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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Arbitrary detention relating to drug policies****Study of the Working Group on Arbitrary Detention*, *****Summary*

The present study is submitted pursuant to Human Rights Council resolution 42/22. In it, the Working Group examines how drug policies may result in human rights violations relating to arbitrary detention and makes recommendations. It draws on the Working Group's own jurisprudence, positions taken by other human rights mechanisms and United Nations entities and contributions submitted by States and other stakeholders.

* Agreement was reached to publish the present report after the standard publication date owing to circumstances beyond the submitter's control.

** The endnotes are reproduced in the language of submission only.



I. Introduction

1. In September 2019, in its resolution 42/22, the Human Rights Council requested the Working Group on Arbitrary Detention to prepare a study on arbitrary detention relating to drug policies to ensure that upholding the prohibition thereon is included as part of an effective criminal justice response to drug-related crimes, in accordance with international law, and that such a response also encompasses legal guarantees and due process safeguards, in accordance with the recommendations on this issue contained in the outcome document adopted by the General Assembly on 19 April 2016 at its special session.¹ In resolution 42/22, the Council also requested the Working Group to bring the report to the attention of the Commission on Narcotic Drugs as the policymaking body of the United Nations with prime responsibility for drug-control matters.

2. In February 2020, a questionnaire was sent to States and other stakeholders.² A briefing on the study was given at the sixty-third session of the Commission on Narcotic Drugs, held in Vienna in March 2020, and consultations were held with the United Nations Office on Drugs and Crime (UNODC), the International Narcotics Control Board and other stakeholders. Furthermore, from 4 to 5 March 2021, the Working Group held a virtual expert consultation. The Working Group thanks all stakeholders for their contributions.

II. Detention for drug-related offences in context

3. The Working Group has found that people who use drugs are particularly at risk of arbitrary detention,³ and has noted with concern “increasing instances of arbitrary detention as a consequence of drug control laws and policies”.⁴

4. The Working Group emphasizes that the absolute prohibition of arbitrary deprivation of liberty and the safeguards to prevent such instances apply to everyone, including those who are arrested, detained or charged with drug-related offences and those undergoing rehabilitation for drug dependence, in accordance with international human rights obligations.⁵ There is a need for all drug policies to serve a necessary, proportionate and legitimate aim. Imprisonment for drug-related offences should be a last resort and in principle should be used only for serious offences, with diversion or a decision not to prosecute used most often for lesser offences.

5. One in five people incarcerated worldwide is incarcerated for drug-related offences. Some 21.65 per cent of those prisoners are serving sentences for possession of drugs for personal use.⁶

6. The number of people incarcerated for drug-related offences as a proportion of the total prison population varies considerably. In some States, depending on the year, it is less than 20 per cent, such as in Argentina (14.8 per cent),⁷ Belarus (5.9 per cent),⁸ Georgia (15.5 per cent),⁹ Ireland (8.5 per cent),¹⁰ Kazakhstan (9 per cent),¹¹ Lebanon (7.7 per cent),¹² Lithuania (15 per cent),¹³ Mexico (9.7 per cent),¹⁴ Sierra Leone (5 per cent),¹⁵ Slovakia (10 per cent)¹⁶ and Ukraine (11 per cent).¹⁷ In other States, it is more than 20 per cent, such as in Albania (26 per cent),¹⁸ Algeria (34.5 per cent),¹⁹ Cambodia (56.9 per cent),²⁰ Ecuador (27.2 per cent),²¹ Indonesia (49 per cent),²² Morocco (25 per cent),²³ Nicaragua (68 per cent),²⁴ the Russian Federation (28.6 per cent)²⁵ and Sri Lanka (52 per cent).²⁶ In some States, it is close to the global average of 20 per cent, such as in Colombia (20.7 per cent),²⁷ Nepal (21 per cent)²⁸ and the United States of America (20 per cent).²⁹

7. A related issue is the criminalization of possessing paraphernalia associated with drug consumption. Possession of such material is a crime in the Philippines, where it can carry a term of imprisonment from six months to four years. In the state of Florida in the United States, the possession of drug paraphernalia can be punished by up to one year in prison.³⁰ In Cambodia, a person’s mere presence near drug paraphernalia is sufficient reason for arrest.³¹ In 2018, the Joint United Nations Programme on HIV/AIDS (UNAIDS) reported that in 10 States, possession of a needle or syringe without a prescription could be used as evidence of drug use or cause for arrest.³²

III. Human rights violations resulting in arbitrary detention for drug-related offences

8. The so-called war on drugs has resulted in a large and disproportionate increase in detention and imprisonment for drug-related offences. Some States have gone well beyond what is required by the international drug control treaties³³ in terms of criminalization and associated penalties, while others have demonstrated excessive zeal in applying the criminalization provisions of those treaties. These disproportionate actions have frequently resulted in widespread human rights violations leading to increased arbitrary detention. Association of the military with drug control efforts has aggravated the situation in several States and has frequently resulted in more and worse human rights violations and punitive outcomes that have not proven effective in reducing the incidence of drug-related offences. The war on drugs has also generated a culture of corruption within law enforcement bodies, particularly regarding payments made to avoid arrest or to affect the outcome of judicial proceedings. States that provide financial or technical assistance to other States, including for drug enforcement operations, should ensure that their assistance does not contribute to human rights violations.

A. Interrogations of suspects when under the influence of drugs

9. The Working Group considers that States should ensure that detainees are not interviewed or interrogated while they are, or are suspected to be, under the influence of drugs and/or alcohol, and that all detainees are given access to effective medical treatment while they are experiencing withdrawal symptoms in the early stages of their detention. To do otherwise casts doubt on whether detainees are capable of understanding their rights and providing accurate statements to the police, particularly in the absence of family members or legal representation.³⁴

B. Testing without consent or judicial warrant, and stop and frisk

10. The Working Group has stated that “subjecting persons to ... testing without their consent may constitute a violation of the right to physical integrity”,³⁵ and has recommended that any testing, including by obtaining a blood or urine sample, be undertaken only with a warrant approved by a judicial officer.³⁶

11. Random drug testing and stop and frisk practices can be used as ways to identify drug users or those with drugs in their possession, with the aim of arresting them. These practices are a marked departure from the requirement of probable cause for legal searches and considerably diminish the human right to security of person. Who is to be tested or searched for possession of drugs can be a highly subjective decision, often based on a person’s physical appearance, gender, age, race, ethnicity or their status as a migrant or a sex worker.³⁷ Drug testing or searches without probable cause can be directed at groups in certain geographic areas, including parks or street locations, entertainment venues or near drug treatment facilities.³⁸ A high number of arrests for drug-related offences may be used in some States as an indicator of successful law enforcement activity. People who use drugs may also constitute an easy target for law enforcement officials who may, in some States, be subject to arrest quotas.³⁹

C. Failure to register or promptly bring arrested persons before a judge

12. In some States, persons detained for drug-related offences are not always registered or promptly brought before a judge, or may be kept in custody without being charged for a substantially longer period than those in detention for other offences.⁴⁰ A delay of 48 hours between arrest and presentation to a judicial authority is ordinarily sufficient; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.⁴¹

13. In Indonesia, a person arrested for drug-related offences can be held for 72 hours before being brought before a judge, which can be extended an additional 72 hours, whereas for other crimes, persons can be held for only 24 hours.⁴²

14. In Kazakhstan, an adult suspected of committing a criminal offence can be held for no more than 48 hours, while for an adult suspected of drug trafficking, detention can be extended to no more than 72 hours.⁴³ In Mexico, persons suspected of being involved in organized crime can be held in pre-charge detention (*arraigo*) and detained for up to 80 days. *Arraigo* can be used in relation to specific drug-related offences.⁴⁴

