

To: Working Group on Arbitrary Detention
c/o Office of the High Commissioner for Human Rights
United Nations Office at Geneva
8-14, avenue de la Paix
1211 Geneva 10, Switzerland

Via e-mail: wgad@ohchr.org

27 January 2020

Dear Members of the UN Working Group on Arbitrary Detention,

Re: Scope of Working Group on Arbitrary Detention study on arbitrary detention related to drug policies, pursuant to Human Rights Council Resolution no. 42/22 (2019)

Harm Reduction International (HRI), the International Drug Policy Consortium (IDPC), and Centro de Estudios Legales y Sociales (CELS) welcome Human Rights Council resolution 42/22 renewing the mandate of the Working Group on Arbitrary Detention (WGAD); and requesting the WGAD to prepare and present a report on arbitrary detention related to drug policies. We also applaud the WGAD's sustained efforts to denounce violations of fundamental rights committed in the context of drug control.

In light of the mandate of the Working Group mandate, and of the internationally recognised definition of arbitrary detention,¹ we respectfully suggest that the WGAD considers in its study the following forms of arbitrary detention committed in the context of drug control:

- 1) Disproportionate or mandatory pre-trial detention;
- 2) Detention in the application of disproportionate or mandatory minimum sentences;
- 3) Detention as a result of exclusion of drug-related offences from sentence-review processes;
- 4) Detention as a result of criminalisation of drug use and other minor drug offences, and as consequence of the disproportionate punishment of other drug offences;
- 5) Mandatory drug detention, rehabilitation, and treatment; and
- 6) Detention on death row for drug offences.

1) Disproportionate or mandatory pre-trial detention

International jurisprudence is clear that pre-trial detention should only be used as a measure of last resort when strictly necessary, and it should never be mandatory, but rather follow an individualised assessment of its necessity and reasonableness.² General Comment no. 35 of the Human Rights Committee (*General Comment no. 35*) reiterates that pre-trial detention "shall be the exception rather than the rule," it should not be general practice, and it should never apply automatically to all those charged with a certain crime.³ Accordingly, pre-

trial detention imposed as a mandatory measure or in situations where it is neither proportionate nor necessary is to be regarded as arbitrary. Furthermore, pre-trial detention should only be used for a limited period of time, based strictly on necessity. This Working Group itself denounced problematic profiles of the use of forms of pre-trial detention – including ‘*arraigo*’ - in the context of drug control.⁴

Pre-trial detention - whose detrimental socio-economic impacts are well documented⁵ - is mandatory for drug-related offences, including drug use and possession for personal use, in many jurisdictions, including Peru, Mexico, Ecuador, Bolivia,⁶ Brazil,⁷ and Honduras.⁸ In these countries, people accused of drug offences can be held in pre-trial detention for months and up to several years before their trial.⁹ In 2017, the Inter-American Commission on Human Rights expressed concerns at “a notable increase in the number of persons deprived of liberty for drug-related criminal acts,” partly caused by the misclassification of minor drug offences as “grave offences” and thus the mandatory imposition of pre-trial detention.¹⁰

Another example is the Philippines, where in 2018 around 100,000 prisoners – 38% of total prison population - were awaiting trial for non-bailable drug offences (for which they must be presumed innocent),¹¹ with an average pre-trial detention of 528 days.¹²

Another problematic form of pre-trial detention is ‘*arraigo*’, a federal precautionary measure that can be imposed in Mexico to deprive of liberty persons who are suspected of being part of organised crime. Under this measure, a person can be detained without being charged for a crime for up to 80 days. Between 2008 and 2011 alone over 7,900 persons were detained under *arraigo* for drug-related offences. A minimal percentage of those were eventually sentenced, pointing to an abuse of the measure.¹³

Women are disproportionately impacted by this measure. In Latin America, an even higher proportion of women than men are held in pre-trial detention for minor drug offences.¹⁴

2) Detention in the application of disproportionate or mandatory minimum sentences

In order for a detention not to be arbitrary, it must be imposed following an assessment of its reasonableness, necessity, and proportionality. The mandatory nature of a sentence prevents such an assessment a priori, thus it is to be considered in violation of the prohibition of arbitrary detention. This is also acknowledged by General Comment no. 35, which qualifies “judicially imposed sentences for a fixed period of time” as arbitrary.¹⁵ In addition, mandatory minimum sentences are often grossly disproportionate to the crimes for which they are imposed.

