



# General Assembly

Distr.: General  
XX June 2019

English only

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## Human Rights Council

### Forty-first session

24 June–12 July 2019

Agenda item 3

**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

**Joint written statement\* submitted by International Harm Reduction Association (IHRA), Canadian HIV/AIDS Legal Network, DRCNet Foundation, Inc., IDPC Consortium, Release Legal Emergency and Drugs Service Limited, Washington Office on Latin America, World Hepatitis Alliance, non-governmental organizations in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[03 June 2019]

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\* Issued as received, in the language(s) of submission only.

## Limitations to Judicial Independence in The Context of Drug Control

Harm Reduction International and supporting organisations welcome the Report by the Special Rapporteur on the independence of judges and lawyers, as well as his March 2019 statement (co-authored with the Special Rapporteur on the right to health) on drug courts;<sup>1</sup> which warned against the dangers of drug courts as manifestations of the abuse of the criminal justice system as a tool of drug control.

We wish to take this opportunity to comment upon other aspects of a criminal justice response to drugs which limit independence and autonomy of judges.

### Proportionality in the context of criminal justice responses to drug-related crimes

Proportionality of sentencing is a key tenet of any fair justice system. From the principle of proportionality and the prohibition of arbitrary detention descends that any deprivation of liberty must be lawful, imposed as a measure of last resort, and reasonable; and that arbitrariness “be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>2</sup>

Regrettably, the exceptionalism characterising the response to drug-related crimes in many countries is manifested in a denial of fair trial guarantees and disproportionate punishment.

This severely impairs judicial autonomy and discretion in: tailoring sentences to the specificity of the crime and the accused; assessing the reasonableness and proportionality of the punishment; and evaluating the very necessity of depriving the defendant of liberty in favour of alternative measures. The latter is particularly problematic in the context of drug control, as one key element to be considered should be the compatibility of the response with promoting individual as well as public health.

Notably, mandatory regimes can have particularly harsh consequences on women, as they prevent judges from taking into consideration gender-based violence or histories of abuse which may have contributed to the woman’s engagement in drug-related crime.<sup>3</sup>

As a result, one in five prisoners worldwide are incarcerated for drug offences,<sup>4</sup> the overwhelming majority of whom for drug possession for personal use.<sup>5</sup> This proportion is even greater for women in some regions like Latin America,<sup>6</sup> and in Thailand where over 80% of the 47,000 women in prison are incarcerated for a drug offence.<sup>7</sup>

### Drug control measures limiting judicial independence

UN human rights mechanisms expressed concern about the unnecessary and disproportionate use of the criminal justice system for drug control;<sup>8</sup> while the UN Office on Drugs and Crime acknowledged that “responses to drug law offences must be proportionate. [...] For offences involving the possession, purchase or cultivation of illicit drugs for personal use, community-based treatment, education, aftercare, rehabilitation and social integration represent a more effective and proportionate alternative to conviction and punishment.”<sup>9</sup>

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1 Information Note, ‘Drug courts pose dangers of punitive approaches encroaching on medical and health care matters’, UN Experts say (20 March 2019)

2 CCPR/C/GC/35, par.12

3 Penal Reform International, ‘Global Prison Trends 2019’ (London, 2019), 16

4 E/CN.15/2014/5

5 E/CN.15/2013/9, [http://www.unodc.org/documents/data-and-analysis/statistics/crime/World\\_Crime\\_Trends\\_2013.pdf](http://www.unodc.org/documents/data-and-analysis/statistics/crime/World_Crime_Trends_2013.pdf)

6 <http://www.oas.org/en/cim/docs/womendrugamericas-en.pdf>[http://www.drogasyderecho.org/wp-content/uploads/2015/10/luciana\\_i.pdf](http://www.drogasyderecho.org/wp-content/uploads/2015/10/luciana_i.pdf)

7 <http://www.bangkokpost.com/opinion/opinion/586901/for-female-offenders-jail-often-no-solution>

8 A/HRC/39/39; A/HRC/30/65

9 UNODC, UNODC and The Promotion and Protection of Human Rights. Position Paper (Vienna, 2012), 16

Among the most common measures which restrict the independence of judges are:

*a) Mandatory pre-trial detention and mandatory minimum sentencing*

Pre-trial detention should be used as a measure of last resort when strictly necessary, and it should not be mandatory, but rather follow an individualised assessment.<sup>10</sup>

The International Guidelines on Human Rights and Drug Policy encourage States to “Ensure that pre-trial detention is never mandatory for drug-related charges and is imposed only in exceptional circumstances where such detention is deemed reasonable, necessary, and proportional.”<sup>11</sup>

Nevertheless, many domestic legislations limit judicial discretion by requiring judges to impose pre-trial detention and/or mandatory minimum sentences for drug-related offences, including drug use and possession for personal use, which tend to be grossly disproportionate. 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).