15. In Nepal, a person arrested for an offence is normally held for 24 hours, although at the request of the investigating authority, detention can be extended for up to 25 days. The law on narcotics control provides that persons arrested for drug-related offences can be held for up to three months.⁴⁵

16. In Sri Lanka, suspects arrested by law enforcement officers are normally brought before a judge within 24 hours of arrest, while persons arrested for offences involving illicit drugs can be held for seven days on the basis of a judicial order, in order to continue investigations.⁴⁶

D. Pretrial detention for drug-related offences

17. In Bolivia (Plurinational State of), Brazil, Ecuador, Honduras, Mexico and Peru, persons charged with drug-related offences are automatically held in pretrial detention.⁴⁷ The Working Group has expressed concern about mandatory pretrial detention, noting that it cannot be justified for any offence, including drug-related offences, as it is incompatible with human rights law. An individualized judicial determination of whether pretrial detention is reasonable and necessary must be made in each case, regardless of the crime with which a person has been charged.⁴⁸

18. Another serious concern is the overuse of pretrial detention for drug-related offences. In several States, even though there is no legal requirement for mandatory detention, in practice persons arrested for drug-related offences are frequently held in pretrial detention. This is the case in Costa Rica, Guatemala and Romania.⁴⁹ In Belarus, persons suspected of drug-related offences involving trafficking are often held in pretrial detention.⁵⁰ In Sri Lanka, persons suspected of drug trafficking and sale cannot be released on bail, apart from in exceptional circumstances.⁵¹

19. In some States, people accused of drug-related offences can be held in pretrial detention for months or even years.⁵² In the Philippines in 2018, approximately 100,000 prisoners were held awaiting trial on non-bailable drug-related offences for an average of 528 days.⁵³ In Sri Lanka, persons can be held in pretrial detention for several months in cases involving small quantities of drugs, and several years in cases involving larger quantities.⁵⁴ The Working Group has expressed concern about preventive detention regimes that provide for the detention of suspected drug traffickers without trial for long periods.⁵⁵

20. In the United States, individuals from low-income backgrounds tend to plead guilty, especially for lesser offences such as possession of small amounts of marijuana, so as to be released from detention facilities because they cannot afford to pay the bond.⁵⁶

E. Torture or ill-treatment

21. In some States, people who have been arrested or detained for drug-related offences have been subjected to physical or psychological violence to extract a confession or obtain information about other drug users or traffickers.⁵⁷ In Mexico, the militarization of the war on drugs led to a significant increase in the number of cases of torture.⁵⁸

22. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has observed that some law enforcement agencies have intentionally withheld opioid substitution therapy from drug dependent suspects in order to extract confessions or obtain information, for example about dealers and suppliers, which he found to constitute

torture.⁵⁹ The international guidelines on human rights and drug policy also indicate that withholding drugs from those who need them for medical purposes, including for drug dependence treatment and pain relief, is considered a form of torture.⁶⁰ The Working Group considers that “denial of medical treatment and/or absence of access to medical care in custodial settings may constitute cruel, inhuman or degrading treatment or punishment”.⁶¹

23. A study in Indonesia of individuals imprisoned for drug-related offences found that 79 per cent experienced abuse in the arrest phase, while 86.6 per cent reported torture or ill-treatment in detention.⁶² In Belarus and the Russian Federation, law enforcement officers have sought confessions from drug dependent persons in custody who were experiencing unmedicated withdrawal.⁶³

24. In Sri Lanka, torture has been used to elicit information from suspects of drug-related offences, and female suspects have complained of intrusive and unlawful body cavity searches being carried out by female law enforcement officers. Drug dependent persons who create disturbances because they are undergoing unmedicated withdrawal in pretrial detention are often beaten rather than given medical assistance.⁶⁴

25. The International Covenant on Civil and Political Rights⁶⁵ and regional human rights instruments protect individuals from extradition and other forms of transfer to countries where they might be subjected to torture and cruel, inhuman or degrading treatment or punishment for drug-related offences.⁶⁶

F. Lack of observance of fair trial guarantees

26. The Working Group has expressed concern about the lack of fair trial standards for persons accused of drug-related offences.⁶⁷ These include not being informed of the reasons for their arrest or the charges against them, reliance on planted or falsified evidence, reliance on confessions made under torture or other cruel and inhuman treatment, including during unmedicated withdrawal, or confession as a condition for being granted bail.

27. Other violations include the use of witnesses whose testimony has been coerced, failure to inform the accused of the right to legal counsel or to allow access to counsel,⁶⁸ failure to provide legal aid at all stages of the proceedings including during the first hours of arrest, ineffective legal counsel,⁶⁹ failure to provide information on the charges, evidence or documents in a language the accused understands, failure to notify the consular representative if the accused is a foreign national, failure to allow the accused to present a defence by calling witnesses or presenting evidence, failure to allow independent forensic evidence on the nature and amount of the substance seized, and a lack of impartiality of a judge or a judge who has been corrupted to obtain a particular outcome.⁷⁰ The use of legal presumptions in some countries in relation to drug trafficking, whereby persons found in possession of keys to a building or vehicle where drugs have been located, is incompatible with the presumption of innocence.⁷¹ A lack of respect for fair trial standards has been reported in many capital drug cases.⁷²

Drug courts

28. Drug courts, of which there are over 3,000 in the United States and significant numbers in other parts of the world, most notably in Latin America and the Caribbean, have been established as an alternative to criminal courts for individuals arrested for low-level drug-related offences. In those courts, if convicted, the accused is given a choice between a term of imprisonment or drug treatment.

29. If participants successfully complete the court-supervised treatment plan, charges will be reduced or dismissed, or their criminal record expunged. If the judge is not satisfied with treatment progress, the person may be subject to imprisonment for the drug-related offence and to additional penalties for not completing the treatment programme.⁷³ A significant flaw in the design of drug treatment programmes is the central focus on abstinence as the measure of success, without regard to the reduction of drug use. A significant number of medical experts specifically trained in drug dependency treatment consider that a reduction in drug

use to manageable levels, which allow a person to maintain employment and social interactions with family and friends, constitutes success in treatment. It is important to involve these health experts, civil society and affected communities in the development of drug policy and what constitutes success in drug treatment.

30. The Special Rapporteur on the independence of judges and lawyers has found that there is considerable evidence that drug courts cause significant harm to participants and frequently violate human rights. Treatment plans for participants are often developed by people with no medical training and can result in non-evidence-based treatment. Participants are punished for relapsing, which is part of the normal recovery process, missing therapy appointments or failing to follow rules.⁷⁴

31. Others have noted that drug courts may compel people to enter treatment programmes that do not include opioid substitution therapy for drug dependence or provide for prescribed medications for anxiety, attention deficit disorder or other health conditions.⁷⁵

32. Commentators have argued that drug courts are conceptually flawed because judges are not qualified to evaluate, monitor or supervise drug treatment, and that treatment should be dealt with exclusively by health professionals.⁷⁶ The Working Group agrees with this view. Courts should not be supervising or involved in any way with drug treatment decisions, which should be left exclusively to health professionals. Its position is set out more fully in paragraph 83 below.