Mandatory minimum sentences are prescribed in many narcotic legislations around the world. One example is the USA, where under the ‘three strikes laws’ subjects convicted for drug offences with no history of violence may face mandatory minimum sentences in excess of 25 years (often without parole).

3) Detention as a result of exclusion of drug-related offences from sentence-review processes

A detention is also arbitrary if it is not subject to periodic re-evaluation of its justification, on the basis of an individualised assessment. This standard, coupled with the prohibition of discrimination, entails that people convicted of certain offences should not automatically suffer worst conditions than those convicted for other crimes. Both the Human Rights Committee and this Working Group have clarified that “consideration for parole or other forms of early release must be in accordance with the law⁵⁶ and such release must not be denied on grounds that are arbitrary” within the meaning of Article 9.¹⁶

Some jurisdictions exclude people convicted of drug-related offences specifically from benefiting from sentence reduction schemes, or from being considered for suspended sentence, parole, pardon, or amnesty.¹⁷ For instance, in Mexico, pregnant women convicted of drug offences cannot benefit from alternatives to incarceration available to those convicted for other crimes.¹⁸

The WGAD has, in the past, recommended that States amend laws that include provisions to that effect.¹⁹

4) Detention as a result of criminalisation of drug use and minor drug offences, and because of the disproportionate punishment of other drug offences.

International human rights law requires that deprivation of liberty be lawful, imposed as a measure of last resort, and reasonable. Accordingly, "arbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".²⁰ The prohibition of arbitrariness means that the underlying rationale for detention cannot be discrimination,²¹ and various UN human rights mechanisms have concluded that drug consumption or dependence are not sufficient justification for detention.²² This Working Group in particular expressed concern at "the use of criminal detention as a measure of drug control following charges for drug use, possession, production and trafficking",²³ and its incompatibility with the central principles of legality, proportionality, necessity, and appropriateness.

International experts have also concluded that the application of punitive laws (criminal or administrative in some states) for drug use, drug possession for personal use, and non-commercial drug distribution in small quantities among fellow drug users, is disproportionate and discriminatory as such.²⁴ A punitive approach to drugs infringes upon multiple human rights in a way that cannot be justified as either necessary or proportional. In particular:

- The range of drug-related activities that are criminalised, their definition, their punishment and their enforcement vary significantly between jurisdictions; the list of controlled substances, the relevant amounts, and the very definition of these conducts also vary considerably; the penalties are diverse and inconsistent across countries. This in itself raises serious concerns under the proportionate nature of penalties imposed on drug offences. In addition, the punishments envisaged for minor, non-violent drug offences are sometimes the same or higher as violent crimes such as homicide. In Bolivia for instance, the maximum penalty for drug trafficking (25 years) is higher than that imposed for rape (15 years) or murder (20 years).²⁵
- The systematic and large-scale negative health impacts of the application of punitive drug laws undermines public health and public safety outcomes; and
- The use of punishment for the aforementioned drug offences does not satisfy the requirement of "minimal infringement" of rights. A health-based approach provides for the same or better health and public safety results with considerably less infringements.

In March 2019, this Working Group re-affirmed 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*"²⁶

A punitive approach to drug control and the forms of detention that ensue from it are also discriminatory. They are a key contributor to the marginalization and vulnerability of people who use drugs — a group that has historically suffered from social and often state-sanctioned stigma.

We thus strongly suggest that incarceration for drug use and other minor drug offences be assessed in the framework of a study on arbitrary detention in the context of drug policies. Specifically, incarceration for drug use, possession for personal use, and related minor offences should always be denounced as a form of arbitrary detention; while incarceration for other drug offences — which are by definition non-violent — is a form of arbitrary detention every time it is disproportionate to the nature and the circumstances of the crime.