Mandatory pre-trial detention -whose detrimental socio-economic impacts are well documented<sup>12</sup>- is also a central feature of drug control in countries such as Peru, Mexico, Ecuador, Bolivia,<sup>13</sup> Brazil,<sup>14</sup> and Honduras,<sup>15</sup> with women being particularly affected.<sup>16</sup> 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.<sup>17</sup>

The same effect is achieved by qualifying drug offences as non-bailable, causing the unreasonable and unnecessary imposition of pre-trial incarceration. According to a 2018 study, around 100,000 prisoners in the Philippines are awaiting trial for non-bailable drug offences (for which they should be presumed innocent.)<sup>18</sup>

*b) Exceptional measures for processing drug-related crimes*

Judicial independence is also limited by unique regimes regulating punishment for drug offences, which are different and harsher than those envisaged for subjects convicted of other crimes. Among others, persons convicted for drug offences are in some jurisdictions denied the possibility of being considered for suspended sentence, parole, pardon/amnesty, or early release.<sup>19</sup> For instance, in Mexico, pregnant women convicted of drug offences cannot benefit from alternatives to incarceration that those convicted for other crimes might benefit from.<sup>20</sup>

A problematic trend is the overreliance on trial-waiver systems like plea-bargaining, whereby the case is negotiated between defendants and prosecutors and hence prevented from ever reaching a judicial mechanism. Plea-bargaining systems often provide limited procedural safeguards and result in disproportionate sentences. Evidence also points to discrimination in the determination of the defendants to whom plea-bargaining is ‘proposed’, with ethnic minorities and vulnerable subjects being overrepresented.<sup>21</sup>

<sup>10</sup> ICCPR Article 9 and 14; CCPR/G/GC/35; CCPR/C/99/D/150/2006, par.10(4)

<sup>11</sup> UNAIDS et al., ‘International Guidelines on Human Rights and Drug Policy’ (2019), 7.ii

<sup>12</sup> Open Society Foundations, ‘The Socioeconomic Impact of Pretrial Detention’ (New York, 2011)

<sup>13</sup> 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’,<sup>13</sup>

<sup>14</sup> ICPR, ‘Prison: Evidence of its use and overuse from around the world’ (2017),<sup>10</sup>

<sup>15</sup> OAS, ‘Report on The Use of Pretrial Detention in the Americas’ (2013),<sup>95</sup>

<sup>16</sup> WOLA, IDPC, Dejusticia, ‘Pretrial detention in Latin America: The disproportionate impact on women deprived of liberty for drug offenses’ (2019)

<sup>17</sup> IACHR, ‘Measures to Reduce Pretrial Detention’ (2017),<sup>14</sup>

<sup>18</sup> 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),<sup>5</sup>

<sup>19</sup> A/HRC/39/39,Par.44

<sup>20</sup> [http://www.altas escuela.org.mx/wp-content/uploads/2017/06/Propuesta\\_de\\_Reforma\\_Politicas\\_Drogas.pdf](http://www.altas escuela.org.mx/wp-content/uploads/2017/06/Propuesta_de_Reforma_Politicas_Drogas.pdf)

<sup>21</sup> For a comprehensive analysis see Fair Trials, ‘The Disappearing Trial’ (2017)

## The death penalty for drug offences

An extreme case of limitation of judicial independence in the context of drug control is the mandatory death penalty for drug offences, prescribed in at least 12 countries.<sup>22</sup>

Even when death penalty is not mandatory, judicial discretion is often impinged by the provision of an extremely limited range of potential punishments. For example:

- In Saudi Arabia, a death sentence can only be commuted to imprisonment for minimum 15 years, flagellation, and a fine of at least 100,000riyals (around \$26,600);
- In Taiwan and Pakistan, the only possible alternative to capital punishment for relevant drug offences is life imprisonment.<sup>23</sup>

In some jurisdictions, judicial discretion in capital drug cases is further limited by: <sup>24</sup>

a) Presumptions. In countries such as Myanmar, Singapore, Malaysia the possession of drugs over certain, often modest, quantities is presumed to be for trafficking. Similarly, possession, control, and knowledge of the nature of the substances are presumed in a broad range of circumstances.

In April 2019, the Malaysian Federal Court declared such double presumption (of the possession and knowledge of the drugs, and consequently of the purpose of trafficking drugs) unconstitutional.<sup>25</sup>

b) Overreach of prosecutorial powers. Recent legal amendments in Singapore and Malaysia limited the cases in which death penalty shall be mandatorily imposed, and allowed judges some discretion in drug trafficking cases, but only *if* and *after* a determination that the defendant provided substantial assistance in disrupting trafficking activities. In Singapore, this requires a formal certificate submitted by the Prosecutor.

The combined impact of the presumptions and the expansion of prosecutorial powers is a structurally prejudiced system of justice, in which key tenets of the right to fair trial – presumption of innocence and separation of powers – are violated.

## Recommendations

We respectfully ask this Special Rapporteur to:

- Continue mainstreaming a human rights and health-based approach to drug policy, and denouncing the tensions between a criminal justice response to drugs and fundamental human rights standards;
- Promote limitations in the use of trial-waiver systems, and condemn exceptionally harsh regimes of punishment for individuals convicted of drug offences;
- Encourage States to ensure that pre-trial detention is never mandatory and is imposed only in exceptional circumstances where it is deemed reasonable, necessary, and proportional;
- Develop and disseminate a report on limitations to judicial independence in the context of drug control.

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Anti-Death Penalty Asia Network (ADPAN), Geneva Platform on Human Rights, Health and Psychoactive Substances, Institute for Criminal Justice Reform (ICJR), International Network of People who Use Drugs (INPUD), LBH Masyarakat NGO(s) without consultative status, also share the views expressed in this statement.

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<sup>22</sup> Giada Girelli, 'The Death Penalty for Drug Offences: Global Overview 2018 (2019)

<sup>23</sup>Ibid.,12

<sup>24</sup>Ibid.,13

<sup>25</sup> <https://www.thestar.com.my/news/nation/2019/04/06/double-presumptions-for-drugtrafficking-conviction-struck-down/>