Military and other special courts

33. In the Russian Federation, military personnel charged with drug-related offences are tried in military courts.⁷⁷ In Lebanon, military courts have jurisdiction over drug-related offences for military personnel, except for recruits who commit offences that are not service related. Members of the internal security and public security forces are also subject to military jurisdiction for such offences. Civilian officers of the Ministry of National Defence, the army, the military courts and the internal security and public security forces are subject to military jurisdiction if the offences were committed in the exercise of their duties.⁷⁸ In Mexico, military personnel charged with drug-related offences may in certain circumstances be tried in military courts.⁷⁹

34. Special State security courts or emergency courts, which lack many fair trial guarantees provided for by human rights law, have been used in Egypt, Iran (Islamic Republic of) and Yemen to try civilians accused of drug trafficking.⁸⁰ In Pakistan, special courts established to try terrorism cases have also been used to try drug traffickers.⁸¹

G. Disproportionate sentencing

35. The International Narcotics Control Board has recommended that the principle of proportionality continue to be a guiding principle in drug-related matters.⁸²

36. The Working Group has expressed concern about disproportionate sentences for drug-related offences.⁸³ Mandatory minimum sentencing and disproportionately long sentences for drug-related offences have sometimes resulted in some States in sentences that are longer than those handed down for serious violent crimes such as murder and rape, and have contributed to overincarceration and prison overcrowding.⁸⁴

37. In Lithuania, sentences for non-violent drug-related offences may be as lengthy as those for violent crimes such as serious bodily harm, rape and sexual assault.⁸⁵ Courts in Saudi Arabia have imposed the maximum sentence for drug-related offences in many cases.⁸⁶ In the United States, individuals convicted three times for drug-related offences may face a mandatory sentence in excess of 25 years even if no violence was involved.⁸⁷ The Working Group has encountered cases of persons convicted of drug-related offences being held beyond their completed sentences.⁸⁸

38. The Working Group has called for reform to ensure that sentences for drug-related offences are proportionate.⁸⁹ It has recommended that “in order to meet the requirement of proportionate sentencing, States should revise their penal policies and drug legislation with

the aim of reducing minimum and maximum penalties and decriminalizing the personal use of drugs and minor drug offences".⁹⁰

39. The Working Group has found that overincarceration for drug-related offences contributes significantly to prison overcrowding and can call into question compliance with article 10 of the International Covenant on Civil and Political Rights, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the dignity of the human person,⁹¹ and other standards such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

40. Another source of concern is the use of corporal punishment, including flogging, lashing, whipping and amputation as punishment for drug-related offences. At least 12 States (Botswana, Brunei Darussalam, Grenada, Iran (Islamic Republic of), Malaysia, Maldives, Nigeria, Qatar, Saudi Arabia, Singapore, the United Arab Emirates and Yemen) use corporal punishment for some drug-related offences.⁹² Corporal punishment is a disproportionate sentence for drug-related offences and a prohibited form of ill-treatment in human rights law. Life imprisonment, particularly without the possibility of parole, for non-violent, drug-related offences has been criticized as excessively punitive and disproportionate.⁹³

H. Use of the death penalty for drug-related offences

41. Imposing the death penalty for drug-related offences is incompatible with international standards on the use of the death penalty.⁹⁴

42. Drug-related offences remain punishable by death in 35 States, four of which (China, Iran (Islamic Republic of), Saudi Arabia and Singapore) carried out executions for drug-related offences in 2018.⁹⁵ Thousands of people are reportedly on death row for drug-related offences in at least 19 States.⁹⁶ Death sentences for drug-related offences frequently constitute a high proportion of the total death sentences handed down. In Indonesia, 61 per cent of those on death row in October 2019 had been sentenced for drug-related offences.⁹⁷

43. The International Narcotics Control Board has encouraged all States that retain the death penalty for drug-related offences to commute death sentences that have already been handed down and to consider the abolition of the death penalty for drug-related offences.⁹⁸

I. Ban on suspended sentence, parole, pardon and amnesty

44. Some States do not allow persons convicted of drug-related offences to be considered for suspended sentence, parole, pardon or amnesty, which are often available to those convicted of other crimes. Some States do not allow reduction of sentences through work or study for drug-related offences.⁹⁹ The Working Group has recommended that States remove such limitations.¹⁰⁰

45. In Mexico, a pregnant woman convicted of a drug-related offence cannot benefit from the alternatives to incarceration that are available to those convicted of other crimes.¹⁰¹ In Nigeria, the possibility of a suspended sentence or community service is not permitted for drug-related offences. However, a convicted person may be released on parole, with or without conditions, subject to the recommendation of the Comptroller General of Prisons, when the person has served at least five years of a 15-year term with good behaviour. The court may consider a reduction in the sentence.¹⁰²

46. In Sri Lanka, persons convicted of certain drug-related offences may not be eligible for early release, as is the case for other crimes when inmates are found to have been rehabilitated and to have maintained good conduct in prison. General pardons and general amnesties issued by the executive cannot benefit prisoners convicted of drug-related offences.¹⁰³

47. While a significant number of States have reduced their prison populations through early release or exceptional measures to help prevent the spread of coronavirus disease (COVID-19), in States such as Algeria, Colombia, Indonesia, the Philippines, Senegal, Turkey and the United Kingdom of Great Britain and Northern Ireland, prisoners charged with drug-related offences have often been excluded from such measures.¹⁰⁴

48. In Canada, correctional authorities at the federal level can cancel an individual's parole if he or she tests positive for illegal drugs or refuses to provide a urine sample.¹⁰⁵ In the Russian Federation, persons convicted of serious drug-related offences are not eligible for parole until they have completed three quarters of their sentence.¹⁰⁶

J. Misuse of drug control to target human rights defenders, journalists and political opponents

49. The Working Group has noted that, in some States, human rights defenders, journalists, political opponents and other critics of the Government are subject to drug charges as a means of suppressing or controlling their exercise of freedom of opinion and expression.¹⁰⁷

50. The Russian Federation has adopted anti-drug propaganda laws that have targeted scientific and other public discussion regarding methods of drug dependence treatment recommended by the World Health Organization (WHO) and dissemination of the recommendations of the Committee on Economic, Social and Cultural Rights concerning the use of opioid substitution therapy as treatment. In 2018, a private foundation was subjected to a substantial fine for making public information about how to reduce harm associated with the use of illicit drugs.¹⁰⁸

IV. Discriminatory drug control measures directed at specific groups

51. The war on drugs may be understood to a significant extent as a war on people. Its impact is often greatest on those who are poor, but also frequently overlaps with discrimination in law enforcement directed at vulnerable groups. This has been referred to as the intersectionality of different forms of discrimination, which reinforces disadvantage. The Working Group has observed that criminalization of drug use facilitates the deployment of the criminal justice system against drug users in a discriminatory way, with law enforcement officers often targeting members of vulnerable and marginalized groups, such as minorities, people of African descent, indigenous peoples, women, persons with disabilities, persons with AIDS and lesbian, gay, bisexual, transgender and intersex persons. Homeless persons, sex workers, migrants, juveniles, the unemployed and ex-convicts may also be vulnerable.¹⁰⁹ The Working Group has encouraged States to take measures to prohibit discriminatory practices of arrest and detention of members of vulnerable and marginalized groups in their drug-control efforts.¹¹⁰

A. Minorities

52. In some States, minorities are disproportionately impacted in terms of arrest, pretrial detention and conviction rates. In Cambodia, ethnic Vietnamese persons are reported to have particularly suffered as a consequence of the State's anti-drug campaign.¹¹¹ In Canada, people of African descent constitute 3.5 per cent of the population, but 8.6 per cent of the federal prison population.¹¹² In Mexico, minorities and the poor are disproportionately targeted.¹¹³ In the United Kingdom, people of African descent were found to be subject to court proceedings for drug possession at 4.5 times the rate of Caucasians, while drug use among both groups was comparable.¹¹⁴ In the United States, people of African descent are 6.5 times more likely to be incarcerated for drug-related offences than Caucasians,¹¹⁵ due in part to law enforcement officers spending more time in predominantly minority communities with high crime rates.¹¹⁶ The Working Group of Experts on People of African Descent has stated that

people of African descent are affected by excessively punitive laws and racial profiling, which has made them a targeted group.¹¹⁷

