committee, General Comment 36 on the right to life, CCPR/C/GC/36, para 26.

²⁷ *Ibid*, CCPR/C/GC/36, para 61.

²⁸ CCPR/C/USA/CO/4

²⁹ A/HRC/31/54, Dec. 30, 2015 para. 91.

³⁰ *Ibid* at para 91.

³¹ A/HRC/37/53 para36.

discrimination, harassment or criminalization on the basis of tenure or housing status is prohibited in all areas...³²

25. Other U.N. Special Rapporteurs have similarly clarified that laws which penalize or criminalize homeless people for sleeping or residing in public space are violations of international human rights law. The previous Rapporteur on Extreme Poverty and Human Rights stated in a report to the UN Human Rights Council on penalization of people living in poverty that: “States shall ensure that discrimination on the basis of economic and social status is prohibited by law and the law applied by courts.”³³ She emphasized that “Laws which specifically target the particular behaviours and actions of persons living in poverty amount to discrimination on the basis of economic and social status, and shall be repealed.” In her Report the Special Rapporteur also explained that “States must ensure that arrest or detention does not disproportionately affect those living in poverty” and that States must “review all detention and incarceration policies and legislation, in order to identify and remove discriminatory laws and practices which disproportionately disadvantage persons living in poverty.”³⁴

26. Similar concerns and recommendations regarding homelessness and the importance of prohibiting criminalization of those who are homeless were affirmed by the UN Human Rights Council in a Resolution adopted on March 23, 2016 (A/HRC/RES/31/9). The Council recognized that fulfilling the right to housing requires strategies and policies that “simultaneously address discrimination, marginalization, social exclusion and housing deprivation” and that States must guarantee “legal protection against forced eviction, harassment and other threats.”³⁵

27. The Human Rights Council Resolution “calls upon States to take all measures necessary to eliminate legislation that criminalizes homelessness and to ensure an effective remedy and the right to access to justice for all for violations in the context of the realization of the right to adequate housing as a component of the right to an adequate standard of living, including measures necessary to ensure that women and persons at risk have equal access to justice; ...”³⁶

III. Conclusion

28. Based on the international human rights law and jurisprudence summarized above, I am able to state unequivocally that if Article 178/B of the Act on Misdemeanors continues to be enforced as law in Hungary, this would place Hungary in clear violation of its obligations under international human rights law.

29. It is also important, however, to recognize the fundamental human rights values and concerns that lie behind the jurisprudence and statements cited above, and the

³² A/73/310/Rev.1 para 47.

³³ Special Rapporteur on Extreme Poverty, Magdalena Sepúlveda Carmona, U.N. Doc. A/66/265 (Aug. 4, 2011) para 82.

³⁴ Ibid. para 82(i).

³⁵ A/HRC/RES/31/9.

³⁶ Ibid para 5.

purpose behind Hungary's and other States' ratification of human rights treaties.

30. As I noted in my report to the UN Human Rights Council on homelessness, the reason there is such widespread concern among UN treaty bodies and special procedures mandate holders about the increasingly discriminatory, stigmatizing and criminalizing treatment of homeless people by governments is that such treatment assaults the very core of human rights values of the dignity and equal worth of every person which it is our duty to uphold. When vulnerable and marginalized individuals who are themselves products of growing socio-economic inequality are subjected to increasing violence and hatred, and when governments reinforce these patterns by penalizing homeless people or making them disappear from public view by removing them from public places, these are matters of the gravest human rights concern.

31. There are the moments when human rights institutions, courts, the free press and responsible citizens must act decisively to protect the human rights of vulnerable groups that have been made scapegoats for broader problems in society. In my view, the growing neglect of the dignity and security of people who are left homeless by increasingly unaffordable housing, compounded by increasing discrimination, stigmatization, hatred and violence against the victims of homelessness, has defined such a moment.

32. The most frequent pleas that I hear when I visit people who are homeless in cities around the world are: "I just want to be seen as human" or "We just want to be treated with dignity." These are human rights claims and the content of international human rights treaties and the jurisprudence emanating from those establishes that this is exactly what homeless people are entitled to. It is the responsibility not only of governments, but also of human rights institutions and courts, to ensure that the claims of those who are homeless to their right to live in adequate housing in peace, security and dignity, are heard and fully protected and ensured.

Sincerely,



Leilani Farha

UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context