In doing that, we suggest that specific attention be reserved to:

a) Populations and groups that are disproportionately impacted by the criminalisation of drugs, including but not limited to: Women,²⁷ ethnic minorities,²⁸ and indigenous peoples.²⁹ Notably, this Working Group has in the past stressed how “criminal and administrative detention for drug control purposes has a disproportionate impact on vulnerable groups, such as women, children, minority groups and people who use drugs.”³⁰

b) The criminalisation of – and ensuing incarceration for - specific drug-related activities which is patently and overly disproportionate, unnecessary, discriminatory, and directly impinging on other fundamental rights such as the right to health and the right to privacy. This includes:

- The use of drugs during pregnancy.³¹ For example, the 2014 Tennessee ‘Fetal Assault Law’ allowed the prosecution and potential incarceration of women giving birth to a child showing symptoms of prenatal exposure to drugs. The law was substantially repealed in 2016, but a similar proposal is currently under discussion;³²
- The provision of essential harm reduction services such as Opioid Substitution Therapy. This is currently prohibited in the Russian Federation, Egypt, Jordan, Saudi Arabia, Syria, and Turkmenistan. Most notably, in the Russian Federation, allegations have also emerged of police officers deliberately causing people who use drugs under arrest to suffer withdrawal symptoms to elicit cooperation or force confessions³³; and
- The possession of needles and syringes or other drug paraphernalia, which is currently criminalised in at least 10 countries around the world.³⁴

5) Mandatory drug detention, rehabilitation, and treatment

Compulsory drug detention, treatment and rehabilitation have been unanimously recognised by human rights bodies as contravening the prohibition of arbitrary detention, alongside the prohibition of inhuman and degrading treatment and the right to health.

This Working Group has denounced this phenomenon and highlighted its many problematic aspects in numerous reports;³⁵ it has clarified that “nowhere in the three drug control conventions [...] is compulsory treatment or involuntary commitment for drug use required”,³⁶ and concluded that “compulsory detention regimes for purposes of drug ‘rehabilitation’ through confinement or forced labour are contrary to scientific evidence and inherently arbitrary.”³⁷

Court-mandated detention for drug use or (suspected) drug dependence alone, often following an administrative decision, is still common in dozens of countries around the world; and not only limited to countries in the Global South but also envisaged in Europe and North America. Of particular concern are scenarios where compulsory drug treatment and rehabilitation centres are located in military bases or overseen by law enforcement, such as in the case of the Philippines³⁸ and Sri Lanka.³⁹

Compulsory drug treatment and rehabilitation should be addressed as a form of arbitrary detention not only when these are conducted in public centres, but also when undergone in **private institutions**. Countless instances exist of people who use drugs being forced to enter private rehabilitation centres imposing non-evidence based (and often abusive) methods of treatment, without being allowed to leave.⁴⁰ General Comment no. 35 clarifies that states have a responsibility to limit the powers of private actors which have been authorised to exercise powers of detention, and to carry out strict and effective control. Evidence of systemic abuses, including physical and psychological violence, often met with impunity, point to a failure of states to uphold this obligation.⁴¹

6) Detention on death row for drug offences

Whether a deprivation of liberty is lawful is to be determined in accordance not only to domestic but also to international law. This Working Group has specified that “legal provisions incompatible with fundamental rights and freedoms guaranteed under international human rights law would also give rise to qualification of detention as arbitrary.”⁴² In this regard, it is now unquestionable that drug offences do not meet the threshold of ‘most serious crimes’ to which Article 6(2) of the ICCPR mandates that the death penalty be restricted, in countries which have not yet abolished this measure. This was most recently reiterated in General Comment No. 36 on the Right to Life published by the Human Rights Committee.⁴³ The same source also clarified that a death sentence imposed for crimes which do not qualify as “the most serious” also violate Article 7 ICCPR.⁴⁴

Executions carried out under internationally-prohibited grounds are deemed as arbitrary, thus in the same way holding an individual on death row for crimes to which the death penalty cannot be imposed should also be denounced, and assessed, as an arbitrary form of detention.