B. Indigenous peoples

53. There is widespread discrimination against indigenous peoples concerning drug-related offences in States with significant indigenous populations.¹¹⁸ In Canada, indigenous peoples account for 5 per cent of the population but 23 per cent of the federal prison population.¹¹⁹ A source of contention for indigenous peoples concerns their rights under the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration protects the right of indigenous peoples to produce crops and plants that they have traditionally grown for their religious, medicinal and customary purposes, including those regulated by the international drug control treaties.¹²⁰ While some States (Argentina, Bolivia (Plurinational State of), Brazil, Canada, Colombia, Ethiopia, Peru, Somalia, the United States and Yemen) have given limited protection to indigenous peoples, protection of their rights in this area remains a challenge.¹²¹

54. A subject broader than indigenous peoples' rights to cultivate is the cultivation of illegal crops by subsistence or small-scale farmers. Several States have focused on a development approach that provides agricultural alternatives to illicit crop production and increased access to government services. Alternative development programmes have been adopted in Afghanistan, Bolivia (Plurinational State of), Colombia, Ecuador, Indonesia, the Lao People's Democratic Republic, Morocco, Myanmar, Peru, the Philippines and Thailand.¹²²

C. Migrants

55. In some States, migrants are disproportionately convicted for drug-related offences.¹²³ In Saudi Arabia, from 2017 until the end of 2019, of the 202 people executed for drug-related offences, 154 (76 per cent) were migrant workers.¹²⁴ In Ecuador, 1,400 people from 46 different countries are imprisoned for drug-related offences.¹²⁵ In Italy, a significant number of foreign nationals are among those detained for drug-related offences.¹²⁶

D. Women

56. In its resolution 59/5, the Commission on Narcotic Drugs adopted requested UNODC to continue to support Member States in mainstreaming a gender perspective in their policies and programmes related to the world drug problem, and encouraged Member States to take into account the specific needs and circumstances of women subject to arrest, detention, prosecution, trial or the implementation of a sentence for drug-related offences.

57. Although women comprise 6.9 per cent of the worldwide prison population, 35 per cent of women in prison worldwide have been convicted of a drug-related offence, compared to 19 per cent of men.¹²⁷ The proportion of women imprisoned for drug-related offences is far higher in some countries, such as Thailand (82 per cent), Cambodia (73 per cent), Brazil and Costa Rica (68 per cent), Venezuela (Bolivarian Republic of) (64 per cent), the United States (56 per cent in federal prisons), Peru and the Philippines (53 per cent), Ecuador (51.7 per cent), Indonesia (48 per cent) and Argentina (46 per cent).¹²⁸

58. The female prison population increased by an estimated 53 per cent between 2010 and 2017, compared to 19.6 per cent for male prisoners. Women are typically involved in low-level, but high-risk activities such as being drug couriers. Most women in prison for drug-related offences have little education and many are single mothers and poor, with limited access to employment opportunities. Some are coerced into drug-related activities by their partners or husbands. In Colombia, 76 per cent of women imprisoned for drug-related offences had not completed secondary school before being incarcerated and in Costa Rica, more than 95 per cent of women who brought drugs into prison were single mothers. In Mexico, an estimated 40 per cent of women imprisoned for drug-related offences had been

coerced by a male partner to commit the offence.¹²⁹ Some women are incarcerated for having drugs in their homes, when the drugs actually belong to their partner.¹³⁰

59. Practice regarding sentencing of women for low-level drug-related offences varies considerably. Some authorities (in Germany and New Zealand, as well as in England and Wales) generally impose non-custodial sentences, whereas others (in the Philippines and the Russian Federation, as well as in Hong Kong, China) normally impose sentences of imprisonment.¹³¹ Women may have limited opportunities to seek reduced sentences or plea bargains due to their lack of access to legal representation or stereotypes that make sentence reduction less likely.¹³²

60. In many States, there are either no dedicated prisons for women or no services oriented to the needs of women, including treatment for drug dependence or harm-reduction measures.¹³³

61. In 1999, the Committee on the Elimination of Discrimination against Women expressed concern that in the United Kingdom, many women had been imprisoned for drug-related offences, which in some instances seemed indicative of women's poverty.¹³⁴ Law enforcement officials in some States target women who use drugs, demanding money or sex in exchange for not arresting them.¹³⁵ Sex workers in Cambodia have been disproportionately targeted in anti-drug operations and forced to make confessions under threat of violence.¹³⁶

62. During its visit to the United States, the Working Group expressed concern about the confinement of pregnant women deemed to pose a danger to themselves or others with respect to the use of alcohol or controlled substances, calling this form of deprivation of liberty "gendered and discriminatory".¹³⁷ In the United States, in 18 states, substance abuse during pregnancy is considered to be child abuse, and in 4 states, drug use during pregnancy is considered to be grounds for civil commitment or involuntary detention in a treatment facility.¹³⁸ In some states in the United States, the threat of criminal sanctions for women who use drugs during pregnancy has discouraged them from seeking health care, prenatal care and drug treatment. Medical associations have argued that legal sanctions, restrictions and reporting requirements are counterproductive.¹³⁹

63. In Norway, the authorities can detain a pregnant woman who is drug dependent for inpatient treatment without her consent if her drug use makes it reasonably likely that the fetus could be harmed and if voluntary health measures are insufficient.¹⁴⁰

E. Lesbian, gay, bisexual, transgender and intersex persons

64. Lesbian, gay, bisexual, transgender and intersex persons who use drugs are disproportionately impacted by drug policies in many countries. They may not seek support or treatment from health-care providers because of previous or anticipated experiences of discrimination and arbitrary detention.¹⁴¹

F. Victims of human trafficking

65. Victims of human trafficking have been exploited to commit drug-related offences in Hong Kong, China.¹⁴² The United States Department of State 2019 *Trafficking in Persons Report* refers to reports indicating that drug trafficking syndicates coerced South American women to carry drugs into Hong Kong, China.¹⁴³ Although instructions for prosecutors from the Department of Justice in Hong Kong, China, provide that consideration should be given to credible claims that an accused is a victim of trafficking, in practice prosecutors have largely failed to do that.¹⁴⁴ The Office of the United Nations High Commissioner for Human Rights (OHCHR) *Recommended Principles and Guidelines on Human Rights and Human Trafficking* provide that: "Trafficked persons shall not be detained, charged or prosecuted for ... their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons" (recommended principle 7).

G. Children who use drugs or commit drug-related offences

66. The international guidelines on human rights and drug policy recommend that States refrain from criminalizing children because of their drug use or possession of drugs for personal use.¹⁴⁵ The Committee on the Rights of the Child has called for children to benefit from harm reduction measures and drug treatment.¹⁴⁶

67. The Working Group has noted that a warrant should be issued for a child's arrest on drug-related charges. Absent exigent circumstances, a child's legal guardian or lawyer should be promptly notified after arrest and have the right to be present during any interrogation. Sentences should be proportionate and not harsh, and the best interests of the child should be central to every case.¹⁴⁷ These safeguards and others listed in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and articles 37 and 40 of the Convention on the Rights of the Child should be applied to children arrested for drug-related offences.

68. In several States (Armenia, Azerbaijan, Belarus, Kazakhstan, Sierra Leone and Slovakia), the age of criminal responsibility is 14 for specified drug-related offences.¹⁴⁸

69. In Belarus, the age of criminal responsibility for drug trafficking offences was lowered from 16 to 14 in 2014. That resulted in an increase of over a thousand young people being convicted and sentenced to long prison terms.¹⁴⁹

70. In Canada, when children aged between 12 and 17 are charged with drug-related offences, courts are required to consider reasonable alternatives to custodial sentencing. Non-custodial sentencing options include warnings, community service, discharge, probation, fines and supervision orders.¹⁵⁰

71. Some States, including Algeria, Croatia, Morocco and Sierra Leone, allow judicially ordered drug treatment for children as a result of a criminal proceeding, although this must normally be accompanied by the consent of the child's legal representative.¹⁵¹ In Lebanon, children may request elective drug addiction treatment with the consent of their legal guardian.¹⁵² In Ecuador, voluntary treatment of children requires the consent of both the child concerned and his or her legal guardian.¹⁵³ Although the Working Group agrees with the Committee on the Rights of the Child that drug treatment and harm reduction services should be made available to children, as stated previously in relation to adults, this should not be offered or mandated by the courts, but rather offered on a voluntary basis, based on informed consent, through social service institutions without any oversight by the judiciary and with health care exclusively in the hands of health professionals.

V. Health care for drug users in detention

A. Right to health for drug users and drug dependent persons

72. The Working Group has addressed the issue of inadequate or non-existent health care for persons in detention.¹⁵⁴ The right to health is established in article 12 of the International Covenant on Economic, Social and Cultural Rights and extends equally to those in any form of detention, without discrimination. The Nelson Mandela Rules provide that health-care services should be organized in a way that ensures continuity of treatment and care, including for drug dependence (rule 24 (2)).

73. The Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health have stated that harm reduction services are essential for persons who are drug dependent.¹⁵⁵ Failure to provide opioid substitution therapy to drug dependent persons can result in painful withdrawal and, as noted above, in some cases may lead to confessions under duress.

B. Health vulnerabilities in detention

74. Worldwide, 20 per cent of persons who are incarcerated use drugs, compared to 5.3 per cent among the general population.¹⁵⁶ The covert introduction of illicit drugs in prisons occurs during visits by family or friends, by inmates moving between courts and prisons or by corrupt prison staff or contractors.¹⁵⁷

75. There are several adverse consequences of high levels of drug use in prisons, including on the health and safety of inmates, the security of prison staff and security and discipline in the prison.¹⁵⁸ Prisons are high-risk environments for spreading communicable diseases such as HIV, hepatitis C and tuberculosis. Prisoners who inject drugs in prisons may be at a much higher risk of contracting tuberculosis. Transmission of blood-borne infections such as HIV and hepatitis C can occur by sharing needles, which is common in prisons that do not have needle and syringe programmes.¹⁵⁹

C. Lack of implementation of health norms in detention

76. Only 56 States provide opioid substitution therapy in prisons, and when provided, it may be available only in a limited number of prisons or in male prisons only. A pilot project for opioid substitution therapy was initiated at one prison in Ukraine in 2019 and was planned in three more prisons in 2020.¹⁶⁰ For needle and syringe programmes, the situation is worse, with only 11 countries providing such programmes.¹⁶¹

77. In Canada, studies have shown high rates of syringe sharing among drug injecting users in prisons, due to the unavailability of sterile injection material. A prison needle exchange programme was introduced in June 2018, and 11 out of 43 federal prisons now have such a programme.¹⁶² In Switzerland, the canton of Geneva provides needle and syringes in its prisons.¹⁶³ In Ukraine, harm reduction services are made available to detainees in remand facilities of the State Penitentiary Service pursuant to a cooperation arrangement with civil society organizations.¹⁶⁴

78. Naloxone, an opioid antagonist, counteracts the effects of drug overdose and can save a person's life. In Canada, naloxone is accessible to prison health staff and increasingly to correctional staff.¹⁶⁵ In Ukraine, naloxone is available in every medical unit in all prisons and detention centres, and training courses have been organized on its use.¹⁶⁶

79. In prisons in Albania, Belgium, Bulgaria, Georgia, Kenya, Latvia, Lithuania, Montenegro, New Zealand (with the exception of one prison), Serbia and Ukraine, opioid substitution therapy is provided only if prisoners were receiving it prior to their incarceration.¹⁶⁷

80. In several States, such as Egypt, Jordan, the Russian Federation, Saudi Arabia, the Syrian Arab Republic and Turkmenistan, opioid substitution therapy is prohibited for society at large and unavailable in prisons.¹⁶⁸

81. A question that has received insufficient attention is the availability of harm reduction services and drug treatment for migrants in detention. The Cyprus National Addiction Authority funds a programme offering prevention, harm reduction and drug treatment services to adult migrants and children in a government detention centre.¹⁶⁹ In Georgia, migrants in custody awaiting deportation receive health care for drug dependency.¹⁷⁰ In Italy, personnel from the drug rehabilitation service regularly visit closed removal centres.¹⁷¹ In Lebanon, all detainees, including migrants, may apply for drug treatment.¹⁷²

VI. Compulsory treatment of drug users

82. Although the Working Group has previously condemned compulsory drug treatment in State-run drug detention facilities, its prior position regarding drug treatment as an alternative to imprisonment has been less categorical. In the past, the Working Group has stated only that when treatment is undertaken as an alternative to incarceration, it should not extend beyond the period of the criminal sentence.¹⁷³

83. The position of the Working Group has evolved. The practice of providing defendants with a choice between imprisonment and drug treatment is not limited to drug courts, but is used by regular courts in a significant number of States. The Working Group considers that the threat of imprisonment should not be used as a coercive tool to incentivize people into drug treatment. While some defendants, when given a choice, have refused drug treatment and accepted a prison sentence as an outcome, the measure of coercion involved in such a choice is too great and is an unacceptable infringement on the right to choose one's treatment freely, to refuse treatment or to discontinue it at any time.¹⁷⁴ Courts should also not order compulsory or forced drug treatment. Drug treatment should always be voluntary, based on informed consent, and left exclusively to health professionals. There should be no court supervision or monitoring of the process, which should rest exclusively with trained medical professionals.

A. State-run compulsory drug detention centres

84. Arbitrary detention may occur when people who use or are suspected of using drugs are confined against their will in compulsory drug detention centres.¹⁷⁵ Typical periods of detention have been estimated at between 6 and 11 months, depending on the law and practice in the State concerned, but can be longer.¹⁷⁶ Detention is based on administrative law in some countries and criminal law in others. There may be little or no legal process for the detention of persons in compulsory drug detention centres, or any right to appeal detention decisions. Individual arrests, mass arrests in drug sweeps, detention for testing positive for drugs and being turned in by family or community members can all lead to such detention.¹⁷⁷ In Cambodia, public health workers, including those promoting harm reduction services, have also been arrested in drug raids and detained in compulsory drug detention centres.¹⁷⁸

85. There is frequently no evaluation of whether a detainee is drug dependent or any type of individual health assessment. In many facilities, no distinction is made between drug use and drug dependence.¹⁷⁹ Treatment in compulsory drug detention centres is often not evidence-based, but focused on abstinence. Health professionals trained to manage drug dependence or assist with harm reduction are usually not present.¹⁸⁰

86. The Working Group has found that practices at these drug detention centres include "painful, unmedicated withdrawal, beatings, military drills, verbal abuse, and sometimes scientific experimentation without informed consent" and "forced labour, without pay or at extremely low wages ... with detainees punished if work quotas are not met". It has determined that "these abuses are flagrant violations of the right to be free from torture, cruel, inhuman, or degrading treatment and punishment and the right to health".¹⁸¹ Forced labour has not been scientifically recognized as a valid means of treating drug dependence.¹⁸² Deaths have been reported at compulsory drug detention facilities due to severe beatings, unmedicated drug withdrawal and unhygienic food. Inhumane conditions at such facilities have also led many detainees to attempt suicide.¹⁸³