In this context, we note that a death sentence – and thus the ensuing detention – is also arbitrary when imposed as a result of a trial that does not qualify as ‘fair’ under international law.⁴⁵ This appears to be the case for many, if not most, capital drug cases around the world.⁴⁶

Most retentionist states fail to provide update, credible, and disaggregated data on their death row population. Nevertheless, civil society reports thousands of people on death row for drug offences in at least 19 countries.⁴⁷ Conditions of detention on death row vary considerably between states, regions, and prisons. However, individuals awaiting execution systematically endure abusive and dehumanising conditions – in particular when the detention is extended to several years. The severe conditions of detention, and the physical and psychological violence death row prisoners are subjected to, often result in permanent physical and/or psychological trauma; in extreme cases, they lead to suicide.⁴⁸

¹ Among others: Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 24 December 2012, A/HRC/22/44; Human Rights Committee, *General Comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35

² UN General Assembly, *International Covenant on Civil and Political Rights* 16 December 1966, UNTS 999 p.171. Articles 9 and 14; CCPR/G/GC/35

³ CCPR/G/GC/35, Para. 38

⁴ Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 10 July 2015, A/HRC/30/36, para. 62

⁵ Open Society Foundations (2011), *The Socioeconomic Impact of Pretrial Detention*. <https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf>

⁶ Centros de Estudios Legales y Sociales (CELS) et al., ‘Contributions to the OHCHR for the preparation of the study mandated by resolution A/HRC/28/L.22 of the Human Rights Council on the impact of the world drug problem and the enjoyment of human rights’, 13. <https://www.ohchr.org/Documents/HRBodies/HRCouncil/DrugProblem/CELS.pdf>

⁷ ICPR (2017), *Prison: Evidence of its use and overuse from around the world*, 10. https://www.prisonstudies.org/sites/default/files/resources/downloads/global_imprisonment_web2c.pdf

⁸ Organization of American States (2013), *Report on The Use of Pretrial Detention in the Americas*, 95. <https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf>

⁹ WOLA (2010), *Systems Overload: Drug Laws and Prisons in Latin America*. <https://www.wola.org/analysis/systems-overload-drug-laws-and-prisons-in-latin-america/>

¹⁰ Inter-American Commission on Human Rights (2017), *Measures to Reduce Pretrial Detention*, 14

¹¹ Narag, Exploring the consequences of prolonged pretrial incarceration: evidence from a local jurisdiction in the Philippines (*International Journal of Comparative and Applied Criminal Justice*, 2018),5

¹² Narag, “Philippines’ Dark Secret: Lengthy Pretrial Detention,” *Rappler*, October 19, 2018, <https://www.rappler.com/thought-leaders/214533-analysis-lengthy-pretrial-detention-philippines-little-dark-secret>. <https://www.rappler.com/thought-leaders/214533-analysis-lengthy-pretrial-detention-philippines-little-dark-secret>

¹³ CMPDDH (2015), *Human Rights and the War on Drugs in Mexico: Submission to the Office of the High Commissioner for Human Rights from the Mexican Commission for the Defence and Promotion of Human Rights*. <https://www.ohchr.org/Documents/HRBodies/HRCouncil/DrugProblem/NHRIMexico.pdf>

¹⁴ WOLA, IDPC, Dejusticia (2019), *Pretrial detention in Latin America: The disproportionate impact on women deprived of liberty for drug offenses*. <https://www.wola.org/analysis/pretrial-detention-in-latin/>

¹⁵ CCPR/G/GC/35, Para 12

¹⁶ A/HRC/22/44, GC35

17 Office of the High Commissioner on Human Rights, *Study on the impact of the world drug problem on the enjoyment of human rights*, 4 September 2015, A/HRC/30/65, para. 44; Human Rights Council, *Report of the Working Group on Arbitrary Detention: Mission to Nicaragua*, 9 November 2006, A/HRC/4/40/Add.3, para. 64-65; Human Rights Committee, *Concluding Observations: Mauritius*, 27 April 2005, CCPR/CO/83/MUS, para. 15

18 Giacomello, C. and Blas Guillen, I (2016), *Propuestas de reforma en casos de mujeres encarceladas por delitos de drogas en Mexico*.

http://www.altaescuela.org.mx/wp-content/uploads/2017/06/Propuesta_de_Reforma_Politicas_Drogas.pdf

19 A/HRC/4/40/Add.3, para. 102(c)

20 *Mukong v Cameroon*, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991 (1994) para. 9.8

21 Aee for example *Fongum Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, U.N. Doc. CCPR/C/83/D/1134/2002 (2005), para. 5.1