87. Detainees are normally treated en masse, with treatment primarily consisting of long hours of physically strenuous exercise, combined with physical and verbal abuse and a strict disciplinary regime. For even minor infractions of the rules, detainees may be subject to severe beatings, solitary confinement and other harsh punishments. In some institutions, religion is invoked to motivate individuals to stop consuming drugs. Drug use is largely viewed as a moral failing.¹⁸⁴

88. There is no evidence that practices at compulsory drug detention centres result in successful treatment of drug dependent persons. Relapse rates upon release are extremely high. This is in contrast to relatively low relapse rates experienced by drug dependent individuals who voluntarily take part in evidence-based treatment provided by health professionals trained in managing drug dependence on an outpatient basis.¹⁸⁵ The Working Group has recommended that "States should make available voluntary, evidence-informed and rights-based health and social services in the community" as an alternative to compulsory drug detention centres.¹⁸⁶

89. State-run compulsory drug detention facilities operate in Cambodia, China, Indonesia, Lao People's Democratic Republic, Malaysia, the Philippines, Singapore, Sri Lanka, Thailand and Viet Nam.¹⁸⁷ In the Philippines and Sri Lanka, these facilities are located on military bases or overseen by law enforcement authorities.¹⁸⁸ Although some States have recognized that relapse rates are extremely high in compulsory drug detention centres and much lower for voluntary, evidence-based treatment in the community, compulsory drug detention centres continue to operate, sometimes in parallel with voluntary, evidence-based programmes, such as in Cambodia, Malaysia and Viet Nam.¹⁸⁹ One explanation for their continued existence is the political objective of removing drug users from the streets and from public places.¹⁹⁰

90. In 2020, recalling the 2012 joint statement on compulsory drug detention and rehabilitation centres,¹⁹¹ 13 United Nations agencies called on States that operate compulsory drug detention centres to close them permanently without further delay as an important additional measure to curb the spread of COVID-19.¹⁹²

B. Private drug treatment centres

91. In some States, the majority of drug treatment centres are private rather than public. In Mexico, there are approximately 2,100 residential drug treatment centres, of which only 45 are public. It has been estimated that 35,000 drug users are in private drug treatment centres that operate outside the law, accounting for around half of all private facilities. Treatment normally lasts between 3 and 16 months, but can be extended with the consent of the family without reference to the wishes of the patient.¹⁹³ In the territory of Puerto Rico, 85 per cent of residential treatment programmes are operated by private entities and only a quarter of drug dependent persons have access to evidence-based treatment services in these facilities.¹⁹⁴

92. Many of these private facilities detain people who use drugs, against their will. People are involuntarily brought to private facilities by law enforcement officials, family members or staff of the centres. Staff at private facilities try to intimidate people into signing consent forms by threatening them or their families if they refuse to do so. For people who are coercively pressured to sign a consent form or otherwise detained against their will and for those who voluntarily seek treatment, attempts to leave without permission can be severely punished, including by beatings and other forms of physical abuse.¹⁹⁵ Private drug treatment facilities may have a financial conflict of interest as they benefit from payment from the State for cases referred by drug courts or regular courts, providing a financial reason for the continued detention of people in their facilities beyond what may be strictly necessary.

93. In several Latin American countries and territories, such as Argentina, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Guatemala and Panama, as well as Puerto Rico, serious human rights violations occur in private drug treatment centres.¹⁹⁶ Private drug treatment centres also exist on a significant scale in Asian countries, including Bangladesh, India, Indonesia, Iran (Islamic Republic of) and Nepal, where some practices constitute serious human rights violations.

94. As in State-run compulsory drug detention centres, the focus in most private drug treatment centres is on abstinence, normally with little or no evidence-based treatment. Physical violence, verbal abuse, humiliation, confrontational therapy, harsh discipline and cruel punishments for infractions of the rules are often practised. Unsanitary living conditions and rotten or unhealthy food have been reported. These harsh practices have resulted in deaths in some private treatment facilities.¹⁹⁷

95. In Bangladesh, dozens of private drug treatment centres, both licensed and unlicensed, employ non-evidence-based practices amounting to ill-treatment, resulting in death in some cases. In the Islamic Republic of Iran, deaths have resulted from forced detoxification and unmedicated withdrawal.¹⁹⁸ In Indonesia, most private facilities focus on abstinence and treatments include beatings, shackling drug users in cages with a ball and chain, magic and prayer.¹⁹⁹

96. In the Russian Federation, the public health system has a low effectiveness rate in treating drug dependent persons and there are many private rehabilitation facilities and private practices that use non-evidence-based methods. Practices reported include flogging, beating, punishment by starvation, malnutrition, humiliation, long-term handcuffing to a bed frame, hypnotherapy aimed at persuading the person that drug use leads to death, electric shocks, immersion in ice-cold water, burying the person in the ground for 15 minutes, long periods of coerced physical labour, and prayer. Attempts to leave treatment have been punished by severe beatings.²⁰⁰

97. The Working Group has described private drug treatment centres as a “disturbing development” and has called on States to investigate and take appropriate action.²⁰¹

C. Compulsory treatment based on administrative or criminal law

Administrative law

98. Some States, such as Albania and Portugal, have mental health legislation allowing for the administrative detention of persons who are deemed to be a danger to themselves or others, and have applied such laws to persons who are drug dependent and have mental health problems.²⁰² Other States, such as the Russian Federation and Sweden,²⁰³ have administrative legislation authorizing the imposition of involuntary drug treatment for those who are deemed to be a danger to themselves or others without reference to mental health legislation.

99. The Working Group has expressed concern at administrative detention “imposed as a means of controlling people who use drugs, especially when such detentions are framed as health interventions”. It has noted that “States have incorporated such detention into national legislation based on perceived notions that drug use in itself endangers the life of the person who uses, as well as the lives of others”.²⁰⁴ Detention for drug use or dependence alone could never be “justified, adequate, necessary and proportional” to the aim of protecting the health or life of the drug user or of others in the community.²⁰⁵

100. Ireland has adopted a legal framework consistent with the views of the Working Group. Administrative detention of a person who is drug dependent is not possible because addiction to drugs is excluded from mental health legislation as a condition for involuntary admission. Similarly, if a person who uses drugs is a danger to others, it is for the police to determine whether there is a credible threat of danger. Individuals cannot be involuntarily detained for treatment for drug use or dependence in a private treatment facility.²⁰⁶

101. In the International Standards for the Treatment of Drug Use Disorders, WHO and UNODC stated that individuals with drug use disorders should, to the extent that they have the capacity to do so, make treatment decisions, including when to start and when to stop treatment. Treatment should not be forced or against the will and autonomy of the patient. The patient’s consent should be obtained before any treatment intervention (principle 2).

Judicially ordered drug treatment based on criminal law

102. Several States, including Albania, Algeria, Armenia, Azerbaijan, Cuba, Ecuador, Nicaragua, Nigeria, Slovakia and Ukraine, authorize judicially ordered drug treatment as a result of a criminal justice proceeding.²⁰⁷ In Croatia, a judge can order compulsory treatment for a drug dependent person who committed a criminal offence under the influence of drugs if there is a perceived danger that due to the addiction the person might commit a serious offence in the future.²⁰⁸ As stated previously, the Working Group disagrees with this approach, and is of the view that the courts should not be involved in mandating or supervising drug treatment, but that this should be left exclusively to health professionals.

VII. Minor drug offences and decriminalization

A. Diversion

103. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provides that, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measure such as treatment and aftercare when the offender is a drug abuser (art. 3 (4) (c)). UNODC has stated that imprisonment has been shown to be counterproductive in the rehabilitation and reintegration of those charged with minor crimes.²⁰⁹ According to the International Narcotics Control Board, “the drug control treaties do not require that people who use drugs or those who commit minor drug-related offenses be imprisoned”.²¹⁰

104. State practice regarding diversion varies considerably. In Armenia, alternative measures to imprisonment, applicable to sentences not exceeding two years, consist of public work that is socially useful. Imprisoned persons can voluntarily receive drug treatment, including methadone replacement therapy.²¹¹

105. In Canada, drug possession offences that carry a sentence of less than two years are eligible for a conditional sentence. The sentence can be served in the community rather than in prison, subject to conditions, one of which a judge can require is drug treatment. Failure to abide by the conditions can result in the requirement to serve the remainder of the sentence in prison. Pretrial diversion is possible for certain lesser offences if the person agrees to undertake some type of rehabilitation, which may include drug treatment.²¹²

106. In Cyprus, persons accused of drug-related offences, not including drug trafficking or other serious offences, can apply to the court to be issued with a treatment decree instead of a prison sentence. The treatment can last between 3 and 24 months.²¹³

107. In Ireland, although the acquisition, possession and personal use of drugs has not been decriminalized, a change in legislation concerning the possession of drugs for personal use has been agreed at government level and is being operationalized. This approach will direct people to health and social services for support. The first time a person is found in possession of drugs for personal use, he or she will be referred for a health screening. When appropriate, high-risk users are offered referral for drug treatment or other support. The second time a person is found in possession of drugs for personal use, the police have discretion to issue an adult caution.²¹⁴

108. In Kazakhstan, non-medical drug use in a public place is unlawful and can be punished with detention for up to 20 days.²¹⁵ In Morocco, individuals found in possession of drugs for personal use are not subject to prosecution if they agree, after a medical examination, to undergo drug treatment.²¹⁶

109. In Lebanon, drug users suffering from addiction can request drug treatment provided by the State and be diverted out of the criminal justice system as long as they complete the treatment. Treatment and methods used include individual and family support, individual and group psychological support, spiritual, legal and health support, and vocational and recreational rehabilitation.²¹⁷

110. In Nepal, although the acquisition, use or possession of drugs for personal use has not been decriminalized, for first time offenders involved in the purchase or possession of a small amount of marijuana or medical opium without commercial motive, or consumption of a small dose of such drugs, prosecution may be withheld if the person undertakes not to commit such an offence again.²¹⁸ In Nicaragua, diversion for minor drug offences is allowed subject to payment of a fine and performance of community service.²¹⁹

111. In Nigeria, arrested suspects who are drug users or drug dependent are diverted out of the criminal justice system. Serious drug-related offences carry a term of imprisonment of 15 to 25 years.²²⁰

112. In Portugal, the acquisition, use or possession of drugs for personal use has been decriminalized. When a person is caught with no more than 10 daily doses for personal consumption and the police have no suspicion or evidence that supply offences are involved,

the drugs will be seized and the case transferred to the Commission for the Dissuasion of Drug Addiction. The Commission may issue a warning, ban the person from certain places or from meeting certain people, oblige the person to make periodic visits to a defined place, or remove the person's professional or firearms licence. If a person fails to meet with the Commission, an administrative fine or community service may be imposed, or the person's driving licence can be revoked. For repeat offenders, sanctions include fines, community service, withholding of social benefits or a requirement to attend group therapy instead of a fine. For a drug dependent person, the Commission tries to persuade the person to undergo drug treatment.²²¹

113. In the Russian Federation, the use and possession of small quantities of drugs are administrative offences, punishable by up to 15 days of imprisonment.²²²

114. In Singapore, a distinction is made between offences involving drug use only and offences involving drug use committed concurrently with other crimes, such as drug trafficking, robbery or assault. Individuals found guilty of committing the latter category of offence are prosecuted in court, while those accused of drug use only are channelled into drug rehabilitation, which may also involve vocational training as a reintegration measure.²²³

115. In Slovakia, while drug use is not a criminal offence, drug possession, acquisition, distribution and related activities are punishable under the Criminal Code. The office of the prosecutor may decide to drop criminal charges for drug possession, depending on the person's criminal record and other factors. That normally occurs only where the amount does not exceed three usual doses.²²⁴

116. In Sri Lanka, alternatives to imprisonment include community service and substance abuse treatment for an offence that carries a sentence of less than two years. Nevertheless, these alternatives remain underutilized and persons convicted of drug-related offences with less than two years' imprisonment are frequently subjected to fines and/or imprisonment.²²⁵

117. In Switzerland, courts may reduce punishment for drug-related offences if the individual is drug dependent and if the offence was committed to finance consumption. In the case of consumption or purchase of small amounts of illicit substances, the court can suspend the judicial procedure, not impose a punishment and issue a reprimand. A person convicted of a drug-related offence and sentenced to deprivation of liberty for a maximum of six months can request to perform community service. Electronic surveillance can be used as an alternative to imprisonment under certain conditions for a sentence of between 20 days and 12 months.²²⁶

118. In Ukraine, according to the Code of Administrative Offences, the illicit manufacturing, purchase, storage, transport and transfer of small amounts of drugs without intent to sell may result in modest fines or between 20 and 60 hours of community service, or administrative arrest for up to 15 days.²²⁷

119. Depending on the State concerned, factors which may affect whether diversion is appropriate include the quantity of drugs involved, first time use, an existing criminal record, whether violence or other offences were committed at the same time, and length of sentence for the offence.

120. With regard to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, an important question is what constitutes a minor offence. The classification of the amount of a drug that exceeds what is considered reasonable for personal use frequently creates a legal presumption in national law of a trafficking offence, with severe criminal penalties. In some States, the quantity is set quite low or no definition is provided at all, facilitating arbitrary detention of people who use or possess drugs in small quantities for personal use.²²⁸ The Working Group has recommended that States legislate reasonable threshold amounts to distinguish between drug possession for personal use and the offence of trafficking so that the more serious charge is used only when appropriate.²²⁹

B. Decriminalization

121. While the 1988 Drug Convention provides for the criminalization of personal use or possession for personal use of drugs, it allows for an exception to criminalization where it is incompatible with a State's constitutional principles and the basic concepts of its legal system (art. 3 (1) (c)). Approximately 29 States have adopted some form of decriminalization of personal use or possession of drugs for personal use.²³⁰ In Canada and Uruguay and in 16 of the states and in Washington, D.C. in the United States, marijuana has been legalized for recreational use.²³¹ Mexico may soon legalize the use of marijuana.²³²

122. The Working Group has stated that “criminalization of drug use or consumption should be avoided by all States”,²³³ and that “States should revise their penal policies and drug legislation with the aim of ... decriminalizing the personal use of drugs and minor drug offences”.²³⁴ Drug use and dependence should not be treated as a criminal matter, but rather as a health issue, and addressed with rights-based measures,²³⁵ particularly measures based on the right to health enshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights.²³⁶ The Working Group has stated that “drug consumption or dependence is not sufficient justification for detention”.²³⁷

123. In the United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration, the members of the United Nations system called for the decriminalization of drug possession for personal use to address prison overcrowding and overincarceration.²³⁸ The international guidelines on human rights and drug policy also call for decriminalization.²³⁹

124. The Special Rapporteur on the right to health has found that criminalization deters people who use drugs from accessing health services, exacerbates stigmatization and undermines health promotion initiatives.²⁴⁰

125. UNODC has estimated that about 250 million people use drugs, and of these, 29.5 million (11.8 per cent) suffer from drug use disorders, of which 20.65 million (70 per cent) suffer from drug dependency.²⁴¹ Therefore, 88.2 per cent of people who use drugs do not experience a drug use disorder. The term “drug use disorder” refers to a condition in which the use of one or more psychoactive drugs leads to clinically significant impairment or distress.²⁴² Given that most people who consume drugs do not experience a drug use disorder provides further support for decriminalization. For those who do experience a drug use disorder, a health response is the appropriate course of action.