22 Among others, see A/HRC/30/36, para. 60.

23 A/HRC/30/36, para. 61

24 For one of definitions of social supply, please see Hough, M., Warburton, H., Few, B., May, T., Man, L.-H., Witton, J. and Turnbull, P. J. (2003). *A growing market. The domestic cultivation of cannabis*. York: The Joseph Rowntree Foundation

25 Center for Legal and Social Studies (2015), *The impact of drug policies on human rights: The experience in the Americas*, <http://www.cels.org.ar/common/drug%20policy%20impact%20in%20the%20americas.pdf>

26 'States should stop arbitrary detentions for drug offences, say UN rights experts' (Statement by the UN Working Group on Arbitrary Detention, 20 March 2019), Emphasis added. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24369&LangID=E>.

27 United Nations Office on Drugs and Crime, UN Women, World Health Organization & International Network of People Who Use Drugs (2014), *Women who inject drugs and HIV: Addressing specific needs* (Policy brief). https://www.unodc.org/documents/hiv-aids/publications/WOMEN_POLICY_BRIEF2014.pdf

28 Stone, K and Shirley-Beavan, S (2018), *The Global State of Harm Reduction* (Harm Reduction International), <https://www.hri.global/files/2018/12/11/global-state-harm-reduction-2018.pdf>, 121

29 Burger, J and Kapron, M (2017), "Drug Policy and Indigenous Peoples", *Health and Human Rights Journal* 19(1) 269-278. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473056/pdf/hhr-19-269.pdf>

30 See, for example A/HRC/16/47/Add.3, A/HRC/4/40/Add.3, A/HRC/27/48/Add.3, E/CN.4/2004/3/Add.3, A/HRC/10/21/Add.3, E/CN.4/2006/7 and A/HRC/27/48.

31 For more on this see: Amnesty International (2017), *Criminalizing Pregnancy: Policing Pregnant Women who Use Drugs in the USA*. <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf>

32 <https://rewire.news/legislative-tracker/law/tennessee-pregnancy-criminalization-law-sb-1391/>

33 CCPR/C/RUS/CO/7, para. 16

34 UNAIDS (2018), *Miles to go. Closing Gaps, breaking barriers, righting injustices*, pag. 160. https://www.unaids.org/sites/default/files/media_asset/miles-to-go_en.pdf

35 Among many others, A/HRC/27/48/Add.3, paras. 113-114; see E/CN.4/1998/44/Add.2

36 A/HRC/30/36, para. 59

37 A/HRC/30/36, para. 59

38 Amnesty International (2019), *'They Just Kill': Ongoing Extrajudicial Executions and Other Violations in the Philippines' 'War On Drugs'*, 40. <https://www.amnesty.org/en/documents/asa35/0578/2019/en/>

39 A/HRC/39/45/add.2, parr.53-59

40 Among others, see: Open Society Foundations (2016), *No health, no help: Abuse as drug rehabilitation in Latin America & the Caribbean*, <https://www.opensocietyfoundations.org/sites/default/files/no-health-no-help-en-21060403.pdf>

41 See, among others: Office of the High Commissioner for Human Rights (2015), *Study on the impact of the world drug problem on the enjoyment of human rights - Report of the United Nations High Commissioner for Human Rights*, A/HRC/30/65, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx>; Human Rights Council (2013), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 1 February 2013, A/HRC/22/53; Open Society Foundations (2011), *Treatment or torture? Applying international human rights standards to drug detention centers*. <https://www.opensocietyfoundations.org/sites/default/files/treatment-or-torture-20110624.pdf>

42 A/HRC/22/44, para. 65

43 Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, 30 October 2018, CCPR/C/GC/36, Para. 26

44 *Ibid.*, para. 52

45 *Ibid.*, para. 40

46 For more information, see Harm Reduction International (2019), *The Death Penalty for Drug Offences: Global Overview 2018*. https://www.hri.global/files/2019/02/22/HRI_DeathPenaltyReport_2019.pdf

47 Harm Reduction International (2019), *The Death penalty for Drug Offences: Conditions of Detention on Death Row*. <https://www.hri.global/files/2019/03/12/death-row-conditions-2018.pdf>

48 *Ibid.*