VIII. Conclusions and recommendations

126. **The Working Group on Arbitrary Detention recommends that States:**

(a) **Decriminalize the use, possession, acquisition or cultivation of drugs for personal use, including the possession of associated paraphernalia. Positive, evidence-based messaging through the media and other publicly accessible resources may assist in reducing stigmatization and promote better understanding of the health and other benefits of decriminalization;**

(b) **Promptly release persons detained only for drug use or possession for personal use and review their convictions with a view to expunging their records;**

(c) **Prioritize the placement of persons accused or convicted of minor, non-violent drug-related offences in diversion or non-custodial alternatives to prison – prison should not be the norm, but used as a last resort only;**

(d) **Undertake a comprehensive review of procedures pertaining to detention, arrest, search, testing, pretrial detention, trial and sentencing to address situations in which human rights violations, including arbitrary detention, frequently occur. How the justice process deals with specific groups that may be the object of discrimination or disproportionate drug control enforcement efforts should be addressed. Targeting of such groups and actions that may constitute an obstacle to such persons receiving health treatment for drug disorders should cease;**

(e) Close without delay State-run compulsory drug detention centres and private treatment facilities that hold persons against their will. Moratoriums on further admissions to such State-run compulsory drug detention centres and private treatment centres should be adopted;

(f) Immediately release persons confined against their will in drug treatment facilities, be they public or private, and encourage drug dependent persons to voluntarily seek evidence-based treatment in a community setting, with their informed consent;

(g) Amend legislation, policy and practice so that all treatment for drug use disorders, including for drug dependency, is evidenced-based, strictly voluntary and based on informed consent. All persons have the right to refuse treatment, agree a programme of treatment in a consultative process, stop treatment at any time and immediately leave any drug treatment facility;

(h) Ensure that health professionals have exclusive competence in matters of drug treatment, and that neither drug courts nor regular courts use the threat of imprisonment as a means to coercively influence an accused or convicted person into drug treatment. The use of drug courts should be discontinued. Forced drug treatment should never be ordered by the courts;

(i) Ensure that military authorities are not, in principle, involved in drug enforcement activities and have no role in the management of drug treatment facilities;

(j) Evaluate the health condition of all persons detained in any place of detention, paying attention to whether they have a drug use disorder, including whether they are drug dependent, and formulate a plan for treatment by health professionals in consultation with the person and with their voluntary and informed consent. Harm reduction services should also be made available;

(k) Ensure the availability in prisons and other places of detention of opioid antagonists, such as naloxone, that counter the effects of drug overdose, and provide them to prisoners during their detention and on their release;

(l) Amend legislation and sentencing guidelines to provide for sentencing for drug-related offences that is proportionate. Courts should consider whether the person charged with a drug-related offence had a lesser or minor role and whether he or she is a victim of human trafficking, was subject to coercion or whether any other mitigating factors are present;

(m) Protect the rights of indigenous peoples to produce crops and plants that they have traditionally grown for their religious, medicinal and customary purposes and ensure that such production is not criminalized. States should also not take punitive action against subsistence and small-scale farmers who produce illicit crops, but should work with them to develop income from alternative agricultural crops and increase government services in their communities;

(n) Afford civil society, including associations of drug users, a meaningful consultative role in the design, implementation, monitoring and evaluation of drug policies;

(o) Ensure that human rights defenders, activists working in the drug policy field, harm reduction service providers and journalists can work and meet freely among themselves, with health professionals and with foreign experts and representatives of international organizations without threat of criminalization of their activities, financial penalties or other forms of harassment;

(p) Monitor the provision of financial and technical assistance to other countries, including for drug enforcement operations, so that such assistance does not contribute to or result in human rights violations, and reduce or cease assistance as appropriate. The Working Group also recommends that international and regional organizations monitor the provision of financial and technical assistance to States so that such assistance does not contribute to human rights violations, with particular reference to drug policy;

(q) **Take into account the United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration, and the international guidelines on human rights and drug policy, in formulating human rights compliant drug policy, including the prohibition of arbitrary detention.**

Notes

- ¹ General Assembly resolution S-30/1.
- ² The questionnaire and the submissions received in response to it can be found at www.ohchr.org/EN/Issues/Detention/Pages/Detention-and-drug-policies.aspx.
- ³ E/CN.4/1998/44/Add.2, paras. 81 and 85; A/HRC/27/48/Add.3, paras. 111–119.
- ⁴ A/HRC/30/36, para. 74.
- ⁵ A/HRC/42/39/Add.1, para. 78.
- ⁶ International Drug Policy Consortium submission, p. 2; Penal Reform International submission, p. 2. See also United Nations Office on Drugs and Crime (UNODC), *World Drug Report 2020*, p. 21.
- ⁷ [Colectivo de Estudios Drogas Derecho](#) submission, p. 1.
- ⁸ Belarus Initiative Group submission, p. 1.
- ⁹ Georgia submission, p. 1.
- ¹⁰ Ireland submission, p. 1.
- ¹¹ Kazakhstan submission, pp. 1–2.
- ¹² Lebanon submission, p. 1.
- ¹³ Eurasian Harm Reduction Association submission, p. 1.
- ¹⁴ [México Unido contra la Delincuencia](#) submission, p. 1.
- ¹⁵ Sierra Leone submission, p. 1.
- ¹⁶ Slovak National Centre for Human Rights submission, p. 3.
- ¹⁷ Ukrainian Parliament Commissioner for Human Rights submission, p. 1.
- ¹⁸ Albania submission, p. 2.
- ¹⁹ Algeria submission, p. 2.
- ²⁰ Amnesty International & Cambodian League for the Promotion and Defense of Human Rights submission, p. 5.
- ²¹ Ecuador submission, p. 4.
- ²² [LBHM, ICJR & HRI](#) (Lembaga Bantuan Hukum Masyarakat, Institute for Criminal Justice Reform and Harm Reduction International) submission, p. 2.
- ²³ Morocco submission, p. 2.
- ²⁴ [Procuraduría para la Defensa de los Derechos Humanos de la República de Nicaragua](#) submission, p. 2.
- ²⁵ Russian Federation submission, p. 1.
- ²⁶ Freedoms Collective submission, p. 1.
- ²⁷ Colombia submission, p. 1.
- ²⁸ Nepal submission, p. 1.
- ²⁹ Wendy Sawyer and Peter Wagner, “Mass incarceration: the whole pie 2020”, Prison Policy Initiative, 24 March 2020, footnote 5.
- ³⁰ Harm Reduction International submission, p. 1.
- ³¹ Amnesty International & Cambodian League for the Promotion and Defense of Human Rights submission, p. 10.
- ³² UNAIDS, *Miles to Go: Closing Gaps, Breaking Barriers, Righting Injustices* (Geneva, 2018), p. 54.
- ³³ The international drug control treaties are the Single Convention on Narcotic Drugs of 1954 as amended by the 1972 Protocol; the Convention on Psychotropic Substances of 1971; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
- ³⁴ A/HRC/42/39/Add.1, paras. 93 (b) and 74.
- ³⁵ Working Group on Arbitrary Detention, “States should stop arbitrary detentions for drug offences, say UN rights experts”, 20 March 2019. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24369&LangID=E.
- ³⁶ A/HRC/42/39/Add.1, paras. 86 and 93 (a).
- ³⁷ A/HRC/41/33, para. 27; A/HRC/30/65, para. 35; Amnesty International & Cambodian League for the Promotion and Defense of Human Rights submission, p. 10; Russian Civil Society Mechanism for Monitoring of Drug Policy Reforms submission, pp. 6–7.
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